September 9, 2022

ATTORNEY GENERAL RAOUL SUPPORTS FEDERAL PROPOSAL THAT STRENGTHENS PROTECTIONS AGAINST SEXUAL HARASSMENT IN SCHOOLS

Raoul and Coalition Highlight Additional Areas for Action Under Title IX to Combat All Forms of Sex Discrimination

Chicago — Attorney General Kwame Raoul, as part of a coalition of 20 attorneys general, today filed a comment letter in support of the federal government's proposed rule aimed at strengthening protections against sex discrimination — including sexual violence and harassment — under Title IX of the Education Amendments Act of 1972 (Title IX).

Title IX requires schools to provide educational programs and activities free from sex discrimination, sexual harassment, and sexual violence. In the comment letter, Raoul and the coalition applaud the federal government's efforts to reverse many of the critical missteps of the 2020 rulemaking that imposed a harmful new process for Title IX sexual violence school proceedings. The comment letter also highlights additional areas for regulatory action under Title IX to help combat sex discrimination in all its forms.

"I am committed to protecting students in the classroom and empowering our educators to create a safe learning environment for our children. The Department of Education's proposed rule under Title IX ensures students will have robust protections against sex discrimination, sexual harassment, and sexual violence," Raoul said. "School is no place for sex discrimination in any form. I applaud the department for restoring and strengthening Title IX after it was gutted. It is time students have the support they deserve."

In 2020, the U.S. Department of Education abruptly deviated from more than 30 years of consistent implementation of Title IX to impose an onerous and harmful new process for Title IX sexual violence and harassment proceedings in schools. The department promulgated new rules that work to significantly change how Title IX is enforced. These amendments simultaneously weaken protections for individuals subjected to sexual violence and harassment and burden schools with duplicative, courtroom-like Title IX proceedings. Rather than supporting state efforts to implement Title IX, the 2020 amendments hinder ongoing work to prevent and address school-based sexual violence and assault at the state level. The 2020 amendments also impose unnecessary barriers to student survivors seeking relief unique only to sexual harassment. These changes were put in place despite clear warnings from Illinois and coalition states the year prior. Accordingly, the states subsequently filed a lawsuit challenging the previous federal administration's final rule in an effort to protect students and shield schools nationwide from the unreasonable implementation timeframe imposed at the onset of the COVID-19 pandemic.

The states strongly support the current efforts by the U.S. Department of Education to end many of the harms imposed by the 2020 amendments. For instance, Raoul and the attorneys general are supporting comprehensive standards for Title IX that better meet its primary objectives, i.e., providing individuals with effective protection against sex discrimination and harassment and to ensure that federal funds are not used to support such misconduct. The current proposed rule realigns Title IX's implementing regulations with the statute's nondiscrimination mandate. It also helps preserve schools' resources by limiting potential duplicate procedures. Additionally, of particular importance to the states, the proposal complements state laws that ensure greater protections for survivors, while preserving the rights of respondents under Title IX to fair and equitable proceedings.

In the comment letter, Raoul and the coalition address how the proposed rule:

- Better effectuates Title IX and aligns with congressional intent and longstanding practices.
- Standardizes and codifies definitions and procedures across Title IX enforcement.
- Improves the sexual violence and harassment complaint process for students in colleges and K-12 schools.
- Realigns Title IX’s sexual harassment standards and higher education proceedings to ensure a prompt and equitable resolution process for all students.
- Reinforces critical protection against discrimination based on gender identity, sexual orientation, pregnancy and parenting status.
- May be further strengthened to help combat sex discrimination in all its forms.

Joining Attorney General Raoul in submitting the comments are the attorneys general of California, New Jersey, Pennsylvania, Connecticut, Delaware, the District of Columbia, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington.

STATE OF CALIFORNIA	**STATE OF NEW JERSEY**	**COMMONWEALTH OF PENNSYLVANIA**
OFFICE OF THE ATTORNEY GENERAL	**OFFICE OF THE ATTORNEY GENERAL**	**OFFICE OF THE ATTORNEY GENERAL**
ROB BONTA ATTORNEY GENERAL	**MATTHEW PLATKIN ACTING ATTORNEY GENERAL**	**JOSH SHAPIRO ATTORNEY GENERAL**

September 9, 2022

Via Federal eRulemaking Portal
The Honorable Dr. Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

RE: Comment on Proposed Rule Regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance—Docket ID ED-2021-OCR-0166, RIN 1870-AA16, 87 Fed. Reg. 41,390 (July 12, 2022)

Dear Secretary Cardona:

On behalf of California, New Jersey, Pennsylvania, Connecticut, Delaware, District of Columbia, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington ("the States"), we write to express our strong support for the Department of Education's ("the Department") Notice of Proposed Rulemaking, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* ("the Proposed Rule"), published in the Federal Register on July 12, 2022, 87 Fed. Reg. 41,390. As Attorneys General, charged with enforcing laws prohibiting sexual violence and discrimination, we take the enforcement of Title IX and prevention of discrimination very seriously. It is critical that our students have the ability to learn in a safe environment, free from sex-based violence and discrimination. The Department's much-needed action will reverse many of the critical missteps in the Department's 2020 rulemaking, which have harmed and continue to harm our schools and our student community. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020) (the "2020 Amendments").[1]

[1] Many of the state signatories to this letter are plaintiffs in a legal challenge to the 2020 Amendments on the grounds that they were arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706.

In many respects, the 2020 Amendments undermined or thwarted the purpose of Title IX of the Education Amendments Act of 1972 ("Title IX"), 20 U.S.C. § 1681. For example, the 2020 Amendments impose an onerous and quasi-criminal process for Title IX sexual harassment proceedings in schools, which deters students subjected to sexual assault and harassment from coming forward, weaken protections for students subjected to sexual assault and harassment[2], and burden schools and survivors by narrowing the scope of Title IX's protections while also erecting new barriers to relief. If adopted, overall the Proposed Rule would advance Title IX's nondiscrimination mandate by facilitating equal access to educational opportunities for all students.

The Proposed Rule addresses those serious flaws by creating comprehensive standards for Title IX that would no longer subject sexual harassment to heightened standards and quasi-criminal processes. The Proposed Rule likewise re-aligns Title IX's implementing regulations with the statute's nondiscrimination mandate. It also helps preserve schools'[3] resources by limiting potential duplication of procedures. And of particular importance to the States, it complements state laws that ensure greater protections for victims, while preserving the rights of respondents under Title IX to fair and equitable proceedings.

Because of its added procedural flexibility, the Proposed Rule may also result in cost-savings for schools, which will provide much-needed relief after the 2020 Amendments required them to completely overhaul their procedures in a mere 90 days while simultaneously addressing the COVID-19 pandemic. To further that end in response to this regulatory revision, we urge the Department to allow for a reasonable implementation timeline.

We commend the Department on the significant improvements it has proposed to the 2020 Amendments and urge it to take additional steps to further align the Proposed Rule with longstanding Department practice. In the following comment letter, we address how the Proposed Rule: effectuates Title IX; standardizes and codifies definitions and procedures across Title IX enforcement; improves the complaint process generally, including and especially the K-12 grievance process; and realigns Title IX's sexual harassment standards and higher education proceedings with more than 30 years of Title IX application prior to 2020. Where we believe there may be room for improvement or clarification, we have included recommendations.[4]

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[2] Unless otherwise stated, the term "sexual harassment" encompasses all forms of sexual harassment, including sexual violence and sexual assault.

[3] Unless otherwise stated, the term "schools" refers to all institutions that are "recipients" covered by Title IX's mandate, including K-12 schools and institutions of higher education.

[4] For the reader's ease, we have included an appendix of documents cited herein that may not be readily accessible on the Department's website, in the Federal Register, or on legal research websites. These documents are organized in the appendix based on the order in which they are referenced in this comment letter. All documents in the appendix and referenced in this letter are incorporated, by reference, as part of the comment record.

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I. THE PROPOSED RULE BETTER EFFECTUATES TITLE IX'S GOAL THAN THE 2020 AMENDMENTS.

A. The Proposed Rule aligns with Congressional intent and longstanding practices.

The Proposed Rule furthers Title IX's antidiscrimination mandate. Congress enacted Title IX to accomplish two objectives: to provide individuals with effective protection against sex discrimination and harassment and to ensure that federal funds are not used to support such misconduct.[5] Title IX requires schools to provide education programs and activities that are free from sex discrimination.[6] To enforce Title IX, Congress established a robust administrative scheme and authorized the Department to withdraw federal funding for schools' non-compliance and to issue rules only if they "effectuate" Title IX.[7]

The Proposed Rule furthers Congress' twin goals for Title IX by "ensuring that recipients prevent and address sex discrimination, including but not limited to sex-based harassment, in their education programs or activities."[8] This is in direct contrast to the 2020 Amendments, which significantly narrow the definition of sexual harassment and limit the ability of students subjected to such harassment to properly seek redress and equal educational access. This narrowing "create[s] a barrier for potential complainants to effectively assert their rights under Title IX."[9] The 2020 Rule spent many pages explaining the application of the "*Gebser/Davis* framework,"[10] but never once explained why aligning with a judicially-created standard for private enforcement fulfills Title IX's mandate to eliminate sexual harassment.[11] This is not surprising, because it simply does not.

In addition, the Proposed Rule is consistent with the Department's longstanding policy and practice of eradicating sexual harassment and ensuring equal access to education. During the Reagan Administration, the Department began affirmatively addressing sexual harassment in schools as a serious problem that contravenes Title IX,[12] consistent with its interpretation and

[5] *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

[6] 20 U.S.C. § 1681(a); *see Franklin v. Gwinnett Cty. Pub. Sch*., 503 U.S. 60, 75 (1992).

[7] 20 U.S.C. § 1682.

[8] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41,564 (July 12, 2022).

[9] *Id.* at 41,409.

[10] 85 Fed. Reg. 30,032 ("The three parts of this framework are: Conditions that must exist to trigger a school's response obligations (actionable sexual harassment, and the school's actual knowledge) and the deliberate indifference liability standard evaluating the sufficiency of the school's response.").

[11] *See* 83 Fed. Reg. 61,466-67; 85 Fed. Reg. 30,032-46.

[12] *E.g.*, U.S. Dep't of Educ., *Sexual Harassment: It's Not Academic* 2 (1988) (quoting U.S. Dep't of Educ., Off. for Civ. Rts., Policy Mem., Antonio J. Califa, Director for Litigation Enforcement and Policy Services (Aug. 31, 1981)).

enforcement of Titles VI and VII of the Civil Rights Act of 1964.[13] For decades, the Department's policies consistently reaffirmed several fundamental requirements for how schools must address sexual harassment.[14] These documents explained that under Title IX, schools were obligated to: (1) take affirmative steps to prevent, end, and remedy sexual harassment, defined as unwelcome conduct of a sexual nature that is so severe, persistent, *or* pervasive that it adversely affects a student's ability to participate in or benefit from the school's program or activity; (2) address harassment committed outside an education program or activity if it creates a hostile environment *in* an education program or activity; and (3) adopt a prompt and equitable grievance procedure, which could be incorporated into existing codes of conduct and procedures.[15]

The Proposed Rule's return of Title IX standards to their longstanding prior form promotes the uniformity and consistency of federal laws.[16] This is again in contrast to the 2020 Amendments, which create notable disparities between the standards applied to Title IX discrimination claims and those applied to discrimination claims under Title VI and Title VII.[17] This difference in approach is inconsistent with prior directives from Congress and the United States Supreme Court, both of which made explicit that Title IX standards were modeled on, and meant to be consistent with, the standards of Title VI from which the 2020 Amendments diverge.[18] The 2020 Amendments also create the unjustifiable (and unjustified) result that school *employees* are provided greater protection from sexual harassment than school students.[19] The Proposed Rule

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[13] *E.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (Title VII); *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,448, 11,449-51 (Mar. 10, 1994).

[14] *Sexual Harassment Guidance: Harassment of Students by Sch. Emps., Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (Mar. 13, 1997) (1997 Guidance); *Revised Sexual Harassment Guidance: Harassment of Students by Sch. Emps., Other Students, or Third Parties*, 66 Fed. Reg. 5512 (Jan. 19, 2001, rescinded Aug. 2020) (hereinafter: 2001 Policy); Stephanie Monroe, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Jan. 25, 2006, rescinded Aug. 2020) (2006 Letter); Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Apr. 4, 2011, withdrawn Sept. 22, 2017) (2011 Letter); U.S. Dep't of Educ., *Q&A on Title IX and Sexual Violence* (Apr. 24, 2014, withdrawn Sept. 22, 2017) (2014 Q&A); U.S. Dep't of Educ., *Q&A on Campus Sexual Misconduct* (Sept. 2017, rescinded Aug. 2020) (2017 Q&A).

[15] *Id.*

[16] *See* Section I.C., *infra.*

[17] 85 Fed. Reg. 30,529 (justifying differences by asserting that Title VI was not a "comparator[s]" to Title IX).

[18] *E.g.*, *Cannon*, 441 U.S. 677 at 704 ("Title IX, like its model, Title VI"); *Sex Discrimination Regulations, Review of Regulations to Implement Title IX, Hearings before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. and Labor*, 94th Cong., 1st Sess., 170 (1975) (Statement of Sen. Bayh) (in setting up "an identical administrative structure" Congress intended to provide the "same coverage" and "same statutory scope for Title IX as for Title VI").

[19] Title VII continues to protect employees, including student employees, from sexual harassment that is "sufficiently severe *or* pervasive to alter the conditions of the victim's employment," *Vinson*, 477 U.S. 57 at 67, whereas the 2020 rule only protects against harassment that is severe *and* pervasive; *see also* 34 C.F.R. § 106.30(a).

restores Title IX standards that are consistent with Title VI and Title VII, as well as more than thirty years of the Department's enforcement efforts and guidance.[20]

Finally, the Proposed Rule appropriately removes a provision of the 2020 Amendments that expressly preempts conflicting state and local laws, even where those laws provide *greater* protections to students than provided by Title IX.[21] The 2020 Amendments' explicit preemption provision is flatly inconsistent with congressional intent. In creating the Department of Education, Congress explicitly announced its intention "to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs," and specifically not to "to increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States."[22] Even had Congress not made its intent so known, federal laws that are designed to protect citizens are presumed to allow for the enactment of state and local legislation that is more protective, barring explicit congressional intent to the contrary.[23] The Proposed Rule rightfully returns Title IX's mandates to a position as a "floor," not a "ceiling" that inappropriately limits state laws enacted to further protect their citizens.

B. The Proposed Rule defines "sex-based harassment" in a manner that effectuates Title IX and accords with longstanding practice.

The States welcome the Department's comprehensive new definition of "sex-based harassment," and, in particular, its (1) inclusion of not only sexual harassment but also additional types of sex-based harassment; (2) delineation of hostile environment harassment in a manner that accords with Title IX and historical Department practice; and (3) re-definition of *quid pro quo* harassment to more effectively protect students from discrimination.

First, the Proposed Rule rightly states that harassing conduct can violate Title IX not only if it constitutes "sexual harassment," but also if it includes harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. This clarification is another welcome step towards the comprehensive enforcement of Title IX. As many of the States explained in 2019, gender-based harassment had long been prohibited by Title IX,[24]

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[20] *See* Section I.C., *infra.*

[21] *Compare* 34 C.F.R. § 106.6(h) (2020 amendment addressing regulation's "[p]reemptive effect") *with* 87 Fed. Reg. 41,569 (proposed § 106.6(b), holding that "[n]othing in this part would preempt a State or local law that does not conflict with this part and that provides greater protections against sex discrimination.").

[22] 20 U.S.C. § 3403(a).

[23] *See Ferebee v. Chevron Chem. Co*., 736 F.2d 1529, 1543 (D.C. Cir. 1984) ("[F]ederal legislation has traditionally occupied a limited role as the *floor* of safe conduct; before transforming such legislation into a *ceiling* on the ability of states to protect their citizens, and thereby radically adjusting the historic federal-state balance, . . . courts should wait for a clear statement of congressional intent.") (emphasis in original); *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 617 (7th Cir. 2003) ("[M]any federal regulatory laws, establish a floor, but not a ceiling, on state and local regulation.").

[24] 2001 Policy at v; U.S. Dep't of Educ., Off. for Civil Rights, *Dear Colleague Letter Re: Title*

and that interpretation of Title IX is in line with Supreme Court precedent on Title VII.[25] 87 Fed. Reg. 41,411 (explaining longstanding Department policy that Title IX applies to harassment based on sexual orientation, sex stereotyping, gender-based harassment, and pregnancy or related condition, regardless of the sex of the alleged harasser). However, the 2020 Amendments fail to specifically codify prohibitions on sex-based harassment, relying instead on incomplete and inadequate clarifications in the preamble.[26] The Department has now concluded that this was insufficient to protect students from harassment. [27] We agree.

Second, the States welcome the Proposed Rule's return to the Department's longstanding definition of "hostile environment harassment" as "unwelcome sex-based conduct that is sufficiently severe *or* pervasive, that, based on a totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity."[28] The Proposed Rule rightly finds that the 2020 Amendments, including their far narrower definition of hostile environment harassment, "do not adequately promote full implementation of Title IX's prohibition on sex discrimination, including sex-based harassment," and the States applaud the Proposed Rule's expanded definition of what constitutes sex-based harassment.[29]

Over the objections of many stakeholder commenters,[30] the 2020 Amendments departed from historical Department practice and interpretation by requiring that hostile environment harassment involve sexual harassment that is "so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to" education,[31] in order to be covered by Title IX. The result was one that the Department itself predicted—an undermining of schools' attempts to stop

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IX Coordinators (Apr. 24, 2015), https://tinyurl.com/4xwnkwsw ("In addition, a recipient should provide Title IX coordinators with access to information regarding . . . incidents of sex-based harassment. Granting Title IX coordinators the appropriate authority will allow them to identify and proactively address issues related to possible sex discrimination as they arise."); *see also* Comment Letter of 19 State Attorney General, in response to proposed rule, *Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, at 16 (Jan. 30, 2019), https://tinyurl.com/2578z6c5 (hereinafter: States' 2019 Comment Letter).

[25] *See, e.g.*, *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81–82 (1998); EEOC, *Sex-Based Discrimination*, https://tinyurl.com/mw9uy9az ("Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex.").

[26] The 2020 Amendments state that sexual harassment on the basis of sexual orientation is prohibited by Title IX and that gender-based harassment is also prohibited, but do not prohibit other forms of sex-based harassment. 85 Fed. Reg. 30,178-79. It clarified in the preamble, without including in the regulations, that this could include conduct based on sex or sex stereotyping. *Id.* at 30,179.

[27] 87 Fed. Reg. 41,411.

[28] *Id.* at 41,568-69 (proposed § 106.2 (sex-based harassment) (emphasis added); *see also* 1997 Guidance at 12,034 (explaining that "[i]n order to give rise to a complaint under Title IX, sexual harassment must be sufficiently severe, persistent, *or* pervasive that it adversely affects a student's education or creates a hostile or abusive educational environment.") (emphasis added).

[29] 87 Fed. Reg. 41,407.

[30] Comment letters in response to 83 Fed. Reg. 61,462: Cal. Dep't of Educ. Comm. at 1-2; SFUSD Comm. at 2; SSA Comm. at 2, 4.

[31] 34 C.F.R. § 106.30(a) (emphasis added).

sexual harassment and prevent recurrence.[32] The Department itself estimated that the 2020 Amendments' narrowed interpretation of Title IX would reduce investigations of sexual harassment by 50% in K-12 schools, which cannot legitimately be squared with the acknowledged underreporting and under-investigation of sexual harassment in schools given Title IX's mission.[33] For purposes of administrative enforcement, this standard raises the bar too high and results in far too many incidents of sexual harassment going unaddressed.

Nearly two thirds of all college students experience sexual harassment in school and, on average, 20.5 percent of college women experience sexual assault in college.[34] Despite the prevalence of sexual assault and harassment, only 12 percent of college sexual assault survivors and two percent of female survivors ages 14-18 reported sexual assault to their schools or police.[35] More than 20% of girls aged fourteen to eighteen have been kissed or touched without their consent, but only 3% reported the incidents, and in the 2017-18 school year, K-12 schools reported a 55% increase in sexual violence.[36]

The 2020 Amendments exacerbate the problem of underreporting. Many institutions of higher education in the States reported having to dismiss matters they could have traditionally resolved through the Title IX process because they did not meet the 2020 Amendments' narrowed definition of sexual harassment. In these cases, schools had to dismiss certain Title IX complaints with a formal letter and then re-initiate proceedings under separate student conduct code policies. This sometimes resulted in complainants abandoning their complaints, making it more challenging to ensure that students have access to an education environment free from sexual harassment. But even when schools did not have to dismiss complaints, they found that the 2020 Amendments create a chilling effect that resulted in fewer students pursuing the complaint process, hampering schools' ability to keep their campuses safe and prevent the recurrence of sexual harassment.

The extremely narrow definition of hostile environment harassment adopted by the 2020 Amendments is not only contrary to Title IX itself,[37] but it also represents a sea change from decades of otherwise consistent enforcement of Title IX to combat sexual harassment resulting from unwelcome conduct on the basis of sex.[38] Since at least 1981, the Department has advised that Title IX protects against sexual harassment, including "verbal or physical conduct of a sexual

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[32] *See* 85 Fed. Reg. 30,070 (recognizing that weak enforcement encourages perpetration).

[33] *Id.* at 30,551-52, 30,565-68.

[34] States' 2019 Comment Letter at 17-18.

[35] *Id.* at 18.

[36] Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence* 1, 2 (Apr. 2017); U.S. Dep't of Educ., *2017-18 Civil Rights Data Collection: Sexual Violence in K-12 Schools* 5 (Oct. 2020), https://tinyurl.com/CRDC2020 (nearly 15,000 reports of sexual violence in K-12 schools during 2017-2018 school year, a 55% increase) (CRDC 2020).

[37] Nowhere in Title IX does the statute require that the sex-based discrimination "effectively deny" an individual access to education. Instead, Title IX states that no person shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" on the basis of sex. 20 U.S.C. § 1681.

[38] 87 Fed. Reg. 41,405-07.

nature."[39] And in 1997, the Department explicitly recognized that sexual harassment results from conduct that is "sufficiently severe, persistent, or pervasive [such] that it adversely affects a student's education or creates a hostile or abusive educational environment."[40] This consistent understanding of what constitutes sexual harassment persisted for three decades, as the Department developed more specific guidance for enforcement of Title IX.[41] The Department has consistently required that schools take "prompt and effective" measures to address a hostile school environment resulting from sex-based harassment.[42]

The 2020 Amendments sharply deviated from this otherwise consistent enforcement history based on the rationale that the "administrative standards governing recipients' responses to sexual harassment should be generally aligned with the standards developed by the Supreme Court in cases assessing liability under Title IX for money damages in private litigation."[43] However, recognizing the broad scope of Title IX's protections, the Supreme Court expressly acknowledged that the Department has regulatory authority to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate," even if those requirements do not give rise to a claim for money damages in private actions.[44] Furthermore, the Supreme Court made clear that its "central concern" in articulating more stringent standards for Title IX lawsuits was that private parties could seek "unlimited recovery of damages under Title IX,"[45] which is not a concern in administrative enforcement because money damages are not at issue at all. Indeed, the Court made clear that administrative enforcement of Title IX may differ from the standards for money damages.[46] The Department has now rightly recognized that the rationale underlying the 2020 Amendments was a "depart[ure] in many respects from OCR's prior longstanding guidance that had been developed to ensure a recipient's implementation of Title IX's protections."[47]

Third, the States support changes the Proposed Rule makes with regard to "quid pro quo harassment." In 2020, the Department concluded that "*quid pro quo* harassment" could be

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[39] *Id.* at 41,405.

[40] *See* 1997 Guidance, 62 Fed. Reg. 12,034. As the Supreme Court recognized in *Cannon*, Title IX is patterned after Title VI, except for the substitution of the word "sex." 441 U.S. 677, 694-95. As noted above, Title VI has long recognized hostile environment harassment.

[41] 87 Fed. Reg. 41,405-07 (explaining history of the Department's Title IX sexual harassment enforcement); States' 2019 Comment Letter at 13-17 (demonstrating consistent application of "sexual harassment" definition under Title IX).

[42] *See* 2001 Policy at 14 ("If a school otherwise knows or reasonably should know of a hostile environment and fails to take prompt and effective corrective action, a school has violated Title IX even if the student has failed to use the school's existing grievance procedure or otherwise inform the school of the harassment."); *see also Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11,448, 11,449, 11,451 n.2 (Mar. 10, 1994).

[43] 83 Fed. Reg. 61,466.

[44] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

[45] *Id.* at 286-87.

[46] *Id.* at 292 (noting that federal agencies could continue to "promulgate and enforce requirements that effectuate the statute's non-discrimination mandate . . . even if those requirements" would not be enforceable for money damages).

[47] 87 Fed. Reg. 41,407.

committed only by an "employee" of the institution,[48] even though previously Department policy had consistently applied this prohibition to non-employees in positions of authority.[49] It claimed that this definition was compelled by Supreme Court precedent,[50] once again improperly equating administrative enforcement with private damages lawsuits. The States welcome the Department's determination "that this is not the appropriate analysis for assessing the Department's responsibility for the administrative enforcement of Title IX."[51] In addition to employees, the Proposed Rule would prohibit *quid pro quo* harassment if conducted by an "agent, or other person authorized by the recipient to provide an aid, benefit, or service" under its education program or activity.[52] This not only returns to the Department's longstanding policy, but it addresses harassment that might not otherwise be addressed by individuals who assert power over students, such as teaching assistants or volunteer coaches who may condition grades or opportunities in return for sexual favors.

The preamble to the Proposed Rule also effectively balances effectuating Title IX's protections with First Amendment interests and articulates a line that ensures freedom from sexual harassment without imposing on students' free speech rights.[53] The States agree with the Department's conclusion that the Proposed Rule's "totality of the circumstances" approach properly requires schools to assess a variety of factors on both a subjective and objective basis to ensure that the alleged conduct actually constitutes harassment and is not mere speech.

In sum, these proposed changes to the 2020 Amendments are not only in line with longstanding practice, but also prevent the recurrence of sex-based harassment, which is crucial to schools' ability to keep their campuses safe and to make their campuses attractive for recruiting. Restoring the concept of hostile environment harassment, empowering schools to take action when pervasive *or* severe harassment takes place, and requiring schools to address all forms of sex-based harassment all will allow schools to keep their campuses safe and welcoming to students and faculty. Moreover, enabling schools to address harassment before it "effectively denies" an individual's access to education can prevent recurrence or even a student from losing their access to education altogether.

C. The Department's proposed complaint resolution process comports with Title IX and avoids the harms caused by the 2020 Amendments.

We welcome the Department's decision to implement grievance procedure standards for all Title IX complaints that do not single out sexual harassment complaints for quasi-judicial enforcement. Although some aspects of the Department's proposed complaint procedures apply to sex-based harassment specifically, the States support the added flexibility included in the proposed grievance process that allows schools to adapt their sex-based harassment proceedings according

[48] 34 C.F.R. § 106.30.

[49] 2001 Policy at 3 n.9 (*quid pro quo* harassment by teaching assistant falls under Title IX).

[50] 85 Fed. Reg. 30,148.

[51] 87 Fed. Reg. 41,412.

[52] *Id.* at 41,569 (proposed § 106.2).

[53] *Id.* at 41,414-15 (explaining the Proposed Rule's consistency with the First Amendment and with the Department's prior Title IX policy).

to their campus needs and resources. The States also welcome the Department's streamlining of the K-12 complaint and grievance process, which takes some steps to address the onerous and impractical requirements of the 2020 Amendments while maintaining standards in line with due process requirements.

1. The Proposed Rule's general standards and procedures for resolving all Title IX complaints ensure that Title IX's protections are fully enforced.

The 2020 Amendments impose inflexible and prescriptive complaint, investigation, and hearing procedures,[54] and limit the conduct that schools can address under Title IX by restricting which persons may file a complaint and excluding conduct that occurs outside of a school's program or activity.[55] Hence, the Department's inclusion of the comprehensive general definition section furthers Title IX's purposes by standardizing the procedures governing all forms of sex discrimination, including sex-based harassment, and eliminates confusion regarding the scope of actionable harassment for schools.

Program or Activity. For purposes of sexual harassment complaints alone, the 2020 Amendments narrowly define an "education program or activity" under §§ 106.30, 106.44 and 106.45 as "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs" and "any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."[56] The 2020 Amendments then require a school to dismiss a formal complaint if the alleged sexual harassment did not occur in the school's "education program or activity, or did not occur against a person in the United States," even if there was a nexus to the school.[57] These requirements thereby undermine (and do not effectuate) Title IX, because harassing conduct taking place outside a school's education program or activity can nevertheless cause someone to "be excluded from participation in, be denied the benefits or, or be subjected to discrimination under any education program or activity."[58] Similarly, sexual harassment outside the United States may have direct consequences inside the United States that are prohibited under Title IX because they result in a student being "denied the benefits of" and "excluded from participating in" an education program or activity. Hence, the Department acted in a manner inconsistent with Title IX's mandate by categorically barring schools from moving forward with Title IX complaints alleging harassment outside the school's education program or activity or outside the United States.

The Proposed Rule corrects these errors in two ways. First, it abandons the notion that sexual harassment complaints should be assessed under a higher standard to determine whether conduct violated Title IX. Second, it clearly states that a school is obligated to address a complaint

[54] 34 C.F.R. §§ 106.30(a) (formal complaint); 106.45(b) (grievance process).
[55] *Id.* at §§ 106.30(a) (sexual harassment); 106.30(a) (formal complaint); 106.44(a).
[56] *Id.* at § 106.44(a).
[57] *Id.* at § 106.5(b)(3).
[58] 20 U.S.C. § 1681(a).

of sex discrimination under its education program or activity, even if conduct that could constitute sex discrimination "occurred outside the recipient's education program or activity or outside the United States."[59] This shift ensures that individuals whose access to an education program or activity has been limited due to sex-based harassment can file a complaint, which, in turn, further effectuates the purpose of Title IX to ensure that a school operates its education program or activity free from sex discrimination.

Complainant. The States commend the Department's broadened definition of "complainant," which uniformly applies to all forms of sex discrimination, including sex-based harassment.[60] Under the 2020 Amendments, a grievance process cannot begin without a formal complaint.[61] Moreover, a formal complaint cannot be filed unless the complainant was participating or attempting to participate in the education program or activity "[a]t the time of filing a formal complaint[.]"[62] As a result, a school cannot investigate and properly address and stop sexual harassment if the complainant left the school before filing a formal complaint. The Proposed Rule rightly eliminates this restriction by permitting a complaint by a third party "who was participating in or attempting to participate in the recipient's education program or activity *when the alleged sex discrimination occurred*."[63] There is no basis for excluding individuals who have been subjected to sex discrimination from Title IX's protection just because they left the school at which the discrimination occurred. Indeed, sexual harassment can cause its targets to drop out of school, and redress is critical both for the targets of harassment and to prevent further harm.[64]

Complaint. The States also support the Department's proposed definition of "complaint" under proposed section 106.2, which removes the formal complaint requirement under the 2020 Amendments. The formal complaint requirement deterred reporting in contravention of Title IX. The Proposed Rule instead allows for both oral and written complaints. The 2020 Amendments require the affected person (or their parent/guardian) to submit a written formal complaint (generally signed) that includes a specific "request[] that the recipient investigate the allegation of sexual harassment" before an investigation can proceed.[65] This requirement was imposed regardless of the complainant's age, disability, or writing ability, or the ability of a parent/guardian to file a complaint.[66] As explained further in Section I.C.3, *infra*, the formal complaint process

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[59] 87 Fed. Reg. 41,571 (proposed § 106.11).

[60] *Cf.* 85 Fed. Reg. 30,095 (explaining that § 106.45 only applies to formal complaints of sexual harassment, and that complaints of other forms of sex discrimination may be filed and handled under the "prompt and equitable" grievance procedures under § 106.8(c)).

[61] 34 C.F.R. § 105.45(b).

[62] *Id.* at § 106.30(a).

[63] *See* 87 Fed. Reg. 41,557 (proposed § 106.2 (emphasis added)).

[64] *See, e.g.*, Alexandra Brodsky, How Much Does Sexual Assault Cost College Students Every Year?, Wash. Post (Nov. 18, 2014); Cecilia Mengo & Beverly M. Black, Violence Victimization on a College Campus: Impact on GPA and School Dropout, 18 J.C. Student Retention: Res., Theory & Prac. 234 (2015); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1297 (11th Cir. 2007) (student decision to drop out after rape was "reasonable and expected" and did not foreclose Title IX claim).

[65] 34 C.F.R. § 106.30(a).

[66] *Id.*

was of particular concern in the K-12 context where most complaints are made orally in the first instance at a school-site. Moreover, educational institutions in several of the States have reported that students in higher education are also at times hesitant to submit a written, signed complaint for fear of retaliation, especially with the level of detailed disclosure required. One state college has yet to move a single case through the entire grievance process as most complainants do not wish to proceed with a formal complaint. The Proposed Rule also remedies the 2020 Amendments' unjustified prohibition against certain third-party complaints,[67] thereby better effectuating Title IX's intent by increasing the possibility that harassment is addressed when it occurs.

Supportive Measures. The States also support the Department's proposed definition of "supportive measures" under proposed Section 106.2, along with its sufficiently clear requirements provided under proposed Section 106.44(g). Under the 2020 Amendments, supportive measures cannot unreasonably burden the respondent,[68] and, as a result, they sometimes did not offer the support and accountability necessary to promptly and effectively protect students. The Proposed Rule clarifies that supportive measures can include "temporary measures that burden a respondent," but only when such measures are "imposed for non-punitive and non-disciplinary reasons," "designed to protect the safety of the complainant or the recipient's educational environment, or deter the respondent from engaging in sex-based harassment, and may be imposed only if the respondent is given the opportunity to seek modification or reversal of them."[69] When schools implement supportive measures that burden respondents, they are to be determined on a case-by-case basis by recipients, and respondents can seek modifications of the supportive measures.[70] This new definition, and the ability for review where a burden is identified, is fair to both parties because it allows a school to promptly and effectively protect the complainant during the grievance procedures while ensuring that any temporary burdensome measures be imposed only if the respondent is given an opportunity to seek modification or reversal of them.[71]

Prompt and Equitable Resolution. Along with the proposed supportive measures, the Department's Proposed Rule requires schools to take "prompt and effective" action to end discrimination, prevent its recurrence, and remedy its effects.[72] The States strongly support the Department's overall efforts to create and maintain school environments free from sex discrimination by returning to its prior longstanding policy of permitting schools to create "prompt and equitable" processes to address all forms of sexual harassment and to investigate and resolve harassment allegations.[73] In 2020, the Department abruptly departed from that policy and implemented the "deliberate indifference" standard, which did not require schools to act proactively to address sex discrimination or prevent harassment. The 2020 Amendments only require a school to provide supportive measures and provide a complainant with information about the grievance procedures in the absence of a formal complaint.[74] In other words, without a formal

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[67] *See* 87 Fed. Reg. 41,557 (proposed § 160.2).
[68] 34 C.F.R. § 106.30(a).
[69] 87 Fed. Reg. 41,421 (proposed § 106.2).
[70] *Id.* at 41,573-74 (proposed § 106.44(g)).
[71] *Id.* (proposed § 106.44(g)(4)).
[72] *Id.* at 41,572-75 (proposed § 106.44).
[73] 62 Fed. Reg. 12,040; 2001 Guidance at 14, 19-21.
[74] 34 C.F.R. § 106.44(a).

complaint, a school has no obligation to take any action to investigate and address possible sex discrimination, even if it had information about it.[75] The Proposed Rule rights this wrong by requiring that "complaints of sex-based harassment are resolved in a prompt and equitable manner."[76]

Notice. The Department's proposed tiered notification scheme eliminates the 2020 Amendments' "actual knowledge" standard, which weakened students' protections against sex discrimination in contravention of Title IX. Under the "actual knowledge" standard, a recipient is obligated to respond only to incidents of sexual harassment upon receiving notice through its Title IX coordinator, any official with authority to institute corrective measures, or any employee of an elementary and secondary school.[77] The tiered notification requirements also fill potential reporting gaps by imposing reporting responsibilities on different categories of nonconfidential employees.[78] This system reflects the practical reality that students may assume that certain employees without authority to institute corrective measures possess the authority to redress sex discrimination, and that employees can receive information about incidents involving sex discrimination in a variety of ways.[79] We commend the Department for addressing the definition of "confidential employee," but note that recipients in our States may suggest ways that the definition be refined to better meet the needs of schools with different populations and staffing configurations. In general, however, we note that confidential resources allow those who are vulnerable and uncomfortable to report harassment and to receive appropriate supportive measures without disclosing their identity or automatically triggering a Title IX investigation.[80]

Informal Resolution. The Proposed Rule also provides schools with discretion to offer an informal resolution process, such as mediation, as a voluntary alternative under proposed Section 106.44(k). The States agree that schools should be provided with a certain degree of flexibility to determine an alternative avenue for the parties to reach a resolution. As the Department notes, schools are often in the best position to assess and determine which resolution process is best based on individualized circumstances.[81] The Proposed Rule also safeguards against misuse of an informal resolution process by requiring that the school obtain the parties' voluntary consent and by foreclosing the use of informal processes in instances where an employee is alleged to have

[75] 87 Fed. Reg. 41,434.

[76] *Id.* at 41,392.

[77] 34 C.F.R. § 106.30.

[78] For an elementary or secondary school, all of its nonconfidential employees would be required to notify the Title IX coordinator upon receiving information about conduct that may constitute sex discrimination. 87 Fed. Reg. 41,572 (proposed § 106.44(c)(1)). For a postsecondary school, employees with authority to institute corrective measures on behalf of the school would be required, at a minimum, to notify the Title IX coordinator, and other employees who have responsibility for administrative leadership, teaching, or advising would be required to: (1) notify the Title IX coordinator any incident involving a student, and (2) either notify the Title IX coordinator or provide contact information of the coordinator and explain how to report sex discrimination when the incident involves an employee. *Id.* (proposed § 106.44(c)(2)).

[79] *Id.* at 41,438, 41,440.

[80] *Id.* at 41,441; A confidential employee is not required to notify the school's Title IX coordinator. *Id.* at 41,573 (proposed § 106.44(d)).

[81] *Id.* at 41,454.

engaged in sex discrimination against a student or where doing so would conflict with Federal, State or local law.[82]

Grievance Procedures. Prior to 2020, the Department's policies consistently emphasized that effective grievance procedures are not only essential to addressing complaints of sex discrimination, but that they are also excellent preventive mechanisms that demonstrate a school does not tolerate discrimination.[83] The 2020 Amendments broke with this tradition by imposing prescriptive, cumbersome, and inflexible grievance process on all schools solely for sexual harassment. And many stakeholders, including the States, raised concerns that the Amendments' grievance procedures failed to effectuate Title IX's nondiscrimination mandate.[84] The Proposed Rule's streamlined grievance procedures instead provide for the prompt and equitable resolution of all complaints of sex discrimination, not just sexual harassment. They include key safeguards, such as a requirement that any investigator, Title IX Coordinator, or decisionmaker be impartial, to ensure a fair process for all parties.[85] As discussed further below, the States specifically support the Proposed Rule's: (1) removal of inflexible timeframes; (2) preference for the preponderance of the evidence standard; and (3) privacy protections.

The States support the removal of inflexible timeframes imposed under the 2020 Amendments and the Proposed Rule's decision to give schools greater flexibility to set reasonable timelines for prompt resolution of complaints. The 2020 Amendments' grievance procedures imposed a time-consuming multi-step process, which substantially lengthened schools' investigations.[86] For example, the 2020 Amendments require schools to give the parties at least 10 days to submit a response after reviewing the evidence. The investigator then prepares a requisite investigative report based on the parties' responses and must provide it to the parties at least 10 days prior to the hearing.[87] The States have observed that their schools have spent an exorbitant amount of time administratively to meet the strict Title IX criteria with little benefit to the parties, and with adverse consequences for their ability to effectively address the harms to the complainant and stop the sex-based discrimination. We therefore commend the Department's efforts to

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[82] *Id.* at 41,574-75 (proposed § 106.44(k)(1)).

[83] 62 Fed. Reg at 12,038, 12,040; 2001 Policy at 14.

[84] *See, e.g.*, 87 Fed. Reg. 41,395-97, 41,409, 41,457-58, 41,501.

[85] *See id.* at 41,575 (proposed § 106.45(b)).

[86] *See* 34 C.F.R. §§ 106.45(b)(2)(i)(B) (requiring formal written notice to the parties "with sufficient time to prepare a response before any initial interview"); 106.45(b)(5)(v) (requiring sufficient time for the prepare to participate meetings, including interviews and hearings, after written notice); 106.45(b)(5)(vi) (requiring an opportunity for the parties to inspect and review any evidence and afford "at least 10 days to submit a written response, . . . prior to completion of the investigative report"); 106.45(b)(5)(vii) (an investigation report to be created at least 10 days prior to a hearing and each party should be given a copy for review and written response); *see also* 87 Fed. Reg. 41,458 (noting stakeholders' concerns that a process that may have taken days under an elementary or secondary school's previous grievance procedures would take several months under the 2020 Rule's time-consuming requirements); *id.* at 41,501 (noting a commentator's concern that the process could add a "delay of nearly one month between the close of interviews and the start of a hearing").

[87] 34 C.F.R. §§ 106.45(b)(5)(vi); 106.45(b)(5)(vii).

streamline the procedures by removing the specific timelines and providing schools with discretion to set reasonable timeframes.[88]

Additionally, the Proposed Rule appropriately requires the use of the preponderance of the evidence standard to determine whether sex discrimination occurred; a recipient may only use the clear and convincing standard if that is the standard it imposes in all comparable proceedings.[89] As the States previously noted, the preponderance of the evidence standard best promotes compliance with Title IX, and many of our schools have long used that standard for similar complaints.[90] Moreover, the preponderance of the evidence standard would equally balance the interests of the parties by giving equal weight to the evidence of each party.[91] The 2020 Amendments, on the other hand, expressly provide an "option" regarding the standard of proof that may be used (*i.e.*, the preponderance of the evidence standard or the clear and convincing evidence standard), but effectively require schools to align their standard with all other discipline proceedings.[92] Overall, the States welcome the Department's proposed framework that provides schools with the flexibility to use the preponderance of the evidence standard for Title IX as long as that is in line with comparable proceedings.

As explained further in Section I.C.3, *infra*, the Proposed Rule addresses many of the privacy concerns associated with the 2020 Amendments, by requiring that recipients take "reasonable steps to protect the privacy of the parties and witnesses during the pendency" of grievance procedures.[93] Conversely, the 2020 Amendments prohibit any restriction on the discussion of sex discrimination allegations.[94] As stakeholders expressed, the Department's failure to place any restrictions on the parties' ability to discuss the allegations exposed students to potential slander, social retaliation, and social media harassment.[95] In addition, the failure to impose commonsense privacy protections chills parties from participating due to reasonable fears of retaliation (including through social media) and negatively affects the reliability of witness testimony.[96] The States therefore welcome the Proposed Rule's proactive measures to protect privacy during the grievance process, which appropriately balance the needs of the parties to collect evidence and represent themselves during the proceedings with students' privacy interests.[97] The States also applaud the Proposed Rule's prohibition on disclosing private student information except when the student has consented to the disclosure, when permitted by the Family

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[88] 87 Fed. Reg. 41,575 (proposed § 160.45(b)(4)).

[89] *Id.* at 41,483.

[90] States' 2019 Comment Letter at 43-47.

[91] *See* 87 Fed. Reg; 41,485. *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983) ("A preponderance-of-the evidence standard allows both parties to 'share the risk of error in roughly equal fashion.' Any other standard expresses a preference for one side's interests.") (internal citation omitted).

[92] 34 C.F.R. § 106.45(b)(1)(vii).

[93] 87 Fed. Reg. 41,469.

[94] 34 C.F.R. § 106.45(b)(5)(iii).

[95] *See* 87 Fed. Reg. 41,469.

[96] *Id.* at 41,470.

[97] *Id.* at 41,469, 41,575 (proposed § 106.45(b)(5)).

Education Rights and Privacy Act (FERPA), when required by other laws, or to carry out the purpose of Title IX.[98]

However, the States suggest that the Department clarify Section 106.45(e) of the Proposed Rule regarding consolidated complaints to further ensure parties' privacy. Currently, the Proposed Rule allows a school to unilaterally consolidate complaints that "arise out of the same facts or circumstances."[99] The Department has long recognized that records relating to sexual harassment complaints may not be disclosed to third parties.[100] But the Proposed Rule's consolidation provision raises the concern that evidence about *all* students involved in a consolidated complaint must be disclosed to *all* parties and to each party's advisor. If records contain information about multiple students, FERPA—which generally forbids the disclosure of information from a student's "education record," including disciplinary records without consent of the student (or the student's parent)—only allows a student and their parents to review the parts of other students' records that relate directly to the reviewing student.[101] The Department's longstanding policy had been that FERPA permits disclosure of a statement containing information related to other students only if the related information cannot be segregated or redacted without destroying meaning.[102] The Department should consider clarifying the Proposed Rule's consolidation provision to ensure compliance with FERPA and to safeguard parties' privacy.

2. The proposed grievance procedures for sex-based harassment proceedings in higher education reinforce Title IX's antidiscrimination mandate while ensuring a fair process for complainants and respondents.

Section 106.46 of the Proposed Rule, which applies to sex-based harassment proceedings in higher education, brings Title IX sex-based harassment investigations and grievance procedures in higher education in line with civil rights law and Title IX's intent to rid higher education of sex discrimination. For institutions of higher education, implementing the onerous procedures required by the 2020 Amendments created a two-fold problem. First, it imposed rigid and inflexible requirements for Title IX sexual harassment proceedings alone. This was not only costly and onerous to implement, but it significantly prolonged the time to complete a single proceeding. Second, by imposing rigid requirements, it chilled reporting and discouraged complainants, making campuses less safe. The Department has demonstrated that it is grappling with those concerns, which have been repeatedly raised since 2018.[103]

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[98] *Id.* at 41,574 (proposed § 106.44(j)).

[99] *Id.* at 41,576 (proposed § 106.45(e)).

[100] *See, e.g.*, U.S. Dep't of Educ., Letter from Dale King, Dir. of Family Policy Compliance Off. (Nov. 6, 2015).

[101] 20 U.S.C. § 1232g(a)(1)(A), (a)(4)(A)(i), (b); *see also* 34 C.F.R. § 99.12 (imposing similar requirements).

[102] *See* Family Educ. Rights and Privacy, 73 Fed. Reg. 74,806, 74,832-33 (Dec. 9, 2008).

[103] 87 Fed Reg. 41,395 (acknowledging that "stakeholders revealed . . . areas of concern and confusion following the implementation of the 2020 amendments," and that "aspects of the new requirements were not well-suited to some or all educational environments or to effectively advancing Title IX's nondiscrimination mandate").

While maintaining some separate procedures for post-secondary sex-based harassment grievances, the Department proposes a return to the educational and civil rights mandate of Title IX with appropriate due process protections, rather than the quasi-criminal procedures the 2020 Amendments impose. We welcome the Department largely aligning sex-based harassment proceedings under Title IX with all other Title IX proceedings. Where the Department has proposed requirements that are specific to sex-based harassment, it has allowed for more flexibility for schools while maintaining both Title IX's nondiscrimination mandate and the preservation of due process for the individuals involved. The Proposed Rule undoes many of the harmful effects of the 2020 Amendments, and with minor adjustments and clarification, the States believe it will better allow schools to prevent and end discrimination on campus.

As a result of its extensive consultation process, the Department noted that schools found that "certain requirements impeded their successful management of the day-to-day school environment."[104] Stakeholders, including many of the States, previously warned that the grievance procedures the Department imposed on schools and students in 2020 would create a quasi-criminal process, lengthen grievance procedures, chill reporting, and undermine schools' ability to stop harassment.[105] Moreover, the Department had conceded at the time that its 2020 requirements were neither compelled by due process concerns, nor required by Title IX's antidiscrimination mandate.[106] In the Proposed Rule, the Department now makes clear that it prioritizes truth-seeking and enforcing Title IX's nondiscrimination mandate, while maintaining a fair process. Specifically, and as discussed further below, the States applaud the Department's decision to: (1) make live hearings optional; (2) introduce flexibility into the process of assessing credibility; (3) remove the requirement that advisors conduct cross-examination; (4) exclude certain sensitive or harassing evidence from the grievance proceedings; (5) no longer mandate dismissal of complaints; and (6) provide guidance regarding whether Title IX grievance procedures apply when the individuals involved in the process are both students and employees.

First, making live hearings optional will relieve a significant burden on schools with fewer resources. Prior to 2020, many schools with significant resources were already carrying out hearings. However, the 2020 Amendments require live hearings with specific procedures for all higher education institutions and are overly prescriptive in specifying the requirements for those live hearings.[107] Even schools that have long held hearings as part of their Title IX sex-based harassment proceedings, have struggled with the number of roles required to process complaints under the 2020 Amendments. One New Jersey school, which has long held Title IX hearings, roughly estimated that in 2019 it took an average of 152 days to resolve one Title IX matter, whereas in 2021, it took 287 days, an 89 percent increase. This was exacerbated by the multiple

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[104] *Id.* at 41,395-96.

[105] States' 2019 Comment Letter at 34-49.

[106] 85 Fed. Reg. 30,303 ("this provision affords parties greater protection than some courts have determined is required under constitutional due process"); *id.* at 30,101 ("unfair imposition of discipline, even in a way that violates constitutional due process rights, does not necessarily equate to sex discrimination [against the accused] prohibited by Title IX").

[107] States' 2019 Comment Letter at 34-49.

10-day review processes incorporated into the 2020 Amendments.[108] Consistent with other schools' experiences, the University of Massachusetts reports, the multiple 10-day review processes have made the review periods considerably slower. Schools also report expending up to $18,000 to hire decisionmakers for a single hearing. Washington schools report having to hire outside investigators, hearing officers and advisors. Even for schools that have only moved a few cases through the grievance process, the costs have been enormous. The Association of Proprietary Colleges in New York, smaller institutions focused on providing education access to under-represented students, report that the live hearings have created "large burdens" because most offices have limited numbers of full-time staff and struggle to recruit, train, and retain volunteers, thus leaving the responsibility to fulfill the necessary roles on a small number of individuals. Some of these schools report spending $10,000 to $16,000 per hearing on a hearing officer alone. This is untenable, particularly for smaller schools with smaller budgets. California schools report that the proposed rules will allow them to more properly staff the investigative and hearing processes and will create greater equity for their students. The 2020 Amendments have thus resulted in the "protracted and unwieldy hearings" that the States warned of in 2019.[109] By making hearings optional and less prescriptive, the Proposed Rule will reduce the financial burden associated with processing complaints.

Higher education institutions also report that the 2020 Amendments have, as predicted, created a chilling effect on campus. The success of Title IX's enforcement scheme relies on "individual reporting."[110] The live hearing requirement has acted as a deterrent and discouraged potential complainants from filing a complaint and pursuing the grievance procedures, undermining the purpose of Title IX's enforcement scheme. Making hearings optional allows smaller schools to assess both their resources and the campus needs to address sex-based harassment complaints in a manner that meets their community's circumstances. On smaller campuses, where students may fear particular risks of retaliation or reputational damage, schools may seek alternatives to live hearings in order to encourage reporting and prevention of sex-based harassment.

Second, the States welcome the flexibility that the Proposed Rule would introduce into the cross-examination process. The 2020 Amendments' cross-examination requirement has had a documented chilling effect. One Washington campus reports that when discussing resolution options with sexual harassment complainants, nearly 90 percent say they do not want to participate in a live hearing with cross-examination. The requirement discourages complainants from pursuing the grievance process under Title IX and potentially re-traumatizes victims of harassment.[111] The Commission of Independent Colleges and Universities (CICU) in New York has noted that "despite institutions' best efforts" cross-examination by advisors "has proven to be adversarial and harmful to students participating in good faith in the process." The length of their hearings (no less than six hours) has also required students to miss classes or required weekend hearings. Some Illinois schools report that respondents, complainants, and witnesses have declined

[108] *See* 34 C.F.R. § 106.45(b)(5)(vi) & (vii).
[109] States' 2019 Comment Letter at 41.
[110] *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005).
[111] States' 2019 Comment Letter at 41.

to participate in hearings after initial interviews were conducted because of the cross-examination requirement.

By requiring cross-examination by advisors, the 2020 Amendments improperly impose on all schools across the nation the requirement created by a single circuit court to conduct advisor-led cross-examination.[112] The courts agree that due process requires some ability to meaningfully examine the credibility of witnesses in school Title IX proceedings.[113] But they have consistently refused to impose a requirement that "the person doing the confronting must be the accused student or that student's representative."[114] At least one court has warned of such confrontation "mirror[ing] common law trials" and overwhelm[ing] administrative facilities" at the expense of "educational effectiveness," while virtually mimicking a "jury-waived trial."[115] It is clear, therefore, that the mandate for advisor-led cross-examination in the 2020 Amendments is not required by due process, as the Department itself now concludes.[116]

The Proposed Rule instead allows the other party to present questions through a decisionmaker or other third party, consistent with due process concerns.[117] This type of live questioning is less harmful for other parties to the proceedings and more appropriate for the educational setting. As the Department notes, it prioritizes enabling the "decisionmaker to seek the truth and minimize the chilling effects on the reporting of sex-based harassment" or participation in grievance procedures by both parties.[118] It also allows schools to conserve resources by training or retaining a more limited number of people in the process related to establishing credibility.

Although the Proposed Rule's treatment of assessing credibility is a dramatic improvement over the 2020 Amendments, several aspects of the Proposed Rule's requirements on this score warrant further clarification. With respect to the process for questioning by a neutral decisionmaker to assess credibility, the Department should consider clarifying how recipients implement the requirement for cross-examination when credibility "is both in dispute and relevant to evaluating one or more allegations of sex-based harassment."[119] For example, the Department should clarify whether it requires specific findings on whether credibility is "in dispute" and

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[112] *See* 87 Fed. Reg. 41,504-06 (discussion of Sixth Circuit requirements and *Baum*).

[113] *See, e.g., Overdam v. Texas A&M Univ.*, 2022 WL 3207431, at *4 (5th Cir. Aug. 9, 2022) (holding that even in matters of sexual assault, where suspension was imposed, due process requires some opportunity to test credibility, but not necessarily direct cross-examination by an attorney); *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019) (stating that "due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'").

[114] *Haidak*, 933 F.3d at 69.

[115] *Id.* at 69-70 (internal citations omitted).

[116] 87 Fed. Reg. 41,505 ("The Department's tentative view is that neither Title IX nor due process and fundamental fairness require postsecondary institutions to hold a live hearing with advisor-conducted cross-examination in all cases.").

[117] *Id.* (concluding that the Proposed Rule's "live questioning process" "enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is in dispute and is relevant to evaluating" the allegations of sex-based harassment); *id.* at 41,577-78 (proposed § 106.46(f), (g)).

[118] *Id.* at 41,505.

[119] *Id.* at 41,482.

"relevant" prior to cross-examination of each witness and whether or not permitting such questioning could result in a recipient being sanctioned. The Department should also clarify the circumstances in which a live hearing requires cross-examination.

Third, under the Proposed Rule, if the school chooses to carry out live hearings, the parties may retain advisors of their choice and the school *may* allow advisors to conduct cross-examination, but it is not required to do so.[120] This provides schools with the necessary flexibility to adjust their sex-based harassment proceedings to their campus environment and resources. Schools that are able to train and retain advisors for cross-examination may do so.[121] Others can instead maintain hearing panels or decisionmakers to conduct questioning. Schools that do not have the resources to retain attorneys as advisors will no longer feel compelled to do so under the Proposed Rule and can focus instead on thoroughly training decisionmakers. For example, the University of Massachusetts system reports that hearing officers have expressed concerns about serving as the Chair of a panel and having to rule on matters related to relevancy, particularly where the advisors are attorneys. In light of these concerns, under the 2020 Amendments, the University has hired external hearing panel members. But under the Proposed Rules, recipients will have the flexibility to focus their resources on decisionmaker training.

This shift—from requiring to permitting advisors to conduct cross-examination—addresses the issue of inequity where one party is represented by an attorney while the other is not. At the same time, the shift relieves the financial burden the 2020 Amendments sometimes placed on recipients. For example, to level the playing field in all Title IX sexual harassment proceedings, a Minnesota State University obtained attorney advisors for students who did not have their own attorney advisor. The school found it challenging to identify attorneys willing to undertake the task of representing either party. For schools that cannot pay for advisors, wealthier students may be able to secure legal representation while other parties to the proceeding would be represented by members of faculty or staff acting in a volunteer capacity, creating inequities that the States warned about in 2019.[122] The New York CICU also reported that some institutions had to scramble to find affordable, high-quality advisors for parties, particularly for respondents. Similarly, Vermont schools report difficulty finding staff willing to serve as investigators and advisors.

With respect to advisors, the Department should consider clarifying that witnesses in a particular proceeding are prohibited from serving as advisors in that proceeding. Without this limitation a witness could be privy to confidential information shared throughout the process, thus affecting their credibility. If a witness served as an advisor, that would also require schools that allow advisor cross-examination to find a separate individual to cross-examine that witness.

Fourth, the States welcome the Proposed Rule's amendments to what evidence and questioning may be excluded from the grievance proceedings.[123] Specifically, the Department now proposes to exclude evidence that is protected under privilege, health records, and sexual interests

[120] *Id.* at 41,578 (proposed § 106.46(f)(1)(ii)).
[121] *Id.* (proposed § 106.46(f)(1)(i)).
[122] States' 2019 Comment Letter at 41.
[123] 87 Fed. Reg. 41,578 (proposed § 106.46(f)(3)).

or conduct.[124] It would also require schools to exclude questions that are "unclear or harassing of the party being questioned."[125] Conversely, the 2020 Amendments provide little guidance beyond noting that information under a "legally recognized privilege" is generally inadmissible and questions, including questions about prior sexual behavior, could only be excluded if the decisionmaker determines that they are not "relevant." The States welcome the Proposed Rule's additional guidance.

Fifth, the States support the Proposed Rule allowing, but not mandating, the dismissal of complaints under certain circumstances, which relieves a major burden for schools.[126] The 2020 Amendments, conversely, mandate that complaints be dismissed if they do not meet the narrow definition of sexual harassment or the scope of required conduct,[127] even if they could constitute a claim under a code of conduct proceeding. This resulted in schools being burdened with dual track proceedings, as the States warned in 2019.[128] For example, after the 2020 Amendments were published, Goldey-Beacom College in Delaware amended its Sexual Misconduct Policy to include two grievance procedures, one for the Title IX incident process and one for sexual misconduct claims outside the scope of the 2020 Amendments' criteria – *i.e.*, for cases in which sexual misconduct was alleged, but the alleged sexual misconduct failed to meet the 2020 Amendment's criteria. Schools in Illinois note that it has been challenging for students to understand this dual process, making the jobs of Title IX coordinators and administrators more difficult. In many of the States, schools report that where they began an investigation and realized that the conduct may have occurred off campus or did not meet the narrowed sexual harassment definition, they were forced to formally dismiss the Title IX complaint process and then re-start the process under their code of conduct in order to ensure a safe learning environment for their students. For example, schools in the University of Massachusetts system report that where the incident reports did not meet the threshold of the 2020 definition of "sexual harassment," the cases were formally dismissed under the Title IX process and then, depending on the facts and circumstances, either dismissed altogether or referred for alternative procedures. In some instances throughout our States, the complainants chose not to move forward after having their complaint dismissed once, thus hampering the schools' ability to prevent recurrence.

Finally, the Proposed Rule adequately addresses the potential tension between Title IX and Title VII where individuals involved in the grievance procedures are both employees and students at a postsecondary institution. The Proposed Rule requires a "fact-specific inquiry" to determine whether Section 106.46 applies. As the States previously explained, when employees are involved in grievance procedures, Title VII's requirements can also apply and may conflict with the 2020 Amendments.[129] In addition, collective bargaining agreements or state laws may impose additional

[124] *Id.* at 41,575 (proposed § 106.45(b)(7)).
[125] *Id.* at 41,578 (proposed § 106.46(f)(3)).
[126] *Id.* at 41,577 (proposed § 106.46(d)).
[127] 34 C.F.R. § 106.45(b)(3).
[128] States' 2019 Comment Letter at 49-51 ("Even if the proposed rule allows broader protections against sex discrimination, mandating that schools dismiss Title IX complaints that fall outside of the regulations' scope will still burden schools by requiring them to create two separate procedures.")
[129] *Id.* at 27-28.

requirements on proceedings involving employees.[130] The Proposed Rule's "fact-specific inquiry" appropriately provides guidance to schools regarding what procedure should apply without being overly prescriptive.[131]

3. The Proposed Rule's changes to the grievance procedures for K-12 schools better effectuate the purpose of Title IX.

Students in grades K-12 are particularly vulnerable to sexual harassment.[132] Instances of sexual harassment are both underreported and on the rise in K-12 schools,[133] and the unique developmental needs of K-12 students require an expeditious and supportive complaint process.[134] Evidence shows how important it is to address misconduct in young children before it escalates in order to prevent long-term harm.[135] The Proposed Rule makes vital changes to the grievance procedures for K-12 schools, including: (1) applying grievance procedures to all complaints of sex-based discrimination; (2) requiring reasonably prompt resolution of all complaints; (3) allowing Title IX coordinators to determine whether a complaint should be initiated; (4) protecting student privacy; and (5) ensuring protections for students with disabilities. Each of these changes, individually and taken together, further Title IX's antidiscrimination mandate.

First, under the Proposed Rule, grievance procedures will apply to all complaints of sex discrimination, not just complaints of sexual harassment.[136] This is in direct contrast to the 2020 Amendments, which impose onerous procedures for complaints of sexual harassment only.[137] The States report that the 2020 Amendments created a dual-track investigative process (one track for sexual harassment complaints, another for all other sex discrimination complaints) that can take months to complete. For example, K-12 schools in Vermont have had to dismiss a sexual harassment complaint if it does not allege the level of sexual misconduct required to meet Title IX's current definition, and then refile the report and take action under a separate process under state law. Schools in Washington and California have had similar experiences, finding that the grievance procedures imposed by the 2020 Amendments make it challenging to process complaints of sexual misconduct. Illinois schools have similarly found that the split grievance systems create unnecessary complexity, especially because individuals understand their grievance in terms of conduct, not legal grounds. The Proposed Rule will avoid the pitfalls of the 2020

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[130] The 2020 Amendments acknowledge this and threaten schools for non-compliance. 85 Fed. Reg. 30,444 (recipients forego federal financial assistance if they will not renegotiate a collective bargaining agreement or are concerned about state law compliance).

[131] 87 Fed. Reg. 41,577 (proposed § 106.46(b)).

[132] Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW 11 (2011), https://tinyurl.com/3pyvmuxh; Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005), https://tinyurl.com/ywyp7az5 (noting differences in the types of sexual harassment and reactions to it).

[133] *E.g.*, CRDC 2020.

[134] *See Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

[135] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); 85 Fed. Reg. 30,486 (discussing harms raised by commenters from significant delays).

[136] 87 Fed. Reg. 41,463 (clarifying that the same grievance procedure is used for sexual harassment claims and other claims of sex discrimination).

[137] 34 C.F.R. § 106.45(b) (grievance procedure provided only for sexual harassment).

Amendments by streamlining grievance procedures and applying a single set of procedures to all sex discrimination claims.

The Proposed Rule also allows school districts to simultaneously meet other requirements of state law that may, for example, allow for greater protection for students subjected to sexual harassment, thus better effectuating Title IX's purpose and ensuring the opportunity for the Title IX coordinator to address patterns of discrimination in the recipient's educational program or activity.

Second, the Proposed Rule returns the K-12 grievance procedures to a prompt and equitable process that recognizes the unique needs of young students. As discussed, *supra* at Section I.C.1, the Proposed Rule appropriately requires that a recipient establish reasonably prompt timeframes for the major stages of the grievance procedures but does not mandate specific minimum timeframes for each stage.[138] This change is, again, in contrast to the 2020 Amendments, which require schools to adhere to set timeframes, which led to more protracted investigations. For example, under the Amendments, after the formal complaint is filed, a school must engage in 10-step process spanning at least 20 days before it can impose even minor discipline, such as an after-school detention, community service, or training, or issue any remedies that may unreasonably burden a respondent.[139]

In the experience of the States, elementary and secondary school-age children are not best served by lengthy procedures, which are less effective at preventing recurring sex discrimination.[140] In Vermont, for example, the inability to use a single-investigator model has hampered schools' capacity to process complaints. The schools struggle to hire the necessary staff and resort to taking other administrative staff from their normal duties. Schools in the States also report spending exorbitant amounts of time and money on ensuring compliance with the 2020 Amendments. K-12 schools need flexibility to determine, after a constitutionally sufficient process, an appropriate response to prevent escalation of sexual harassment.[141] This is what the Proposed Rule allows for, in furtherance of Title IX's purpose.

The Proposed Rule also gives a recipient more flexibility in conducting an emergency removal of a respondent when the respondent poses a threat to the health and safety of others, as it now permits emergency removal of a respondent after a recipient conducts an individualized assessment and determines that an immediate threat exists, and removes the limitation that the threat must be "physical."[142] Taken together, these changes better effectuate Title IX's purpose and Congressional intent, balancing due process with the need to ensure that students are protected from sexual harassment and receive prompt and effective resolutions to their complaints.

Third, the Proposed Rule returns flexibility to the Title IX Coordinator to decide whether a complaint should be initiated and ensures that all complaints received orally or otherwise are

[138] 87 Fed. Reg. 41,468, 41,575 (proposed § 106.45(b)(4)).
[139] 85 Fed. Reg. 30,310; 30,288; 34 C.F.R. § 106.45(b)(2), (5)(iv)-(vii), (6)(i)-(ii), (7)(ii), (8).
[140] *See* 87 Fed. Reg. 41,459.
[141] *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 580, 582-83 (1975).
[142] 87 Fed. Reg. 41,451-52, 41,574 (proposed § 106.44(h)).

promptly and equitably addressed.[143] Conversely, the 2020 Amendments, which require a written formal complaint before a sex discrimination investigation can be initiated, created significant barriers for K-12 students because (1) young children and students with disabilities often do not have the capacity to complete a formal complaint and may instead report via informal oral communications with staff, and (2) some children do not have a parent or a guardian, and therefore do not have a representative to help them file a complaint.[144] Furthermore, Los Angeles Unified School District has reported that parents may be unavailable to file on their child's behalf for a variety of reasons, such as abuse, interaction with the foster system, literacy, difficulty writing in English, or disability.

While recognizing the importance of complainant autonomy, the Proposed Rule properly allows the Title IX Coordinator to weigh other factors—such as age—that are consistent with schools' legally recognized *in loco parentis* responsibilities.[145] Furthermore, the Proposed Rule ensures that *all* students have an adult advocating for them by providing authorized legal representatives with the right to act on behalf of an individual without a parent or guardian.[146] This change appropriately permits an educational representative, who may not be a youth's guardian but is legally authorized to act on the youth's behalf, to initiate Title IX proceedings.[147] By adding flexibility regarding the initiation of a Title IX complaint, the Proposed Rule furthers Title IX's antidiscrimination mandate.

Finally, the Proposed Rule also includes appropriate privacy protections to ensure that students who file a Title IX complaint do not experience retaliation from classmates, parents or school staff for voicing their concerns.[148] In contrast, the 2020 Amendments prohibit recipients from restricting the ability of either party to discuss the allegations, including the parties' names, under investigation.[149] Under the 2020 Amendments, the States have seen that without any limitations on students' ability to spread information about complaint allegations, complaining students have been subject to social retaliation—on and offline—which creates a chilling effect (and can subject the complainant to a further hostile campus environment). As discussed, *supra*, in Section I.C.1., the Proposed Rule properly returns the appropriate privacy protections to K-12 students by requiring that a "recipient must take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures," while explicitly balancing this goal with various practical necessities of the grievance process.[150] Schools would also be prohibited from disclosing private student information except when the student has

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[143] *Id*. at 41,451.

[144] *Id*. at 41,404 (the 2020 rule only designates a parent or guardian to act on behalf of the student), *Id.* at 41,569 (proposed § 106.6(g)).

[145] *Id*. at 41,445; *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986).

[146] 87 Fed. Reg. 41,404.

[147] *Id*; Lichty, L.F., Torres, J.M., Valenti, M.T. and Buchanan, N.T. (2008), Sexual Harassment Policies in K-12 Schools: Examining Accessibility to Students and Content. Journal of School Health, 78: 607-614. https://tinyurl.com/5n7dfb35.

[148] 85 Fed. Reg. 30,295 (acknowledging and chronicling concerns raised by many commenters); 87 Fed Reg. at 41,469.

[149] 87 Fed Reg. 41,469.

[150] *Id.* at 41,575 (proposed § 106.45(b)(5)).

consented to the disclosure, when permitted by FERPA, when required by other laws, or to carry out the purpose of Title IX.[151] These changes represent a return to the longstanding practice of protecting the privacy of young students during grievance proceedings.[152]

4. The Proposed Rule recognizes and appropriately gives effect to the parallels between Title IX and Title VI.

The 2020 Amendments inappropriately limit the definitions currently set forth in Title IX at Section 106.30 from being applied to Title VI complaints, even where a complaint consists of a mixed harassment complaint on grounds of sex and race, color, or national origin. Disconnecting Title IX from Title VI created problems for mixed harassment complaints.[153] For example, when a student faces discriminatory harassment based on sex and race in the same incident, the 2020 Amendments require the school to conduct two separate investigations and apply two separate legal standards to the same underlying harassing conduct, which could lead to absurd and inequitable results. And if that harassment could be proved through written admissions of a respondent who refuses to testify, under the 2020 Amendments, the respondent could avoid responsibility for the sexual harassment entirely while being held accountable for the racial harassment.[154]

In addition to the practical problems for mixed harassment complaints, this separation is not supported by statutory text because, as the Supreme Court recognized in *Cannon v. University of Chicago*, Title IX is patterned after Title VI.[155] Both Title IX and Title VI seek "to accomplish two related, but nevertheless somewhat different, objectives": (1) "to avoid the use of federal resources to support discriminatory practices" and (2) "to provide individual citizens effective protection against those practices."[156] A congressional hearing to review Title IX regulations reaffirmed Congress's intent to make the protections against sex discrimination in Title IX co-extensive with Title VI's protections against discrimination based on race, color, and national origin.[157]

By bringing definitions applicable to Title IX back into proposed Section 106.2 and removing any requirements not to apply Title IX's procedural definitions to Title VI proceedings, the Department appears to have addressed the problems caused by the 2020 Amendments and brings enforcement of Title IX and Title VI back in line, as is contemplated by the parallel statutory protections.

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[151] *Id*. at 41,574 (proposed § 106.44(j)).

[152] *E.g*., U.S. Dep't of Educ., *Sexual Harassment: It's Not Academic Pamphlet* 7 (1988).

[153] *See* 85 Fed Reg. 30,432 (stating that schools may use a different grievance process to address race or disability allegations), 30,071 (acknowledging concerns with diverging standards between Title IX and Title VI, but dismissing them by stating that Title VI regulations will continue to be enforced).

[154] *Id.*

[155] *Cannon,* 441 U.S. at 694-95.

[156] *Id.* at 704.

[157] For example, Senator Bayh noted that Title IX "sets forth prohibition and *enforcement* provisions which generally parallel the provisions of Title VI." 118 Cong. Rec. 5807 (1972) (emphasis in original)).

D. The Proposed Rule's definition of the role of a Title IX Coordinator aligns with Title IX's purpose.

The 2020 Amendments require that a school appoint a Title IX Coordinator, but fail to address important details regarding the role of a Title IX Coordinator. The Proposed Rule adopts additional requirements concerning the role and responsibilities of a Title IX Coordinator that more fully effectuate implementation of the statute.[158]

First, rather than requiring the Title IX Coordinator to fulfill all required responsibilities on their own, the Proposed Rule permits a school to assign designees to help fulfill some of the Title IX Coordinator's responsibilities, as long as the Title IX Coordinator retains oversight and ultimate responsibility for compliance.[159] As the Department appropriately notes, this approach enables recipients who provide services at multiple locations to more effectively enforce Title IX.[160] In the experience of schools in the States, it is helpful and more efficient to be able to delegate Title IX enforcement activities, and it is particularly untenable to have one person perform each of these activities with respect to larger schools.

Second, as discussed in Section I.C.3, *supra*, the Proposed Rule rightly empowers the Title IX Coordinator to determine whether to initiate a complaint where the complainant is unwilling or unable to make one, or to "[t]ake other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity."[161] The preamble further explains the factors a Title IX Coordinator should consider in making such determination, ensuring that complainant autonomy is balanced against threats to health and safety.[162] This is a significant improvement over the 2020 Amendments, which discussed the topic only sparingly in the preamble. That is especially true because complaints and related measures initiated by a Title IX Coordinator are an important tool for schools to be able to proactively ensure they are providing education programs or activities free from sex discrimination.

Third, the Proposed Rule appropriately requires the Title IX Coordinator to receive the same training required by all other recipient employees along with training on their specific responsibilities, the recipient's recordkeeping system, and any other training necessary to coordinate compliance with Title IX.[163] These training requirements, which were absent from the 2020 Amendments, effectuate the purpose of Title IX by ensuring that Title IX Coordinators and other employees will receive training on the "aspects of Title IX that are relevant and critical to their specific roles."[164]

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[158] 87 Fed. Reg. 41,569-70 (proposed §§ 106.8(a) & (d)), 41,573 (proposed § 106.44(f)).
[159] *Id.* at 41,424, 41,569 (proposed § 106.8(a)).
[160] *Id.* at 41,424.
[161] *Id.* at 41,445, 41,573 (proposed § 106.44 (f)(5)-(6)).
[162] *Id.* at 41,445-46.
[163] *Id.* at 41,570 (proposed § 106.8(d)).
[164] *Id.* at 41,428.

The States, however, propose two modest clarifications to the above provisions. First, while the preamble of the Proposed Rule indicates that "every reference to the 'Title IX Coordinator' in the preamble, other than in discussion of [certain specified sections] should be understood to include the Title IX Coordinator and any designees,"[165] the Final Rule would be clearer if Section 106.8(a) itself were amended to state where the rule requires or permits action by the "Title IX Coordinator" (except as to ultimate oversight and review) those duties may also be carried out by the "Title IX Coordinator's designees." Relatedly, the Department should consider explicitly stating that in large school districts with multiple sites, principals and vice principals may be designated to provide supportive measures like counseling, stay-away protections, and course changes because it is not feasible for the Title IX Coordinator or district-level designees to provide supervision or direct oversight.[166]

II. THE PROPOSED RULE IMPROVES EQUITABLE ACCESS TO EDUCATION FOR ALL STUDENTS.

In addition to the improvements discussed above, which establish standards for Title IX enforcement concerning sexual violence and sexual harassment that are consistent with longstanding Department practice, the Proposed Rule makes substantive improvements in other areas that likewise better effectuate Title IX's purpose to provide individuals with effective protection against sex discrimination and equitable access to educational opportunities. As discussed in further detail below, the Proposed Rule (1) recognizes and better protects students with disabilities, who are more likely to experience gender-based discrimination; (2) clarifies that the reach of Title IX includes discrimination on the basis of sex stereotypes, sex characteristics, sexual orientation, and gender identity, in line with how the United States Supreme Court and other federal agencies have interpreted related federal anti-discrimination law; (3) ensures compliance with and provides greater detail regarding existing mandates relating to pregnancy and parenting students, protections that are vital to ensuring gender equality in education; and (4) elaborates on longstanding protections Title IX affords to students to be free of retaliation for asserting their Title IX rights. The States applaud each of these improvements.

A. The Proposed Rule rightly recognizes that students with disabilities are protected under Title IX.

The Proposed Rule rightly recognizes that "sex discrimination . . . sometimes overlap[s] with other forms of discrimination, such as race discrimination and disability discrimination," which keep[] affected students from benefiting fully from their school's education programs and activities."[167] The States' experience shows that discrimination is often multi-faceted. Studies show that people with disabilities may be twice as likely to experience gender-based violence,[168]

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[165] *Id.* at 41,425.

[166] *See Id.* at 41,573 (proposed § 106.44(f)(3) (requiring the Title IX Coordinator to offer and coordinate supportive measures).

[167] *Id.* at 41,392.

[168] U.S. Agency for Int'l Dev., *Advancing Women and Girls with Disabilities* (May 7, 2019), https://tinyurl.com/4cpchj67.

and women report experiencing nearly 1.5 times as many violations of the Americans with Disabilities Act as do men.[169] Moreover, evidence of sex and disability discrimination may be "inextricably intertwined," and it can often be difficult to determine whether discrimination faced by a person with a disability "is derived from the [complainant's] status as a woman, her status as a disabled person, or both."[170]

To effectuate Title IX's protection against sex discrimination, the Proposed Rule appropriately adds a definition of the term "student with a disability,"[171] and includes other provisions "that would require a recipient to consider the requirements of Federal disability laws when implementing the Title IX regulations."[172] As the Department correctly notes, both Section 504 of the Rehabilitation Act[173] and the Individuals with Disabilities Education Act[174] impose requirements on recipients that must be considered throughout the implementation of grievance processes under Title IX.[175]

We also commend the Department for recognizing that supportive measures that address the effects of harassment in relation to a student's disability "may require tailoring in ways that may not be obvious to a Title IX Coordinator," and therefore whenever a student with a disability enters a Title IX grievance proceeding "the Title IX Coordinator has the responsibility to consult with the [Individualized Education Program] team [and/or] Section 504 team who are already charged by Federal law with making individualized decisions about students with disabilities."[176] This is particularly important because supportive measures may intersect with decisions made by these teams, including placement, reasonable accommodations, special education, and related services that are necessary to ensure K-12 students have access to a free and appropriate education and postsecondary students have equal access to education.[177]

However, we also note that in a K-12 setting, a student's Individualized Education Program (IEP) team or Section 504 plan participants may include a wide range of members and may be difficult to convene in a timely manner. Thus, in order to more expeditiously provide the type of consultation that will benefit the student, without unnecessarily delaying the implementation of supportive measures, we suggest amending proposed Sections 106.8(e) and 106.44(g)(7)(i) to instead require the Title IX Coordinator to consult with a "lead member of" the IEP team for K-12 students with disabilities or the Section 504 Coordinator for students with a Section 504 plan.

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[169] Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 Minn. L. Rev. 1099, 1102-3 (2017).

[170] *Id.* at 1100-01 (2017).

[171] 87 Fed. Reg. 41,400 (discussing added proposed § 106.2 definition).

[172] *Id.* (discussing proposed §§ 106.8(e) and 106.44(g)(7)).

[173] 29 U.S.C. § 701 *et seq.*

[174] 20 U.S.C. § 1400 *et seq.*

[175] 87 Fed. Reg. 41,429-30.

[176] *Id.* at 41,430.

[177] *See* 34 C.F.R. §§ 300.17, 300.300-300.328, and 104.34-104.36.

B. The Proposed Rule clarifies the scope of "sex discrimination" in accordance with Title IX, Supreme Court precedent, and historical Department practice.

The Proposed Rule appropriately clarifies that "sex discrimination," as defined and prohibited by Title IX, includes "discrimination on the basis of sex stereotypes, sex characteristics . . . , sexual orientation, and gender identity."[178] This clarification effectuates Title IX by ensuring protection of LGBTQI+ students, who are at greater risk of lower educational achievement due to sex discrimination, and by ensuring that enforcement of the statute aligns with the Department's historical practice and Supreme Court precedent.

The protections in the rule are essential because LGBTQI+ students who experience discriminatory policies and practices have "lower levels of educational achievement, lower grade point averages, and lower levels of educational aspiration than other students."[179] LGBTQI+ students who experienced sex-based discrimination at school were found to be almost three times as likely to miss school as their non-LGBTQI+ classmates because they felt unsafe or uncomfortable.[180] LGBTQI+ students face prevalent discrimination in school, including sexual harassment.[181] For example, transgender youth experience higher levels of discrimination, violence, and harassment than cisgender youth. Of students known or perceived as transgender, 77% reported negative experiences at school, including harassment and assault.[182] Discrimination at school puts transgender students at risk of suicide, mental health issues, and worse educational outcomes, and Title IX's strong protections are needed to ameliorate these risks.[183]

The Proposed Rule is also consistent with governing case law. The Supreme Court's recent decision in *Bostock v. Clayton County*[184] held that, under Title VII, discrimination on the basis of sexual orientation or gender identity "requires an employer to intentionally treat individual employees differently because of their sex," which includes being discriminated against for ''traits or actions it would not have questioned in members of a different sex."[185] Because courts have

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[178] 87 Fed. Reg. 41,410.

[179] Kosciw et al., *The 2019 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation's schools*, GLSEN 45, 48 (2020); *see also* Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools*, GLSEN 25, 27 (2009) (showing that more-frequently harassed transgender students had significantly lower grade point averages than other transgender students).

[180] Kosciw et al., *The 2019 National School Climate Survey*, at 49.

[181] *Id.* at 28 (81% of LGBTQI+ students reported being verbally harassed because of their sexual orientation, gender identity, or gender expression, and more than one in three (35.1%) reported they were verbally harassed often or frequently).

[182] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 132-35 (Nat'l Ctr. for Transgender Equal. Dec. 2016).

[183] James et al., *2015 U.S. Transgender Survey*, at 132; Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 45, 48; Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, J. of Pub. Mgmt. & Soc. Policy 65, 75 (2013).

[184] *Bostock v. Clayton County, Georgia,* 140 S. Ct. 1731 (2020).

[185] *Id.* at 1742, 1737.

long looked to Title VII to interpret Title IX's mandate,[186] it stands to reason that Title IX's protection against "discrimination on the basis of sex" therefore similarly protects against discrimination based on sexual orientation and gender identity. The Proposed Rule is likewise consistent with several federal circuit court decisions interpreting Title IX, and a U.S. Department of Justice memorandum determining, based in part on this case law, that the "best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation."[187]

The Proposed Rule's approach also aligns with the Department's longstanding practice and prior interpretations. In 1997, the Department's Office of Civil Rights (OCR) explained that "sexual harassment directed at gay or lesbian students may constitute sexual harassment prohibited by Title IX."[188] Then, in 2001, OCR identified that sex discrimination included harassment based on sexual orientation, harassment based on the victim's failure to conform to stereotyped notions of femininity, and that sexual harassment can occur between members of the same sex.[189] In 2010, OCR reaffirmed that "Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination."[190] In 2014, OCR reiterated that Title IX's prohibition on discrimination includes discrimination based on gender identity.[191] In 2006 and 2020, OCR recognized protections against specific types of sex stereotypes.[192] Finally, in 2016, OCR explained that a student's gender identity must be treated as their sex for purposes of Title IX's prohibition on sex-based discrimination.[193]

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[186] *See, e.g.*, *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

[187] Memorandum, Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972, 2, U.S. Department of Justice Civil Rights Division (Mar. 26, 2021); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.* 858 F.3d 1034 (7th Cir. 2017) (holding that exclusion of transgender children from restrooms that match their gender identity is prohibited under Title IX); *Dodds v. United States Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016) (same); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (observing that Bostock's interpretation guides the evaluation of Title IX claims), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878, 210 L. Ed. 2d 977 (2021).

[188] *See* 1997 Guidance at 12,039.

[189] *See* 2001 Policy, https://tinyurl.com/fp8v3y7x.

[190] Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Off. for Civ. Rts., Dear Colleague Letter on Harassment and Bullying, 8 (Oct. 26, 2010), https://tinyurl.com/mrd4vjyc.

[191] 2014 Q&A.

[192] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,539 (Oct. 25, 2006) (proposed § 106.34(b)(4)(i) (recipients must ensure that their single-sex classes are substantially related to the recipient's important objective and do not rely on overly broad generalizations about either sex.)); 34 CFR § 106.45(b)(1)(iii) (Decisionmakers must receive training on the relevance of questions and evidence, which includes "questions and evidence about the complainant's sexual predisposition or prior sexual behavior [that] are not relevant.").

[193] Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Off. for Civ. Rts., Dear Colleague Letter on Transgender Students, 2 (May 13, 2016, rescinded), https://tinyurl.com/ue38fd8h.

Relatedly, the Proposed Rule appropriately recognizes that sex discrimination need not occur based on binary gender identities. In this regard, the 2020 Amendments, which presupposed "sex as a binary classification,"[194] are out of step not only with Title IX and the Department's historical practice, but also the irrefutable reality that there are thousands of Americans whose anatomy is neither typically "male" nor typically "female."[195] Consistent with this, the Proposed Rule rightly prohibits discrimination on the basis of sex characteristics, including intersex traits,[196] and clarifies that the list of characteristics set forth in the preamble is not exhaustive.[197]

Finally, the Proposed Rule appropriately recognizes that, while not all distinctions based on sex are impermissible, the limited circumstances where such distinctions are allowed must not cause more than *de minimis* harm to a person.[198] Studies show that denying students' ability to participate in education-related activities that match the student's gender identity cause more than *de minimis* harm. One study found that almost 70% of transgender students avoided restrooms and other school spaces because they felt unsafe or uncomfortable.[199] Additionally, denying students the opportunity to participate in sports causes more than *de minimis* harm for a number of reasons, including because students that participate in sports are more likely to graduate from high school, go to college, and achieve higher grades and scores on standardized tests.[200] Participating in sports also increases students' self-confidence and connection with peers.[201] Therefore, the Proposed Rule appropriately clarifies that "adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity subjects a person to more than *de minimis* harm on the basis of sex."[202] This requirement is also consistent with court decisions finding that denying a student access to facilities or activities consistent with their gender identity is prohibited under Title IX.[203] To further delineate the protections already outlined in the Proposed Rule, the States look forward to release of a Title IX athletics rule that will make "amendments to § 106.41 . . . in the context of sex-separate athletics."[204] We encourage

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[194] 85 Fed. Reg. 30,178.

[195] Stephanie Dutchen, *The Body, The Self,* Harvard Medicine (2022), https://tinyurl.com/24c2j92u ("Estimates of incidence range from more than 1 in 100 to less than 1 in 5,000 births, suggesting a prevalence between 66,000 and 3.3 million people in the United States.").

[196] 87 Fed. Reg. 41,532.

[197] *Id*.

[198] *Id*. at 41,534; *see Peltier* v. *Charter Day Sch., Inc.,* 37 F.4th 104, 129 (4th Cir. June 14, 2022) (en banc) (''for the plaintiffs to prevail under Title IX, they must show that . . . the challenged action caused them harm, which may include 'emotional and dignitary harm''' (internal citation omitted)).

[199] Kosciw et al., *2015 National School Climate Survey*, at 86.

[200] National Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* 41 (2017), https://tinyurl.com/y2787rcy.

[201] *Id*. at 42; *see also* Stacy M. Warner et al., *Examining Sense of Community in Sport: Developing the Multidimensional 'SCS' Scale*, 27 J. of Sport Management 349, 349-50 (2013).

[202] 87 Fed. Reg. 41,534.

[203] *See, e.g., Grimm,* 972 F.3d at 617–18 (holding that evidence that a transgender boy suffered physical, emotional, and dignitary harms as a result of being denied access to a sex-separate program or activity consistent with his gender identity was sufficient to constitute harm under Title IX).

[204] 87 Fed. Reg. 41,538.

this forthcoming proposed rulemaking to further clarify that under Title IX, all students can participate fully and equally in school sports.

C. The Proposed Rule's provisions addressing sex-based discrimination on account of pregnancy and parental status are also consistent with Title IX's mandate.

The Proposed Rule rightly clarifies and expands upon existing protections within the Title IX regulations designed to ensure that neither pregnancy nor parenting status should hinder full and equal access to educational opportunities. Students who are pregnant or raising children are subjected to sexual harassment at higher rates, leading to concrete educational harms in addition to the harm of the harassment itself.[205] Moreover, discrimination based on pregnancy is a form of sex discrimination, a fact that the 2020 Amendments already acknowledge.[206] The Proposed Rule addresses these issues and clarifies existing protections in multiple ways. First, it prohibits discrimination based on pregnancy or related conditions.[207] Second, it prohibits the use of admissions criteria that discriminate against applicants who are pregnant or have related conditions.[208] Third, it proposes various substantive requirements, such as the provision of a private lactation space, to ensure equal access for pregnant and nursing students.[209] Finally, it provides various protections to pregnant or parenting students employed by educational institutions, such as pregnancy leave and lactation breaks.[210] The States applaud these provisions.

The Department and various courts have all acknowledged that the prohibition on pregnancy discrimination in the 2020 Amendments is consistent with Title IX,[211] its legislative history,[212] and other federal laws.[213] Although the 2020 Amendments' prohibition on pregnancy *discrimination* is an important step forward "from the pre-Title IX era in which pregnant students

[205] Nat'l Women's Law Center, Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting 12 (2017), https://tinyurl.com/czf3yun9 (56 percent of girls aged 14 to 18 who are pregnant or raising children are touched or kissed without consent).

[206] 34 C.F.R. § 106.40.

[207] 87 Fed. Reg. 41,571 (proposed § 106.10).

[208] *Id.* (proposed § 106.21(c)).

[209] *Id.* at 41,571-72 (proposed § 106.40).

[210] *Id.* at 41,579 (proposed §§ 106.51, 106.57).

[211] *Conley v. Nw. Fla. State Coll.*, 145 F. Supp. 3d 1073, 1076-77 (N.D. Fla. 2015).

[212] *See, e.g.,* 118 Cong. Rec. 5804 (1972) (Senator Birch Bayh, the sponsor of Title IX, explaining that the "social evil of sex discrimination in education" includes the fact that "[m]any students are denied leave for pregnancy and childbirth."); *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 526–27 (1982) (noting that Senator Bayh's remarks "are the only authoritative indications of congressional intent regarding the scope of [Title IX]").

[213] *See, e.g.*, *Chipman v. Grant Cnty. Sch. Dist.*, 30 F. Supp. 2d 975, 978 (E.D. Ky. 1998) (acknowledging that the "purpose [of Title IX's pregnancy protection] is generally the same as the Pregnancy Discrimination Act" and applying precedent from the latter to Title IX case); *Castro v. Yale Univ.*, 518 F. Supp. 3d 593, 605 (D. Conn. 2021) (noting that both Title IX and Title XI prohibit educational institutions from discriminating based on pregnancy in hiring); 87 Fed. Reg. 41,514-15 (noting that the Proposed Rule is consistent with Title VII's prohibition on pregnancy discrimination in employment as added pursuant to the Pregnancy Discrimination Act).

were commonly excluded from school entirely or confined to separate schools for pregnant (or otherwise delinquent) girls," the civil rights of pregnant and parenting students are violated by many circumstances other than outright exclusion.[214] And while the 2020 Amendments guarantee a pregnant student a right to educational leave and to reinstatement at the conclusion of pregnancy, they contain no explicit requirements to ensure that schools "provide the supports that pregnant students or new mothers might actually need to succeed in" their educational efforts.[215] To the extent the 2020 Amendments provide for any "affirmative accommodation mandates" for pregnant students, they did little to "ease the educational impacts of motherhood."[216] In effect, the 2020 Amendments provide clear protections to *pregnant* students but leave the rights of *parenting* students less explicit.[217] The importance of protections for both pregnant *and* parenting students, including addressing lactation-related needs, has been widely recognized by regulators,[218] courts,[219] and commenters.[220]

The Proposed Rule answers this call by clarifying that pregnant and parenting students have equal access to all educational programs. The Proposed Rule reiterates that Title IX's prohibition of sex discrimination includes discrimination on the basis of pregnancy or related conditions, which has long been recognized by the Department.[221] For students who are experiencing pregnancy or related conditions, recipients must ensure the student is notified of their rights, can take a leave of absence, is offered modifications to recipient's procedures, and has

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[214] Deborah L. Brake & Joanna L. Grossman, *Reproducing Inequality Under Title IX*, 43 HARV. J. L. & GENDER 171, 187 (2020).

[215] *Id.* at 174.

[216] *Id.* at 187.

[217] Reflecting this, all examples of Title IX violations contained in the Questions and Answers section of a relevant 2013 guidance document put out by ED addressed pregnant students, and gave no examples or guidance for violations relating to parenting students. U.S. Dep't of Educ., Off. for Civil Rights, Supporting the Academic Success of Pregnant and Parenting Students, https://tinyurl.com/2much786 (June 2013).

[218] U.S. Equal Emp't Opportunity Comm'n Enforcement Guidance on Pregnancy Discrimination and Related Issues (June 25, 2015) (noting, *inter alia,* the need to afford lactating employees opportunity and circumstances to allow for expression of milk multiple times daily); Affordable Care Act, 29 U.S.C. § 207(r)(1) (requiring employers to provide reasonable break times and a private location for breastfeeding employees to express milk for one year after a child's birth).

[219] *See, e.g., Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1259 (11th Cir. 2017) ("[L]actation is a related medical condition and therefore covered under the PDA."); *Equal Emp. Opportunity Comm'n v. Hous. Funding II, Ltd.,* 717 F.3d 425, 428–29 (5th Cir. 2013) (finding that ''[i]t is undisputed . . . that lactation is a physiological result of being pregnant and bearing a child'' and therefore that lactation-related needs are protected under the Pregnancy Discrimination Act); *Nevada Dep't of Hum. Res. v. Hibbs,* 538 U.S. 721, 730-34, 736 (2003) (noting that discrimination based on pregnancy or related conditions can reflect "mutually reinforcing stereotypes" about the roles of men and women and can occur based on the failure to accommodate conditions associated with women as effectively as those associated with men).

[220] *See, e.g.*, Kendra Fershee, *Hollow Promises for Pregnant Students: How the Regulations Governing Title IX Fail to Prevent Pregnancy Discrimination in School*, 43 IND. L. REV. 79 (2009); Deborah L. Brake, *The Invisible Pregnant Athlete and the Promise of Title IX*, 31 HARV. J.L. & GENDER 323 (2008).

[221] 87 Fed. Reg. 41,531; *see also, e.g.,* 34 CFR §§ 106.21(c)(2) & (3), 106.40(b), 106.51(b)(6), 106.57(b)-(d).

access to a prompt and equitable grievance procedure.[222] The Proposed Rule adds "or related conditions" to the prohibition that recipients cannot take adverse employment action against an employee for pregnancy, which means that an employee no longer pregnant but suffering from a medical condition related to pregnancy or lactation, such as mastitis, is now entitled to leave.[223] Additionally, under the Proposed Rule's pregnancy leave provision, the Department eliminated the word "she" in referring to the pregnant employee, which extends leave protections to transgender and gender nonconforming employees and is consistent with other changes discussed above, as well as longstanding enforcement practices.[224]

These changes are consistent with the Department's prior enforcement efforts. The Department has investigated many schools that have improperly responded to the needs of pregnant and parenting students.[225] These investigations include circumstances where schools failed to properly make ongoing accommodations to ensure pregnant students are not denied equal educational opportunity, both before and after giving birth.[226]

The provisions of the Proposed Rule are also consistent with protections provided by anti-discrimination laws in many of the States. For example, in the preschool-12 context, California law imposes notice[227] and antidiscrimination mandates[228] similar to those in the Proposed Rule. Minnesota, similarly, imposes notice requirements on public and regionally accredited private postsecondary educational institutions.[229] In 2015, California enacted lactation space requirements, similar to those in the Proposed Rule,[230] and in 2019 it imposed a variety of

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[222] 87 Fed. Reg. 41,520.

[223] *Id.* at 41,526.

[224] *Id.* at 41,527.

[225] *See, e.g.*, U.S. Dep't of Educ., Off. for Civ. Rts., Cal. St. Univ., East Bay, OCR Case No. 09-18-2245 (Aug. 1, 2018), https://tinyurl.com/4ztabpf4 (resolution letter) (school had, *inter alia*, informed complainant that "Title IX protected individuals who qualified under a protected class against discrimination and listed various protected groups which did not include pregnant students."); U.S. Dep't of Educ., Off. for Civ. Rts., Rivertown School of Beauty, OCR Case No. 04-15-2363 (Sept. 30, 2019), https://tinyurl.com/yc2ej2b6 (resolution letter) (school had, *inter alia*, an official written policy excluding pregnant students from an esthetician program, regardless of the stage of pregnancy, and excluding students who were seven months or more pregnant from all programs); U.S. Dep't of Educ., Off. for Civ. Rts., Stilwell Pub. Schs., OCR Case No. 07-16-1035 (May 2, 2016), https://tinyurl.com/3bk5knhy (resolution letter) (school had, *inter alia*, an official written policy excluding pregnant or parenting students from the cheerleading program).

[226] *See, e.g.*, U.S. Dep't of Educ., Off. for Civ. Rts., W. Ill. Univ., OCR Case No. 05-16-2087 (June 15, 2016), https://tinyurl.com/377h94sm (resolution letter) (resolution agreement required the University to provide all faculty and students a copy of the policies and procedures requiring faculty members to make necessary modifications for pregnant students, and to train administrators and faculty in how to provide modifications for pregnant students in order to ensure that the University does not discriminate against students based on their pregnancy).

[227] Cal. Educ. Code § 222.5.

[228] *Id.* at § 221.51.

[229] Minn. Stat. 135A.158.

[230] Cal. Educ. Code § 222.

curricular and leave requirements that also closely track requirements in the Proposed Rule.[231] In 2014, California also passed into law a bill explicitly reminding California's postsecondary educational institutions of Title IX's mandates regarding pregnancy discrimination, emphasizing the requirements already imposed by Title IX at that time.[232] In Illinois, the Illinois Human Rights Act (IHRA) makes it a civil rights violation for any person to unlawfully discriminate against an individual based on pregnancy status in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations."[233] Further, pursuant to the IHRA, public accommodations include a non-sectarian nursery, day care center, elementary, secondary, undergraduate, or postgraduate school, or other places of education.[234] Additionally, in Michigan, the Elliot-Larson Civil Rights Act prohibits discrimination based on "familial status" and includes a person who is pregnant as a parent in this protected category.[235] In Vermont, pregnant or parenting students are ensured access to any public school, approved Vermont independent school, or any other educational program approved by the Vermont State Board of Education In which other Vermont students may enroll.[236]

In sum, the Proposed Rule better informs schools of their obligations prior to, during, and after a student's pregnancy. It will also encourage greater efforts by schools to comply with Title IX's anti-discrimination mandate by ensuring students are given equal access to educational programs whether they are pregnant, on leave after giving birth, or balancing their educational obligations with ongoing parental roles. And it is consistent with other federal laws, as well as Title IX's plain language and legislative history, and the Department's historical interpretation.

D. The Proposed Rule appropriately recognizes the need to protect against retaliation.

To adequately protect against sex discrimination, it is important to also protect against the threat of retaliation for reporting sex discrimination or participating in the complaint-resolution process. The Supreme Court has recognized that Title IX prohibits retaliation.[237] Further, since the 1975 Title IX implementing regulations, the Department has prohibited retaliation.[238] Experience in the States shows that retaliation, including retaliation by other students, can create a chilling effect for reporting violations of Title IX, creating unsafe conditions for all students.[239] Courts

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[231] *Id.* at § 46015.
[232] *Id.* at § 66281.7.
[233] 775 Ill, Comp. Stat. 5/sec. 1-102(A).
[234] 775 Ill. Comp. Stat. 5/sec. 5-101(A)(11).
[235] Mich. Comp. Laws §§ 37.2102(1), 37.2103(e).
[236] Vt. Stat. Ann. Tit. 16, § 1073.
[237] *Jackson v. Birmingham Bd. of Educ.* 544 U.S. 167, 173-74 (2005) ("Retaliation against a person because that person has complained of sex discrimination…is 'discrimination' 'on the basis of sex' in violation of Title IX.").
[238] 34 C.F.R. § 106.71.
[239] *See* Los Angeles Unified School District Comment (Jan. 8, 2019), https://tinyurl.com/28k9kvmn.

have also consistently recognized that peer retaliation must be addressed in order to adequately effectuate Title IX protections.[240]

The Proposed Rule's definitions for "retaliation" and "peer retaliation" and its amendment to Section 106.71, clarify what constitutes prohibited retaliation and the steps required to address and mitigate retaliation. First, the proposed definitions clarify that prohibited retaliation encompasses both retaliation by the recipient and retaliation by students against other students.[241] Further, the proposed definitions, together with the example of prohibited retaliation found in proposed Section 106.71(a), clarify the scope of retaliatory conduct that is prohibited by Title IX. Proposed Section 106.71 provides clarity regarding how recipients must respond to prohibited retaliation, permitting recipients to consolidate retaliation complaints with complaints of sex discrimination that arise from the same facts or circumstances.[242] These changes will streamline the investigation process and decrease the costs of enforcing Title IX protections. The specific definitions and examples of prohibited retaliation, together with direction in the Proposed Rule regarding how to respond to information and complaints of retaliatory conduct, provide guideposts to ensure students are protected from sex discrimination in education programs and activities.

III. THE STATES PROPOSE SEVERAL ADDITIONAL AMENDMENTS AND CLARIFICATIONS.

The States strongly support the Proposed Rule as a whole and believe that it effectuates the purpose of Title IX and brings the Department's enforcement back in line with historical practice. The following requests for amendments and clarifications in specific areas, in addition to those suggested above at pp. 14, 16-17, 20, 21, 27-28, and 29, would further improve upon the Proposed Rule, allowing it to even more comprehensively provide effective protection against sex discrimination and harassment in education programs and activities.

A. The Department should reinstitute the longstanding prohibition on publications that suggest sex discrimination.

Although the Proposed Rule's definition of sex properly encompasses sex stereotyping, elsewhere the Proposed Rule retains revisions made for the first time in the 2020 Amendments that removed a prohibition on a school's use or distribution of publications that "suggest, by text or illustration" that the school discriminates based on sex.[243] For 45 years, Title IX regulations rightfully prohibited schools from using or distributing any publication that "suggests" sex

[240] *See Feminist Majority Foundation v. Hurley,* 911 F.3d 674, 695 ("[A]n educational institution can be liable for acting with deliberate indifference toward known instances of student-on-student retaliatory harassment."); *Doe v. Sch. Dist. No. 1,* 970 F.3d 1300, 1311-12 (10th Cir. 2020) (holding that peer retaliation for reporting a sexual assault is a form of retaliation to which a school must respond).

[241] 87 Fed. Reg. 41,538.

[242] *Id.* at 41,541.

[243] *Compare* 34 C.F.R. § 106.9(b)(2) (effective until Aug. 14, 2020) *with* 34 C.F.R. § 106.8(b)(2)(ii) (current 2020 version of same prohibition) *and* Proposed Rule (not addressing or editing this provision).

discrimination.[244] The 2020 Amendments inexplicably change this prohibition to only prohibit publications that outright "state" sex-discriminatory policies.[245] At the time of publication in 2020, the Department asserted, without any explanation, that a "clearly stated policy that [the school] does not discriminate" makes it unnecessary to scrutinize "graphics, photos, or illustrations."[246]

We request that the Department reinstate the longstanding language from the 1975 rule. The States note that the mere existence of a nondiscrimination policy does not preclude a school from contravening that policy using sex stereotyping in its publications. The current language would permit schools to publish materials picturing exclusively male students in STEM classes, with exclusively female students depicted in education or nursing classes. Distributed materials of a school can be susceptible to "suggestions" of sex stereotyping, even where they do not "state" discriminatory policies. A prospective student is often introduced to an educational institution and its course offerings through the visual images in its publications issued by mail or posted on its website. Both male and female students may face sex stereotyping in the form of visual images, statements, and conduct that discourages, limits, or denies their access to vocational and educational career paths based on sex. This includes, as an example, male students discouraged from engaging in dance or theater because these occupations are not sufficiently "masculine," and female students discouraged from participating in science or engineering based on stereotypical misconceptions of a woman's ability to do math and science.[247] In addition to reinstating the language from the 1975 rule, the States suggest the Department use this opportunity to provide clarity regarding the situations in which a publication may "suggest" sex discrimination.

Moreover, reverting to the pre-2020 Amendments is consistent with other provisions of the Proposed Rule relating to published materials, which require that "materials used to train Title IX Coordinators, investigators, decisionmakers" and others "must not rely on sex stereotypes."[248] It is difficult to see how the prohibition in training materials can be squared with allowing schools to create published materials that suggest discrimination by relying on those same sex stereotypes through imagery, so long as they do not "state" a discriminatory policy in words. Permitting materials that suggest (but do not explicitly state) discrimination is also inconsistent with the approach of other federal laws prohibiting discrimination. For example, the Fair Housing Act and

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[244] 34 C.F.R. § 106.9(b)(2) (effective until Aug. 14, 2020).

[245] 34 C.F.R. § 106.8(b)(2)(ii).

[246] 85 Fed. Reg. 30,468, 30,470.

[247] *See, e.g.*, Claire Cain Miller, Many Ways to Be a Girl, but One Way to Be a Boy: The New Gender Rules, N.Y. Times (Sept. 14, 2018) (three quarters of girls 14 to 19 said they felt judged as a sexual object or unsafe as a girl, and three-quarters of boys said strength and toughness were the male character traits most valued by society), https://tinyurl.com/5chtu3pk; Daniel Reynolds, You Throw Like a Girl: Gender Stereotypes Ruin Sports for Young Women, Healthline (July 2, 2018) (girls receive less encouragement from teachers and family members to be physically active and participate in sports; as a result, girls ages 8 to 12 are 19 percent less active, according to 2016 study), https://tinyurl.com/4d9aysmw; Rachael Pells, Sexism in schools: 57% of teachers admit to stereotyping girls and boys, Independent (Feb. 8, 2017), https://tinyurl.com/bdfkeapr (also noting that female employees in the US account for less than a quarter of STEM workers, despite making up almost half the overall workforce); Suzanne Vranica, Stereotypes of Women Persist in Ads, Wall St. J., https://tinyurl.com/3dsmbczh (Oct. 17, 2003).

[248] *See* 34 C.F.R. § 106.45(b)(1)(iii).

its implementing regulations have been interpreted to prohibit publications advertising housing that "indicate" a particular race would be disadvantaged.[249]

We therefore encourage the Department to consider revising Section 106.8(b)(2)(ii) to reinstitute the decades-long prohibition on published materials that "suggest [discrimination], by text or illustration" and not only those that "state," a policy or practice of sex discrimination.

B. The Department should clarify which training materials must be published on school websites.

The Proposed Rule requires that "[a]ll materials used to provide training under" Title IX must be made "publicly available on [the recipient's] website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public."[250] This requirement merits some clarification to avoid being overly burdensome to large school districts, where it could be read to require, for example, that any email reminding employees of Title IX obligations would necessarily need to be published on the district's website. Similarly, sign-in sheets or email invitations to trainings could be considered "materials used to provide training" but would not be appropriate for website publication and would be extremely burdensome to produce. The States therefore suggest that the Department amend the proposed Section 106.8(f)(3) to provide a definition for "training materials" that only encompasses the PowerPoint or other instructive handouts provided to training participants.

C. The Department should reinstate the requirement that schools must provide advance written notice of their intent to assert a religious exemption to Title IX.

The 2020 Amendments permit schools to assert a religious exemption to Title IX for the first time *after* a complaint of sex discrimination has been filed.[251] Prior to the 2020 Amendments, regulations required institutions controlled by a religious organization claiming an exemption from all or part of Title IX to provide written notice to the Department with a declaration identifying which part of Title IX or the regulation conflicts with a tenet of the religion.[252] This advance notification requirement helps ensure students will not unknowingly enroll in schools that believe themselves to be exempted from Title IX but do not claim the exemption publicly, only to learn of their school's position after they seek to assert their Title IX rights. In fact, before the 2020 Amendments, the Department maintained a list of exempt schools,[253] and posted on its website

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[249] *See, e.g., Corey v. Sec'y, U.S. Dep't of Hous. & Urban Dev.* ex rel. *Walker*, 719 F.3d 322, 326 (4th Cir. 2013) (interpreting Fair Housing Act, 42 U.S.C. 3604(c) (prohibiting any publication which "indicates" discrimination)); *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991) (same).

[250] 87 Fed. Reg. 41570 (proposed § 106.8(f)(3)).

[251] *Compare* 34 C.F.R. § 106.12(b) (effective until Aug. 14, 2020) *with* 34 C.F.R. § 106.12(a) *and* Proposed Rule (not addressing or editing this provision).

[252] 34 C.F.R. § 106.12(b) (effective until Aug. 14, 2020).

[253] U.S. Dep't of Educ., Off. For Civ. Rts., Institutions Currently Holding Religious Exemption Case (June 14, 2018), https://tinyurl.com/yygqa6kp.

statements of religious exemption.[254] These lists allowed students, prospective students, employees, parents, and the public to know whether a particular school would comply with Title IX.

Students, parents, and the public formed a "legitimate reliance" on the pre-notice protection in pre-2020 regulation.[255] In addition, as a policy matter, students should know before they matriculate whether (and to what extent) their school intends to comply with Title IX, and they should be able to assume that they will enjoy Title IX's full protections unless the school has informed them otherwise. No student should learn, only after becoming a victim of discrimination, that their school considered itself exempt from the relevant requirements of Title IX. Even worse, under the current rule, a school could wait to assert its exemption from Title IX until after it initiates grievance procedures and a complainant participates in the hearing process and has personal information shared with the respondent and others, at which point they could learn the school has no intention to address the complaint at all. No student should face this prospect.

The burden of notifying the Department is minimal, and nowhere in the 2020 Amendments was any explanation given of how identifying religious tenets or related practices that conflict with Title IX is a burden. The elimination of a notice requirement is also inconsistent with various other provisions contained in the Proposed Rule and 2020 Amendments that place great weight on the importance of notice.[256] On top of all this, under the 2020 Amendments, schools were not required to identify any specific conflict with a tenet of its controlling religious organization, encouraging potentially unsupported assertions of this exemption to avoid liability. For these reasons, we request a return to the Title IX regulation language as it existed prior to the 2020 rule.

Finally, we ask that the Department allow for a reasonable implementation timeline of the Proposed Rule.

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The States welcome the important steps the Department has taken to enact much needed changes to the Title IX rules. We strongly support the Proposed Rule, which is consistent with Title IX's antidiscrimination mandate, represents the return to longstanding Department practice, and works to ensure equal access to educational opportunities.

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[254] U.S. Dep't of Educ., Off. for Civ. Rts., Other Correspondence (July 24, 2020), https://tinyurl.com/yxuss3rk.

[255] *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1913-14 (2020).

[256] *See, e.g.,* 34 C.F.R. §§ 106.44(c), 106.45(b)(1)(v), (b)(2), (b)(3)(iii), (b)(5)(v), (b)(9)(i); 85 Fed. Reg. 30,287 n.1142 (school cannot use respondent statement in sexual assault report because no advance written notice was provided), 30,473 ("education community will be aware of the procedures involved in a . . . grievance process without the unfairness of waiting until a person becomes a party to discover what [the process] looks like"); 87 Fed Reg. 41,472-3, 41,574 (proposed § 106.44(k)(3)), 41,575 (proposed § 106.45(c)).

Respectfully Submitted,

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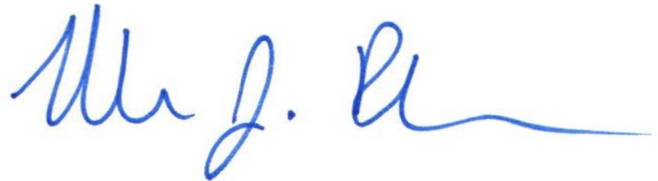
California Attorney General



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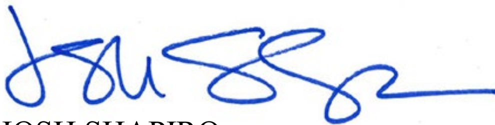

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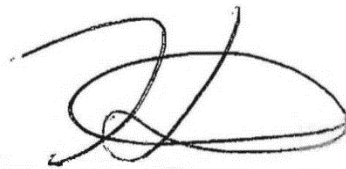

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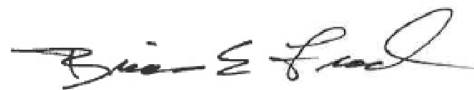

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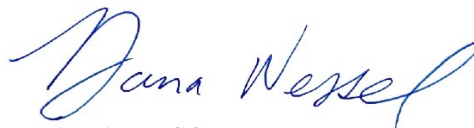

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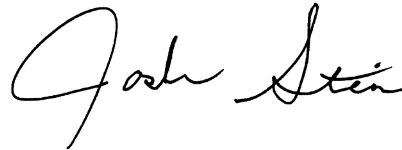

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Press Releases

February 1, 2019

ATTORNEY GENERAL OPPOSES FEDERAL RULE THAT WOULD WEAKEN PROTECTIONS UNDER TITLE IX

Raoul, 18 Attorneys General Argue Rule Would Weaken Protections for Survivors of Sexual Harassment and Violence

Chicago — Attorney General Kwame Raoul joined a multistate coalition of 19 attorneys general in submitting a comment letter to Secretary Betsy DeVos and the U.S. Department of Education (DOE) urging federal officials to withdraw a proposed rule that would undermine the anti-discrimination protections of Title IX of the Education Amendments Act of 1972, and weaken protections against sexual harassment and violence for students.

In a letter submitted Wednesday, Raoul and the attorneys general argue the proposed rule would impose new requirements on schools and students that would be a significant departure from the fundamental purpose of Title IX and the department's longstanding Title IX guidance. Title IX requires schools to provide all students with access to an educational environment free from discrimination based on sex, including sexual harassment and sexual violence. Raoul and the coalition state that while the DOE's draft rule claims to provide procedures to help implement Title IX, many of its provisions are inconsistent with Title IX and constitute an inappropriate exercise of the DOE's rulemaking authority.

"Access to safe schools free of discrimination on the basis of sex is a fundamental civil right for all students," Raoul said. "The Department of Education's proposed rule falls far short of protecting students from sexual violence and sex discrimination on campus, and, if enacted, would further imbalance student protections."

In the letter, Raoul and the attorneys general argue that the proposed rule would thwart the very purpose of Title IX in several ways, including:

- Improperly narrowing the definition of sexual harassment;
- Restricting schools' ability to address harassment that occurs progressively;
- Exacerbating factors that prevent students from reporting sexual harassment and violence;
- Limiting schools' obligation to respond to sexual harassment and violence that occurs outside "an educational program or activity";
- Mandating unfair and inequitable grievance procedures that would burden schools and students alike; and
- Making it more difficult for the Education Department to take enforcement action against schools that violate Title IX.

In the letter, Raoul and the coalition write that proper enforcement of Title IX is immensely important to states. As administrators of educational institutions, states will be bound by the DOE's final rules. States also have a deep concern for the well-being of their resident students, families, and teachers, all of whom have the right to access education in a safe environment free from sexual harassment, violence and discrimination. In addition, Raoul and the attorneys general write, the states have a strong interest in vigorously enforcing state anti-discrimination laws that promote students' ability to learn in a safe environment free from violence and harassment.

Joining Attorney General Raoul in filing the letter are the attorneys general of California, Pennsylvania, Delaware, the District of Columbia, Hawaii, Iowa, Kentucky, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, and Washington.

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June 4, 2020

ATTORNEY GENERAL RAOUL DEFENDS TITLE IX

New Regulations Force Schools To Accept Burdensome Requirements or Lose Federal Funding

Chicago — Attorney General Kwame Raoul today joined 17 attorneys general in filing a complaint against the Department of Education's new restrictions to Title IX. The complaint is designed to stop new regulations from weakening protections for sexual assault and harassment victims, and block the creation of inequitable disciplinary proceedings — from kindergarten through college.

"Schools have a duty to protect students from sexual assault and harassment, but this regulation will restrict them from doing so in a time when resources are already thinly stretched," Raoul said. "I oppose these new rules and will work to ensure that the civil rights of all students are protected."

These new rules will force schools to use scarce resources for unnecessary hiring and implementation — distracting them from critical needs like remote learning and reopening plans for the fall.

Student sexual harassment is rampant within our schools. In grades 7-12, 56 percent of girls and 40 percent of boys are sexually harassed. In college, nearly two-thirds of both men and women will experience sexual harassment.

This chronic problem is vastly underreported and under-addressed, but instead of encouraging robust enforcement of Title IX's antidiscrimination promise, the Department of Education has violated key protections by discouraging reporting and sowing confusion on campuses across the country.

In the complaint, Raoul and the attorneys general assert that the Department of Education's new rule strips students of longstanding protections against sexual harassment in violation of Title IX's mandate to prevent and remedy sex discrimination. The new rule also conflicts with federal and state statutes and Supreme Court precedent.

The rule will inhibit the reporting of sexual harassment, the complaint says, and make it harder for schools to reach fair outcomes as they investigate complaints.

Raoul and the coalition argue the new Title IX Rule will cause irreparable harm to primary, secondary, and postsecondary schools in Illinois and other states and the students they serve. Among other flaws, the department's new regulations:

- Narrow the protections for students and others by redefining "sexual harassment" to exclude a broad spectrum of discriminatory conduct from Title IX's reach, arbitrarily excluding incidents of sexual harassment based on where they occur and limiting when schools can respond to serious sexual misconduct.
- Require extensive and unnecessary new procedural requirements that will reduce the number of reports and investigations and undermine the ability of schools to provide a fair process to all students.
- Force schools to dismiss any reports of sexual harassment that happen outside the guidelines of the new rule, requiring schools to adopt parallel code of conduct provisions to keep their campuses safe. This will cause confusion and inhibit reporting.
- Demand schools make significant changes by mid-August in the midst of the COVID-19 pandemic. This will require schools to bypass the mechanisms that allow students, parents, faculty, staff, and community members to help shape important school policies.

Joining Raoul in filing the complaint are the attorneys general of California, Colorado, Delaware, the District of Columbia, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington and Wisconsin.

COMMONWEALTH OF PENNSYLVANIA OFFICE OF ATTORNEY GENERAL JOSH SHAPIRO ATTORNEY GENERAL

STATE OF CALIFORNIA OFFICE OF THE ATTORNEY GENERAL XAVIER BECERRA ATTORNEY GENERAL

STATE OF NEW JERSEY OFFICE OF THE ATTORNEY GENERAL GURBIR S. GREWAL ATTORNEY GENERAL

January 30, 2019

VIA Federal eRulemaking Portal & Mail
The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue S.W.
Washington D.C. 20202

Re: Comment on Proposed Rule Regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance—Docket ID ED–2018–OCR–0064 (83 Fed. Reg. 61,462 (Nov. 29, 2018))

Dear Secretary DeVos:

On behalf of the Commonwealths of Pennsylvania and Kentucky, the States of New Jersey, California, Delaware, Hawai‘i, Illinois, Iowa, Maine, Maryland, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia, we write to express our strong opposition to the *Proposed Rule Regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (the "proposed rule"), published by the Department of Education (the "Department") in the Federal Register on November 29, 2018. This rule seeks to impose procedures for the implementation of Title IX of the Education Amendments Act of 1972 (Title IX). Unfortunately, many of these proposed procedures would thwart the very purpose of Title IX—to provide equal access to educational opportunities. For this reason, we urge you to withdraw this rule.

Proper enforcement of Title IX is an issue of immense importance to our states, our resident students and families, our teachers, and our communities. The ability to learn in a safe environment free from violence and discrimination is critical and something that we as states prioritize and value.

Conduct that violates Title IX may also violate criminal laws, and state attorneys general, along with county and local prosecutors, have the responsibility to investigate and prosecute these violations when warranted. Many of our states prohibit discrimination based on sex.[1] We have a strong interest in vigorous enforcement of these laws and in ensuring that our own enforcement efforts are not undermined by a weaker federal regime.

Title IX applies to public K-12 schools as well as public colleges and universities, so the states are regulated entities under the proposal. And the states themselves regulate, and in many cases provide funding for, private educational institutions within their borders, which will be subject to the proposed rule to the extent they receive federal funds. Most importantly, the states have a profound interest in protecting the well-being of their students and in ensuring that they are able to obtain an education free of sexual harassment, violence, and discrimination.

We represent states in which schools[2] have worked to bring their procedures in line with Title IX's requirements: to provide students an educational environment free from discrimination based on sex, including sexual harassment and violence. The proposed rule imposes new requirements on schools and complainants that would mark a significant departure from that fundamental purpose of Title IX.

In this comment letter, we address aspects of the proposed rule that would be incompatible with Title IX, inappropriate exercises of the Department's authority, and unsupported by the facts. Section I of the comment provides relevant factual and legal background on sexual harassment and violence and its impact on education. Section II addresses the Department's proposal for a general rule to govern schools' obligations to respond to sexual harassment and violence. Section III addresses the proposed definitions of "complainant," "formal complaint," and "supportive measures." Section IV details problems with the Department's proposed formal grievance procedures. Section V requests clarification regarding how the proposed rule will interact with other federal, state, and local laws and policies. Section VI addresses other issues with the proposed rule. Section VII identifies flaws in the

[1] *E.g.*, Cal. Const., art. I, § 7(a) & (b); Cal. Educ. Code § 220; Cal. Gov't Code § 11135; Minn. Stat. § 363A.13; N.J.S.A. 10:5-12; Pa. Const. art. I, § 28.

[2] For purposes of this letter, "school" is defined consistent with the statute to include "any education program or activity receiving Federal financial assistance," which includes but is not limited to most elementary and secondary schools and institutions of undergraduate and higher graduate education. 20 U.S.C. § 1681, *et. seq.* We use "school" synonymously with the term "recipient" used by the proposed rule.

Department's regulatory impact analysis. And Section VIII speaks to the effective date of any Title IX rule adopted by the Department.

Finally, we are concerned that during the notice and comment process the Department of Education has not proactively released required records under the Administrative Procedure Act (APA). The APA requires federal agencies to reveal "for public evaluation" the "technical studies and data upon which the agency relies" in rulemaking, including reports and information relied on by the agency in reaching its conclusions.[3] We understand that studies relied on by the Department in preparing the Regulatory Impact Analysis[4] have not been made available to the public in contravention of the APA. In addition, tens of thousands of comments already submitted to Regulations.gov are also not available to the public,[5] even though the Notice of Proposed Rulemaking (NPRM) specifically indicates "all public comments about these proposed regulations" will be available for inspection "[d]uring and after the comment period" by accessing Regulations.gov. 83 Fed. Reg. at 61,463. We ask that the Department promptly make this information public and provide sufficient time for a meaningful response.

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[3] *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (internal quotations and citations omitted).

[4] *See, e.g.*, 83 Fed. Reg. at 61,485 (discussing "examin[ation of] public reports of Title IX reports and investigations at 55 [institutions of higher education] nationwide").

[5] *Compare* https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001 (stating that approximately 96,800 comments have been submitted as of 2:00 PM ET on January 30, 2019), *with* https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=ED-2018-OCR-0064&refD=ED-2018-OCR-0064-0001 (allowing the public to access only 8,909 comments as of 2:00 PM ET on January 30, 2019).

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I. Title IX Guarantees Students an Equal Education Free of Sexual Harassment[6], Which is Pervasive and Deeply Harmful to Students.

Title IX of the Education Amendments Act of 1972 is a civil rights statute that guarantees students equal access to educational programs and activities free of discrimination based on sex.[7] Since at least 1992, this right has been applied to protect students from sexual harassment and sexual violence that would limit or deny their ability to participate equally in the benefits, services, and opportunities of federally funded educational programs and activities.[8]

Sexual harassment of students occurs far too frequently—at all grade levels and to all types of students. More than 20 percent of girls aged 14 to 18 have been kissed or touched without consent.[9] In grades 7–12, 56 percent of girls and 40 percent of boys are sexually harassed every year, with nearly a third of the harassment taking place online.[10] In college, nearly two thirds of both men and women will experience sexual harassment.[11] More than 1 in 5 women and nearly 1 in 18 men in college were survivors of sexual assault or sexual misconduct due to physical force, threats of force, or incapacitation.[12] The federal government's own studies reaffirm these statistics: the U.S. Department of Justice's Bureau of Justice Statistics found that, on average, 20.5 percent of college women had experienced sexual assault since entering college,[13] while the Centers for Disease Control and Prevention found that one in five women

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[6] Sexual violence and sexual assault can both be forms of sexual harassment. The term "sexual harassment" as used herein includes sexual violence, which courts and the Department have recognized is a subset of actionable conduct under the term "sexual harassment." *See, e.g.*, U.S. Dep't of Educ., Off. for Civil Rights, *Dear Colleague Letter*, at 1 (Apr. 4, 2011, withdrawn Sept. 22, 2017) (the "2011 DCL") ("Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.").

[7] 20 U.S.C. § 1681(a).

[8] *Franklin v. Gwinnett Cty. Pub. Schs.,* 503 U.S. 60 (1992).

[9] Nat'l Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017), https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence.

[10] Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW 11 (2011), https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf.

[11] Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005), https://history.aauw.org/files/2013/01/DTLFinal.pdf (noting differences in the types of sexual harassment and reactions to it).

[12] *E.g.*, David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, Association of American Universities 13-14 (Sept. 2015, reissued Oct. 2017), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf.

[13] *See generally*, Campus Climate Survey Validation Study, Final Technical Report (Jan. 2016), Appx. E, https://www.bjs.gov/content/pub/pdf/App_E_Sex-Assault-Rape-Battery.pdf; *see also* Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–*

have experienced sexual assault in their lifetimes.[14] And harassment is not limited to women: Men and boys are far more likely to be subjected to sexual assault than to be falsely accused of it.[15] Historically marginalized and underrepresented groups—such as girls who are pregnant or raising children, LGBTQ students, and students with disabilities—are more likely to experience sexual harassment than their peers.[16]

Despite the frequency of campus sexual harassment and violence, those subjected to it often refrain from reporting it. In 2016, only 20 percent of rape and sexual assault survivors reported these crimes to the police.[17] Only 12 percent of college survivors[18] and two percent of female survivors ages 14–18[19] reported sexual assault to their schools or the police. One national

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2013, U.S. DOJ, Office of Justice Programs, Bureau of Justice Statistics (Dec. 2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.

[14] Ctrs. for Disease Control & Prevention, *National Intimate Partner and Sexual Violence Survey*, https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf; *see also* Ctrs. for Disease Control & Prevention, *Understanding Sexual Violence Fact Sheet*, https://www.cdc.gov/violenceprevention/pdf/sv-factsheet.pdf (last checked Jan. 21, 2019) (reporting that 1 in 2 women and 1 in 5 men experienced sexual violence other than rape during their lifetimes, about 1 in 5 women have experienced completed or attempted rape, 1 in 21 men have been made to penetrate someone else in their lifetime, and 1 in 3 female rape victims experienced it for the first time between 11-17 years old and 1 in 9 reported that it occurred before age 10).

[15] *E.g.*, Tyler Kingkade, *Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It*, Huffington Post (Oct. 16, 2015), https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html.

[16] Nat'l Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 12 (2017), https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting (56 percent of girls aged 14 to 18 who are pregnant or raising children are touched or kissed without consent); Joseph G. Kosciw et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN 26 (2018), https://www.glsen.org/article/2017-national-school-climate-survey-1; *AAU Campus Climate Survey*, *supra* note 12, at 13–14 (nearly 25 percent of transgender or gender non-conforming students are sexually assaulted in college); Nat'l Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Final_nwlc_Gates_GirlsWithDisabilities.pdf ("[C]hildren with disabilities were 2.9 times more likely than children without disabilities to be sexually abused.").

[17] DOJ, Bureau of Justice Stats., *Criminal Victimization, 2016: Revised*, at 7 (Oct. 2018), https://www.bjs. gov/content/pub/pdf/cv16.pdf.

[18] *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; *see also Drawing the Line: Sexual Harassment on Campus*, supra note 11, at 2 ("[L]ess than 10 percent of these students tell a college or university employee about their experiences and an even smaller fraction officially report them to a Title IX officer.").

[19] *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence*, supra note 9, at 2.

survey found that of 770 rapes on campus during the 2014–2015 academic year, only 40 were reported to authorities under the Clery Act guidelines.[20] Students often choose not to report for fear of reprisal, because they believe their abuse was not important enough, or because they think that no one would do anything to help.[21] Reporting is even less likely among students of color,[22] undocumented students,[23] LGBTQ students,[24] and students with disabilities.[25]

When not addressed properly, sexual harassment can have a debilitating impact on a student's access to education.[26] For example, 34 percent of college survivors of sexual assault drop out of college,[27] often because they no longer feel safe on campus.[28]

This is why effective Title IX enforcement is crucial: Protecting students from the devastating effects of sexual harassment is a necessary component of an equal education free

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[20] N.J. Task Force on Campus Sexual Assault, *2017 Report and Recommendations*, https://www.nj.gov/highereducation/documents/pdf/index/sexualassaulttaskforcereport2017.pdf.

[21] RAINN, *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence.

[22] Colleen Murphy, *Another Challenge on Campus Sexual Assault: Getting Minority Students to Report It*, The Chronicle of Higher Education (June 18, 2015) (discussing underreporting by student of color), https://www.chronicle.com/article/Another-Challenge-on-Campus/230977; *see also* Kathryn Casteel, Julie Wolfe & Mai Nguyen, *What We Know About Victims of Sexual Assault in America*, Five Thirty Eight Projects (last checked Jan. 21, 2019), https://projects.fivethirtyeight.com/sexual-assault-victims (reporting results of the 2017 National Crime Victimization Survey (NCVS), finding that 77 percent of incidents of rape and sexual assault were not reported to the police and that 15 percent of the incidents of rape and sexual assault in the NCVS were reported by Hispanic respondents and 13 percent by non-Hispanic black respondent).

[23] *See* Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. Times (Apr. 30, 2017), https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3.

[24] National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* 12 (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf.

[25] Nat'l Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls with Disabilities* 7 (2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Final_nwlc_Gates_GirlsWithDisabilities.pdf.

[26] *E.g.*, Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, Vice (Sept. 26, 2017), https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.

[27] Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. Student Retention: Res., Theory & Prac. 234, 244 (2015), https://doi.org/10.1177/1521025115584750.

[28] *E.g.*, Alexandra Brodsky, *How Much Does Sexual Assault Cost College Students Every Year?*, Wash. Post (Nov. 18, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-college-students-every-year/.

from discrimination. In enacting Title IX, Congress intended to ensure that all students, regardless of sex, have equal access to education. Title IX places the obligation on schools—not students—to provide educational programs and activities free from sex discrimination, sexual harassment, and sexual violence. A school's compliance with Title IX is not limited to responding appropriately to individual reports or formal complaints filed by students. Instead, schools have an affirmative legal obligation to stop harassment, eliminate hostile educational environments, prevent recurrence of harassment, and remedy its effects not only on those subjected to sexual harassment, but on the entire student body.[29]

Consistent with the purpose of the law, any Title IX regulation should focus on maximizing student access to an education free of sexual discrimination, harassment, assault, stalking, and domestic violence.[30] Yet the proposed rule does the opposite. It prioritizes reducing the number of Title IX investigations a school conducts, flipping Title IX on its head. It narrows the scope of schools' responsibility, contrary to decades of established law and practice, and ignores the reality of how sexual harassment affects a student's access to education. It will chill reporting of sexual harassment—which is already severely underreported—by imposing onerous burdens on students who seek to report sexual harassment and to vindicate their right to an equal education. It will make the standard for non-compliance so high that only schools who deliberately and intentionally flout the law will be required to take even the most basic remedial and preventative action, leaving many students without recourse or help from their school. And it will allow systemic harassment and toxic campus cultures to flourish by removing schools' well-established obligation to seek out and remedy such violations.

Equally concerning, the proposal blurs the lines between the procedures governing criminal proceedings and those applicable to non-criminal proceedings under Title IX. As a civil rights statute, Title IX is focused on ensuring equal access to educational programs and activities, not denying life and liberty to the guilty. In non-criminal proceedings, both parties are treated equally, with neither side receiving greater procedural protections than the other and with procedures designed to find the truth when the parties dispute the facts. But the proposed rule provides greater protections to respondents, and imposes significant and inappropriate burdens on complainants. Criminal procedures and protections do not apply in the Title IX context.

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[29] *See generally Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288 (1998) ("In the event of a violation, [under OCR's administrative enforcement scheme] a funding recipient may be required to take 'such remedial action as [is] deem[ed] necessary to overcome the effects of [the] discrimination.' §106.3."); U.S. Dep't of Educ., Off. 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) (the "2001 Guidance").

[30] The Violence Against Women Act, 42 U.S.C. 12291, recognizes the need to protect against domestic violence, assault, and stalking. Similarly, it is appropriate for the implementation of Title IX to recognize that domestic violence, assault, and stalking may impermissibly restrict access to educational opportunities on the basis of sexual discrimination.

At the end of the day, Title IX sets the floor—not the ceiling—on what schools must do to provide non-discriminatory education to all their students. Any Title IX regulation should encourage schools to uncover and prevent any harassment that negatively affects a student's access to education—not incentivize schools towards willful ignorance. And any Title IX regulations certainly cannot bar state and local governments and schools from responding more robustly to campus sexual harassment, or interfere with schools' compliance with other applicable federal, state, and local laws and policies that require such a response. Schools must continue to enjoy a right to establish codes of conduct and protections for students that go beyond what Title IX requires.

Working with the Department's Office for Civil Rights (OCR), many schools across the country have developed Title IX procedures that are fair to all parties, that reflect each school's unique circumstances, and that further the statute's anti-discrimination mandate. In many places, the proposed rule subverts these carefully refined policies. The Department's proposal is based on the misguided belief that schools are facing a torrent of frivolous Title IX complaints, but the effect will be to reduce the filing of bona fide complaints. The proposed rule introduces new biases into the process, imposes uniform requirements ill-suited to many schools' circumstances, and undermines the goal of a discrimination-free campus. The Department's proposal would reverse practices endorsed by both Democratic and Republican administrations;[31] contravene Supreme Court and other legal precedent and requirements, including the mandates of the APA; ignore the reality of where campus sexual assault occurs; impose onerous burdens on complainants; and run contrary to Title IX itself and other federal laws. The result will chill reporting of sexual harassment and prevent schools from effectively addressing its insidious effects.

It is vital that the Department's regulations support schools in fulfilling their Title IX obligations. As the Department noted in 2001, 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."[32] But the Department lacks statutory authority to issue regulations, such as the proposed rule, that would impede enforcement of Title IX and limit schools' ability to rid their programs and activities of sex discrimination. Title IX mandates that no student "be excluded from participation in, denied benefits of, or be subjected to discrimination under any education program or activity" on the basis of sex.[33] And the Department's instruction from Congress is to "effectuate" this anti-discrimination mandate.[34] By effectively mandating ceilings to schools' Title IX investigations and tilting grievance

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[31] *E.g.*, 2001 Guidance; U.S. Dep't of Educ., Off. for Civil Rights, *Dear Colleague Letter* (Jan. 25, 2006) (the "2006 DCL"); 2011 DCL.

[32] *E.g.*, 2001 Guidance at 20.

[33] 20 U.S.C. § 1681(a).

[34] 20 U.S.C. § 1682.

procedures against complainants, the rule undermines Title IX under the guise of enforcing it. The Department may not promulgate regulations that limit the effectiveness of the statutory mandate or hinder schools' efforts to combat discrimination even more vigorously than the statute requires.

II. The Department of Education's Title IX Standards Are Contrary to Title IX and Weaken Students' Protections Against Sexual Harassment and Violence.

The Department has proposed a general standard for the sufficiency of a school's response to sexual harassment that would mark a significant retreat from decades-long, bipartisan efforts to combat sexual harassment and its impact on equal access to education. Proposed § 106.44(a) would provide that "[a] recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent." This proposed standard—as well as the proposed definitions of "sexual harassment," "actual knowledge," "program or activity," and "deliberate indifference"—depart from current law and policy without any sound justification. As a result, the proposed rule does not effectuate the anti-discrimination mandate of Title IX as it applies to sexual harassment; rather, the rule would undermine it.

The Department's stated reason for proposing this rule is that "the administrative standards governing recipients' responses to sexual harassment should be generally aligned with the standards developed by the Supreme Court in cases assessing liability under Title IX for money damages in private litigation." 83 Fed. Reg. at 61,466. But the Department's "alignment" of the proposed rule with Supreme Court precedent is only partial and arbitrarily selective, incorrect as a matter of law, and unreasonable as a matter of policy. This proposal is ill-advised and should be withdrawn.

The Department does not point to any unfairness in the previous definition of sexual harassment, the application of constructive knowledge or agency principles, the requirement that schools address off-campus conduct, or the reasonableness standard—all of which have been in place for decades (and many of which continue to apply under Title VII[35]). The Department reverses course and removes protection for student subject to sexual assault based on an unreasoned desire to equate Title IX government investigations with private civil actions for money damages.

The Supreme Court distinguishes between the Department's administrative enforcement of Title IX and its decisions involving monetary damages actions. Unlike private civil money damages cases, the risk of significant monetary damages resulting from an OCR Title IX investigation is substantially reduced. This is because "Title IX requires OCR to attempt to

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[35] Title VII of the 1964 Civil Rights Act prohibits employment discrimination based on race, color, religion, sex and national origin. 42 U.S.C. § 2000e *et seq*.

secure voluntary compliance" in the first instance.[36] In contrast, the Court's fear in *Gebser*[37] was allowing private parties "unlimited recovery of damages under Title IX" without actual notice to the schools.[38] In the Department's administrative enforcement scheme, a school is obligated to take corrective action, and rarely, if ever, loses its Title IX funding.[39] This does not raise the possibility of large damages awards or significant risk of losing federal funding, which the *Gebser* court acknowledged as its "central concern."[40] The Court was concerned that because Title IX was adopted under the Spending Clause, by simply accepting federal funds schools would make themselves liable for monetary damages for conduct that they were not only unaware of, but also that they would have remedied had they been made aware.[41] Conversely, "OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation."[42] The Department's application of the standards for private civil suit damages to Title IX enforcement actions ignores the distinctions the Supreme Court has drawn between administrative enforcement actions and cases seeking monetary damages.

A. The Proposed Rule Would Narrow the Definition of "Sexual Harassment" In Ways that Would Undermine the Objectives of Title IX.

1. The Proposed Definition of "Sexual Harassment" Would Significantly Depart from Previous Title IX Policy.

In § 106.44(e)(1), the Department has proposed a narrow definition of "sexual harassment" that represents a significant departure from its longstanding understanding of the term. The Department has done so without providing any meaningful justification for the abrupt change in decades' worth of consistent policy—which went through a notice and comment making process—and practice. Proposed § 106.45(b)(3) also requires schools to cease investigating any complaint of sexual harassment that does not meet the definition.

In its 1997 Guidance, the Department recognized that sexual harassment results from conduct that is "sufficiently severe, persistent, **or** pervasive that it adversely affects a student's

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[36] 2001 Guidance at 15.

[37] *Gebser*, 524 U.S. 274.

[38] *Gebser* 524 U.S at 286.

[39] 2001 Guidance at 14–15.

[40] *Gebser*, 524 U.S at 287. *See also Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999); 20 U.S.C. §§ 1682 & 1683 (identifying that among other things, prior to termination of funds the department shall provide notice of the failure to comply, determine that compliance cannot be secured by voluntary means, file a written report with the committees of the House and Senate and wait thirty days, and provide for judicial review of the decision); 2001 Guidance at 14–15.

[41] *Gebser* 524 U.S. at 287; *See also Davis* 526 U.S. at 639; 2001 Guidance at iii–iv.

[42] 20 U.S.C. §§ 1682 & 1683; 2001 Guidance at iv.

education or creates a hostile or abusive educational environment."[43] After the Supreme Court in *Davis*[44] established a narrower definition of harassment for money damages actions, the Department in its 2001 guidance reinforced its interpretation that Title IX prohibits conduct of a sexual nature that is "severe, persistent, **or** pervasive."[45] It also reinforced the notion that the question of whether sexual harassment occurred requires a flexible analysis.[46] In 2001, the Department further recognized sexual harassment includes "unwelcome sexual advances" and "physical conduct of a sexual nature."[47] The Department has repeatedly emphasized in its guidance that the prohibition on sexual harassment requires schools to investigate "hostile environment" harassment[48] and to "eliminate discrimination based on sex in education programs and activities."[49] A prudential assessment is used to determine whether conduct is sufficiently severe or pervasive.[50] According to the Department, "the more severe the conduct, the less the need to show a repetitive series of incidents."[51] Thus, a single severe incident, or for example, repeated unwelcome sexual comments and solicitations, could create a hostile environment.

The Department now seeks to abandon its long-standing policy, backed by case law, in favor of a definition more restrictive than the Title IX statute and more restrictive than what is set forth in *Gebser* and *Davis*, which was created for the very different context of civil actions involving money damages. In § 106.44(e)(1), it proposes to require that harassment be severe,

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[43] *See* U.S. Dep't of Educ., Off. for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (Mar. 13, 1997) (the "1997 Guidance"). As the Supreme Court recognized in *Cannon v. University of Chicago*, Title IX is patterned after Title VI, except for the substitution of the word "sex." 441 U.S. 677, 694-95 (1979). The Department's 1994 "Racial Incidents and Harassment Against Students at Educational Institutions" is another example of this consistent policy, as it sets forth the same definition of harassment for Title VI claims on the basis of race, color, or national origin. 59 Fed. Reg. 11,448, 11,449 (Mar. 10, 1994) ("A violation of Title VI may also be found if a recipient has created or is responsible for a racially hostile environment --- i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in our benefit from the services, activities or privileges provided by a recipient.").

[44] 526 U.S. 629 (1999).

[45] 2001 Guidance at v.

[46] 2001 Guidance at vi ("We also believe that the factors described in both the 1997 guidance and the revised guidance to determine whether sexual harassment has occurred provide the necessary flexibility for taking into consideration the age and maturity of the students involved and the nature of the school environment.").

[47] 2001 Guidance at 2.

[48] 2001 Guidance at 5–7.

[49] 2001 Guidance at i.

[50] 2001 Guidance at 6.

[51] 2001 Guidance at 6.

pervasive, **and** objectively offensive for administrative enforcement of Title IX claims, thus adding a requirement that the conduct be objectively offensive and removing the possibility that a violation could be found on any one of three bases—the severity, the persistence, or the pervasiveness of the misconduct. In this part, it adopts part of the definition from the Court's requirements for sexual harassment in money damages actions. However, the Department also proposes to require that the harassment "effectively den[y]" the individual access to the school's education program or activity. Proposed § 106.44(e)(1)(ii). This is a sea change from the statute, which states that victims should not "be excluded from" or "denied" the benefits of an educational program or activity and from the Supreme Court's definition, which requires the harassment to "deprive" a victim of access to educational opportunities or benefits to be actionable.[52] By requiring that the harassment "effectively deny" the victim of equal access to educational programs or activities, the Department deviates significantly from its Title IX authority.

In its NPRM, the Department states its belief, without justification, that "responses to sexual harassment should be generally aligned with the standards developed by the Supreme Court" in private litigation for damages. 83 Fed. Reg. at 61,466. The Department extols the virtue of a uniform standard and states that the Court's decisions are rooted in textual interpretation of Title IX. *Id.* However, in doing so, the Department ignores both the uniformity with which sexual harassment has long been defined and enforced under both Title IX and Title VII, as well as the Supreme Court's own acknowledgment that administrative enforcement of Title IX can be more flexible than the Court's decisions regarding private money damages.[53]

The Department also ignores the prudential considerations that the Supreme Court identified in developing the standard for a civil suit for damages where Congress has not spoken on an issue, which are inapplicable in the administrative enforcement context. The *Gebser* court identified that while Congress expressly authorized administrative enforcement of Title IX, it did not expressly authorize either civil actions or the right for individual parties to obtain damages in court. Rather, the Supreme Court identified these rights by implication.[54] The Department cannot

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[52] *Davis*, 526 U.S. at 650.

[53] *Davis*, 526 U.S. at 639 ("Federal Departments or agencies . . . may rely on any . . . means authorized by law . . . to give effect to the statute's restrictions.") (internal quotations omitted); *Gebser* 524 U.S. at 292 (stating that the Department of Education could administratively require the school to promulgate a grievance procedure because "[a]gencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate . . . even if those requirements do not purport to represent a definition of discrimination under the statute.") (internal quotations and citations omitted). *See supra* Section II.

[54] *See Gebser* 524 U.S. at 292 (acknowledging the power of the Department to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate, which are distinct from circumstances giving rise to a civil action for monetary damages); *id.* at 289 (discussing the difference between the "statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance" and a "judicially *implied* system of enforcement" that "permits

lawfully improperly restrict the enforcement and application of Title IX based on its misapplication of Supreme Court precedent.

Moreover, although Title VII does not provide a perfect analogy to Title IX, in this instance, it is instructive. Title VII regulations describe workplace harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[55] The Supreme Court has reaffirmed the unwelcome component of harassment stating that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome."[56] The Supreme Court has also reaffirmed that to create a hostile environment the harassment can be either severe **or** pervasive, such that it either limits or alters the conditions of employment. In adopting the broader definition of sexual harassment for Title VII, the Court recognized that Congress had explicitly authorized a civil action in damages. The Court thereby further reinforced that its decisions in *Gebser* and *Davis* are limited to civil actions in damages, where Congress has not spoken, but do not extend to Federal agency enforcement of the statute, where Congress' clear mandate is to affirmatively "'protect' individuals from discriminatory practices carried out by recipients of federal funds."[57]

We are also concerned because Title VII prohibits gender-based harassment that is not sexual, which the Department has also consistently recognized under Title IX in its policy guidance and its enforcement practices.[58] This interpretation is consistent with the text and purpose of Title IX and Supreme Court cases interpreting Title VII in the employment context.[59] Despite this, the proposed regulations do not specifically address the prohibition against gender-based harassment. Thus, we recommend that, in issuing the final rule, the Department state explicitly that "unwelcome conduct on the basis of sex," in § 106.44(e)(1)(ii), covers all sex-based conduct.

Once again, by disregarding Supreme Court precedent and Title VII in its formulation of the proposed rule, the Department has embraced the notion that students in a school environment

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substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice").

[55] 29 C.F.R. § 1604.11(a).

[56] *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986) (internal quotation marks omitted).

[57] *Gebser*, 524 U.S. at 287.

[58] 2001 Guidance at v; U.S. Dep't of Educ., Off. for Civil Rights, *Dear Colleague Letter Re: Title IX Coordinators* (Apr. 24, 2015), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf ("In addition, a recipient should provide Title IX coordinators with access to information regarding . . . incidents of sex-based harassment. Granting Title IX coordinators the appropriate authority will allow them to identify and proactively address issues related to possible sex discrimination as they arise.").

[59] *See, e.g.*, *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81–82 (1998); EEOC, *Sex-Based Discrimination*, https://www.eeoc.gov/laws/types/sex.cfm ("Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex.").

should be unprotected from sex-based harassment, even though they would be protected in the employee-employer context. The Department lacks authority to carve out exclusions to this landmark civil rights legislation not drafted in statute and inconsistent with courts' precedent.

2. The Proposed Definition of "Sexual Harassment" Would Fail to Account for the Context in Which Sexual Harassment Occurs.

The Department's proposed definition of "sexual harassment" is drafted to preclude schools, in many circumstances, from addressing hostile environment harassment, an important component of the schools' educational responsibilities and the Department's enforcement responsibilities. The requirement that harassment be severe, pervasive, **and** objectively offensive fails to take into account how harassment in a school setting frequently arises in a gradually escalating manner. Isolated and infrequent harassing behavior can become pervasive over time if left uncorrected, but the definition in the proposed rule does not require any remedial action until smaller problems have become larger, more significant ones. Failure to promptly address potential hostile environments could engender distrust in the institutions' ability to address sexual harassment on campus and create situations where the conduct that could have been prevented has exploded into something much more severe and potentially dangerous. This could increase liability under other legal theories, where a school could have stopped the conduct from escalating much sooner. Many schools are concerned that if they are not permitted to address conduct under Title IX until it becomes sufficiently severe, pervasive, and objectively offensive, they will fail to proactively avoid potential liability and fail to respond adequately to many harassing behaviors and will therefore be unsuccessful in establishing a welcome educational environment, free from gender discrimination.

Likewise, the severity requirement may exclude, for example, a situation in which the same group of students repeatedly makes unwelcome sexual comments or derogatory sex-based comments at multiple women walking by a fraternity house, thereby causing each of those women to alter their walking path. Even though the conduct is persistent, the school might not consider the offensive behavior severe enough or pervasive enough to warrant remedial action, given the one-time nature of the act as experienced by each of the women. But under Title IX, a school should address sexual harassment affecting multiple students before the harassing behavior escalates to the point where it is severe, pervasive, **and** objectively offensive for an individual student.[60]

Finally, the Department acknowledges that employee-on-student harassment includes instances where the provision of some aid or benefit is made contingent upon an individual's participation in unwelcome sexual conduct. However, the proposed rule improperly restricts this type of misconduct to employee-on-student conduct only. Students may engage in *quid pro quo*

[60] 2001 Guidance at 13–14 ("In other cases, the pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment—if the harassment is widespread, openly practiced, or well-known to students and staff.").

harassment as well. There are circumstances in which, for example, a student conditions assistance with studying on unwelcome sexual conduct. Likewise, students in positions of authority, such as teaching assistants or resident advisors, as well as students serving on boards, student government, clubs, or other activities, may condition the provision of aid or a school benefit on engaging in unwelcome sexual conduct. Conduct of this type contributes to a hostile sexual environment for students, and is undoubtedly a type of sexual harassment against which Title IX should protect.

3. The Proposed Definition of "Sexual Harassment" Would Chill Reporting.

The rate of student reporting of incidents of sexual harassment in grades K-12 and on college campuses is already exceedingly low.[61] Survivors often fail to report sexual harassment as a result of trauma (13 percent of female sexual assault survivors attempt suicide[62] and 34 percent of college survivors drop out of college),[63] lack of confidence in the institution's protection and procedures, and lack of knowledge in the processes offered.[64]

A heightened requirement for sexual harassment will exacerbate the factors that prevent students from reporting the harassment they experience. Many students would question whether institutions will take their experiences seriously. Some will wonder whether their harassment will be seen as sufficiently severe by the school to warrant a response. And in many cases, individuals subjected to sexual harassment will not know whether the offensive conduct that they experienced was pervasive or an isolated event. The complicated definition of sexual harassment may also confuse students, many of whom already report a lack knowledge about or understanding of the Title IX grievance processes.[65] This restrictive definition turns the purpose of Title IX—to prevent and combat sexual violence—on its head. It fosters confusion and distrust among students and will likely chill reporting of sexual harassment, thus restricting

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[61] *See supra* Section I.

[62] RAINN, *Victims of Sexual Violence Statistics*, https://www.rainn.org/statistics/victims-sexual-violence. By comparison, a national survey estimated that 0.5 percent of adults 18 years or over attempted suicide nationally. *See* American Foundation for Suicide Prevention, *Suicide Statistics*, https://afsp.org/about-suicide/suicide-statistics/.

[63] Senate Health, Education, Labor & Pensions Committee, Letter from Senators Murray and Hassan, Advocates and Survivors of Sexual Assault Urge Secretary DeVos to Withdraw Title IX Rule, Urge Students and Survivors to Make Their Voices Heard (Nov. 28, 2018), https://www.help.senate.gov/ranking/newsroom/press/murray-hassan-advocates-and-survivors-of-sexual-assault-urge-secretary-devos-to-withdraw-title-ix-rule-urge-students-and-survivors-to-make-their-voices-heard.

[64] Rutgers, The State University of New Jersey, Center on Violence Against Women and Children, *#iSpeak Student Experience, Attitudes and Beliefs about Sexual Violence Results*, *New Brunswick*, 1, 31 (2015) (hereinafter "Rutgers Survey"), https://socialwork.rutgers.edu/centers/center-violence-against-women-and-children/research-and-evaluation/campus-climate-project/reports-findings.

[65] Rutgers Survey, *supra* note 64, at 31–32.

schools' knowledge of harassment on campus and hampering their ability to address and prevent it.

B. The Proposed Rule Would Inappropriately Limit Schools' Obligation to Respond to Sexual Harassment and Violence by Excusing Failures to Respond to Conduct that Does Not Occur "In an Education Program or Activity."

Proposed § 106.44(a) requires a response only to "sexual harassment *in* an education program or activity." Proposed § 106.45(b)(3) similarly requires dismissal of Title IX complaints, even when the conduct alleged would constitute sexual harassment, if the conduct "did not occur *within* the recipient's program or activity." The proposed regulations thereby improperly narrow the scope of Title IX and sexual harassment complaints that will be investigated by focusing on whether the alleged *incident(s)* occurred in an education program or activity, rather than focusing on whether the incident(s) gave rise to *discrimination* in an educational institution's program or activity.

This change in focus directly contradicts the plain language of Title IX. Regardless of whether an incident giving rise to an alleged Title IX violation itself occurs in an education program or activity, Title IX protects students who, based on sex, are "excluded from participation in [or] . . . denied the benefits of . . . any education program or activity receiving Federal financial assistance."[66]

In keeping with the clear statutory text, both courts and the Justice Department have concluded a school may violate Tile IX by failing to respond adequately to alleged misconduct that occurred in a location outside the control of the school if that conduct causes a hostile environment in the education setting. As the U.S. Justice Department itself has explained: "When assessing whether off-campus rape creates a hostile environment on campus, courts have recognized that the pernicious effects of rape by another student are not limited to the event itself and can permeate the educational environment. This is due to the daily potential of the victim student encountering her assailant as they both live and learn at the college." [67]

The Department's proposed change is also an unjustified departure from preexisting and continuously repeated Department policy in effect since at least 2001. In 2001, the Department published guidance after engaging in a notice and comment process, stating that in determining whether a hostile environment exists, the educational institution must determine whether "the conduct denies or limits a student's ability to participate in or benefit from the program based on

[66] 20 U.S.C. § 1681(a).

[67] Statement of Interest of the United States 12–13, *Weckhorst v. Kan. State Univ.*, No. 16-2255 (D. Kan. filed July 1, 2016), ECF 26 (citations omitted) (collecting cases); *see also id.* at 11–14; Statement of Interest of the United States 12–21, *Farmer v. Kan. State Univ.*, No. 16-2256 (D. Kan. filed July 1, 2016), ECF 32; *Doe 12 v. Baylor Univ.*, 336 F. Supp. 3d 763, 780-81 (W.D. Tex. 2018).

sex."[68] On January 25, 2006, the Department reiterated its support for existing policy by directing educational institutions to rely on the 2001 Guidance for their obligations regarding preventing and remedying sexual harassment.[69]

In 2011, the Department reiterated that schools have an obligation to assess whether there is a nexus between alleged off-campus harassment and the denial of access to an education program or activity. In this regard, the Department stated that "[s]chools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity . . . [b]ecause students often experience the continuing effects of off-campus sexual harassment in the educational setting [and, therefore] schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus."[70] Then on September 22, 2017—in this current administration—the Department stated that, "schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities."[71] This longstanding policy is also consistent with the Supreme Court's interpretation of Title IX.[72] By confining Title IX's jurisdiction to only sexual harassment and assault that occurred in the first instance "within" an education program or activity, § 106.45(b)(3), the proposed regulation ignores this precedent and is flatly inconsistent with the statutory text.[73]

Furthermore, there are a number of situations that underscore the need to evaluate the effect of conduct that occurs off-campus or outside an education program or activity to be consistent with Title IX protections. For example, a student forced to perform a sex act by students from his or her school at an off-campus location should be able to pursue Title IX remedies to protect her or him from further harassment on campus. Similarly, a student who is sexually abused by a teacher or professor near campus or off-campus should be protected by Title IX. In addition, an athlete who was sexually assaulted by a school trainer or doctor at any

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[68] 2001 Guidance at 5.

[69] 2006 DCL at 6.

[70] 2011 DCL at 4.

[71] U.S. Dep't of Educ., Off. for Civil Rights, *Q&A on Campus Sexual Misconduct*, 1 n.3 (Sept. 22, 2017).

[72] *See, e.g.*, *Davis*, 526 U.S. at 644 (the statute "confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs."); *Gebser*, 524 U.S. at 278, 279 (assuming sexual harassment of the student complainant by the teacher under Title IX, even where sexual contact occurred in her home while giving her a book and "never on school property" but during school time).

[73] Requiring a recipient to only respond "to conduct that occurs *within* its 'education program or activity,'" 83 Fed. Reg. at 61,468 (emphasis added), is also directly contradictory to proposed § 106.44(a), which requires a response from "[a] recipient with actual knowledge of sexual harassment *in* an education program or activity." *Id.* (emphasis added).

time should be protected by Title IX. This is so even where the sexual assault occurred off campus—in the homes of the athletes who used the University's facilities, as well as other locations not operated or controlled by the University, such as hotels during events. If the proposed rule becomes final, school districts and Universities would be required to dismiss similarly egregious Title IX complaints simply because they occurred off-campus, even if they result in a hostile educational environment.

The Department's focus on the context in which sexual misconduct itself occurs also contradicts studies showing that off-campus conduct may create a hostile environment on campus, thus leading a student to be denied the benefits of an educational program or activity.[74] Even the studies relied on by the Department to justify the current policy changes, which are used to highlight the costs of sexual assault, do not distinguish between on- and off-campus assault.[75] Universities themselves acknowledge the effect off-campus activities can have on a student's on-campus learning.[76] It is arbitrary to assume that only harassment that occurs *in* an educational program or activity affects a student's access to the educational program or activity.

It is similarly arbitrary to limit Title IX's protections to activity occurring only in an educational program or activity when the Clery Act, 20 U.S.C. § 1092 (f), specifically recognizes that information regarding crimes occurring on "[p]ublic property . . . immediately adjacent to and accessible from the campus" is relevant to understand the crime statistics for the campus.[77] The Department attempts to clarify that "Title IX's 'education program or activity' language should not be conflated with Clery Act geography [because] these are distinct jurisdictional schemes," but this is a distinction without any obvious or appropriate purpose. It does not make sense to alert potential students to, for example, a rape that may occur outside the specific confines of an educational program or activity if that same incident would never affect the student's access to the educational program or activity.

In sum, the inquiry as to whether conduct that occurs off-campus or outside a school's program and activities creates a hostile environment under an education program or activity on the basis of sex is fact-specific and requires a school's careful assessment. The language of the

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[74] *See, e.g.*, Christopher P. Krebs, Ph.D., et al., *The Campus Sexual Assault (CSA) Study,* National Institute of Justice 5–19 (Oct. 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf (finding two-thirds of campus sexual assaults occur off-campus but can still severely impact a student's access to the educational program).

[75] 83 Fed. Reg. at 61,485 (citing Cora Peterson et al, *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. of Preventative Med. 691 (2017)).

[76] *See, e.g.*, Isa Gonzalez*, Title IX Coordinator Discusses How Proposed Education Dept. Reforms Could Impact UD*, Flyer News (Dec. 17, 2018) (quoting University of Dayton's Title IX coordinator as explaining "[e]ven [for] students who live in landlord housing or near the campus footprint, their experience is often as if they are a residential student."), https://tinyurl. com/ybboqxn2.

[77] 34 C.F.R. § 668.46.

proposed regulation ignores this, in contravention of existing and long-held Department policy, as well as judicial, OCR, and Justice Department interpretations.

C. The "Actual Knowledge" Standard is Too Restrictive.

1. The Proposed Rule Undermines the Purpose of Title IX and Creates an Improper Incentive to Willfully Ignore Sexual Harassment Because it Requires Schools to Respond Only if They Have "Actual Knowledge" of the Harassment.

Previous Department policy required schools to address all student-on-student sexual harassment allegations if the school knew or reasonably should have known about them.[78] The Department has also long-imputed notice to a school when "any employee with authority to take action to redress the harassment, who has the duty to report to appropriate school officials . . . or an individual who a student could reasonably believe has this authority or responsibility" has notice of the harassment.[79] Finally, the Department has required agency principles (i.e., vicarious liability) to apply to most instances of employee-on-student harassment.[80] As the Department has previously recognized, including the "good judgment and common sense of teachers and school administrators" is key to judging compliance with Title IX.[81]

Now, absent adequate justification, the Department proposes to eliminate these elements of notice. Under proposed § 106.44(e)(6), a school lacks actual knowledge unless allegations are brought to the attention of an employee with the authority to institute corrective measures (or when a formal complaint is filed with the Title IX Coordinator). Teachers at the K-12 level are deemed officials with the authority to institute corrective measures, but not at the university level. Furthermore, the proposed rule eliminates vicarious liability for employee-on-student sexual harassment, requiring the "actual knowledge" standard in this context as well. In all contexts, if the respondent is the only one with notice, actual knowledge is not imputed to the school.

By defining "actual knowledge" narrowly and ignoring situations in which a school clearly ought to have known of sexual harassment, the proposed rule virtually abandons Title IX's overriding goal of addressing hostile environments, eliminating sexual harassment, and creating an educational environment free from discrimination on the basis of sex. The actual knowledge requirement shifts the burden from schools to students. Instead of requiring schools to address instances of sexual harassment of which they are aware because an employee who a student would reasonably believe has the authority to report or assist has received notice, the proposed rule would flip Title IX on its head and require students to report sexual harassment to

[78] 2001 Guidance at 13.

[79] *Id.*

[80] 2001 Guidance at 10.

[81] 2001 Guidance at ii.

authority figures whom they are generally hesitant to seek out or of whom they may not be aware.

The proposed rule creates an improper incentive structure for schools that discourages them from uncovering allegations and instead incentivizes them to shield themselves from learning about wrongdoing. In the very different context of civil suits for damages, the dissent in *Gebser* warned specifically about this phenomenon, stating that as long as schools "can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability."[82] The ongoing prospect of administrative enforcement of Title IX, even in the absence of "actual knowledge" of harassment, has deterred schools from ignoring problems. The Department now proposes to do away with that incentive. Instead, the proposed rule could create a situation where multiple employees, such as teachers (at the university level), resident advisors, campus medical personnel, school resource officers, or guidance counselors are fully aware of allegations of sexual harassment, but absent an explicit obligation to report to an official with authority to institute corrective measures, the school would not have a responsibility to investigate or take remedial action.

It is clear that in crafting the proposed rule, the Department ignored the evidence that students subjected to sexual harassment hesitate to report to officials with authority to take corrective action, due to various barriers, including lack of knowledge of reporting procedures, fear of being disbelieved, or fear of facing negative repercussions and additional harassment.[83] Campus climate surveys demonstrate that those subjected to sexual harassment often report to close acquaintances, and officials may find students reluctant to formally report.[84] Only 17 percent of students in one survey reported disclosing sexual harassment incidents to formal campus resources, while 77 percent disclosed to close friends and 52 percent reported to roommates.[85] However, the Department now requires students to directly report to specific authorities or file formal complaints. The proposed rule should not disregard such clear evidence that reporting on campus is complex and requires schools to be more vigilant in addressing sexual harassment.

[82] *Gebser* 524 U.S. at 298.

[83] Rutgers Survey, *supra* note 64, at 32.

[84] *Id.*

[85] Rutgers Survey, *supra* note 64, at 31–32.

2. Constructive Knowledge and Agency Principles Should Apply to the School's Notice of Sexual Harassment and Violence.

The Department has not demonstrated any unfairness with the constructive knowledge or agency principles it has long-implemented, and there is no adequate justification for reversing course now.[86]

The Department has long required that a school should investigate, if a school knew or reasonably should have known of sexual harassment, whether by employees, students, or third parties.[87] This standard provides the required flexibility for universities since a constructive knowledge standard considers the school's size, its available resources, the public nature of the harassment, and the status of the individuals to whom the harassment was reported. Importantly, the "should have known" standard does not impute knowledge for isolated instances that a school, taking reasonable care, would not be aware of. However, a constructive notice standard prevents schools from willfully ignoring obvious signs of harassment, such as graffiti in public places,[88] systemic abuse of power by a teacher, constant unwelcome cat-calling, or other abusive behavior of a sex-based nature at known locations. Requiring schools to act on constructive knowledge ensures investigations into a hostile environment or culture of harassment, which is a primary purpose of Title IX. Constructive knowledge has been the Department's long-standing position in Title IX cases, and the Department has put forward no convincing rationale for abandoning this eminently sound approach.[89]

In the proposed rule, the Department also reverses course on agency principles, upending years of federal government positions on this important issue and even flouting Supreme Court

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[86] If the Department nevertheless adopts the proposed "actual knowledge" standard, it should adopt mandatory, prompt reporting requirements for all non-confidential employees, so that Title IX Coordinators and other officials with authority to institute corrective measures are notified of sexual harassment more quickly. Mandatory reporters should include those individuals are considered "responsible employees" under current policy. *See* 2001 Guidance at 13. At the same time, students should have people to confide in, while knowing that their discussions will be kept confidential. Following best practices and prior Department guidance and practice schools should be required to make public (1) the individuals to whom students can report confidentially with no fear of being required to file a formal complaint and (2) the individuals who are required to report harassment to officials with corrective authority. *E.g.*, U.S. Dep't of Educ., Off. for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, at D-4, E-13, 16, 22 (Apr. 29, 2014, withdrawn Sept. 22, 2017) (the "2014 Q&A"). Converting Department policy into a proposed rule could help to mitigate (but not resolve) the problems with the proposed "actual knowledge" standard.

[87] 2001 Guidance at 13–14.

[88] 2001 Guidance at 14

[89] *See* 2001 Guidance at 14 ("If a school otherwise knows or reasonably should know of a hostile environment and fails to take prompt and effective corrective action, a school has violated Title IX even if the student has failed to use the school's existing grievance procedure or otherwise inform the school of the harassment.")

guidance.[90] Agency principles should continue to apply to employee-on-student harassment, just as they do to supervisor-on-employee harassment. The Department previously explained that notice to a school is triggered when the employee is or appears to be acting in the context of carrying out his or her responsibility to students.[91] In *Gebser*, the U.S. Department of Justice stated that it is appropriate to hold a school responsible in such instances because "the teacher was aided in accomplishing the harassment by his agency relationship with the recipient or his apparent authority."[92] In light of this, it is particularly disturbing that the proposed rule exempts the school from actual knowledge when the only person with actual knowledge is also the respondent. This requirement would apply to the K-12 context as well. It sets up a scenario in which a student would have no valid Title IX claim when any school employee, including a school leader such as a superintendent, principal, or vice principal, repeatedly harasses or sexually assaults them in class or during school-related activities, unless the misconduct was known by another responsible school official.[93] This proposed rule must be stricken. As indicated in prior guidance, a school should be required to address conduct by an individual taking advantage of the position of authority and concomitant access to students afforded to them by the education institution, regardless of the school's notice.[94]

The 2001 guidance articulated the standards and possible scenarios for applying agency principles in situations involving employee-on-student harassment.[95] The guidance appropriately recognized that the application of vicarious liability to schools would require a determination that the employee was acting or appearing to act in the context of the employee's duties, and it set out multiple potential factors to consider before imposing liability.[96] That careful approach, based on evidence and experience, should not be reversed without ample justification. Requiring schools to take action based on constructive knowledge and agency principles also provides an opportunity to protect schools from later dealing with situations that could have been resolved with much less damage had the school acted more quickly to alleviate the problems.

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[90] *Franklin*, 503 U.S. 60 (implying that agency principles may be appropriate in the Title IX context).

[91] 2001 Guidance at 10.

[92] *Gebser*, 524 U.S. 274, No. 96-1866, Statement of Interest of the United States, 9 (filed Jan. 16, 1998).

[93] *See, e.g. Salazar v. South San Antonio Independent Sch. District*, 2017 WL 2590551 (5th Circuit), cert. denied, 138 S. Ct. 369 (holding that district could not be liable under Title IX for principal of elementary schools repeated sexual molestation of an elementary school student, because the principal who engaged in the molestation was the only one aware of the conduct).

[94] 2001 Guidance at 10.

[95] 2001 Guidance at 10-12.

[96] 2001 Guidance at 10-11.

Once again, Title VII is instructive. Under Title VII, the definition of "employer" includes any "agent of the employer,"[97] and courts routinely look to agency principles to determine employer liability for employee harassment.[98] Here, as in other areas of the proposed regulations, the Department sets up a scenario in which school employees are afforded better protection from harassment than students, who are far more vulnerable due to their age and experience. If a school can be held liable for monetary damages for supervisor-on-employee harassment under Title VII, then surely the Department of Education should require schools to at least respond to employee-on-student harassment under Title IX. Furthermore, schools arguably have more responsibility to protect their K-12 students, because they act *in loco parentis* while students are in attendance. [99]

The Department has failed to articulate intervening circumstances, facts, or evidence that would justify a reversal from the application of consistent agency policy and decisions to employee-on-student harassment. The proposed rule change should not be adopted.

D. The Proposed Rule Would Adopt a "Deliberative Indifference" Standard That Is Not Appropriate for Administrative Enforcement of Title IX.

Since at least 1997, the Department has understood Title IX to require schools to act reasonably in taking steps to end sexual harassment and prevent its recurrence.[100] Specifically, schools are required to act in a "reasonable, commonsense" manner in addressing sexual harassment and to take "prompt and effective" steps once they have knowledge of harassment.[101] Moreover, the existing regulations, in effect since 1975, have required schools to have procedures that provide a "prompt and equitable" response to any complaint of sex discrimination, a requirement that the Department has consistently enforced for decades and applied to all forms of sex discrimination, including sexual harassment.[102]

Under the proposed rule, even a school that responds unreasonably, untimely, and ineffectively to sexual harassment may avoid repercussions, so long as the school's response is not "deliberately indifferent." Proposed § 106.44(a). And "only" a "response to sexual harassment" that is "intentionally" and "clearly unreasonable in light of the known circumstances" will be considered "deliberately indifferent." *Id.*

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[97] 42 U.S.C. § 2000e(b).

[98] *Vinson* at 72 ("[W]e do agree with the EEOC that Congress wanted court to look to agency principles for guidance in this area.")

[99] *Veronia School District 47J v. Acton*, 515 U.S. 646, 656 (1995) (discussing that the duty is both "custodial and tutelary").

[100] 1997 Guidance.

[101] 2001 Guidance at iii, 15

[102] 34 C.F.R. 106.8(b).

The Department has failed to justify such a policy change. The NPRM does not point to any instances in which schools were burdened or unfairly penalized as a result of the reasonableness standard. To the contrary, the proposed rule neglects the purpose of the Department's administrative enforcement of Title IX, which is to provide schools with an opportunity to correct prior actions in response to sexual harassment and address a hostile environment moving forward (before they incur liability for damages).[103] Rarely does administrative enforcement lead to the dramatic step of withholding Title IX funding; rather, the Department's role is to "make schools aware of potential Title IX violations and to seek voluntary corrective action."[104] Without some basis for demonstrating that the reasonable care standard was inadequate or overly burdensome for schools, it is inconsistent with the intent of Title IX to adopt a standard that is less protective of students who experience discrimination.

Although the Department purports to draw its "deliberately indifferent" standard from case law, it misses the mark. Courts have concluded that "[r]esponses that are not reasonably calculated to end harassment are inadequate."[105] And a failure to investigate alleged sexual harassment can be unreasonable in light of the circumstances, even absent a formal complaint.[106] Again, the requirement that schools not act with deliberate indifference in response to complaints, as adopted by the courts for money damages actions, is immaterial to the Department's administrative enforcement of Title IX.[107] The Department should intervene to ensure schools are responding appropriately to sexual harassment allegations well before the school would be liable for money damages in a civil suit for its failure to act.

In addition, students should receive protection from sexual harassment at least equal to the protection afforded employees in the workplace. Under Title VII, employers (including schools) are liable for acts of sexual harassment in the workplace unless the employer "can show that it took immediate and appropriate corrective action."[108] Students are generally more vulnerable to sexual harassment than adult employees, particularly in grades K-12, since they are both minors and subject to compulsory school attendance requirements.[109] Under the proposed

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[103] *See North Haven Bd. of Ed. v. Bell,* 456 U.S. 512, 521 (1982) (reiterating that the text of Title IX should be accorded "'a sweep as broad as its language.'").

[104] 2001 Guidance at iii–iv (stating that if OCR finds violations of Title IX, it must first "attempt to secure compliance by voluntary means.").

[105] *See Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669 (2d Cir. 2012) (holding that a university did not engage in efforts that were "reasonably calculated to end [the] harassment").

[106] *E.g.*, *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 696 (4th Cir. 2018) (holding a school administrator responsible for a claim of retaliation under Title IX, and stating that the retaliation spanned a sufficient period that the University should have taken "reasonable steps to address it").

[107] *See supra* Section II.

[108] 29 C.F.R. §§ 1604.11

[109] *See supra* Section I.

rule, an employee who is sexually harassed can sue a school *for money damages* if the school fails to take immediate and appropriate corrective action, but the Department of Education cannot take even non-monetary enforcement action against a school that fails to protect a student from sexual harassment unless the school's response failed the much higher "deliberate indifference" standard. Furthermore, graduate students who teach and other student employees of a school may fall under a complicated enforcement scheme, depending on whether they are considered "employees" or "students." The Department should not create this artificial disparity in the enforcement of sexual harassment prohibitions, which would indicate to students that the Government takes student safety less seriously than employee safety. If anything, the Department should afford students greater protection from sexual harassment due to their vulnerabilities.

E. Safe Harbor Provisions Are Inappropriate and Schools Must Investigate Any Potential Hostile Environment.

The proposed rule provides several safe harbor provisions for schools. Taken together with the deliberate indifference standard, the safe harbor provisions severely curtail the Department's ability to meaningfully enforce Title IX's anti-discrimination objectives. Curtailing OCR's ability to independently review comprehensively how schools handle sexual harassment complaints is contrary to its mandate to investigate compliance with Title IX. The new rule would incentivize schools to do the bare minimum in enforcement of Title IX, contrary to the statutory mandate to provide educational programs and activities that are free from harassment.

The safe harbor provisions take various forms. The first, proposed § 106.44(b)(1), provides schools a safe harbor from a finding of deliberate indifference if they carry out grievance procedures consistent with those outlined in the rule in response to a formal complaint. 83 Fed. Reg. at 61,469. Any failure to fairly and adequately implement those procedures in a manner that is equitable, timely, or effective is seemingly irrelevant. Such a safe harbor erodes schools' responsibility to investigate hostile educational environments. This is of particular concern in the K-12 context where most complaints are taken verbally and informally by a dean, vice principal or other administrator who plays multiple roles.

The other safe harbors are equally untenable. Proposed § 106.44(b)(2) provides a safe harbor to a school where, upon actual knowledge of multiple complaints against the same respondent, the Title IX coordinator files a complaint on the complainant's behalf and the school follows the proposed grievance procedures. The proposed rule, in § 106.44(b)(3), also provides a safe harbor from a finding of deliberate indifference if a school that has actual knowledge of sexual harassment, absent a formal complaint, merely offers the complainant supportive measures. 83 Fed. Reg. at 61,469. Finally, in proposed § 106.44(b)(5), the Department also prevents OCR from a finding of deliberate indifference solely because OCR would have come to a different responsibility conclusion. 83 Fed. Reg. at 61,470.

Title IX imposes an affirmative obligation on schools to ensure that students are not subject to discrimination on the basis of sex. As a result, the Department has long recognized that

schools have an obligation to take reasonable steps to prevent harassment "whether or not the student who was harassed makes a complaint or otherwise asks the school to take action."[110] Consistent with this recognition, the 2001 Guidance made it clear that a school's obligation to investigate and respond to a report of harassment does not depend on the filing of a formal complaint: "Once a school has notice of possible sexual harassment of students—whether carried out by employees, other students, or third parties—it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again."[111] Federal courts have reaffirmed schools' affirmative obligation to protect their students from harassment.[112]

The proposed rule fails to recognize the obligation of schools to address harassment in the absence of a formal complaint (unless, of course, a complainant receives written notice of the available resolution options and, voluntarily and without coercion, decides not to pursue the complaint). By implication, therefore, it suggests that a school's Title IX responsibilities are triggered only when a student begins the formal complaint process. This, of course, is false: nothing in the language of Title IX supports such a narrow view of a school's obligations. To the contrary, Title IX prohibits discrimination on the basis of sex in education programs receiving federal funds, period. So at a minimum, a school that is put on notice of evidence of harassment, through whatever means, has an obligation to investigate and, if it determines that harassment is occurring, take steps to address it and provide notice of the outcome of its process. Any rule purporting to implement Title IX must make this fact clear: once a school has actual knowledge of harassment, it must investigate—even if the student has not reported it to the school.

Any final rule must also make clear that schools are obligated to investigate and address systemic problems of which they are made aware. The Department has regrettably stepped away from its own obligation to identify systemic violations of Title IX.[113] It should not compound this error by limiting the obligations of schools to investigate such violations. Incidents of harassment rarely occur in a vacuum: too often, they are fueled by the presence of a toxic culture or hostile environment that enables such abuses. Title IX's prohibition on discrimination on the basis of

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[110] 2001 Guidance at 15.

[111] *Id.*

[112] *Feminist Majority Found.*, 911 F.3d at 692 ("We are satisfied that the University was obliged to investigate and seek to identify those students who posted the threats and to report the threats to appropriate law enforcement agencies."); *see also Abbott v. Pastides*, 900 F.3d 160, 173 (4th Cir. 2018) (observing that "universities have obligations not only to protect their students' free expression, but also to protect their students").

[113] *E.g.,* Adam Harris, *Memo Outlines Education Dept. Plans to Scale Back Civil-Rights Efforts,* The Chronicle of Higher Education (June 15, 2017), https://www.chronicle.com/blogs/ticker/memo-outlines-education-dept-plans-to-scale-back-civil-rights-efforts/118937.

sex thus requires schools that are made aware of systemic discrimination to respond, and to do so in a manner commensurate to the scope of the problem. By failing to affirmatively state that schools have such an obligation, the proposed rule rewrites Title IX in a way that is inconsistent with its plain language and clear purpose.

In the same vein, creating a safe harbor for merely providing supportive measures to a student subjected to sexual harassment (or a parent complainant) who was not informed of or was otherwise unaware of the procedural step of filing a formal written and signed complaint is particularly unjust. Under the proposed rule, a school with knowledge of sexual assault against a student cannot be found to have responded inadequately as long as it offered the survivor a change of class schedule or some other similarly meager support. Deeming a school to have fully satisfied its Title IX obligations by providing only supportive measures to individuals subjected to sexual harassment who do not file formal complaints is likely to chill reporting and reduce investigations into a hostile educational environment, as individuals subjected to sexual harassment will find the process inadequate and will likely lose trust in the institution's processes.

Additionally, any provision on supportive measures must ban schools from pressuring students subjected to sexual harassment into accepting supportive measures in lieu of an investigation or grievance mechanism. The Department should prohibit even subtle incentives to accept supportive measures over formal adjudications. Any indication of students being steered or pressured into accepting only supportive measures or being discouraged from pursuing other options (such as local law enforcement) should be thoroughly investigated by OCR and remediated by the school.

Finally, the safe harbors remove OCR's discretion in Title IX enforcement. OCR's independent weighing of the evidence surely is a relevant factor in determining whether a school has been or is being deliberately indifferent (or unreasonable). Suppose, for example, OCR finds that, despite adopting the proper procedures for addressing formal complaints, the school's decision-makers always find in favor of complainants, or always find in favor of respondents. Absolute safe harbors remove OCR's ability to determine a school's liability if there is a pattern or practice of shielding respondents or favoring complainants. The Assistant Secretary, after a thorough investigation, should have the discretion to decide whether a school's determination of responsibility was discriminatory, or whether a school's overall climate is a discriminatory one.

The Department should remove the safe harbor provisions from the proposed rule.[114]

[114] While we strongly oppose the existence of any safe harbor in any final rule, if the Department nevertheless continues to include them, we strongly recommend any safe harbor incentivize schools to provide additional protections.

III. The Department Should Adopt Policies for Complaints that Maximize Reporting.

A. The Department's Proposed Definition of "Complainant" Is Too Restrictive.

Proposed § 106.44(e)(2) 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."[115] This definition raises many problems.

Importantly, the proposed definition of "complainant," in conjunction with the proposed definition of "formal complaint" (which must be "a document signed by a complainant or by the Title IX Coordinator"), effectively preclude third parties from filing formal complaints of sexual harassment, which triggers the recipient's obligation under the proposed rule to initiate an investigation or proceedings to address the allegations.[116] This is a departure from prior guidance, which recognized that a school must investigate and take appropriate remedial action "regardless of whether the student [subjected to sexual harassment], student's parent, or a third party files a formal complaint."[117]

The proposed shift in policy regarding who may file a formal complaint of sexual harassment ignores the realities of how sexual harassment is reported on campus. Only a small percentage of campus sexual violence is formally reported, for reasons previously articulated.[118] And instances of sexual harassment are often communicated to close confidants, who may report such incidences to appropriate officials. In K-12 schools, instances of sexual harassment or violence are often reported by a parent or guardian on behalf of a student or another student or employee witness to the sexual harassment. By eliminating the requirement that schools initiate investigations in response to information reported by third parties, the Department's proposal will result in more harassment going unacknowledged and unaddressed. The proposed definition

[115] "For purposes of this definition, the person to whom the individual has reported must be the Title IX Coordinator or another person to whom notice of sexual harassment results in the recipient's actual knowledge under [the proposed rule]." These comments address this part of the definition of "complainant" in their discussion of the "actual knowledge" standard.

[116] In some States, a parent or guardian could file a formal complaint on behalf of a minor child, but on this issue, the Department's proposed rule would defer to state law and local educational practice. *See* 83 Fed. Reg. at 61,482.

[117] 2014 Q&A at D-2, 15–16. Existing Department guidance also recognizes that, in some instances, the survivor may not want the school to proceed with an investigation and appropriately established several factors for a school to weigh in balancing whether to move forward over a survivor's objections. The factors to weigh include the survivor's wishes along with the school's duty to provide a safe and nondiscriminatory environment for all students, the seriousness of the alleged harassment, the age of the student harassed, whether there have been other reports of harassment against the alleged harasser, and the rights of the accused individual to receive information about the accuser and the allegations, where a formal proceeding with sanctions may result. 2001 Guidance at 17-18.

[118] *See supra* Section I & Section II.C.

should be modified to clarify that a third party, such as a witness, parent, guardian, or school employee, may file a formal complaint.[119]

More broadly, the proposed rule will yield results that cannot be squared with schools' obligations under Title IX and the case law applying it. Schools have a legal obligation to take reasonable steps to prevent and eliminate sexual harassment, including hostile environment harassment.[120] Yet the proposed rule places the burden on individuals subjected to sexual harassment to report harassment in a particular manner. In addition, a hostile environment "can occur even if the harassment is not targeted specifically at the individual complainant. For example, if a student, group of students, or a teacher regularly directs sexual comments toward a particular student, a hostile environment may be created not only for the targeted student, but also for others who witness the conduct."[121] Similarly, a school's repeated failure to respond appropriately to allegations of sexual assault may contribute to a hostile environment for students who have not themselves been the subject of an assault. It is not clear from the Department's proposal whether students who have witnessed but who have not been "targeted" by harassment may qualify as individuals who may file a formal complaint. Consistent with existing policy, the Department should clarify that these individuals may file formal complaints.

B. The Definition of "Formal Complaint" Creates a Barrier to Filing for Complainants, Particularly Underage Students, and Does Not Provide for Reasonable Accommodation.

Proposed § 106.44(e)(5) defines the "formal complaint," which must be filed to trigger most of the protections set forth in the remainder of the regulation, as "a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment . . . and requesting initiation of the recipient's grievance procedure." *Id*. This requirement is inconsistent with the objective of the statute because it creates an unnecessary barrier to obtaining the protections against discrimination promised unequivocally by Title IX's text. It is also a departure from the existing regulations, which require a recipient to establish procedures for addressing "*any action* which would be prohibited by" the regulation.[122] As applied, a recipient could dismiss a meritorious complaint of which it has notice or fail to take action solely for immaterial technical reasons, such as the complaint not being signed or failing to include specific language "requesting initiation" of the grievance procedures.

[119] We recognize that schools reasonably may respond differently to complaints filed by those subjected to sexual harassment and complaints filed by third parties, but the appropriateness of a school's response should be fact-specific. *See* 2001 Guidance at 18 (identifying "factors" that "will affect the school's response" when "information about harassment is received from a third party (such as from a witness to an incident or an anonymous letter or telephone call)").

[120] *E.g.*, 2001 Guidance at 5–14.

[121] 2001 Guidance at 6 & n. 43 (collecting cases).

[122] 34 C.F.R. § 106.8(b) (emphasis added).

Furthermore, the proposed regulation ignores the reality in elementary and secondary schools throughout the nation that complaints of sexual harassment are most often brought to the attention of administrators verbally by children, many of whom will be unaware of the proposed regulation's prescriptions. As such, the proposed regulation will too often result in K-12 students being deprived of their rights under Title IX based on the mere technicality of not filling out and signing a written document. In this regard, we note that the Department has included no cost estimate for training students (or their parents and guardians) on the new sweeping changes in the regulations. They will nonetheless be responsible for meeting these procedural requirements to obtain any relief.

In addition, the proposed rule runs afoul of other federal civil rights laws because it fails to specify that reasonable accommodations in the grievance process shall be provided for individuals whose disabilities may inhibit their ability to read, write, and sign a complaint.[123] Moreover, for a complainant who is under 18, as many in the schools affected by this regulation are, the proposed regulations do not address how schools will implement this requirement if a parent later disagrees with a child complainant's decision to file or is not consulted prior to filing. The change also creates unnecessary administrative costs, paperwork, and delay because schools must create or receive a signed document before executing their clear responsibilities under the law to investigate and, as necessary, stop the harassment, prevent its recurrence, and remedy its effects.

C. "Supportive Measures" Should be Responsive to a Complainant's Needs.

Under prior guidance, the Department acknowledged that Title IX may require a school to take "interim measures" to protect a complainant and other students before the conclusion of an investigation.[124] In § 106.44(e)(4), the proposed rule would introduce the new term "supportive measures" and would provide that implementing supportive measures may itself be an adequate response in some cases of sexual harassment.

The proposed rule provides a safe harbor to a school that "offers and implements supportive measures *designed to* effectively restore or preserve the complainant's access to the recipient's education program or activity," without regard to whether the supportive measures are actually (or even reasonably) effective in accomplishing that objective. Further, for supportive measures to be effective, a school must acknowledge the crucial role of the complainant and, as needed, the respondent in crafting such measures and work with the parties to design appropriate measures after assessing what is needed to stop the harassment, prevent its recurrence, and address its effects. The Department should clarify that although schools should not be required to provide every measure the student requests, they should give due

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[123] *See generally* Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Americans with Disabilities Act of 1990 as amended, 42 U.S.C. § 12131, *et. seq*.

[124] 2001 Guidance at 16, 18 ("It may be appropriate for a school to take interim measures during the investigation of a complaint.")

consideration to what the student who was harassed deems appropriate supportive measures in light of the circumstances, so that access to programs and activities can be assured.

The proposed rule would provide that supportive measures offered to a complainant or respondent should be designed to avoid "unreasonably burdening the other party." 83 Fed. Reg. at 61,496. By comparison, Department policy issued between 2001 and 2014 consistently emphasized that, in adopting interim measures, schools should minimize the burden on the student who was harassed. For example, the 2001 Guidance stated that such measures should "be designed to minimize, as much as possible, the burden on the student who was harassed."[125] The 2014 Guidance stated that schools should minimize the burden on the complainant. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the complainant from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case."[126]

We agree that schools should endeavor to avoid "unreasonably burdening" alleged perpetrators, but we believe this principle requires elaboration. The Department should clarify that, consistent with prior policy, there should be a presumption against imposing unnecessary burdens on the complaining student when devising supportive measures. By crafting appropriate and individualized measures, this can be done even while protecting the due process rights of the respondent during the pendency of the investigation.

And the Department should likewise make clear that schools retain their local flexibility to deal immediately with potentially predatory or violent situations, even in ways that significantly burden one or more students, and even before a formal complaint has been filed or there has been an adjudication of responsibility, when necessary to meet their responsibilities for student safety and well-being. In such situations, to ensure the safety and well-being of its students, a school may need to impose a temporary and immediate suspension on a student, subject to the right for that student to have a prompt hearing with a right to return to the educational environment.

IV. The Proposed Grievance Procedure Fails to Provide a Fair and Equitable Process for Resolving Formal Title IX Complaints.

In 2001, the Department recognized that "[s]trong policies and effective grievance procedures are essential to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it."[127] This is why the Department has consistently required school grievance procedures to provide for "prompt and equitable resolution of sex discrimination complaints."[128] In many places, the proposed rule fails to meet

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[125] 2001 Guidance at 16.

[126] 2014 Q&A at G-2, 33.

[127] 2001 Guidance at iii.

[128] 2001 Guidance at 14.

this standard: it improperly tilts the proceedings in favor of the respondent, it prevents schools from imposing reasonable controls that protect confidentiality and ensure fair proceedings, and it burdens schools and students alike with untenable hearing requirements. In other places, the proposed rule requires clarification to ensure a truly equitable process. As such, the proposed grievance procedures must be substantially revised in order to comply with Title IX.

A. Credibility Determinations Should Not Be Based Solely on Person's Status.

To ensure that all evidence is evaluated objectively, the proposed rule states that "credibility determinations may not be based on a person's status as a complainant, respondent, or witness." Proposed § 106.45(b)(1)(ii). We agree that all evidence must be considered fairly and objectively by recipient schools. But fact-finders should not be categorically prohibited from considering any factor—including the person's status and motivations for offering their testimony—when determining credibility. As the EEOC has recognized in the employment context, no single factor is determinative of credibility.[129] Instead, the final rule should state that "credibility determinations may not be based solely on a person's status as a complainant, respondent, or witness."

B. The Presumption of Non-Responsibility Improperly Tilts the Process in Favor of the Respondent.

The proposed rule states that there is a "presumption" that the respondent is "not responsible" for the alleged sexual harassment. §§ 106.45(b)(1)(iv) & (b)(2)(i)(B). The presumption appears aimed at protecting respondents in a manner akin to the presumption of innocence in criminal cases. But the grievance procedures are non-criminal in nature, so a criminal presumption by another name is not appropriate. Relatedly, but more fundamentally, the presumption contradicts the regulation's stated goal of promoting impartiality by inherently favoring the respondent's denial over the complainant's allegation. Instead the allegation and the denial must be treated neutrally, as competing assertions of fact whose truth can only be determined after an investigation. The problem would be even starker if any final regulation were to retain recipients' ability to choose a "clear and convincing" evidence standard (which we contend is not appropriate). The presumption of non-responsibility and the "clear and convincing" standard of evidence likely would, in practice, compound one another and raise an exceedingly high bar to any finding of responsibility for sexual harassment.

Accordingly, there should be no presumption regarding the respondent's responsibility.

[129] EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), https://www.eeoc.gov/policy/docs/harassment.html.

C. The Department Should Provide Prompt Timeframes and Should Not Encourage Good Cause Delay for Concurrent Law Enforcement Proceedings.

Since 1980, the regulations have required that schools provide a "prompt" resolution to any allegation of discrimination prohibited by this part.[130] Department policy interpreting the regulations has also required grievance procedures for resolving allegations of sexual harassment to be completed "promptly."[131] Proposed § 106.45(b)(1)(v) would require schools to establish "reasonably prompt timeframes for conclusion of the grievance process." According to the preamble, the Department has selected the language "reasonably prompt" to track "the language in the Clery Act regulations at 34 C.F.R. § 668.46(k)(3)(i)(A)." 83 Fed. Reg. at 61,473. We are concerned that schools will likely construe "reasonably prompt" as imposing a more relaxed timeliness obligation than "promptly." Other than a desire to provide consistency with the Clery Act, the Department does not provide an adequate justification for a change that may result in further delays in completion of the resolution process for both parties to a sexual harassment investigation, each of whom have a significant interest in a prompt resolution. The Department should strike "reasonably," so that change in wording does not constitute a departure from its long-established guidance without adequate justification.

In addition, we urge the Department to reaffirm, in issuing any final rule, the goal of completing investigations of formal complaints in a 60-day timeframe,[132] subject to the institutions' need for flexibility for practical concerns and to protect due process rights. Timely resolution of grievance procedures is vital for complainants who may be re-victimized as the process drags on without resolution or relief. As the Department has recognized, "OCR experience" had shown that "a typical investigation takes approximately 60 calendar days following receipt of the complaint," although "the complexity of the investigation and the severity and extent of the harassment" can necessitate a longer process.[133] In the proposed rule, the Department notes that "[s]ome recipients felt pressure in light of prior Department guidance to resolve the grievance process within 60 days." But nowhere does the Department claim that OCR's experience has changed. Rather than abandon this timeline, the Department should provide schools with guidelines for timeliness that continue to recognize that grievance procedures can vary in length based on the complexity of the investigation, the severity of the harassment, and factors outside of the schools' control, such as the unavailability of witnesses.[134]

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[130] *See* current 34 C.F.R. § 106.8(b), proposed § 106(c).

[131] *E.g.*, 2001 Guidance at 19; 2011 DCL at 8.

[132] Of course, other stages such as appeals will have a separate prompt timeframe, as OCR has consistently recognized.

[133] 2011 DCL at 12; *see also* 2014 Q&A at 31.

[134] *E.g.*, state administrative procedures that require multiple stages but are still completed within a prompt timeframe.

Such a definition will also provide clear notice to schools of the Department's expectations for a prompt resolution.

Finally, the Department provides in proposed § 106.45(b)(1)(v) that schools many temporarily delay the process for good cause, which can include "concurrent law enforcement activity." For several reasons, any final rule should be clear that concurrent law enforcement activity, without more, is not good cause to delay Title IX proceedings. First, "because legal standards for criminal investigations are different, police investigations or 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."[135] Conduct may restrict a student's access to education even though it does not rise to the level of a criminal violation. Second, as we discuss more fully elsewhere, schools generally have an independent obligation under Title IX to investigate and resolve complaints of sexual harassment—regardless of any parallel criminal investigation.

Generally, school and law enforcement officials should de-conflict their investigations to avoid prejudicing each other's investigation. Although concurrent law enforcement activity should not be considered sufficient grounds for delaying Title IX proceedings, some limited circumstances would support good cause for a temporary delay. For example, a school may find good cause to delay a portion of a Title IX investigation at the request of a prosecutor to protect the integrity of a criminal investigation, or "a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence."[136] But "once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation."[137] And schools should not refrain from providing supportive measures in the interim.

Therefore, if the Department finalizes its proposal, § 106.45(b)(1)(v) should be revised to reflect that "concurrent law enforcement activity" may be grounds for delaying Title IX proceedings only when there is good cause beyond the mere existence of concurrent law enforcement activity. That said, any final rule should also clarify that schools must tell complainants of their right to file a concurrent criminal complaint and not dissuade them from doing so.

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[135] 2001 Guidance at 21 & n.110 (citing *Academy School Dist. No 20*, OCR Case No. 08-93-1023 (school's response determined to be insufficient in a case in which it stopped its investigation after complaint filed with police); *Mills Public School Dist.*, OCR Case No. 01-93-1123 (not sufficient for school to wait until end of police investigation)).

[136] 2011 DCL at 10 & n.25.

[137] *Id.* (noting that in "one recent OCR sexual violence case, the prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances").

D. When Issuing a Notice Upon Receipt of a Formal Complaint, Schools Should be Required to Protect Confidentiality and Preserve the Integrity of the Investigation.

In § 106.45(b)(2)(i)(B), the proposed rule defines the notice a school must provide upon receipt of a formal complaint. We agree that due process requires that a respondent have access to information about the complained-of conduct in order to have a meaningful opportunity to prepare an effective response. But by requiring schools in all circumstances to send written notices that identify the complainant and detail the allegations, the proposed rule fails to address the potential confidentiality concerns of both the complainant and the respondent. For example, a written notice sent to the parties that names the complainant and details the allegations could be leaked or forwarded to unrelated third parties. This could damage the respondent's reputation,[138] invite retaliation against the complainant, threaten both parties' access to education, and, depending on the information disclosed regarding the complainant's medical information related to sexual violence, violate state and federal health care privacy laws.[139]

We are also concerned by the proposal's mandate that the required notice be provided "[u]pon receipt of a formal complaint," proposed § 106.45(b)(2)(i)(B), and then supplemented on an "ongoing" basis, "[i]f, in the course of an investigation, the recipient decides to investigate allegations not included in the notice provided pursuant to paragraph (b)(2)(i)(B)." § 106.45(b)(2)(ii). As long as the respondent receives the necessary information early enough to have a meaningful opportunity to prepare a response, schools should retain some discretion as to when they provide a respondent information about allegations being investigated. For example, a school may wish to conduct a preliminary investigation to determine whether the new allegations are credible or whether alleged systemic conduct is occurring. Schools may also need to delay notice to avoid prejudicing the investigation.

To avoid these problems, any final rule should instead advise schools to provide the respondent with prompt written notice of the filing of a formal Title IX complaint, including the specific allegations against her or him, the applicable grievance procedures and conduct code sections, a prompt timeframe for providing access to relevant information about the allegations, and an opportunity to respond. This would allow schools to continue to protect both parties by, for example, sending respondents only an initial written notice about the existence of a complaint and specific allegations, and then providing him or her with relevant information in person, including additional details about the alleged conduct and the identity of the complainant. Any final rule should also allow schools to protect respondents and complaints in other ways, such as by barring them from disclosing personally identifiable information except as necessary to prepare a response.

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[138] *E.g.*, 2001 Guidance at 18 ("Publicized accusations of sexual harassment, if ultimately found to be false, may nevertheless irreparably damage the reputation of the accused.").

[139] *E.g.*, 2001 Guidance at 17–18.

Any final rule should also allow schools to withhold the identity of the complainant in certain circumstances. We agree that in many circumstances, the respondent must be informed of the complainant's identity to prepare an adequate response. But there are circumstances in which a school may not need to identify a complainant who has requested confidentiality, such as when the complaint involves harassment in a public setting (e.g., a teacher saying something to a whole class or systemic problems at a fraternity). In addition, when a school moves forward with a complaint on behalf of a student who has requested confidentiality, the school can still provide prospective relief, such as sexual harassment training and guidance that can meets it obligations to prevent harassment and address its effects. Students who have declined to pursue a formal investigation should not be identified against their will if appropriate corrective measures can still be pursued.

Finally, any final rule should require any notice to include a warning that retaliation against the complainant, including by making statements or spreading rumors intended to intimidate or dissuade him/her from filing or pursuing a Title IX complaint, constitutes an independent Title IX violation.

E. Schools Should be Allowed to Place Limited, Reasonable Restrictions on Discussions by the Parties.

In § 106.45(b)(3)(iii), the proposed rule bars schools from restricting the parties from discussing the allegations under investigation. We agree that parties cannot be barred from disclosing information needed to prepare a response or prepare for an interview or hearing. But there are several circumstances in which a school may need to place reasonable limitations on the ability of both parties to discuss the allegations. For example, a school may be able to respect a complainant's request for confidentiality by requiring the respondent to not disclose the complainant's identity unless necessary to prepare his or her response. In addition, schools should be allowed to limit (in the short term) discussions to preserve the integrity of the investigation, such as limiting conversations between parties and witnesses to prevent witness tampering. Finally, effective interim supportive measures should continue to include a school's ability to restrict the respondent from contacting the complainant or otherwise harassing or retaliating against him or her during the pendency of the investigation. Therefore, any final rule should state that the school must not restrict the ability of either party to discuss the allegations under investigation as necessary to prepare a response or prepare for an interview or hearing.

F. The Proposed Hearing Procedures Will Chill Reporting, Burden Schools, and Harm Both Complainants and Respondents.

Proposed § 106.45(b)(3)(vi) allows K-12 institutions to conduct live hearings at their discretion. Live hearings place a sharp spotlight on both parties. K-12 students—particularly those in elementary and middle school—will typically lack the maturity necessary to participate. They also have greater vulnerability to potential traumatization or re-traumatization. In addition, allowing live hearings raises serious privacy concerns for children, particularly with respect to

student witnesses. The final rule should not allow live hearings in the K-12 context unless otherwise required by state law.

If live hearings do take place in K-12 schools, the final rule should include minimum protections for student parties and witnesses who testify, and require schools to protect the confidentiality of the participants and the process. Given the privacy considerations for underage minors and potential for re-traumatization, the complaining and responding student should never be required to testify in the same room or to face each other in any cross-examination. The regulation should also provide exceptions for student testimony and participation where the student's maturity level would make in-person participation inappropriate.

In § 106.45(b)(3)(vii), the proposed rule requires all institutions of higher education to conduct live hearings at which each party's advisor must be allowed to conduct cross-examination of the other party. As we discuss below, any final rule should not mandate live hearings, return advisors to a supporting role only, and only allow party questioning via neutral third parties.

First, although some states require them, live hearings can pose problems. Schools may have a legitimate interest in avoiding circumstances that may subject the complainant to further harassment. Particularly in cases of sexual violence, requiring the complainant to face the respondent risks re-traumatizing a survivor. In addition, live hearings can be burdensome on institutions. They are typically overseen by faculty members or school staff who, no matter how dedicated they are to a fair process, are not professional mediators or judges. Months or even years can pass between hearings, which can undermine the efficacy of training, while the presence of attorneys for either party risks intimidating the panel and overtaking the proceedings. And finding a time when the panel members, the parties, and all witnesses are available can delay proceedings. To avoid these problems, some schools instead have the fact-finder or investigator conduct hearings with, or take sequential evidence from, all parties and witnesses, with the parties able to submit questions in advance. This allows for the solicitation of live testimony and enables the fact-finder to personally evaluate the speaker's credibility.[140]

Therefore, the final rule should permit investigations via methods other than live hearings, subject to constitutional due process protections.

Second, requiring cross-examination by a party's advisor during a live hearing will create serious problems to both the school and the parties. The opportunity for the parties to pose questions is an important element of fact-finding. Indeed, the ability to pose questions of witnesses and the other party protects both respondents and complainants. But the Department's shift to cross-examination by advisors has created even greater problems—problems that will

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[140] *E.g.*, *Doe v. Univ. of S. California*, 241 Cal. Rptr. 3d 146, 163 (Cal. Ct. App. 2018) (holding that "[w]here a university's determination turns on witness credibility, the adjudicator must have an opportunity to assess personally the credibility of critical witnesses," but not finding due process violation in the university's decision to not hold a live hearing).

inhibit the Department's stated goals of discovering the truth and reducing the burden on schools. 83 Fed. Reg. at 61,476.

Advisor-led cross-examination will be untenable. Some parties may choose to bring in attorney advisors. This risks disparate treatment if, for example, the complainant has an attorney advisor and the respondent has an institution-provided faculty member advisor. In cases in which the school is required to provide the advisor, schools are concerned that they could later be challenged for failing to provide an adequate advisor. Attorney-advisor cross-examination also risks intimidating the non-lawyer faculty or staff member(s) who typically oversee Title IX hearings. To ensure that the fact-finder can run a fair and effective hearing, schools may feel the need to hire attorneys to serve as dedicated Title IX fact-finders, which would impose an even greater expense and burden on institutions. In addition, cross-examination by an advisor of the party's choice—which could be an attorney, a family member, or a fellow student—risks harassing the respondent, retraumatizing the complainant, and further deterring survivors from filing formal complaints.[141]

To avoid these problems, any final rule should permit the practice already widely used in schools that hold live hearings. Each party should be allowed to bring to a hearing or interview an advisor of his or her choice who serves only a supportive function. The complainant and respondent should be allowed to pose questions through a neutral third party, such as the fact-finder overseeing the hearing. This would balance the need for each party to ask questions of the other party, the need for the fact-finder to evaluate how the parties respond to live questions, and the need to protect all parties from trauma, intimidation, and further harassment. The Department must also ensure that adjudicators are sufficiently empowered to control the proceedings and place some reasonable limitations on the questioning of the parties and witnesses. By making relevance the only ground for excluding questions, 83 Fed. Reg. at 61,476, the Department's proposal would result in protracted and unwieldy hearings that would impose additional costs on schools and parties (costs not reflected in the Department's regulatory impact analysis). Such hearings may not ultimately protect respondents and complainants from abusive or harassing questioning or, most importantly, facilitate the discovery of truth.

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[141] *See, e.g.*, Tom Lininger, *Bearing the Cross*, 74 Fordham L. Rev. 1353, 1357 (2005) ("As a general matter, victims willingness to report crimes varies inversely with their fear of embarrassment during cross-examination."); Anoosha Rouhanian, *A Call for Change: The Detrimental Impacts of Crawford v. Washington on Domestic Violence and Rape Prosecutions*, 37 B.C.J.L. & Soc. Just. 1, 35 (2017); William J. Migler, *An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings*, 20 Chap. L. Rev. 357, 370 (2017); H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning Up the "Greatest Legal Engine Ever Invented*", 27 Cornell J.L. & Pub. Pol'y 145, 176 (2017).

G. Schools Should Not be Required to Provide Parties With Access to All Collected Evidence.

In § 106.45(b)(3)(viii), the proposed rule details how institutions must prepare investigative reports and provide the parties with access to evidence. These provisions raise several serious concerns.[142]

First, no platform exists that is wholly immune from "downloading or copying the evidence." Among many other vulnerabilities, the relevant evidence could easily be photographed using a smartphone camera. The final rule should not require schools to provide such sensitive information in a way that exposes both the respondent and the complainant.

Second, providing all parties access to "any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility" is overbroad. Schools should not be required to provide the parties with access to evidence that is privileged and confidential, such as "communications between the complainant and a counselor or information regarding the complainant's sexual history."[143] Schools also cannot provide parties with access to evidence that it itself cannot use, such as an illegal voice recording in a state such as Pennsylvania that requires two-party consent.[144] Nor should a school provide either party with evidence that was collected as part of the investigation but which is irrelevant.

Nor can schools be required to provide access to information where doing so is barred by the Family Educational Rights and Privacy Act (FERPA). The Department mischaracterizes the law when it asserted in the preamble that this provision "is consistent" FERPA, "under which a student has a right to inspect and review records that directly relate to that student." 83 Fed. Reg. at 61,475. FERPA does not allow one student to review information about other students. 34 C.F.R. § 99.12(a). And not every piece of evidence obtained as part of an investigation is necessarily "directly related to" *each* student who is a party to an investigation for the purposes of FERPA.[145] For example, a complainant's full medical history, even if obtained as part of an investigation to ascertain the extent of alleged physical injuries, is both irrelevant to the specific

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[142] *See, e.g.*, Richard Reed, *Feds concerned about loophole that may have enabled UO to get alleged rape victim's records,* The Oregonian (June 13, 2015), https://www.oregonlive.com/education/index.ssf/2015/06/feds_voice_concern_about_looph.html (discussing disclosure of student's confidential counseling records regarding an alleged rape on campus and the impact on the survivor and other legal liability).

[143] 2011 DCL at 11 n.29.

[144] Digital Media Law Project, *Recording Phone Calls and Conversations*, http://www.dmlp.org/legal-guide/recording-phone-calls-and-conversations (last checked Jan. 18, 2019).

[145] 20 U.S.C. § 1232g(a)(4)(A)(i).

allegation at issue and not at all "directly related" to the respondent. Likewise, "if a school introduces an alleged perpetrator's prior disciplinary records to support a tougher disciplinary penalty, the complainant would not be allowed access to those records."[146]

Therefore, any final rule should permit schools to place reasonable limitations on a respondent's access to information.

H. The Standard of Proof Should Remain Preponderance of the Evidence.

Proposed regulation § 106.45(b)(4)(i) requires the recipient to:

> [A]pply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

Although the proposed regulation expressly provides an "option" regarding the standard that may be used, requiring that the preponderance of the evidence standard only be used if it is also used in other specific contexts could effectively eliminate the preponderance of the evidence standard in Title IX proceedings. This proposal is presented under a veneer of treating complaints equitably, but would, in fact, often create an inequitable situation at odds with Title IX's text and intent, exceed the Department's authority under Title IX, and be strikingly unfair to those subjected to sexual harassment and sexual violence.

First, the idea that a heightened standard of proof should apply to claims of sexual harassment and violence in school disciplinary processes misapprehends these proceedings' fundamental purpose. While of great consequence to all parties involved, these are not criminal proceedings. In criminal proceedings, a heightened standard of proof is constitutionally mandated and appropriate given the retributive nature of criminal sanctions, as well as the potential of loss of life or liberty. In contrast, student disciplinary proceedings must be viewed in light of the institutions' educational missions. As stated in a publication by the Association for Student Conduct Administration, "[t]he goal is to protect the academic environment."[147] That goal is undermined by a standard that "says to the victim/survivor, 'Your word is not worth as

[146] 2011 DCL at 11.

[147] Chris Loschiavo & Jennifer Waller, PhD, *Preponderance of the Evidence Standard: Use in Higher Education Campus Conduct Processes*, 1, 3, Association for Student Conduct Administration, https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf.

much to the institution as the word of accused' or, even worse, that the institution prefers that the accused student remain a member of the campus community over the complainant."[148]

Second, the "preponderance of the evidence" standard in this context is widespread and has been in use for decades. In fact, the Department has required schools to employ this standard since at least 1995, under both Democratic and Republican administrations.[149] Further, contemporaneous surveys showed that the majority of colleges and universities employed this standard even before the Department's 2011 guidance.[150] Tellingly, multiple rounds of comments on Title IX guidance in the past 20 years yielded no complaints about, or even mention of, the preponderance of evidence standard.[151]

While the proposed rule pushes back on the analogy to civil litigation as one of its rationales for employing the clear and convincing standard, 83 Fed. Reg. at 61,477, the Department cannot dispute that the preponderance of the evidence standard is typical in civil lawsuits, including ones in which civil rights violations—such as Title IX and Title VII—are alleged.[152] The 2001 Guidance noted that "[w]hile *Gebser* and *Davis* made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the *Davis* Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX."[153] The Department's proposed rule turns Title IX on its head, making it harder for a victim of sex discrimination to obtain relief than a respondent. In this regard, a respondent will now be able to sue a school for a "due process" violation of Title IX and only have to prove the

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[148] *Id.* at 4.

[149] Katherine K. Baker, et al., *Title IX & the Preponderance of the Evidence: A White Paper*, Feminist Law Professors 1, 10 (Aug. 7, 2016), http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf (citing Letter from Gary D. Jackson, Reg'l Civil Rights Dir., Off. for Civil Rights, U.S. Dep't of Educ., to Jane Jervis, President, The Evergreen St. Coll. (Apr. 4, 1995) (Clinton Administration); Letter from Howard Kallem, Chief Att'y, D.C. Enforcement Off., Off. for Civil Rights, U.S. Dep't of Educ., to Jane Genster, Vice President and General Counsel, Georgetown Univ. (Oct. 16, 2003) (George W. Bush Administration)).

[150] *Id.* at 7 (citing two studies showing that shortly before 2011 DCL, (1) 80 percent of schools with a standard of evidence used the preponderance standard and (2) 61 percent of college and university administrators surveyed used the preponderance standard).

[151] *Id.* at 9–10.

[152] *See*, *e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (noting that under the "conventional rule of civil litigation," the preponderance of the evidence standard generally applies in cases under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252–55 (1989) (approving preponderance standard in Title VII sex discrimination case) (plurality opinion); *id.* at 260 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment).

[153] 2001 Guidance at vi; *see also Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

case by a preponderance of the evidence, whereas the complainant would have to prove sexual harassment in the first instance by the higher clear and convincing standard.

Further, as acknowledged in the NPRM, the Department's own OCR uses a preponderance of the evidence standard. 83 Fed. Reg. at 61,477. OCR's Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX.[154]

The "preponderance of the evidence" standard is the only standard of proof that can provide for an "equitable resolution" of student harassment complaints,[155] as required under Title IX.[156] Absent a statutory instruction to the contrary, the Department has no authority to depart from the usual allocation of risk between parties to grievance proceedings. In discussing appellate rights, the Department recognizes that each party in grievance proceedings is equally deserving of an accurate outcome. 83 Fed. Reg. at 61,478–79. This recognition makes the Department's proposal to use a standard other than preponderance of the evidence—which privileges one party's interests over others' and the search for truth—all the more inexplicable.

To be sure, this proposed regulation applies by its terms to complaints against employees as well, and some colleges and universities have policies for faculty under which a higher standard of proof is used. But schools have a qualitatively different relationship with their employees than their students. In the modern university context, courts "have increasingly recognized a college's duty to provide a safe learning environment both on and off campus."[157] This most obviously manifests itself in the student housing context, where students are almost entirely dependent on the university for security, and have little to no power to enhance their security themselves.[158] The proposed regulation's requirement that schools can only use a preponderance of the evidence standard for student complaints if they use that same standard for

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[154] U.S. Dep't of Educ., *Case Processing Manual,* Art. III, § 303, https://www2. ed.gov/about /offices/list/ocr/docs/ocrcpm.pdf. Notably, this Manual was updated under this Administration (in November 2018) and retained the preponderance of the evidence standard.

[155] *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983) ("A preponderance-of-the-evidence standard allows both parties to 'share the risk of error in roughly equal fashion.' Any other standard expresses a preference for one side's interests.") (internal quotation marks omitted). *See also Steadman v. SEC*, 450 U.S. 91, 96 (1981) (same).

[156] *See* 34 C.F.R. §106.8(c) (construing Title IX to require equitable resolution of grievances).

[157] Kristen Peters, Protecting the Millennial College Student, 16 S. Cal. Rev. L. & Soc. Just. 431, 448 (2007); *see also Duarte v. State*, 88 Cal. App. 3d 473 (Cal. 1979) (noting that students "in many substantial respects surrender[]the control of [their] person[s], control of [their] own security to the university"); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335–36 (Mass. 1983) (holding that "[p]arents, students, and the general community . . . have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.").

[158] *See Mullins*, 449 N.E.2d at 335.

complaints against employees ignores the fundamental fact that schools are obliged to protect their students in different ways than their employees, which is especially true for students who are minors.[159]

The proposed rule prohibits schools from having a different standard of proof for allegations of sexual harassment than it does for other infractions that carry the same potential sanctions. The reasons provided for this change further highlight the inherent one-sidedness underlying the proposal to alter the standard of proof. Here, the Department only discusses the "heightened stigma often associated with a complaint regarding sexual harassment," 83 Fed. Reg. 61,477, but fails to recognize the trauma associated with being subjected to sexual harassment or violence, and how this could be exacerbated by applying an evidentiary standard of proof favoring the accused over the individual subjected to sexual harassment or violence.

The proposed rule will have the effect of deterring complainants from filing administrative school complaints and instead encourage additional costly civil litigation, an additional cost impact for which the Department fails to account. Assuming that the Department's proposed regulations are adopted, a complainant filing a civil lawsuit under Title IX would now be required to meet the same extremely high burdens—e.g., standards for deliberate indifference, actual knowledge, and sexual harassment—in school as in court. But the court case would be adjudicated under the preponderance of the evidence standard, a lower burden of proof than would be available in many school grievance proceedings under the proposed rule. In addition, the complainant would be able to obtain damages in court, something that the Department's proposed rule explicitly prohibits in the administrative context.

The problem is that civil adjudication is only an alternative for students with means to pursue it. Students without the financial means would be uniformly disadvantaged in pursuing sexual harassment complaints. Additionally, where school proceedings are perceived unfair or unduly burdensome, some students may choose to pursue criminal actions, which can be re-traumatizing for a person subjected to sexual harassment and more stigmatizing for the accused.

Finally, the proposed rule may also prove unworkable for many institutions that will be unable to meet two masters. To meet the second requirement of consistency between faculty and student complaints, colleges and universities will most frequently be required to adopt the higher standard of proof, clear and convincing, since tenured faculty often are entitled by law and contract to an application of the higher standard. But to meet the first requirement of consistency between conduct code violations with similar maximum penalties, many colleges and universities that handle all conduct code violations using a preponderance of the evidence standard would be required to adopt the higher standard of proof. The Department's rule will thus likely require colleges and university to enact far reaching changes to conduct violation policies and practices that extend well beyond the scope of the Department's authority to regulate under Title IX, inappropriately reaching conduct that has nothing to do with

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[159] *See supra* note 99.

discrimination on the basis of sex—for example, cheating and simple battery. Further, the Department provides no explanation for why these proceedings—faculty disciplinary standards and code of conduct complaints—are more appropriate analogues to Title IX's disciplinary proceedings than Title VII or sexual harassment civil proceedings in court.

I. The Written Determination Must Include Steps to Eliminate Any Hostile Environment.

Proposed § 106.45(b)(4)(ii) provides a summary of what the final written determination must include. Any final rule should confirm that the written determination must also include assurances that the school will take steps to prevent recurrence of harassment, correct its discriminatory effects, and prevent any retaliation against the complainant.[160] As we have discussed, the effects of harassment can go beyond the complainant and the respondent. The Department has long recognized that Title IX requires schools to "eliminate any hostile environment that has been created," which may require implementing corrective measures throughout the education community.[161]

J. The Department Should Clarify that both Complainants and Respondents Have Equal Access to the Appeal Process.

As currently written, § 106.45(b)(5) 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." This could be read to suggest that a complainant can only appeal the remedies provided and not the substantive findings. To avoid a rule that could be read to favor one party over another, any final rule should clarify that both complainant and respondent should be given equal grounds for appeal. In addition, the final rule should clarify that even if a complainant is not entitled to a particular sanction, complainant can still appeal and seek a different sanction than the one imposed.

K. Any Informal Resolution Must Empower Complainants and Seek Restorative Justice.

In § 106.45(b)(6), the Department proposes to allow informal resolution of any sexual harassment complaint. The use of informal resolution has been shown to have powerful remedial benefits in the criminal justice system.[162] But any use of informal resolution under Title IX must be voluntary and only initiated after the parties have full notice of their options, including the right to proceed with a formal resolution process. In addition, informal resolution should allow

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[160] 2001 Guidance at 17.

[161] 2001 Guidance at 16.

[162] *E.g.*, Common Justice, *Common Justice Model*, https://www.commonjustice.org/common_justice_model (last checked Jan. 29, 2019).

for an option to access voluntary restorative justice. And schools should have the option not to offer informal resolution in cases of sexual violence or assault, which may raise more difficult issues that some schools may not have the resources to adequately address.

To that end, any final rule that allows schools to offer an informal resolution process must require them to provide complainants and respondents with written notice of the options for informal resolution at the outset, but not pressure students to pursue an informal resolution. Confirmation that the parties received written notice of the availability of informal resolution should be maintained by the school. Any final rule should also state that any informal resolution process must involve a trained staff member. With voluntary written consent of both parties, a face-to-face meeting may be part of an informal process, but at no point should a complainant be required to resolve the problem alone with the respondent.[163] Both parties must receive written notice of the outcome of the informal resolution process, including any remedies and sanctions. Finally, both parties must be informed of the right to discontinue the informal process at any time and file a formal complaint.[164]

L. The Recordkeeping Retention Period Should Be Extended.

Sections 106.45(b)(7)(i)–(ii) of the proposed rule set forth a requirement that all recipients "create, make available to the complainant and respondent, and maintain for a period of three years records of" any sexual harassment investigation, the results of that investigation, any appeal from that investigation, and all training materials relating to sexual harassment. The explicit requirement to retain such records is a positive step that will help improve consistency in investigations and allow the Department to assess compliance with Title IX.

But the Clery Act requirement to report all crimes that occurred within the last three years has little to do, as a matter of policy or law, with how long recipients should *retain records* of sexual harassment and sexual assault after they have been reported. It does not follow that the period of *retention* for such records should be tied to the Clery Act's limitation period for *reporting* specific campus crimes.[165]

In fact, when interpreting the Clery Act's requirement to "Retain Records," the Department has explicitly held that all three years of records relied upon for annual reporting must be kept for another three years *after* the publication of that year-end report—or "in effect,

[163] 2001 Guidance at 21.

[164] *Id.* In some cases, informal resolution may also require the existence of a safety guardrail to ensure that the school has made a sufficient inquiry to determine the scope of likely harm to the complainant and others in the school community and the extent of the injuries to fashion appropriate redress.

[165] *See* The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"), 20 U.S.C. § 1092(f); 34 C.F.R. 668.46(c)(1) (requiring schools to annually report all crimes which occurred in the prior three calendar years by the end of the following year).

seven years."[166] The proposed regulation asserts that it "tracks the language in the Clery Act," thereby implying that this proposed change is consistent with current law. 83 Fed. Reg. at 61,471, 61,473, 61,475, 61,476, 61,478. However, as demonstrated above, the proposed three-year retention requirement is inconsistent with the Clery Act's seven-year retention requirements. The retention period in the proposed regulations therefore should be, at minimum, seven years.

In addition, as a practical matter, a three-year recordkeeping requirement could undermine criminal prosecutions related to the incidents at issue. For example, several states have no statute of limitations for rape or certain other serious sexual offenses.[167] In other states, the statutes of limitations for sexual offenses far exceed the three-year recordkeeping requirement.[168] And sexual offenses against minors are often subject to significantly lengthened statutes of limitations.[169]

The proposed regulations therefore would permit recipients to discard vital records that could help the criminal prosecution of sexual assault and rape well before the statute of limitations for such crimes has run, thereby potentially letting the perpetrators of these serious crimes go free. Given that so many related crimes have statutes of limitations substantially longer than the three-year requirement in the proposed regulations, the retention policy is inadequate, and should be extended in any final rule.

V. The Department Should Not Adopt a Title IX Rule that Adversely Affects Schools' Ability to Go Beyond Title IX's Requirements in Addressing Sexual Harassment and Violence, Including Their Ability to Comply with Other Applicable Laws.

A. Title IX Cannot, And Does Not, Restrict The Ability of States and Schools To Provide Broader Protections Against Sex Discrimination.

The proposed rule's new general standard and definitions of terms, as discussed above,[170] would narrow schools' obligations to respond to sexual harassment and assaults and decrease the

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[166] U.S. Dep't of Educ., *The Handbook for Campus Safety and Security Reporting* 9–11 (2016 Ed.); *see also id.* at 6–11 ("As with all other Clery Act-related documentation, your institution is required to keep emergency test documentation for seven years.").

[167] *See, e.g.*, Cal. Penal Code §§ 261, 799; N.J.S.A. 2C:1-6a(1).

[168] Any "major sexual offense" committed in the state of Pennsylvania can be prosecuted within twelve years of its occurrence. 42 Pa.C.S.A. § 5552(b)(1).

[169] In California, for example, assaults against minors can be prosecuted at any point up until the victim's 40th birthday. Cal. Penal Code § 801.1(a)(2). In Pennsylvania, assaults against minors can be prosecuted until the victim's 50th birthday. 42 Pa.C.S.A. § 5552(c)(3). In New Jersey, "criminal sexual contact" involving minor victims may be prosecuted up to five years after the victim turns 18. N.J.S.A. 2C:1-6b(4).

[170] *See supra* Section II.

protections afforded to those subjected to sexual harassment and assault. In addition, this newly-narrowed definition of sexual harassment could potentially have negative consequences in other contexts. Section 106.45(b)(3) of the proposed regulation holds that whenever "the conduct alleged by the complainant would not constitute sexual harassment as defined in section 106.44(e) . . . , the recipient *must dismiss* the formal complaint with regard to that conduct." (emphasis added). One reading of this requirement would dictate that no recipient could attempt to address sexual harassment or assault if the basis of those claims did not fit within the newly-narrowed federal definition provided in the proposed regulations, even where the recipient's own policy or state law would nevertheless prohibit the actions alleged by the complainant. We believe that the proposed rule at § 106.45(b)(3), if finalized, must be revised to state, consistent with other parts of the proposed regulation,[171] that Title IX cannot, and does not, restrict the ability of states and schools to provide broader protections against sex discrimination. Further, we believe that the Department should ensure that schools can continue to enforce additional civil rights protections.

Even if the proposed rule allows broader protections against sex discrimination, mandating that schools dismiss Title IX complaints that fall outside of the regulations' scope will still burden schools by requiring them to create two separate procedures: one for Title IX sexual harassment and one for conduct that may constitute sexual harassment under other applicable law or policies but not under the Department's interpretation of Title IX. 83 Fed. Reg. at 61,475 (noting that "a recipient remains free to respond to conduct that does not meet the Title IX definition of sexual harassment"). Yet the Department has long held that Title IX does not require a school "to provide separate grievance procedures for sexual harassment complaints."[172] Indeed, many schools prohibit sexual harassment in the school's code of student conduct.[173]

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[171] Other sections of the proposed regulation accurately reflect that Title IX does not preempt the field of sex discrimination. *See, e.g.*, 83 Fed. Reg. at 61,475 ("a recipient remains free to respond to conduct that does not meet the Title IX definition of sexual harassment"); (responses could include "responding with supportive measures for the affected student or investigating the allegations through the recipient's student conduct code" and that "such decisions are left to the recipient's discretion in situations that do not involve conduct falling under Title IX's purview").

[172] 2001 Guidance at 19.

[173] *E.g.*, Uni. of Pittsburgh, *Title IX—Policies and Procedures*, https://www.titleix.pitt.edu /policies-procedures (Jan. 17, 2019); San Francisco Unified School District (SFUSD), *Administrative Regulation 5145.3* (Aug. 8, 2016), http://www.sfusd.edu/en/assets/sfusd-staff/Equity/Nondiscrimination, %20Harassment%20-%20AR%205145.3%20-%20English%20(8.8.16).pdf (defining harassment on the basis of sex as "[a]cts of verbal, nonverbal, or physical aggression, intimidation, or hostility that are based on sex, gender identity, or gender expression, regardless of whether they are sexual in nature, where the act has the purpose or effect of having a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment …."); Rutgers, the State University of New Jersey, *Policy Prohibiting Discrimination and Harassment,* Section 60.1.12 (rev. Jul. 5, 2016), http://catalogs.rutgers.edu/generated/ejbppp_current/pg67.html (including indirect harassment and hostile environment created by generalized harassing behaviors); The George Washington Univ., *The Sexual and*

Moreover, it's unclear what a school would do differently when considering a non-Title IX sexual harassment complaint, given that the Department purports to believe that its grievance proposals constitute the floor of fair and equitable proceedings.

If the Department were, however, to impose regulations that inhibit state laws or recipient codes of conduct that are more protective of those subjected to sexual harassment for behavior that falls outside of the Department's narrowed definition of sexual harassment under Title IX, those regulations would be inconsistent with civil rights law and Title IX generally. In creating the Department of Education, Congress explicitly announced its intention "to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs," and specifically not to "to increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the

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Gender-Based Harassment and Interpersonal Violence Policy (July 1, 2018), https://my.gwu.edu/files/policies/SexualHarassmentFINAL.pdf (defining gender-based harassment to include "harassment based on gender, sexual orientation, gender identity or gender expression, which may include acts of aggression, intimidation or hostility, whether verbal or non-verbal, graphic, physical or otherwise …."); Georgetown Univ., *Code of Student Conduct 2018-2019*, Section 33, https://studentconduct.georgetown.edu/code-of-student-conduct (defining sexual harassment "as any unwelcome conduct of a sexual nature, including sexual advances, request for sexual favors, or other verbal or physical conduct of a sexual or gender-based nature when: [1] Submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment or academic relationship; or [2] Submission to or rejection of such conduct is used as a basis for making an employment or academic decision affecting an individual; or [3] Such conduct has the purpose or effect of interfering with an individual's work or academic performance, denying or limiting an individual's ability to participate in or benefit from the University's education programs, or creating an intimidating, hostile, or offensive environment for work or academic pursuit"); Howard Univ., *Code of Student Conduct* (Apr. 18, 2015), Section VI.23, http://www.howard.edu/secretary/documents/StudentCodeofConductApprovedApril182015.pdf (same); D.C. Code § 38-1802.04(C)(1A)(5) ("title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) … shall apply to a public charter school"); District of Columbia Public Charter School Board, *Resources for Transgender and Gender-Nonconforming Students* (last checked Jan. 24, 2019), https://www.dcpcsb.org/resources-transgender-and-gender-nonconforming-students ("Title IX protects all students, including transgender and gender-nonconforming students, from sex discrimination. Title IX encompasses discrimination based on a student's nonconformity with sex stereotypes and gender identity, including a student's transgender status"); Office of the State Superintendent of Education, *Civil Rights and Gender Equity Methods of Administration (MOA) Coordination*, https://osse.dc.gov/service/civil-rights-and-gender-equity-methods-administration-moa-coordination ("Under federal law, all students in the District are protected against discriminatory actions based upon a student's sex, race, ethnic origin or disability. [Career and Technical Education] [(]CTE[)] students and families should expect the following: … Your school and school district must post the federal laws that explicitly note your rights that protect you against any type of discrimination that would prevent deter you from equal access to enrolling and completing CTE courses; … [and] Your school and school district must draft grievance policies, let you know how to file a grievance, and who the contact person is …."); Wash. Admin. Code § 478-121-155 (2017) (prohibiting, in the Student Conduct Code for the University of Washington, sexual harassment).

States.[174] Moreover, federal laws that are designed to protect citizens are presumed to allow for the enactment of state and local legislation that is more protective, barring explicit *congressional* intent to the contrary.[175] For example, Title VII, which prohibits discrimination in employment in certain contexts, does not bar states from prohibiting discrimination in employment in other contexts that are not covered by Title VII.

Nothing within Title IX's text or history suggests Congress intended the unusual result of impeding state and local efforts to protect those subjected to sexual harassment more broadly than Title IX or preventing schools from proactively avoiding Title IX liability (or for that matter, impeding their efforts to comply with other federal laws that may apply, such as Title VII).

B. State Laws Provide Greater Protections for Students In Their States.

As might be expected, states already have enacted laws that provide greater protections than those required by Title IX.

For example, California defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting," so long as the conduct would have "the purpose or effect of having *a negative impact* upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment."[176] This definition goes beyond the definition in the proposed regulation, which would require that the objectionable conduct "effectively den[y]" the complainant of equal access to the educational program or activity. 83 Fed. Reg. at 61,496. California also provides clear protection against discrimination for sex-based and gender-based harassment, including harassment on the basis of gender identity and sexual orientation. Sexual harassment can be proved based on a showing of severity or pervasiveness, which, as discussed provides additional protections not in the proposed rule.

[174] 20 U.S.C. § 3403(a).

[175] *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1543 (D.C. Cir. 1984) ("[F]ederal legislation has traditionally occupied a limited role as the floor of safe conduct; before transforming such legislation into a ceiling on the ability of states to protect their citizens, and thereby radically adjusting the historic federal-state balance, . . . courts should wait for a clear statement of congressional intent."); *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 617 (7th Cir. 2003) ("[M]any federal regulatory laws, establish a floor, but not a ceiling, on state and local regulation.").

[176] Cal. Ed. Code § 212.5(c); *see also* Cal. Educ. Code 48900.2 (sexual harassment must "be sufficiently severe **or** pervasive to have a negative impact upon the individual's academic performance or to create an intimidating, hostile, or offensive environment").

Another example is the state of Oregon, which has a number of laws that protect the civil rights of students.[177] By statute and regulation, Oregon prohibits discrimination on the basis of sex,[178] and also prohibits sexual harassment of students by staff and other students.[179] Higher

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[177] The Oregon Attorney General represents both the Oregon Department of Education and the Higher Education Coordinating Commission, which have roles in addressing discrimination in Oregon's colleges and universities.

[178] Oregon Revised Statute (ORS) 659.850(1) prohibits discrimination defined as: "… any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on race, color, religion, sex, sexual orientation, national origin, marital status, age or disability. "Discrimination" does not include enforcement of an otherwise valid dress code or policy, as long as the code or policy provides, on a case-by-case basis, for reasonable accommodation of an individual based on the health and safety needs of the individual." It further provides in (2) that: "A person may not be subjected to discrimination in any public elementary, secondary or community college education program or service, school or interschool activity or in any higher education program or service, school or interschool activity where the program, service, school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly."

[179] Oregon Administrative Rule (OAR), Chapters 589-021; ORS 342.704. The latter provides in relevant part:

(1) (b) Sexual harassment of students includes:

(A) A demand for sexual favors in exchange for benefits; and

(B) Unwelcome conduct of a sexual nature that has the purpose or effect of unreasonably interfering with a student's educational performance or that creates an intimidating, offensive or hostile educational environment; …

(c) All complaints about behavior that may violate the policy shall be investigated;

(d) The initiation of a complaint in good faith about behavior that may violate the policy shall not adversely affect the educational assignments or study environment of the student; and

(e) The student who initiated the complaint and the student's parents shall be notified when the investigation is concluded.

(2) The State Board of Education shall adopt by rule minimum requirements for school district policies on sexual harassment of staff by students and other staff including, but not limited to, requirements that:

(a) All staff and students are subject to the policies;

(b) Sexual harassment of staff includes:

(A) A demand for sexual favors in exchange for benefits; and

(B) Unwelcome conduct of a sexual nature that has the purpose or effect of unreasonably interfering with a staff person's ability to perform the job or that creates an intimidating, offensive or hostile work environment;

(c) All complaints about behavior that may violate the policy shall be investigated;

Education Coordinating Commission (HECC) regulations, which apply to both private career schools and post-secondary universities, prohibit schools from "otherwise limiting any student in their enjoyment of a right, privilege or opportunity," which likely includes harassment claims.[180] Aggrieved students can file a complaint with HECC, which then reviews the complaint and determines whether it is valid.[181] Once HECC issues its order, such order would be subject to a contested case hearing through the Oregon Office of Administrative Hearings.[182]

All universities in Oregon are also required to have a written sexual assault protocol,[183] but many of the proposed rule's provisions would create inconsistencies. The protocol applies to

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(d) The initiation of a complaint in good faith about behavior that may violate the policy shall not adversely affect any terms or conditions of employment or work environment of the staff complainant; and

(e) The staff member who initiated the complaint shall be notified when the investigation is concluded.

[180] OAR 715-011-0050(8).

[181] OAR 715-011-0075

[182] OAR 715-011-0085.

[183] ORS 350.255 provides:

(1) Each public university listed in ORS 352.002 (Public universities), community college and Oregon-based private university or college shall adopt a written protocol to ensure that victims of sexual assault receive necessary services and assistance in situations where:

(a) The alleged victim of the sexual assault is a student at the university or college and the alleged sexual assault occurred on the grounds or at the facilities of the university or college; or

(b) The alleged perpetrator of the sexual assault is a student at the university or college, or a member of the faculty or staff of the university or college, regardless of where the alleged sexual assault occurred.

(2) A written protocol adopted under subsection (1) of this section must ensure that each victim who reports a sexual assault is provided with a written notification setting forth:

(a) The victim's rights;

(b) Information about what legal options are available to the victim, including but not limited to:

(A) The various civil and criminal options the victim may pursue following an assault; and

(B) Any campus-based disciplinary processes the victim may pursue;

(c) Information about campus-based services available to the victim;

(d) Information about the victim's privacy rights, including but not limited to information about the limitations of privacy that exist if the victim visits a campus health or counseling center; and

(e) Information about and contact information for state and community-based services and resources that are available to victims of sexual assault.

(3) A written notification provided under subsection (2) of this section must:

situations in which the alleged victim is a student and the assault occurred on the grounds or at the facilities of the university or if the alleged perpetrator is a student or member of faculty of the university, regardless of the location. As such, under Oregon law, universities have the ability to regulate activities of students that occur off-campus.[184] Under Oregon law, the complainant may provide notice to the university generally in order to trigger a review required by state standards; the complainant need not inform an official with authority to take corrective action as required under the proposed rule. Under Oregon law, public universities, including community colleges, and Oregon-based private universities and colleges, regardless of religious affiliation, are required to follow the sexual harassment and assault protocol.[185] Accordingly, in Oregon, the Department's proposed rule will drastically narrow the scope of Title IX investigations by imposing bottlenecks on almost every phase of the process, including the physical locations subject to the law, the level of formality of the notice required to initiate a grievance process, the applicable definition of "harassment," and the standard by which culpability must be determined. As a result, the proposed rule conflicts with Oregon's multiple discrimination statutes.

Another example is the state of Washington, which provides broad civil rights protections to individuals subjected to harassment and violence on the basis of sex and sexual orientation through its Law Against Discrimination (WLAD).[186] Because the Department's proposed Title IX regulation does not mention sexual orientation, Washington's law arguably provides greater civil rights protections. Further, because the purpose of the law is to deter and to eradicate discrimination in Washington, it requires liberal construction, and "nothing contained in the law shall 'be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights[.]'"[187]

Similarly, the state of Nevada, like California, defines sexual harassment more broadly than the proposed rule contemplates. Nevada's sexual harassment codes and guidelines are

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(a) Be written in plain language that is easy to understand;

(b) Use print that is of a color, size and font that allow the notification to be easily read; and

(c) Be made available to students:

(A) When a sexual assault is reported;

(B) During student orientation; and

(C) On the Internet website of the university or college.

[184] ORS 350.255.

[185] *Id.*

[186] Wash. Rev. Code § 49.60; Wash. Rev. Code § 49.60.030(1) ("The right to be free from discrimination because of … sex, … sexual orientation, is recognized as and declared to be a civil right."); *see also* Const. art. XXXI, §§ 1–2 (amend. 61) (equality of right shall not be denied or abridged on account of sex).

[187] *Marquis v. City of Spokane*, 922 P.2d 43, 49 (Wash. 1996).

designed to permit State agencies and organizations to be proactive and discipline or remove an employee before his/her actions subject the State to liability.[188] Further, Nevada's Clark County School District, like California, includes a broader definition of sexual harassment than the proposed regulation, identifying prohibited conduct as "sufficiently severe, persistent, **or** pervasive to limit a student's ability to participate in or benefit from an educational program or to create an intimidating, hostile, or offensive educational or work environment."[189]

Likewise, the University of Nevada, in Las Vegas and Reno, defines sexual harassment more broadly than the proposed rule, explaining sexual harassment incudes "sexual advancements, requests for sexual favors, and other visual, verbal or physical conduct of a sexual or gender bias nature" in situations including when "[t]he conduct has the purpose or effect of substantially interfering with an individual's academic or work performance, or of creating an intimidating, hostile or offensive environment in which to work or learn."[190]

The proposed rule's conflict with a number of current proactive laws and policies that deal with sexual harassment in many of our states, together with the decreased protections the proposed rule would afford to victims of sexual harassment, is yet another reason we oppose the proposed rule.

VI. Other Areas That Should Be Addressed Before Any Final Rule is Adopted.

A. Any Final Rule Should Reinstate the Longstanding Prohibition of Policies That "Suggest" Sex Discrimination.

Section 106.8(b)(2)(ii) of the proposed regulation unnecessarily, and without adequate justification, narrows the types of discriminatory publications that a recipient is prohibited from using and distributing to its applicants, students, and employees. The current regulation states that a recipient cannot "use or distribute a publication . . . which *suggests*, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex."[191] For many years, this section has addressed the use and distribution of materials by recipient

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[188] *E.g.*, Nevada Admin. Code 284.0995.

[189] Clark County School District Regulation, *Discipline: Harassment*, https://ccsd.net/district/policies-regulations/pdf/5141.2_R.pdf; *see also* Washoe County School District's policy, https://www.washoeschools.net/site/default.aspx?PageType=3&ModuleInstanceID=1853&ViewID=7b97f7ed-8e5e-4120-848f-a8b4987d588f&RenderLoc=0&FlexDataID=6800&PageID=1189 ("Sexual Harassment is a form of sexual discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive educational or work environment. The term sexual harassment includes sexual violence under Title IX of the Educational Amendments.").

[190] *See* University of Nevada, Las Vegas, *Policy Against Sexual Harassment,* § 4(c), https://www.unlv.edu/hr/policies/harassment#7 (last checked Jan. 28, 2019).

[191] 34 C.F.R. 106.9(b)(2) (emphasis added).

educational institutions that promote and perpetuate sex stereotypes through images or pictures, thereby discouraging applicants of one sex or another from applying or participating in a career path or type of class or program. The proposed change limits the prohibition to only publications that explicitly "state" a school's policy of engaging in different treatment on the basis of sex. This change is fundamentally inconsistent with Title IX's goals, for at least two reasons.

First, the proposed change is contrary to clearly established Supreme Court precedent that explicitly recognizes the right to be protected from discrimination and harassment based on sex, including sex stereotyping.[192] The Department has provided no statistical or other evidence to show that the rationale for this important provision has changed, or that sex-stereotyping no longer needs to be remedied in our educational institutions.[193] Nor has it provided any justification for retreating from clearly-established Supreme Court law on this issue.

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[192] *See Price Waterhouse*, 490 U.S. at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype of their group . . ."); *Oncale.,* 523 U.S. at 80 (recognizing that harassment on the basis of sex can include harassment of a female in "sex-specific and derogatory terms" motivated by "general hostility to the presence of women"); *see also* 2001 Guidance at 3 (recognizing that "gender-based harassment, which may include acts of verbal . . . hostility based on sex or sex-stereotyping . . . is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student's ability to participate in or benefit from the educational program.").

[193] The published policies and other distributed materials of a school can be particularly susceptible to "suggestions" of sex stereotyping, even where they do not "state" discriminatory rules. A prospective student is often introduced to an educational institution and its course offerings through the visual images in its publications issued by mail or posted on its website. Both male and female students continue to be subjected to sex stereotyping in the forms of visual images, statements, and conduct that discourages them from engaging in, limits, or denies their access to vocational and education career paths based on sex. This includes male students discouraged from engaging in dance or theater because these occupations are not sufficiently "masculine," and female students discouraged from participating in science or engineering based on stereotypical conceptions of a woman's ability to do math and science. *See, e.g.*, Rachael Pells, *Sexism in schools: 57% of teachers admit to stereotyping girls and boys*, Independent (Feb. 8, 2017), https://www.independent.co.uk/news/education/education-news/sexism-schools-poll-teachers-stereotypes-boys-girls-stem-subjects-sciences-maths-tech-a7567896.html (also noting that female employees in the US account for less than a quarter of STEM workers, despite making up almost half the overall workforce); Daniel Reynolds, *You Throw Like a Girl: Gender Stereotypes Ruin Sports for Young Women*, Healthline (July 2, 2018) (girls receive less encouragement from teachers and family members to be physically active and participate in sports; as a result, girls ages 8 to 12 are 19 percent less active, according to 2016 study), https://www.healthline.com/health-news/gender-stereotypes-ruin-sports-for-young-women#1; Claire Cain Miller, *Many Ways to Be a Girl, but One Way to Be a Boy: The New Gender Rules*, N.Y. Times (Sept. 14, 2018) (three quarters of girls 14 to 19 said they felt judged as a sexual object or unsafe as a girl, and three-quarters of boys said strength and toughness were the male character traits most valued by society), https://www.nytimes.com/2018/09/14/upshot/gender-stereotypes-survey-girls-boys.html; Suzanne Vranica, *Stereotypes of Women Persist in Ads*, Wall St. J. (Oct. 17, 2003).

Second, the proposed change is fundamentally inconsistent with the plain language of § 1681(a), which states that no person shall be "excluded from participation in [or] be denied the benefits of . . . any education program or activity receiving Federal financial assistance."[194] As the Supreme Court has recognized, Title IX protects students "not only . . . from discrimination, but also . . . from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving federal financial assistance'."[195] Therefore, a school can violate Title IX where a student is denied access to educational benefits and opportunities on the basis of gender, even in the absence of a facially discriminatory policy.[196]

The proposed change is inconsistent with and unsupported by the plain language of Title IX because it only prohibits explicit intentional discrimination while allowing implicit discrimination, which can nevertheless deny students a fair and equal education. Courts have consistently recognized and upheld Title IX regulations that prohibit policies found to have a discriminatory effect on one sex.[197] Indeed, this proposed change itself constitutes a discriminatory policy in violation of Title IX.

Moreover, prohibiting policies that "suggest" discrimination is not unique to the Title IX context; the Fair Housing Act and its implementing regulations have similarly been interpreted to prohibit publications advertising housing that "suggests" that a particular race would be disadvantaged.[198]

Finally, the proposed regulation's stated justification—that it would "remove subjective determination" from evaluating violations and make the requirement "more clear"—cannot excuse a result that harms the intended beneficiaries of Title IX—those subjected to discrimination on the basis of sex. 83 Fed. Reg. at 61,482. The justification also rings hollow, since, for more than thirty years, courts and administrators of Title IX have applied this regulation and others to address sex-stereotyping without apparent difficulty. The Department

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[194] 20 U.S.C. § 1681(a).

[195] *Davis*, 526 U.S. at 650; *see also Vinson*, 477 U.S. at 64 (stating in the employment context that Title VII's arguably narrower discriminatory prohibitions "evince[] a congressional intent to strike at the entire spectrum of disparate treatment of men and women").

[196] *See Davis*, 526 U.S. at 650 ("The statute makes clear that . . . students must not be denied access to educational benefits and opportunities on the basis of gender.").

[197] *See Mabry v. State Bd. of Cmty. Colleges & Occupational Educ.*, 813 F.2d 311, 317 n.6 (10th Cir. 1987) (compiling "regulations implementing Title IX [that] prohibit some facially neutral policies."); *Sharif by Salahuddin v. New York State Educ. Dep't*, 709 F. Supp. 345, 361 (S.D.N.Y. 1989) ("Several Title IX regulations specifically prohibit facially neutral policies. . . . with a discriminatory *effect* on one sex.").

[198] *See, e.g.*, *Corey v. Sec'y, U.S. Dep't of Hous. & Urban Dev. ex rel. Walker*, 719 F.3d 322, 326 (4th Cir. 2013) (interpreting Fair Housing Act, 42 U.S.C. 3604(c) (prohibiting any publication which "indicates" discrimination); *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991) (same).

provides no support, empirical or otherwise, for its position that schools or courts have been hampered by a lack of clarity in this rule.

In sum, the stated basis for such a dramatic change is unsupported and inconsistent with Title IX's plain statutory language and objectives, established case law, and congressional intent.

B. The Proposal to Eliminate the Requirement that Institutions Invoke the Statute's Religious Exemption in Writing Raises Concerns of Fair Notice to Students.

The Department proposes to amend § 106.12 to eliminate the current requirement that an educational institution "shall" advise OCR "in writing" if it wishes to invoke Title IX's statutory exemption for educational institutions controlled by religious organizations to the extent application of Title IX "would not be consistent with the religious tenets of such organization."[199] The proposed amendment is unnecessary and raises a concern that students at some institutions will not know their rights under Title IX until it is too late.

The proposed amendment is unwarranted because schools' burden in notifying the Department regarding religious exemptions is minimal. The Department characterizes the current rule as "confusing," 83 Fed. Reg. at 61,482, but identifies no basis for confusion. And schools have successfully asserted religious exemption in letters to the Department hundreds of times over the past several decades.

In addition, we are concerned that the proposed amendment will lead to more students unknowingly enrolling in schools that believe themselves to be exempted from Title IX but do not claim the exemption publically, only to learn of their school's position after they seek to assert their Title IX rights. Students should know before they matriculate whether (and to what extent) their school intends to comply with Title IX, and they should be able to assume that they will enjoy Title IX's full protections unless the school has informed them otherwise. No student should learn, only after becoming a victim of discrimination, that their school considered itself exempt from the relevant requirements of Title IX. Even worse, under the proposal, a school seemingly could wait to assert its exemption from Title IX until after it initiates grievance procedures and a complainant undergoes cross-examination and has personal information shared with the respondent and others.

If the Department eliminates the current rule's letter requirement, the Department should require schools to disclose their Title IX exemption status to current and prospective students in writing and bar schools from claiming an exemption after the fact if they have affirmatively represented that they comply with Title IX.

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[199] 20 U.S.C. § 1681(a)(3).

C. Restriction of Remedies to Exclude "Damages" and Lack of Definition Inconsistently Limits Remedial Scheme Which Was Intended to Strike at the Entire Spectrum of Discrimination on the Basis of Sex.

Even in circumstances where an egregious violation of Title IX might warrant relief to an individual subjected to sexual violence and assault, proposed § 106.3(a) removes the ability of the Department to assess "damages," a remedy long available under common law. 83 Fed. Reg. at 61,495. In addition, the proposed regulation fails to define "damages," potentially leaving it open to an overly broad interpretation with a great impact on the intended beneficiaries of the statute, those subjected to sex discrimination. Therefore, the scope and impact of the change proposed by the Department on intended beneficiaries of the statute, and on the Department's ability to address and remedy noncompliance has not been adequately explained.

Specifically, the proposed change is contrary to the plain language of the statute, which authorizes the use of "any other means authorized by law."[200] The change inconsistently limits the Department's authority to provide remedies for noncompliance to only those means authorized in equity. The statutory enforcement language in Title IX mirrors language from the Civil Rights Act of 1964. But there, the drafters identified precisely where remedies would be limited.[201] Congress did not provide such a limit here. Yet the Department would impose one for the first time, more than 45 years after the passage of Title IX. This undermines Title IX's purpose and improperly usurps Congress's role.

Furthermore, OCR's public resolution agreements reflect that where noncompliance is found, the Department has historically provided compensatory or remedial services (e.g., counseling, tutoring, and academic support) to overcome or remedy the effects of harassment on the student, including, as warranted, funding for tuition where a student withdraws from the institution because a recipient has created, encouraged or permitted a hostile environment on the basis of sex.[202] Without a definition of damages, we are concerned that the proposed change may

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[200] 20 U.S.C. § 1682.

[201] 42 U.S.C. 2000a-3 (limiting relief to "preventative relief" only).

[202] *Southern Methodist University*, OCR Complaint Nos. 06-11-2126; 06-13-2081; 06-13-2088, https://www2.ed.gov/documents/press-releases/southern-methodist-university-agreement.pdf (in sexual harassment/sexual violence matter, requiring University to reimburse complainant for all university-related expenses (tuition/fees, housing/food, and books) incurred for the fall semester minus any scholarship and grant assistance received, and all counseling expenses incurred over a two-year period); *Tufts University*, OCR Complaint No. 01-10-2089, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01102089-b.html (in sexual harassment/sexual violence matter, voluntary resolution agreement includes reimbursement to the student complainant for educational and other reasonable expenses, incurred during a year time period, and a complaint review which, as appropriate, would provide remedies, such as referrals to counseling); *Princeton University*, OCR Complaint No. 02-11-2025, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/02112025.html (in sexual harassment/sexual violence matter, voluntary resolution agreement includes reimbursement for appropriate University-related expenses, as well as expenses for counseling, that Students 1-3 incurred

be used to impermissibly limit the authority granted by Congress to the Department to utilize "any other means authorized by law," thereby resulting in remedies and regulations that are inconsistent with the statute and its objectives, which include providing "individual citizens effective protection against [discriminatory] practices" and "overcom[ing] the effects" of such discrimination.[203]

D. Any Final Rule Should Include Guidelines for Confidentiality.

Issues relating to the confidentiality of information are critical to any discussion of how to effectively investigate and remedy sexual harassment and assault. As a result, any rule implementing Title IX should separately address schools' obligations with respect to requests by complainants to keep information confidential.[204] A school must, for instance, take all reasonable steps to honor a request from a complainant to keep his or her identity confidential. They should, however, notify the complainant that maintaining confidentiality may limit the schools' ability to effectively investigate and respond to allegations of harassment and that, depending on the nature of the complaint, certain information—including the identity of the complainant—must be disclosed if the student wishes to file a Title IX complaint. The school should inform the student of the actions it will take regardless of whether the student wishes to go forward with a formal complaint, including that it will take reasonable steps to prevent retaliation.

Furthermore, any final rule should make clear that a request by a student to maintain confidentiality does not free the school of its obligation to investigate and respond to the allegation. Rather, the school must still "investigat[e] the complaint to the extent possible,"[205] and it must also take reasonable actions to prevent recurrences of the conduct alleged by the complainant.

As discussed in Section IV.D, it may be possible to conduct a full investigation without revealing the name of the complainant. In other matters, a complete investigation may not be possible, but the school can nonetheless take certain actions, including seeking to identify whether there have been other complaints regarding the same individual and implementing measures that reiterate and reinforce Title IX prohibitions and provide remedies for the complainant that do not impact the due process rights of the respondent. And under all

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from the date each first reported alleged sexual assault/violence to the date of the resolution); *City University of New York, Hunter College*, OCR Complaint No. 02-13-2052, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/02132052.html (in sexual harassment/sexual violence matter, voluntary resolution agreement includes assessing whether complainant in case 1-3 and 5-7 and 9-12 suffered effects as a consequence of College not offering counseling or other interim measures or from any hostile environment created and take steps to address these effects).

[203] 20 U.S.C. § 1682; *Gebser*, 524 U.S. at 286, 288.

[204] *See* 2001 Guidance at 17–18.

[205] 2001 Guidance at 18.

circumstances, a school should consider whether other corrective action short of disciplining the accused individual may be appropriate.[206]

Finally, any final rule should make clear that, independent of specific requests by individuals to maintain confidentiality, schools have an affirmative obligation to preserve the confidentiality of all documents and evidence utilized in investigations of Title IX complaints.

E. Schools Have Continuing Obligations Following a Finding of Responsibility or Following an Independent Investigation.

The proposed regulations fail to explain the obligations Title IX imposes on schools following a finding of responsibility. Rather, the proposed regulations seem to imply that a school's duties upon such a determination extend no further than disciplining the students determined to be responsible, and then only if the determination was made through a formal proceeding. *E.g.*, Proposed § 106.45(b)(4). But schools' obligations go much further.

First, as discussed in Section II.E, a school has an independent obligation to protect its students by preventing and remedying harassment, even in the absence of a formal report. A school must take steps to end the harassment, if it is ongoing, and to prevent future harassment by the same individual. If the conduct was enabled by or reflects a toxic culture or other systemic problems, the school must address such systemic issues.

Furthermore, schools must address the effects of the harassment, which may include appropriate remedial actions for the complainant or the broader community.[207] It is for this reason that the safe harbor provisions addressed above[208] are inconsistent with Title IX to the extent that they erode schools' continued responsibilities to their students.

Critically, any regulations should also specify that a school's obligation to respond following a determination of harassment is not time-limited, and that the school must take steps to ensure that its remedial efforts are successful and to identify whether further efforts are necessary. The full extent of this obligation will depend in part on the nature and severity of the conduct at issue, but in all circumstances the school should understand that it maintains an obligation to take reasonable steps to address the ongoing impact of a violation of Title IX.

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[206] *See* 2001 Guidance at 18 ("Examples include conducting sexual harassment training for the school site or academic department where the problem occurred, taking a student survey concerning any problems with harassment, or implementing other systemic measures at the site or department where the alleged harassment has occurred.").

[207] *See, e.g.*, *Gebser*, 524 U.S. at 288–89; *Feminist Majority Found.*, 911 F.3d at 696.

[208] *See supra* Section II.E.

F. The Proposed Rule Fails to Sufficiently Address the Family Educational Rights and Privacy Act (FERPA).

As noted in Part IV.G, the proposed regulations do not adequately address the Family Educational Rights and Privacy Act (FERPA).[209] For example, FERPA generally forbids disclosure of information from a student's "education record" without consent of the student (or the student's parent).[210] The regulations need to address whether proposed regulation § 106.45(b)(3)(v)'s requirements that recipients provide each "party whose participation is invited or expected [at a hearing] written notice of the date, time, location, participants, purpose of all hearings, investigative interviews, or other meetings with a party" can include information about the sanction that will be implemented. Additionally, the proposed regulations and their accompanying justification focus only on the rights of respondents to have access to their educational records. *See, e.g.*, 83 Fed. Reg. at 61,475 (citing a student's "right to inspect and review records that directly relate to that student" pursuant to FERPA); 83 Fed. Reg. at 61,476 ("[t]he scope of the parties' right to inspect and review evidence collected by the recipient is consistent with students' privacy rights under FERPA, under which a student has a right to inspect and review records that directly relate to that student."). Equally important, however, and completely unaddressed by the proposed regulations, is the right of the complainant to have their educational records kept private.[211] The interplay of these competing rights should be addressed in any final regulations, particularly in light of Title IX's mandate that grievance procedures be equitable.[212]

VII. The Regulatory Impact Assessment Fails to Accurately Assess the Effect of the Proposed Rule.

The Department asserts the proposed regulations were issued "only on a reasoned determination that their benefits justify their costs," 83 Fed. Reg. at 61,484. However, even a cursory review of the Department's costs analysis reveals its inadequacy. The Department acknowledges that it "cannot estimate the likely effects of these proposed regulations with absolute precision." 83 Fed. Reg. at 61,484. While we agree it is difficult to precisely estimate the costs of the proposed regulations, a minimal review of the Department's analysis shows the costs of the proposed regulations are much higher than it estimates.

A. Ignored Costs.

The Department states the economic analysis explicitly excludes economic consequences of sexual assault incidents themselves, stating that it is "only intended to capture the economic

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[209] 20 U.S.C. § 1232g.

[210] 20 U.S.C. § 1232g (b)(1).

[211] 20 U.S.C. § 1232g (b)(1).

[212] *See* 34 C.F.R. § 106.8(c) (requiring grievance procedures adopted pursuant to Title IX provide for "equitable resolution" of student complaints).

impacts of this proposed regulatory action." 83 Fed. Reg. at 61,485. The Department's statement is self-contradictory. The proposed regulatory action is exclusively aimed at changing the laws and regulations governing sexual assault and harassment, which have concrete and obvious economic costs. The analysis cannot possibly capture the economic impacts of the proposed regulatory action if it excludes from any analysis the actual economic costs incurred by students subjected to sexual harassment and violence—the very students the regulations govern. To provide a cost estimate that even marginally reflects the realities of the regulation, the costs of sexual assault and harassment must be considered. For example, the cost of rape in the United States has been estimated to be $122,461 per survivor, or $3.1 trillion over all survivor's lifetimes, and these costs are borne by survivors, society, and the government.[213] In addition to considering the costs of sexual assault and harassment, the Department should consider the economic impact on students who will lose access to their education as a result of being denied justice under these proposed regulations.

However, even setting aside the rippling costs of students subjected to sexual harassment whose sexual assaults would be excluded from Title IX's purview, there are additional costs that the proposed regulation ignored.

1. Allegations that Do Not Meet the Proposed Stringent Requirements May Still Resurface as Costly Lawsuits.

While the Department finds savings in narrowing Title IX's scope, it ignores the costs stemming from the exclusion of allegations that would no longer fall within that scope. The Department anticipates a decreased number of investigations under the drastically scaled-down requirements in covered conduct/location, as well as the reduction in "responsible employees" to whom conduct may be reported. However, in order to seek justice for themselves, students will be forced file their allegations in court or with law enforcement. It is unreasonable to assume that the proposed changes will simply make these allegations disappear, especially amidst nationwide trends of increasing filings of sexual harassment and assault claims.[214]

The Department has the ability to assess, based on a review of prior and existing cases, how many will not be addressed or resolved under the proposed regulations. But it failed to undertake this task or provide the public with accurate and adequate information about the

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[213] Peterson et al., *Lifetime Economic Burden of Rape Among US Adults,* 52 Am. J. of Preventative Med. 691 (2017). These costs were not unknown to the Department, as the Department cited this study in their analysis. 83 Fed. Reg. at 61,485 n.16. The Department nevertheless disregarded these costs by assuming they would be unaffected by the proposed regulations. *Id.* at 61,485.

[214] *See* Jamie D. Halper, *In Wake of #MeToo, Harvard Title IX Office Saw 56 Percent Increase in Disclosures in 2018, Per Annual Report*, The Harvard Crimson (Dec. 14, 2018), https://www.thecrimson.com/article/2018/12/14/2018-title-ix-report; U.S. Equal Employment Opportunity Commission, *EEOC Releases Preliminary FY 2018 Sexual Harassment Data*, (Oct. 4, 2018), https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm (stating "charges filed with the EEOC alleging sexual harassment increased by more than 12 percent from fiscal year 2017").

impact. Nevertheless, it is reasonable to anticipate that because the Department has narrowed its jurisdiction, the nation will see both an increase in Title IX complaints in civil and criminal courts, as well as an increase in costly lawsuits alleging non-Title IX causes of action.

2. The Department Should Consider the Relationship Between Uninvestigated Allegations and Short- and Long-Term Absences.

Complainants whose Title IX allegations are not investigated may also have increased absences, which would decrease receipt of tuition and attendance-related funding by institutions of higher education (IHEs) and local educational agencies (LEAs). The Department did not include lost tuition costs for complainants who drop out or take a leave of absence from colleges or universities, or any decrease in attendance-related funding for LEAs, despite such absences being clearly contemplated as possible supportive measures for sexual misconduct complainants.[215] According to the Campus Climate Survey Validation Study, over 8 percent of rape victims and 1.6 percent of sexual battery victims dropped classes and changed their schedule, and over 21 percent of rape victims and 5.9 percent of sexual battery victims considered taking time off school, transferring, or dropping out.[216] These absences may have direct and indirect costs, which warrant the Department's consideration.[217]

3. Costs to Transgender Students.

Finally, the Department fails to even the mention the term "transgender" in the proposed regulations.[218] This overt exclusion may make transgender students less likely to report on-campus sexual harassment or sexual assault to the designated "coordinator." According to a recent survey of transgender people, 17 percent of K-12 students and 16 percent of college or

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[215] *Sample Language for Interim and Supportive Measures to Protect Students Following an Allegation of Sexual Misconduct,* White House Task Force to Protect Students from Sexual Assault 1, 6 (Sept. 2014), https://www.justice.gov/archives/ovw/page/file/910296/download.

[216] Krebs et al, *Campus Climate Survey Validation Study Final Technical Report*, Bureau of Justice Statistics Research and Development Series 1, 114 (Jan. 2016), https://www.bjs.gov/content/pub/pdf/ccsvsftr.pdf.

[217] U.S. Dep't of Educ., et al., *Dear Colleague Letter Regarding Chronic Absenteeism* at 1 (Oct. 7, 2015), https://www2.ed.gov/policy/elsec/guid/secletter/151007.html ("A growing and compelling body of research demonstrates that chronic absence from school . . . is a primary cause of low academic achievement and a powerful predictor of which students will eventually drop out of school.").

[218] The Department withdrew its May 13, 2016 Dear Colleague Letter on Transgender Students less than a year after its joint issuance with the U.S. Department of Justice's Civil Rights Division (U.S. Dep't of Educ., Office for Civil Rights, & U.S. DOJ, Civil Rights Division, *Dear Colleague Letter*, 1 (Feb. 22, 2017)).

vocational school students who were out or perceived as transgender reported leaving school because of mistreatment.[219]

B. Unreasonably Low Estimate of Percentage of Title IX Complaints Based on Sexual Harassment or Sexual Violence.

The Department's assumption that sexual harassment and sexual assault make up only 50 percent of Title IX complaints (83 Fed. Reg. at 61,488) is unreasonably low, relies on an unclear baseline, and ignores the nationwide uptick in sexual harassment complaints discussed above. As we have explained, sexual harassment is pervasive.

In addition to the low initial baseline, studies show there is an upward trend of sexual harassment-related Title IX complaints.[220] The Department's own OCR reported that there was a 277 percent increase and an 831 percent increase in its receipt of sexual violence complaints at the K-12 and postsecondary levels, respectively, since Fiscal Year 2011.[221] This upward trend means, at a minimum, that averaging prior years' complaints is not a fair extrapolation of sexual harassment-related Title IX claims.

C. The Department Provides Unreasonably Low Cost Estimates for Implementing the Proposed Rule.

The Department significantly underestimates the amount of time that will be required by Title IX coordinators to review any final rule and to revise local grievance procedures accordingly. The Department estimates that for LEAs, the Title IX Coordinator and a lawyer will spend 4 hours and 8 hours, respectively, reviewing any final regulations. 83 Fed. Reg. at 61,486. For IHEs, the Department estimates review would take 8 and 16 hours, respectively. 83 Fed. Reg. at 61,487. Given the dramatic nature of the changes contained in the proposed regulations, and the extensive and nuanced changes that will be required of recipients' own policies, it is unreasonable to assume that Title IX coordinators will require only a day or less to review, and that educational institutions' attorneys will only take two days or less to review. Further, the Department severely underestimates the time that will be required to revise grievance procedures to comply with any new regulations. The Department assumes that for LEAs, Title IX Coordinators will spend 4 hours and lawyers will spend 16 hours on revising grievance procedures. 83 Fed. Reg. at 61,486. The Department estimates these times will be doubled for IHEs. *Id.* This includes no time for stakeholder input on grievance procedure revisions and

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[219] S.E. James, et al, *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality 1, 11 & 136 (Dec. 2016), http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.

[220] Celene Reynolds, *The Mobilization of Title IX across U.S. Colleges and Universities, 1994-2014,* 00 Social Problems 1 (Mar. 2018), https://doi.org/ 10.1093/socpro/spy005.

[221] U.S. Dep't of Educ., Off. for Civil Rights, *Securing Equal Educational Opportunity: Report to the President and Secretary of Education* (Dec. 2016), https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf.

underestimates the amount of time required to revise procedures. Finally, the Department anticipates it will only take a single hour for Title IX coordinators to create or modify a "safe harbor" form for complainants who report sexual harassment but who do not want to file a formal complaint. 83 Fed. Reg. at 61,494. It is unreasonable to assume that a significant document intended to serve as a "safe harbor" would be created in only one (1) hour by a Title IX Coordinator, and that an attorney would not even review it. These cost estimates are arbitrary and unreasonably low.

The Department also assumes the Title IX Coordinator, investigator, and a decision maker will each spend 16 hours in training. 83 Fed. Reg. at 62,486. It is concerning that the Department would contemplate only that a single investigator and a single decision-maker would or should attend the training. 83 Fed. Reg. at 61,486. Especially since the Department is anticipating limiting the number of people who can accept formal complaints, it will be essential to provide training to all staff who interact with students regarding how to counsel students on the appropriate channels for instigating formal complaints. It will also be essential to provide training for students, parents and guardian on how to properly file complaints, so that they do not lose their rights due to an inconsequential procedural mistake. Further, the Department does not accurately represent the costs for training hearing officers and panels during live hearings, where they will need to be versed in evidentiary procedure and taking examination and cross-examination. In addition, the Department "do[es] not calculate additional costs in future years as [it] assume[s] that recipients will resume training of staff one[sic] their prior schedule after Year 1." 83 Fed. Reg. at 61,487. This limitation to one year of training costs and to training only individuals who can receive formal complaints underscores the Department's inappropriate focus away from the protection of students who are meant to be protected by Title IX.

There are also several ways in which the Department inappropriately underestimates the costs of investigations. First, the Department estimates "a reduction in the average number of investigations per IHE per year of 0.75." 83 Fed. Reg. at 61,487. It is unreasonable to assume this reduction, given that reports are, as described above, increasing, and the proposed regulations create significant additional avenues for complaints filed by respondents. Second, while the Department assumes an approximate reduction of 0.18 of the number of IHE investigations by disregarding off-campus sexual harassment (83 Fed. Reg. at 61,487), the Department fails to allocate time for the investigation that would need to occur for the jurisdictional analysis to establish where the incident occurs.

In addition to underestimating the time it will take for a recipient to investigate Title IX complaints, the Department underestimates the cost for the parties' representation in the investigative process. For responses to a formal complaint at the LEA level, the Department assumed that both parties would obtain legal counsel who would work for one hour and, in the alternative, estimated an average cost non-attorney advisor cost would be two attorney hours. 83 Fed. Reg. at 61,487. The calculated cost the Department associated with the representation is flawed in two respect. First, the Department assumes a rate of $90.71 per hour. 83 Fed. Reg. at

61,486. The Department provides no basis for this assumed rate for an attorney, which is significantly lower than the average hourly rate of attorneys.[222] Second, it is unreasonable to assume adequate representation could occur with representation by an attorney for only one hour (or two hours for a non-attorney) for a hearing, particularly one involving a complex investigation of a sexual assault.

Finally, the Department fails to appropriately estimate the costs of the live hearings required under the proposed regulations. The Department will require live hearings at IHEs, but fails to consider many of the increased costs this requirement will entail. For example, the Department does not estimate any costs for transcription and translation services that may be needed. Further, the Department estimates that in 60 percent of IHEs, the Title IX Coordinator also serves as the decision-maker. 83 Fed. Reg. at 61,488. Only allowing costs for an additional adjudicator in 40 percent of hearings is arbitrary and in direct contradiction to proposed regulation § 106.45(b)(4) which precludes the decision-maker from being the same person as the Title IX Coordinator of the investigation.

VIII. The Department Should Delay the Effective Date of the Rule.

If the Department adopts a final rule along the lines of its proposal, it should give schools adequate time to respond before the rule takes effect. We believe that an effective date no earlier than three years from the date of the final rule would be appropriate.

A compliance window of three years or more is warranted because the proposed rule represents a stark departure from the substantive and procedural standards that educational institutions have been applying for years. Schools will need time to overhaul their procedures, hire new staff, train employees, and disseminate information to students. Smaller schools in particular will require an extended period to come into compliance. For reasons discussed above, the Department's new rule will cause confusion among students, staff, and other stakeholders however quickly they are implemented, but the confusion will only be compounded if the Department does not allow schools enough time to respond appropriately.

Adopting an earlier effective date would be inconsistent with the Department's recent approach to other regulations that would apply to fewer schools than the proposed Title IX rule, and that would not require such significant programmatic changes. For instance, the Department has seen fit to allow schools until July 2019 to comply with provisions of its 2014 Gainful

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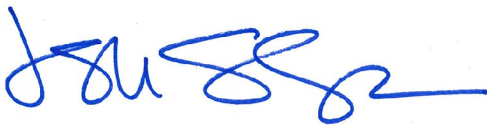
[222] *See, e.g.*, Jay Reeves, *Top 10 Hourly Rates by City*, Lawyers Mutual Byte of Prevention Blog, (Apr. 6, 2018), https://www.lawyersmutualnc.com/blog/top-10-lawyer-hourly-rates-by-city (listing lawyer rates by practice area ranging from $86/hour to $340/hour); Hugh A. Simons, *Read This Before You Set Your 2018 Billing Rates*, Law Journal Newsletters (Nov. 2017), http://www.lawjournalnews letters.com/2017/11/01/read-this-before-you-set-your-2018-billing-rates/ (indicating first year associates cost their employers approximately $111/hour). Further, it is unreasonable to assume adequate representation could occur with representation by an attorney for only one hour (or two hours for a non-attorney).

Employment rule[223] and its 2016 Borrower Defense rule,[224] and delayed the effective date of the 2016 Program Integrity and Improvement rule until July 2020.[225] Setting aside the reasonableness of the Department's decisions with respect to these other regulations, it would only be appropriate for the Department to adopt a similar compliance period for Title IX rule that would have more far-reaching consequences for many more schools.

IX. Conclusion

Proper enforcement of Title IX has an immense impact on our states, our colleges and universities, our K-12 schools, and most importantly, our students. Title IX requires schools to provide an education that is free from sexual harassment, violence, and discrimination. Our educational institutions, relying on prior guidance from the Department, have spent many years developing procedures and policies to address these issues, and they have made great strides in fostering more open and inclusive educational environments. The proposed rule, however, is a step backward, rather than a step forward, in achieving Title IX's goals. It would inject confusion and bias into the Title IX adjudicatory process. Survivors of sexual harassment and violence would face significant reporting obstacles under the new rule, further undermining the already too low sexual violence and harassment reporting rates. The proposed rule is not consistent with Title IX as written and fails to further its goals. It should be withdrawn.

Respectfully submitted,



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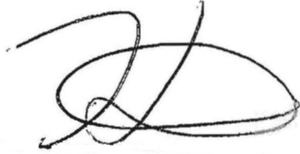
[223] *See* 83 Fed. Reg. 28,177 (June 18, 2018).

[224] *See* 83 Fed. Reg. 6,458 (Feb. 14, 2018); 83 Fed. Reg. 34,047 (July 19, 2018).

[225] 83 Fed. Reg. 31,296 (July 3, 2018).



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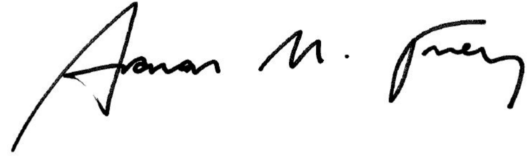

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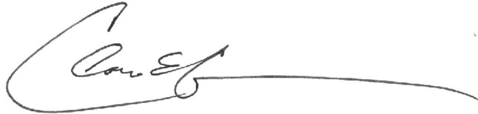

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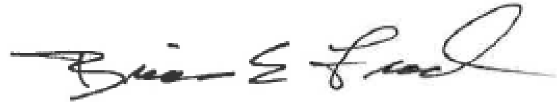

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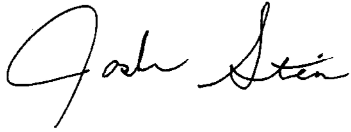

JOSH STEIN
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF PENNSYLVANIA 1600 Arch St., Suite 300 Philadelphia, PA 19103 STATE OF NEW JERSEY Richard J. Hughes Justice Complex 25 Market Street Trenton, NJ 08625-0080 STATE OF CALIFORNIA 1300 I Street Sacramento, CA 94814 STATE OF COLORADO 1300 Broadway, 10th Floor Denver, CO 80203 STATE OF DELAWARE Carvel State Office Building 820 N. French Street, 5th Floor Wilmington, DE 19801 DISTRICT OF COLUMBIA 441 4th Street, N.W. Suite 630S Washington, D.C. 20001 STATE OF ILLINOIS 100 West Randolph St. Chicago, IL 60601. COMMONWEALTH OF MASSACHUSETTS One Ashburton Place Boston, MA 02108 STATE OF MICHIGAN P.O. Box 30758 Lansing, MI 48909 STATE OF MINNESOTA 445 Minnesota Street, Suite 1400 St. Paul, MN 55101	**Case No. _______** **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

STATE OF NEW MEXICO
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501

STATE OF NORTH CAROLINA
114 W. Edenton Street
Raleigh, NC 27603

STATE OF OREGON
1162 Court St. NE
Salem, OR 97301

STATE OF RHODE ISLAND
150 South Main Street
Providence, RI 02903

STATE OF VERMONT
109 State Street
Montpelier, VT 05609

COMMONWEALTH OF VIRGINIA
202 North Ninth Street
Richmond, VA 23219

STATE OF WASHINGTON
800 5th Avenue
Suite 2000
Seattle, WA 98104-3188

STATE OF WISCONSIN
Post Office Box 7857
Madison, WI 53707-7857

Plaintiffs,

v.

ELISABETH D. DEVOS, *in her official capacity as Secretary of the United States Department of Education*
400 Maryland Avenue, S.W.
Washington, D.C. 20202

UNITED STATES DEPARTMENT OF EDUCATION 400 Maryland Avenue, S.W. Washington, D.C. 20202 UNITED STATES OF AMERICA, Defendants.	

INTRODUCTION

1. Plaintiffs Commonwealth of Pennsylvania, State of New Jersey, State of California, State of Colorado, State of Delaware, District of Columbia, State of Illinois, Commonwealth of Massachusetts, State of Michigan, State of Minnesota, State of New Mexico, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, Commonwealth of Virginia, State of Washington, and State of Wisconsin (collectively, "the Plaintiff States" or "the States") bring this action against Defendants Secretary Elisabeth D. DeVos, the U.S. Department of Education (the "Department"), and the United States of America to prevent implementation of the unlawful rule recently promulgated by the Department titled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020) (the "Title IX Rule" or "Rule").

2. If the Rule is permitted to take effect, students across the country will return to school in the fall with less protection from sexual harassment.[1] The Rule will reverse decades of effort to end the corrosive effects of sexual harassment on equal access to education—a commitment that, until now, has been shared by Congress and the Executive Branch across multiple elections and administrations, as well as by state and local officials and school

[1] Unless otherwise stated, this Complaint uses the term "sexual harassment" to encompass all forms of sexual harassment, including sexual violence and sexual assault.

administrators. And because of the Rule's impracticable effective date, primary, secondary, and postsecondary schools across the country will be required to completely overhaul their systems for investigating and adjudicating complaints of sexual harassment in less than three months, in the midst of a global pandemic that has depleted school resources, and with faculty, staff, and student stakeholders absent from their campuses due to the pandemic and, in many cases, on leave due to the summer.

3. The Department claims that its Rule effectuates Title IX of the Education Amendments Act of 1972 ("Title IX"), but in reality the Rule undercuts Title IX's mandate to eradicate sex discrimination in federally funded education programs and activities.[2] The Rule creates substantive and procedural barriers to schools' investigation and adjudication of sexual harassment complaints, and discourages students and others from making sexual harassment complaints. As a result, fewer sexual harassment complaints will be filed, and schools will be less well equipped to protect their students' safety and rid their programs and activities of the pernicious effects of sex discrimination.

4. The Rule is unlawful. Without adequate justification or explanation, the Rule strips away longstanding protections against sexual harassment in violation of Title IX's mandate to prevent and remedy sex discrimination, and in ways that conflict with other federal and state statutes and Supreme Court precedent. For example, the Rule will not allow a school to investigate and remedy an egregious but isolated incident of sexual harassment, including some forms of unwanted touching, under Title IX because such harassment is no longer sufficiently

[2] With only limited exception, Title IX applies to all entities that receive federal funds from the Department, including primary, secondary, and postsecondary public and private schools, as well as museums, libraries, cultural centers and other entities that operate education programs or activities. Unless otherwise stated, this Complaint uses the word "schools" to refer generally to all recipients of federal funding subject to Title IX and the new Title IX Rule.

"pervasive" to fall within the Rule's narrowed definition of sexual harassment. Similarly, the Rule will eliminate a school's ability to open a Title IX investigation into sexual harassment of a former student because that student is no longer "participating" in an education program or activity—even where the former student left school *because of the sexual harassment* and even if the alleged perpetrator remains associated with the campus. In addition, the Rule will prevent a school from investigating a Title IX complaint by a student who is sexually harassed by another student at an off-campus apartment because the harassment did not take place "under the substantial control" of the school, even if the harassment limits the student's ability to benefit from or access the education program or activity. These and the Department's other newly created limitations on Title IX proceedings have no basis in Title IX.

5. The Rule also creates arbitrary and unlawful procedural requirements that will chill reporting of sexual harassment and make it harder for schools to reach fair outcomes as they investigate and adjudicate those sexual harassment complaints that the Department still deems cognizable under Title IX. For example, in postsecondary schools, the Rule will require third-party advisors to conduct live, direct, oral cross-examination of the other party—even where the advisor selected is a parent or the other party's teacher and even where less traumatizing methods exist to allow parties to ask questions of each other.

6. The Department's imposition of one-size-fits-all formal procedures—regardless of the nature of the complaint or the institutional setting—will prevent schools from formulating fair and equitable grievance procedures based on schools' individual circumstances and expertise in providing equitable educational opportunities to their students. In addition, the Rule's mandate that schools dismiss from Title IX proceedings sexual harassment complaints that fall outside the Rule's ambit will result in many schools feeling compelled—as a matter of state law, to ensure

the nondiscriminatory educational experience promised by Title IX, or both—to create separate grievance processes to investigate and adjudicate the same underlying allegations: one for sexual harassment that satisfies the Department's crabbed standards, which can be adjudicated in "Title IX proceedings," and another for sexual harassment as it has been widely understood, which must be relegated to "non-Title IX proceedings." The incentives that the Rule creates for schools are inequitable if not perverse: a school risks its federal funding if it does not strictly comply with even one of the Department's new procedural requirements, but a school that fails to respond to sexual harassment, even in a manner that is just short of clearly unreasonable, may not lose its funding.

7. The Rule's defects stem in part from a flawed rulemaking process. The Department included in the final Rule new substantive provisions that are not a logical outgrowth of the proposed rule, negating the States' (and the public's) opportunity to comment on the consequences of these provisions. Further, the Department has buried even more requirements and prohibitions in its hundreds of pages of preamble and nearly two thousand footnotes, including some that conflict with the text of the final Rule itself. Moreover, the Department failed to provide the public with the data and analysis underlying the Rule, contributing to a cost-benefit analysis that arbitrarily and intentionally disregarded key factors, including the substantial and quantifiable mental health, physical health, emotional, and economic costs to students who are harmed as a result of the Rule.

8. The Department acknowledges that sexual harassment is a form of sex discrimination that can create an unsafe and unwelcoming school environment, interfering with students' learning, impacting their mental and physical health well after the conduct itself has ceased, and potentially affecting survivors' family, friends, and other community members. It

also acknowledges that these harms are often exacerbated if the individual is forced to relive the incident of harassment in the context of investigatory, judicial, or other proceedings, such as the grievance procedures required by the Rule. Nevertheless, the Rule the Department has issued will exacerbate and inflict untold irreparable harm on students nationwide, including the more than 20 million school-age children enrolled in the Plaintiff States' public education systems and over 7 million students enrolled in the Plaintiff States' higher education institutions.

9. According to the federal government's own data, sexual harassment against students remains pervasive and mostly unreported. With the Department's final Rule, sexual harassment will not become less common—but it will, as the Department acknowledges in the Rule, become even less regularly reported and remedied.

10. Compounding the harms imposed by the Rule is its unduly short effective date of August 14, 2020, which is itself an affront to schools and students. Schools nationwide will be forced to undertake wholesale revisions of their sexual harassment policies and procedures in less than three months, in the midst of the ongoing global health crisis caused by the novel coronavirus (COVID-19) pandemic, and while most students and many administrators and faculty are away from school for the summer. This will leave schools unable to engage students, faculty, staff, parents, and other affected stakeholders in their educational communities as they ordinarily would when undertaking such an initiative, and thus unable to complete required internal review and approval processes. The resulting rushed policies will cause confusion and mistrust and will lack the buy-in necessary for effective implementation. Under normal circumstances, requiring schools to overhaul their policies and procedures, re-negotiate collective bargaining agreements, and implement the Rule's hiring, training, and other requirements in less than three months would impose an extraordinarily difficult burden. Given

the ongoing uncertainty caused by the COVID-19 pandemic and the strain it has placed on education institutions, Defendants' decision to require compliance with the Rule by August 14, 2020, is inexplicable.

11. Plaintiffs respectfully request that the Court stay the effective date of the Rule pending judicial review; grant them declaratory and injunctive relief from the Rule, on a preliminary and permanent basis; vacate and set aside the Rule; and award them such other relief as is requested herein.

JURISDICTION AND VENUE

12. This action arises under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 553, 701–06. This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

13. This Court has authority to issue declaratory relief, injunctive relief, and other relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, and the APA, 5 U.S.C. §§ 702, 705–706.

14. This is a civil action in which Defendants are agencies of the United States or officers of such an agency. Venue is proper in this Court because a defendant resides in this district, a substantial part of the events giving rise to this action occurred in this district, and a plaintiff resides in this district and no real property is involved. *See* 28 U.S.C. § 1391(e)(1)(A)–(C).

PLAINTIFF STATES

15. Plaintiff Commonwealth of Pennsylvania is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Josh

Shapiro, the “chief law officer of the Commonwealth.” Pa. Const. art. IV, § 4.1. Attorney General Shapiro brings this action on behalf of the Commonwealth pursuant to his statutory authority. 71 Pa. Stat. § 732-204.

16. Plaintiff State of New Jersey is a sovereign state of the United States of America. This action is being brought on behalf of the State by Attorney General Gurbir S. Grewal, the State’s chief legal officer. N.J. Stat. Ann. § 52:17A-4(e), (g).

17. Plaintiff State of California is a sovereign state of the United States of America. This action is being brought on behalf of the State by California Attorney General Xavier Becerra, the State’s chief law officer, Cal. Const., art. V, § 13, who has the duty to see that the laws of the State are uniformly and adequately enforced, and Governor Gavin Newsom, the State’s chief executive officer, who is responsible for overseeing the operations of the State and ensuring that its laws are faithfully executed, Cal. Const., art. V, § 1.

18. Plaintiff State of Colorado is a sovereign state of the United States of America. This action is brought on behalf of the State of Colorado by Attorney General Phillip J. Weiser, who is the chief legal counsel of the State of Colorado, empowered to prosecute and defend all actions in which the state is a party. Colo. Rev. Stat. § 24-31-101(1)(a).

19. Plaintiff State of Delaware is a sovereign state of the United States of America. This action is brought on behalf of the State of Delaware by Attorney General Kathleen Jennings, the “chief law officer of the State.” *Darling Apartment Co. v. Springer*, 22 A.2d 397, 403 (Del. 1941). General Jennings also brings this action on behalf of the State of Delaware pursuant to her statutory authority. Del. Code Ann., tit. 29, § 2504.

20. Plaintiff District of Columbia is a sovereign municipal corporation organized under the Constitution of the United States. It is empowered to sue and be sued, and it is the local

government for the territory constituting the permanent seat of the federal government. The District is represented by and through its chief legal officer, the Attorney General for the District of Columbia, Karl A. Racine. The Attorney General has general charge and conduct of all legal business of the District and all suits initiated by and against the District and is responsible for upholding the public interest. D.C. Code § 1-301.81.

21. Plaintiff State of Illinois is a sovereign state of the United States of America. This action is being brought on behalf of the State by Attorney General Kwame Raoul, the State's chief legal adviser to the State of Illinois. His powers and duties include acting in court on behalf of the State on matters of public concern. *See* 15 ILCS 205/4.

22. Plaintiff Commonwealth of Massachusetts is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Maura Healey, who has both statutory and common-law authority and responsibility to represent the public interest for the people of Massachusetts in litigation, as well as to represent the Commonwealth, state agencies, and officials in litigation. *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266-67 (Mass. 1977); Mass. Gen. Laws ch. 12, § 3.

23. Plaintiff State of Michigan is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Dana Nessel, the State of Michigan's chief law enforcement officer, pursuant to her statutory authority. Mich. Comp. Laws § 14.28.

24. Plaintiff State of Minnesota is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Keith Ellison, the chief law officer of the State. Minn. Stat. § 8.01.

25. Plaintiff State of New Mexico is a sovereign state of the United States of America. New Mexico is represented by its Attorney General, Hector Balderas, who is authorized to assert the state's interests in state and federal courts.

26. Plaintiff State of North Carolina is a sovereign state of the United States of America. This action is brought on behalf of the State of North Carolina by Attorney General Joshua H. Stein, who is the chief legal counsel of the State of North Carolina and who has both statutory and constitutional authority and responsibility to represent the State, its agencies, its officials, and the public interest in litigation. N.C. Gen. Stat. § 114-2.

27. Plaintiff State of Oregon, acting by and through the Attorney General of Oregon, Ellen F. Rosenblum, is a sovereign state of the United States of America. The Attorney General is the chief law officer of Oregon and is empowered to bring this action on behalf of the State of Oregon, the Governor, and the affected state agencies under Or. Rev. Stat. §§ 180.060, 180.210, and 180.220.

28. Plaintiff State of Rhode Island is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Peter F. Neronha, the State's chief legal officer. R.I.G.L. § 42-9-5; R.I. Const., art. IX § 12.

29. Plaintiff State of Vermont is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Thomas J. Donovan, Jr., the State's chief legal officer. *See* Vt. Stat. Ann. tit. 3, §§ 152, 157.

30. Plaintiff the Commonwealth of Virginia is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Mark R. Herring. As chief executive officer of the Department of Law, General Herring performs all

legal services in civil matters for the Commonwealth. Va. Const. art. V, § 15; Va. Code Ann. §§ 2.2-500, 2.2-507.

31. Plaintiff State of Washington is a sovereign state of the United States of America. Washington is represented herein by its Attorney General, Bob Ferguson, who is the State's chief legal adviser. The powers and duties of the Attorney General include acting in federal court on matters of public concern to the State.

32. Plaintiff State of Wisconsin is a sovereign state of the United States of America. This action is brought on behalf of the State of Wisconsin by Attorney General Joshua L. Kaul pursuant to his authority under Wis. Stat. § 165.015(6). Attorney General Kaul brings this action at the request of Governor Tony S. Evers pursuant to Wis. Stat. § 165.25(1m).

33. In filing this action, Plaintiff States seek to protect themselves and the students and schools in their States from harm caused by Defendants' illegal conduct and prevent further harm. Those injuries include harm to Plaintiff States' proprietary, sovereign, and quasi-sovereign interests.

DEFENDANTS

34. Defendant Elisabeth D. DeVos is Secretary of the United States Department of Education and is sued in her official capacity. Her principal address is 400 Maryland Avenue, S.W., Washington, D.C. 20202.

35. Defendant United States Department of Education is an executive agency of the United States of America. Its principal address is 400 Maryland Avenue, S.W., Washington, D.C. 20202.

36. Secretary DeVos is responsible for carrying out the duties of the Department of Education under the Constitution of the United States of America and relevant statutes, including Title IX of the Education Amendments Act of 1972.

FACTUAL ALLEGATIONS

I. STATUTORY AND REGULATORY BACKGROUND

A. Title IX of the Education Amendments of 1972

37. Congress enacted Title IX in 1972 to remedy "one of the great failings of the American educational system" that had plagued America's education institutions for generations, namely, "the continuation of corrosive and unjustified discrimination against women" that "reaches into all facets of education." 118 Cong. Rec. 5803 (1972) (remarks of Senator Birch Bayh, original sponsor of Title IX).

38. Title IX's mandate is broad and unequivocal: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 1972 Education Amendments Act, Pub. L. No. 92-318, § 901(a), 86 Stat. at 373 (codified at 20 U.S.C. § 1681(a)).

39. Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, which provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, Pub. L. No. 88352, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d).

40. Both Title IX and Title VI "sought to accomplish two related, but nevertheless somewhat different, objectives": "to avoid the use of federal resources to support discriminatory

practices" and "to provide individual citizens effective protection against those practices." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

41. Fifteen years after enacting Title IX, Congress enacted legislation clarifying that, if any part of an institution receives federal funding, the whole institution must comply with Title IX. Civil Rights Restoration Act of 1987, Pub. L. 100–259, 102 Stat. 28 (codified in relevant part at 20 U.S.C. § 1687), *superseding Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

42. To enforce Title IX, Congress "authorized and directed" every federal agency providing financial assistance to education programs or activities to "effectuate the provisions of" Title IX "by issuing rules, regulations, or orders of general applicability[.]" Pub. L. No. 92-318, § 902, 86 Stat. at 374 (codified at 20 U.S.C. § 1682). The Department is one of many federal agencies that provide financial assistance to education programs and activities.

43. As a result, any regulations issued by the Department pursuant to Title IX must "effectuate" Title IX's antidiscrimination mandate.

44. Congress further mandated that no agency can issue a rule, regulation, or order effectuating Title IX "unless and until approved by the President." Pub. L. No. 92-318, § 902, 86 Stat. at 374 (codified at 20 U.S.C. § 1682). In Executive Order 12250, the President delegated this authority to the U.S. Attorney General. Exec. Order No. 12250, § 1-1, 45 Fed. Reg. 72,995 (Nov. 2, 1980).

45. Congress empowered federal agencies to enforce their Title IX rules and regulations through "the termination of or refusal to grant or to continue assistance" or "by any other means authorized by law." Pub. L. No. 92-318, § 902, 86 Stat. at 374 (codified at 20 U.S.C. § 1682).

46. Although Congress created a robust administrative enforcement scheme in Title IX, it also provided that any school that violates the statute should first receive notice of noncompliance and be allowed to come into voluntary compliance with Title IX. Pub. L. No. 92-318, § 902, 86 Stat. at 374 (codified at 20 U.S.C. § 1682).

47. Congress provided for judicial review of any agency rule, regulation, or administrative enforcement decision issued to effectuate Title IX, which "shall not be deemed committed to unreviewable agency discretion." Pub. L. No. 92-318, § 903, 86 Stat. at 374–75 (codified at 20 U.S.C. § 1683).

48. Separate from this administrative enforcement scheme, victims of discrimination can enforce Title IX through an implied private right of action, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979), including against States, Rehabilitation Act Amendments of 1986, 100 Stat. 1845 (codified at 42 U.S.C. § 2000d–7).

49. In 1992, the Supreme Court confirmed that schools can be held liable for violating Title IX based on incidents of sexual harassment. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992). And it further held that the students who have experienced sexual harassment can seek money damages from schools in private civil suits. *Id.* at 75-76.

50. Since enacting Title IX, Congress has passed several other statutes reflecting its intent to provide strong protections for individuals subjected to sexual violence and assault.

51. In 1990, Congress passed the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the "Clery Act"), Pub. L. No. 101–542, 104 Stat. 2384 (codified at 20 U.S.C. § 1092(f)), which imposes on postsecondary schools specific reporting requirements about crimes committed on campus.

52. In 1994, Congress passed the Violence Against Women Act ("VAWA"), Pub. L. No. 103–322, 108 Stat. 1902 (codified at 34 U.S.C. §§ 12291–12512), which provides for federal funding to stop violent crimes committed against women.

53. In 2013, Congress passed the Campus Sexual Violence Elimination Act as part of the VAWA Reauthorization Act. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat.54 (codified at 20 U.S.C. § 1092(f)(8)(B)(iv) & (C)). The Campus Sexual Violence Elimination Act amended the Clery Act to better align it with Title IX and provide for a survivor-centered approach to prevention and enforcement in schools. It encouraged greater transparency at higher education institutions and required such institutions to prevent sexual violence, protect victims, and investigate and resolve on or off campus complaints of sexual violence, including domestic violence, stalking, and dating violence.

B. The Department's 1975 Title IX Regulations

54. In 1975, the U.S. Department of Health, Education and Welfare, the Department of Education's predecessor for matters relating to education, promulgated regulations to effectuate the antidiscrimination mandate of Title IX. 34 C.F.R. pt. 106.

55. The regulations required schools to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [the regulations]." 34 C.F.R. § 106.8(b).

56. The regulations also prohibited schools from using or distributing publications that "suggest[], by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex." 34 C.F.R. § 106.9(b)(2).

57. Under the regulations, if the Department found that a school violated Title IX, the school "shall take such remedial action as the Assistant Secretary [for Civil Rights] deems necessary to overcome the effects of such discrimination." 34 C.F.R. § 106.3(a).

58. Title IX provides an exemption for schools controlled by religious organizations if its application would be inconsistent with the religious tenets of the organization. Pub. L. No. 92-318, § 901(a)(3), 86 Stat. at 373 (codified at 20 U.S.C. § 1681(a)(3)). The regulations provided that any school that wished to claim the exemption was required to "submit[] in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization." 34 C.F.R. § 106.12(a)–(b).

59. A congressional hearing to review these regulations reaffirmed Congress's intent to make the protections against sex discrimination in Title IX co-extensive with Title VI's protections against discrimination based on race, color, and national origin. For example, Senator Bayh noted that Title IX "sets forth prohibition and *enforcement* provisions which generally parallel the provisions of Title VI." *Sex Discrimination Regulations: Hearings before the Subcommittee on Postsecondary Education of the Committee on Education and Labor*, H.R. 94th Cong., First Session, at 170 (June 17, 20, 23, 24, 25, & 26, 1975) (statement of Senator Bayh of Indiana (quoting from his February 28, 1972, statement, 118 Cong. Rec. 5807 (emphasis in original))).

60. The 1975 regulations were codified not only in the Department of Education's regulatory code, but also in the regulatory codes of 25 other agencies that also funded education programs.[3] *E.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities

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[3] *See* Agency for International Development, 22 C.F.R. pt. 229; Corporation for National and Community Service, 45 C.F.R. pt. 2555; Department of Agriculture, 7 C.F.R. pt. 15a; Department of Commerce, 15 C.F.R. pt. 8a; Department of Defense, 32 C.F.R. pt. 196; Department of Energy, 10 C.F.R. pt. 1042; Department of Health and Human Services, 45 C.F.R. pt. 86; Department of Homeland Security, 6 C.F.R. pt. 17; Department of Housing and Urban Development, 24 C.F.R. pt. 3; Department of Interior, 43 C.F.R. pt. 41; Department of

Receiving Federal Financial Assistance; Final Common Rule, 65 Fed. Reg. 52,858 (Aug. 30, 2000) (promulgating common rule to "promote consistent and adequate enforcement of Title IX" by the adopting agencies).

C. The Department's Policy on Unlawful Sexual Harassment

61. Since the 1980s, the Department has recognized that sexual harassment is a form of sex discrimination prohibited by Title IX.

62. Under the Reagan Administration, the Department's Office for Civil Rights ("OCR") recognized sexual harassment as a serious problem that was prohibited by Title IX and issued enforcement and policy guidance to all OCR regional directors accordingly. U.S. Dep't of Educ., Office for Civil Rights, Policy Mem., Antonio J. Califa, Director for Litigation Enforcement and Policy Services (Aug. 31, 1981) ("Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex . . . that denies, limits, provides different, or conditions the provision of aids, benefits, services, or treatment protected under Title IX."); *see also* Dep't of Educ., *Sexual Harassment: It's Not Academic Pamphlet* (1988)[4] (requiring education institutions, where sexual harassment is found, to "take immediate action to stop and prevent further harassment, as well as initiate appropriate remedial measures").

63. The Department's position has been consistent with interpretations of other anti-discrimination statutes.

Justice, 28 C.F.R. pt. 54; Department of Labor, 29 C.F.R. 36; Department of State, 22 C.F.R. pt. 146; Department of Transportation, 49 C.F.R. pt. 25; Department of Treasury, 31 C.F.R. pt. 28; Department of Veterans Affairs, 38 C.F.R. pt. 23; Environmental Protection Agency, 40 C.F.R. pt. 5; Federal Emergency Management Agency, 44 C.F.R. pt. 19; General Services Administration, 41 C.F.R. pt. 101-4; National Aeronautics and Space Administration, 14 C.F.R. pt. 1253; National Archives and Records Administration, 36 C.F.R. pt. 1211; National Science Foundation, 45 C.F.R. pt. 618; Nuclear Regulatory Commission, 10 C.F.R. 5; Small Business Administration, 13 C.F.R. pt. 113; Tennessee Valley Authority, 18 C.F.R. pt. 1317.

[4] https://files.eric.ed.gov/fulltext/ED330265.pdf.

64. Under Title VII of the Civil Rights Act of 1964, sexual harassment is actionable if, among other things, it creates a hostile environment because it is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986). Employees have a right to file a Title VII complaint after leaving employment for any reason.

65. The Department has likewise incorporated the disjunctive "severe, pervasive, or persistent" definition of hostile environment harassment into its enforcement of Title VI's prohibition of discrimination on the basis of race, color, and national origin. Department policy stated that "harassment need not result in tangible injury or detriment to the victims of the harassment" to create a hostile environment. *Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11,448, 11,450 (Mar. 10, 1994). The Department further recognized that Title VI and Title IX set similar legal standards. *Id.* at 11,451 n.2. Title VI does not limit who is able to file a complaint of harassment based on race, color, or national origin.

66. Beginning in 1997 and continuing until the promulgation of the Rule, OCR issued policy documents that established foundational requirements for how schools must respond to sexual harassment. The Department enforced these policies for more than two decades. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (Mar. 13, 1997) (the "1997 Policy"); *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed. Reg. 5512 (Jan. 19, 2001) (the "2001 Policy"); Stephanie Monroe, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Jan. 25, 2006) (the

"2006 Letter")[5]; Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Apr. 4, 2011, withdrawn Sept. 22, 2017) (the "2011 Letter")[6]; U.S. Dep't of Educ., *Questions and Answers on Title IX and Sexual Violence* (Apr. 24, 2014, withdrawn Sept. 22, 2017) (the "2014 Q&A")[7]; U.S. Dep't of Educ., *Q&A on Campus Sexual Misconduct* (Sept. 2017) (the "2017 Q&A").[8]

67. Both the 1997 Policy and the 2001 Policy went through a notice and comment process prior to final publication in the Federal Register. *Sexual Harassment Guidance: Peer Sexual Harassment*, 61 Fed. Reg. 42,728 (Aug. 16, 1996); *Sexual Harassment Guidance: Harassment of Students by School Employees*, 61 Fed. Reg. 52,172 (Oct. 4, 1996); *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 65 Fed. Reg. 66,092 (Nov. 2, 2000).

68. These policy documents set forth schools' obligation to provide students with an education experience free from sexual harassment. That obligation entails preventing sexual harassment, ending it when it occurs, preventing its recurrence, and remedying its effects.

69. In these policy documents, the Department consistently set forth and reaffirmed certain fundamental principles relating to administrative enforcement of Title IX with respect to sexual harassment: (1) schools are obligated to take affirmative steps to prevent sexual harassment, end harassment when it does occur, prevent its recurrence, and remedy its effects; (2) unlawful sexual harassment is defined as unwelcome conduct of a sexual nature that denies or limits a student's ability to participate in or benefit from the school's program based on sex;

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[5] https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html.

[6] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[7] https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[8] https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

(3) unlawful sexual harassment can be caused by both quid pro quo harassment and a hostile environment; (4) a hostile environment is created by conduct that is severe, persistent, *or* pervasive—in other words, sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program; (5) schools are required to address harassing conduct occurring outside an education program or activity if the conduct creates a hostile environment in an education program or activity; (6) schools must adopt prompt and equitable grievance procedures that allow for, among other things, adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; and (7) schools may incorporate Title IX sexual harassment policies and procedures into their broader codes of conduct and grievance procedures.

70. In these prior policy documents, the Department did not require schools to dismiss complaints that fell outside the scope of Title IX as defined by regulation; it did not limit who could file a complaint alleging unlawful sexual harassment; it did not dictate prescriptive grievance procedures; and it did not mandate the creation of policies and procedures for sexual harassment separate and apart from the schools' other civil rights policies, student codes of conduct, or faculty and employee handbooks.

71. The Department's policy on administrative enforcement of Title IX remained consistent after the Supreme Court set heightened standards for liability in cases brought under Title IX's implied private right of action for money damages. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998); *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 632 (1999) (requiring school's actual knowledge of, and deliberate indifference to, harassing conduct for purposes of private claim for money damages).

72. In two letters issued following *Gebser*, the Department advised that even after this decision, schools' obligations under the Department's administrative enforcement of Title IX remained unchanged. Richard W. Riley, U.S. Sec'y of Educ., U.S. Dep't of Educ., Dear Colleague Letter regarding *Gebser v. Lago Vista* (Aug. 31, 1998)[9]; Richard W. Riley, U.S. Sec'y of Educ., U.S. Dep't of Educ., Dear Colleague Letter regarding *Gebser v. Lago Vista* (Jan. 28, 1999).[10] The Department observed that the Supreme Court's decision did not alter the fundamental obligations of schools to take prompt action to address sexual harassment because the Court had "expressly distinguished the limits on private recovery of money damages from the Department of Education's enforcement of Title IX."

73. Subsequent Department policy documents continued to reaffirm the principles embodied in the 1997 Policy and to distinguish the Department's administrative enforcement of Title IX from private claims for money damages against schools. *E.g.*, 2001 Policy ("reaffirm[ing] OCR's standards for administrative enforcement of Title IX" and "re-ground[ing] these standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages"); 2006 Letter (stating that the 2001 Policy "outlines standards applicable to OCR's enforcement of compliance in cases raising sexual harassment issues" and distinguishing these standards from those "applicable to private Title IX lawsuits for monetary damages"); 2011 Letter (reaffirming the 2001 Policy while also supplementing it); 2014 Q&A (reaffirming the 2001 Policy while seeking to "further clarify the legal requirements and guidance articulated in the [2011 Letter] and the 2001 Guidance and include examples of

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[9] https://www2.ed.gov/offices/OCR/archives/pdf/AppC.pdf.

[10] https://www2.ed.gov/News/Letters/990128.html.

proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects").

74. In September 2017, the Department issued a letter withdrawing the 2011 Letter and the 2014 Q&A. Candice Jackson, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Sept. 22, 2017).[11] But the Department also issued a new interim Q&A that continued to explicitly reaffirm its 2001 Policy and many of the principles described above that had shaped Title IX enforcement for decades. 2017 Q&A.

II. THE DEPARTMENT'S NEW TITLE IX REGULATIONS

75. In 2018, Defendants published in the Federal Register a notice of proposed rulemaking to address sexual misconduct under Title IX. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462 (Nov. 29, 2018).

76. In a speech after the notice of proposed rulemaking was issued, Secretary DeVos suggested that students are over-reporting sexual harassment and making frivolous claims: "Too many cases involve students and faculty who have faced investigation and punishment simply for speaking their minds or teaching their classes. Any perceived offense can become a full-blown Title IX investigation. But if everything is harassment, then nothing is." Prepared Remarks by Secretary DeVos at the Independent Women's Forum Annual Awards Gala, U.S. Dep't of Educ. (Nov. 13, 2019).[12]

[11] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

[12] https://www.ed.gov/news/speeches/prepared-remarks-secretary-devos-independent-womens-forum-annual-awards-gala.

77. Secretary DeVos's remarks are contrary to the federal government's own data, which indicates that, despite Title IX's success in reducing many forms of sex discrimination, sexual harassment remains widespread at all levels of education.

78. Data reported by the U.S. Department of Education, the U.S. Department of Justice's Bureau of Justice Statistics, and the Centers for Disease Control and Prevention all demonstrate extraordinarily high rates of sexual harassment against students. For example, the Bureau of Justice Statistics found that 20 percent of college women had been sexually assaulted since entering college and one in three female rape victims had been assaulted for the first time between the ages of 11 and 17.

79. Many other studies confirm these results. For example, a 2019 study found that one in four undergraduate women (25.9 percent), one in fifteen undergraduate men (6.8 percent), and one in four (22.8 percent) transgender or gender-nonconforming undergraduates have been sexually assaulted during college.

80. In late February, the Department of Education lamented the troubling rise of sexual assault in K-12 public schools. In grades 7–12, 56 percent of girls and 40 percent of boys are sexually harassed every year, with nearly a third of the harassment occurring online. More than 20 percent of girls ages 14 to 18 have been touched or kissed without their consent.

81. The vast majority of incidents of sexual harassment go unreported. One national study found that only 12 percent of college students who have experienced sexual assault reported the incident to their school or the police. That same study found that only two percent of female students aged 14–18 who were sexually assaulted reported the incident.

82. On March 27, 2020, many Plaintiff States sent a letter to Defendants asking for the Rule to be delayed during the public health emergency caused by the COVID-19 pandemic. Plaintiff States received no response.

83. Almost eighteen months after issuing the notice of proposed rulemaking, the Department published the final Rule in the Federal Register. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020). All schools must be in full compliance with the Rule by August 14, 2020.

84. The Rule establishes binding obligations that prescriptively dictate how schools must respond to allegations of sexual harassment, in many instances *limiting* the ability of schools to respond to conduct that Title IX seeks to prevent.

85. In promulgating the Rule, which sharply curtails investigation and enforcement, the Department has also upended decades of its own established policy. Much of this established policy went through two notice and comment processes in the late 1990s and early 2000s and has become well-established practice at schools in Plaintiff States.

86. In spite of conclusive evidence in the administrative record that sexual harassment incidents are on the rise and underreporting is a significant concern, Defendants improperly narrow Title IX by excluding all but the most egregious sexual harassment from its protections.

87. Defendants improperly eliminate protections for students who are denied equal access to education due to harassing conduct outside of a school's education program or activity, at, for example, an unauthorized fraternity party or in off-campus housing.

88. Defendants also improperly eliminate protections for students if sexual harassment occurs during a U.S. school-sponsored study abroad program, at a U.S. school's foreign campus, or during a U.S. school-sponsored foreign field trip.

89. Defendants improperly limit the circumstances under which a complainant or a school can file a formal complaint of sexual harassment.

90. Defendants unlawfully require schools to dismiss any complaint that falls outside of the Department's narrow interpretation of Title IX. As a result, schools will be compelled—as a matter of state law, to ensure the nondiscriminatory educational experience promised by Title IX, or both—to establish separate grievance procedures in order to pursue these complaints under their own codes of conduct. At the same time, Defendants make clear that they will withdraw federal funding from schools that inadvertently miscategorize complaints and adjudicate them using the "wrong" grievance procedure. *E.g.*, 85 Fed. Reg. at 30,221 & 30,283 n.1129.

91. The Rule turns Title IX on its head by placing schools at greater risk of losing federal funding if they fail to strictly implement each of the Rule's specified procedural requirements (by, for example, considering the statement of a complainant or witness who is unable or unwilling to testify at the live hearing) than if the response to sexual harassment itself is anything short of "clearly unreasonable."

92. Schools that fail to comply with all of the Rule's many complicated, novel, counterproductive, and burdensome requirements by August 14, 2020, face significant consequences as they could come under investigation by the Department, face enforcement actions, and lose billions of dollars of much-needed federal funding.

A. New Sexual Harassment Regulations

1. Limitations on the Scope of Unlawful Sexual Harassment

93. The Rule improperly narrows the definition of sexual harassment under Title IX to "conduct on the basis of sex that satisfies one or more of the following: (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or (3) 'Sexual assault' as defined in 20 U.S.C. 1092(f)(6)(A)(v),[13] 'dating violence' as defined in 34 U.S.C. 12291(a)(10), 'domestic violence' as defined in 34 U.S.C. 12291(a)(8), or 'stalking' as defined in 34 U.S.C. 12291(a)(30)." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.30(a) (*sexual harassment*)).

94. The first prong excludes "quid pro quo" harassment by students who may be in positions of authority with respect to other students regarding educational aid, benefits, or services but may not be considered "employees" under applicable state law. A teaching assistant, for example, may not be considered an employee by a school but may nevertheless exercise significant or sole control over another student's grades. In fact, a separate notice of proposed rulemaking issued by the National Labor Relations Board proposes to exclude student employees

[13] "Sexual assault" means "an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation." 20 U.S.C. 1092(f)(6)(A)(v). These offenses are limited to: forcible rape, forcible sodomy, sexual assault with an object, forcible fondling, incest, and statutory rape. FBI, *Uniform Crime Reporting Program: National Incident-Based Reporting System Offense Definitions* (2012), https://ucr.fbi.gov/nibrs/2012/resources/nibrs-offense-definitions.

from the definition of "employee" under the National Labor Relations Act. 84 Fed. Reg. 49,691 (Sept. 23, 2019). The Rule never acknowledges this proposal.

95. The second prong improperly elevates the definition of hostile environment sexual harassment in the context of Title IX's administrative enforcement scheme to the heightened standard used only for private civil actions that seek monetary damages. In requiring harassment to be "so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient's education program or activity" to qualify as hostile environment sexual harassment, Defendants impermissibly weaken the administrative enforcement scheme contemplated by Congress in enacting Title IX.

96. The Department's definition requires students to endure repeated and escalating levels of harassment to the point of risking school avoidance; detrimental mental health effects, such as increased risk of self-harm and depression; declines in attendance; withdrawal; and even dropout before the Rule permits schools to stop the discrimination under Title IX.

97. The Department's definition fails to address the unique circumstances for young children and children with disabilities who are unable to verbalize social-emotional and other safety concerns. The impact of such trauma on a student's ability to learn, and thus on access to education, may not be evident until much later, especially for students who may be nonverbal or have other difficulties expressing its impact. Such trauma impacts have far reaching consequences for a student's ability to stay in school, progress, and learn.

98. The Department's new definition of hostile environment sexual harassment conflicts with Title VII of the Civil Rights Act of 1964, which protects school employees, including student employees, from sexual harassment that is "sufficiently severe *or* pervasive to alter the conditions of the victim's employment[.]" *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67

(1986) (emphasis added). The anomalous result is that school employees are afforded more protection from sexual harassment under Title VII than students at those very same schools are afforded under the Department's interpretation of Title IX.

99. The Department also inexplicably deviates from the hostile environment harassment standard under Title VI of the Civil Rights Act of 1964, which protects individuals from harassment on the basis of race, color, or national origin if it is "severe, pervasive, or persistent"—even though the Department has consistently recognized the standard for harassment on the basis of sex and the standard for harassment on the basis of race, color, or national origin are coextensive. *Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11,448, 11,450 (Mar. 10, 1994).

100. These inconsistent standards are contrary to the purpose of Title IX, which is to eliminate sex discrimination in education, including sexual harassment. The Department fails to provide adequate justification for treating harassment on the basis of sex differently from harassment on the basis of race, color, national origin, and disability, such that schools must bear significantly higher administrative and financial burdens to remedy the unlawful conduct on the basis of sex.

101. Similarly, the Rule sets sexual harassment apart from all other conduct prohibited by Title IX, without adequate justification, thus providing less protection to survivors of sexual harassment than other victims under Title IX.

102. The Rule further narrows Title IX's sexual harassment prohibitions to protect students only if the harassing conduct occurs in a school's "education program or activity." The Rule defines "education program or activity" to "include[] locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in

which the sexual harassment occurs, and also include[] any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.44(a)).

103. This improperly excludes from Title IX's protection harassment that takes place *outside* an education program or activity but nonetheless causes a student to "be excluded from participation in" and "be denied the benefits of" an equal education *in* that education program or activity. For example, it would exclude sexual harassment in off-campus housing—where it often occurs.

104. This also effectively prevents schools from fulfilling their Clery Act/VAWA obligations to investigate all allegations of sexual assault, stalking, domestic violence, and dating violence both on and off campus.

105. The Rule further unlawfully limits Title IX so that it protects students from sex discrimination only when the discriminatory conduct occurs "against a person in the United States." 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.8(d)).

106. This limitation misinterprets Title IX. Sex discrimination may flow from discriminatory decisions by a federally funded school relating to sexual harassment that took place outside the United States. Additionally Title IX applies to "all of the operations" of that school's education programs and activities, including those that operate abroad. Defendants' invocation of the presumption against extraterritoriality does not apply.

107. Finally, the Rule requires schools, after receiving a formal complaint of sexual harassment, to "follow[] a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in

§ 106.30,[14] against a respondent." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.44(a)). A school that does not strictly implement the Department's specific procedures will violate the Rule and risk coming under investigation and ultimately losing federal funding.

108. At the same time, the Rule requires that schools, after receiving notice of sexual harassment, respond to that harassment only in a manner that is not deliberately indifferent, i.e., "clearly unreasonable in light of the known circumstances," 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.44(a)).

109. These inconsistent standards mean schools are at risk of losing federal funding if they fail to strictly implement the Department's uniform procedures for handling formal complaints, but face no risk to their funding if they respond to sexual harassment in a manner that is just short of clearly unreasonable.

2. Limitations on Filing and Responding to Complaints

110. The Rule mandates that "[a]t the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.30(a) (*formal complaint*)).

111. This limitation applies regardless of whether the formal complaint is signed by the victim of the harassment or by the Title IX Coordinator.

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[14] The Rule defines "supportive measures" as individualized "non-disciplinary, non-punitive services" offered to a complainant or a respondent to "restore or preserve equal access" to the education program or activity without "unreasonably burdening the other party." They can be offered before, after or without the filing of a formal complaint. Examples include counseling, increased security and monitoring, changes of housing or changes in class schedules. 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. 106.30(a) (*supportive measures*)).

112. Because all conduct meeting the Rule's elevated definition of sexual harassment must go through the Rule's grievance process, the Rule prevents schools from sanctioning or removing a student or employee who has sexually harassed victims not participating or attempting to participate in the school's education program or activity at the time the formal complaint is made.

113. This limitation improperly denies Title IX protection to former students who have left the school or transferred, even if *because of sexual harassment*, as well as to campus visitors or students from other schools who are harassed by school students or employees while participating in the school's education programs or activities on an intermittent basis. This limitation also fails to recognize that perpetrators of sexual harassment may go on to harass others if their conduct goes unaddressed, regardless of whether the perpetrator's original conduct was directed at a complainant participating in or attempting to participate in a school's education program or activity at the time that the formal complaint is made.

114. The Rule also mandates that schools *must* dismiss any complaint that "would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(3)(i)).

115. Although schools "must dismiss" these complaints, the Rule "does not preclude action under another provision of the recipient's code of conduct." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(3)(i)).

116. Defendants lack authority to require schools to dismiss complaints that do not meet Defendants' narrow interpretation of Title IX.

117. Requiring schools to develop separate "Title IX sexual harassment" and "non-Title IX sexual harassment" policies and grievance procedures will cause confusion among students, faculty, and staff; will pose complex administrative and financial burdens; will undermine timely Clery Act/VAWA compliance; and will discourage students, faculty, and staff from reporting sexual harassment. All of these consequences undermine the purpose of Title IX.

118. The Rule further eliminates the requirement in the existing 1975 regulation that remedies shall be designed to "overcome the effects" of discrimination and limits schools from issuing remedies that go beyond "restor[ing] or preserv[ing] access" for the individual complainant. 85 Fed. Reg. at 30,391 & 30,577 (to be codified at 34 C.F.R. §§ 106.3(a) & 106.45(7)(ii)(E)).

119. These limitations on schools' ability to fully redress a sexually hostile environment on campus are inconsistent with Title IX's nondiscrimination mandate and long-standing Department policy requiring schools to take steps "to eliminate any hostile environment that has been created," which may include interventions for an entire class "to repair the educational environment" or for an "entire school or campus." 2001 Policy at 16.

3. Prescriptive Grievance Process

120. The Rule mandates adopting certain arbitrary and unlawful procedural requirements that will chill reporting of sexual harassment and make it harder for schools to provide a fair process to all of their students.

121. The Rule requires that postsecondary schools "must provide for a live hearing," during which "the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)). This cross-

examination "must be conducted directly, orally, and in real time by the party's advisor of choice." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)).

122. As articulated in the preamble but not the Rule itself, the live-hearing requirement applies even if the complainant or respondent is a preschooler cared for at a university daycare center or a minor attending a university's college summer program, summer sports camp, or university-sponsored event for high school students.

123. The live-hearing requirement also applies to faculty and employees of postsecondary institutions accused of sexual harassment. This mandate conflicts with some State employment laws and investigation procedures for expeditiously investigating discrimination claims.

124. Direct, oral cross-examination risks traumatizing both complainants and respondents. Because the Rule prevents schools from placing reasonable limits on who may serve as a party's selected advisor, parties and witnesses may be cross-examined by anyone, even a parent or one's own teacher, which risks chilling reporting and deterring survivors from filing complaints.

125. The mandate for direct, oral cross-examination will impose litigation-like requirements on an investigation and decision-making process intended for an educational setting, without regard to schools' and students' unique needs or to existing state or local requirements. Schools may feel compelled to hire lawyers or arbitrators to serve as decision-makers to ensure that hearings remain fair and to enforce any school-created rules of decorum. These unaccounted-for costs will impose additional burdens on schools, chill reporting and complaint filing, and undermine schools' ability to fulfill their Title IX obligations.

126. Defendants arbitrarily reject less burdensome and less traumatizing methods of cross-examination, such as submitted questions via a neutral third party, which would still allow both parties to ask each other questions and fulfill the truth-seeking function while mitigating the likelihood of traumatization.

127. The Rule further mandates that if either party "does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)).

128. The Rule creates unaddressed inequities, such as when one party's advisor may be an attorney and the other party's advisor may be a volunteer untrained in effective cross-examination. These inequities are inconsistent with the nondiscrimination mandate of Title IX and contrary to the 1975 regulatory requirement that school processes be "prompt and equitable." To avoid inequitable hearings and to reduce the risk of litigation, schools may feel compelled to hire attorneys or specially trained advocates to serve as advisors. These unaccounted-for costs will impose additional burdens on schools and undermine schools' ability to fulfill their Title IX obligations.

129. The Rule further provides that during these hearings, "[b]efore a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)); *see also* 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)) (listing types of irrelevant questions).

130. In the preamble, the Rule arbitrarily and impermissibly forbids schools from adopting additional rules of evidence to ensure an equitable hearing. 85 Fed. Reg. 30,336–37. But the regulations themselves allow schools to adopt "provisions, rules, or practices other than those required by" 34 C.F.R. § 106.45 as long as they "apply equally to both parties." 85 Fed. Reg. at 30,575 (to be codified at 34 C.F.R. § 106.45(b)).

131. Classrooms are not courtrooms, and school decision-makers are typically not attorneys or judges. Instead, school decision-makers are normally administrators and faculty members. Requiring them to rule on the relevancy of every question and "explain any decision to exclude a question as not relevant"—an obligation not required of Article III judges, Fed. R. Evid. 103(c)—will impose significant burdens on schools as they will either need to try to train non-lawyer decision-makers in the rules of evidence or hire lawyers or arbitrators to fill the role.

132. The Rule further mandates that if a complainant, respondent, or witness "does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)). The Rule's preamble states that if a party does not appear at the hearing or refuses to submit to cross-examination, all of the party's statements are excluded, including the allegations that form the basis for the formal complaint itself and statements made in police and hospital reports. 85 Fed. Reg. at 30,347.

133. Because most schools lack subpoena power and are not permitted to compel parties or witnesses to attend hearings, this provision will undermine the ability of schools to

fully address known sexual harassment in their education programs and activities whenever witnesses or parties refuse, or are unable, to submit to direct, oral cross-examination.

134. The Rule does not impose the live hearing requirement on "other recipients that are not postsecondary institutions," even though these recipients may be museums, libraries, or cultural centers. 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(ii)). The Department fails to explain why only postsecondary institutions are required to hold live hearings with direct, oral cross-examination by a third-party advisor.

135. The Rule further states that schools must not "restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(5)(iii)).

136. This provision fails to take into account the particularly challenging situation presented in primary and secondary schools, where young students are in a close environment. These schools now will be unable to restrict young minor complainants and respondents from sharing sensitive information with other minors. This provision increases the risk of retaliation, harassment, and the disclosure of sensitive, confidential, and other legally protected information to third parties.

137. The Rule further requires schools to "[p]rovide both parties [and their third-party advisors] an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(5)(vi)). Schools must provide the evidence "in an electronic format or a hard copy."

138. The Rule's preamble suggests that schools "may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process)." 85 Fed. Reg. at 30,304. However, this clarification is set forth only in the preamble and not found in the text of the Rule.

139. As a result, schools—including and primary and secondary schools—will be required to provide *all* evidence collected during the investigation to both parties and their third-party advisors, without regard to relevancy, confidentiality, the need to protect witnesses (who may be young minors), or the implications of sharing sensitive information with and about young children. The suggestion of a non-disclosure agreement fails to account for the unique circumstances of primary and secondary education: While only a minor party's parent or guardian can sign the nondisclosure agreement, the school must still disclose the evidence to the minor complainant or respondent.

140. The Rule further prohibits schools from imposing "disciplinary sanctions or other actions that are not supportive measures"—i.e., actions that "unreasonably burden[]" one party, 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.30(a) (*supportive measures*))—unless the school follows "a grievance process that complies with § 106.45." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.44(a)).

141. This requirement ignores the unique circumstances of K-12 schools, which will be unable to address the safety of their students and campuses through well-established and constitutionally sound forms of discipline—such as detention or a one- or two-day suspension—without going through a process that requires a minimum of 20 days and a formal appeal process. 85 Fed. Reg. at 30,576–78 (to be codified at 34 C.F.R. §§ 106.45(b)(5)(vi) (requiring

schools to give parties at least 10 days to submit a written response to all evidence directly related to the allegations), (b)(5)(vii) (requiring schools to provide an investigative report fairly summarizing the relevant evidence at least 10 days prior to a hearing or other time of determination), (b)(8) (establishing appeal process)).

142. This prescriptive grievance process establishes procedural requirements for addressing allegations of sexual harassment that differ from the procedural requirements for addressing other types of discrimination. Not only will this create disparities in the treatment of members of different protected classes, contrary to Title IX's purpose, but it could also significantly complicate proceedings in which a single individual is accused of perpetrating multiple different types of discrimination.

143. Title IX does not give Defendants authority to establish rules for primary and secondary education institutions that upend and override local school discipline policies and practices which meet Supreme Court standards and which allow for the flexibility needed by school officials to maintain safety. Title IX authorizes the Department to issue regulations that prevent and remedy sex discrimination, but does not authorize regulations that dictate the particular process that must be used by schools when such process is unrelated to preventing and remedying sex discrimination and when other K-12 processes already ensure fundamental fairness.

144. Finally, the preamble to the Rule admonishes that the "choice to initiate the grievance process must remain within the control of the complainant unless the Title IX Coordinator has specific reasons justifying the filing of a formal complaint over the wishes of a complainant." 85 Fed. Reg. at 30,304. The preamble's requirement that the Title IX Coordinator

in a K-12 school set forth "specific reasons" before acting to protect a child is inconsistent with the *in loco parentis* status of school officials.

4. Family Educational Rights and Privacy Act

145. The Rule conflicts with the Family Educational Rights and Privacy Act of 1974 ("FERPA") and the Department's own FERPA regulations. Pub. L. No. 93-380, § 513, 88 Stat. 484, 571–74 (codified as amended at 20 U.S.C. § 1232g).

146. Defendants are charged with enforcing both FERPA and Title IX.

147. The Rule imposes new obligations on schools that conflict with FERPA, despite the Department's statement in the preamble that a recipient "may comply with both these regulations and FERPA." 85 Fed. Reg. at 30,422.

148. For example, the Rule requires that a school must provide both parties and their third-party advisors "an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint," including evidence the recipient does not intend to rely upon in reaching a determination regarding responsibility. 85 Fed. Reg. at 50,576 (to be codified at 34 C.F.R. §§ 106.45(b)(2)(i)(B) & (5)(vi)). However, FERPA prohibits the "release" of student "education records," which would include any such evidence containing information directly related to a student that is maintained by a school, without the written consent of the student (or parent, where applicable). 20 U.S.C. § 1232g(a)(4)(A), (b).

149. In addition, the Rule permits consolidating "formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(4)). However, FERPA limits any right to review and inspect education

records that include information on more than one student to "only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material." 20 U.S.C. § 1232g(a)(1)(A); *see Family Educational Rights and Privacy*, 73 Fed. Reg. 74,806, 74,832–33 (Dec. 9, 2008).

150. The Rule prohibits schools from taking reasonable steps—already widely used consistent with FERPA—that both provide a fair process and comply with Congress's directive to protect student privacy.

151. The Rule states that the "obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99." 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.6(e)).

152. Defendants lack authority to implement these non-conflicting statutes in a way that creates a conflict and to resolve that conflict by superseding FERPA via regulation.

B. Changes to Other Title IX Regulations

153. Defendants make unlawful changes to the Department's other Title IX regulations, specifically, to the prohibition on discriminatory publications and the procedure required to claim a religious exemption.

154. Before the Rule, schools were prohibited from "us[ing] or distribut[ing] a publication of the type described in this paragraph which *suggests, by text or illustration*, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part." 34 C.F.R. § 106.9(b)(2) (emphasis added).

155. The Rule amends this provision to prohibit a school only from "us[ing] or distribut[ing] a publication *stating* that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part." 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.8(b)(2)(ii) (emphasis added)).

156. Defendants fail to provide a reasoned explanation for eliminating this prohibition on publications that suggest discrimination—a prohibition that is intended to combat sex stereotyping—or any evidence that the standard used for over 40 years has somehow failed to accomplish the purpose of Title IX's antidiscrimination mandate. The arbitrary nature of this change is exemplified by adding a requirement in the Rule that "materials used to train Title IX Coordinators, investigators, decision-makers" and others "must not rely on sex stereotypes." 85 Fed. Reg. at 30,575 (to be codified at §106.45(b)(1)(iii)).

157. The Rule also upends the prior long-standing application of Title IX's religious exemption. The Rule no longer requires an institution controlled by a religious organization claiming an exemption from all or part of Title IX to provide written notice to the Department with a declaration identifying which part of Title IX or the regulations conflicts with a tenet of the religion. Instead, schools now may declare an exemption for the first time after receiving a Title IX complaint. 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.12(b)).

158. Defendants fail to provide a reasoned explanation for this change, which will now leave prospective students, parents, and others in the dark about whether non-exempt schools will comply with Title IX's anti-discrimination requirements. Defendants also failed to identify support for the purported burden on education institutions that request the exemption and any cost-savings resulting from the change.

C. Effective Date

159. The Rule's August 14, 2020, effective date fails to provide schools with adequate time to review and implement the new legal requirements in a way that fulfills Title IX's antidiscrimination mandate.

160. For example, by August 14, 2020, every school in Plaintiff States must:

a. Carefully review 547 Federal Register pages of preamble (and 1,971 footnotes), which improperly specify additional mandates and restrictions on schools and provide critical information found nowhere in the eight pages of regulations themselves as to how schools must implement the Rule, *e.g.*, 85 Fed. Reg. at 30,296 n.1162 (a Title IX coordinator can sign a formal complaint against the wishes of a complainant only if doing so "is not clearly unreasonable in light of the known circumstances," contrary to the plain language of the regulation); 85 Fed. Reg. at 30,287 n.1142 (suggesting that school can be found in noncompliance for using a respondent's informal statements, in response to a report of sexual assault, in a subsequently-filed formal complaint process, because the school did not give the respondent advance notice of the (informal) interview); 85 Fed. Reg. at 30,428 (stating that if recipient obtains evidence about a party's sexual predispositions directly related to allegations, the recipient should allow both parties and their advisors an opportunity to review, contrary to the plain language of the regulation); 85 Fed. Reg. at 30,273 (even though supportive measures for the respondent are not required, failure to provide a respondent with supportive measures could result in a deliberate indifference violation finding by the Department);

b. Determine if any state or local laws conflict with the regulations and are therefore preempted, 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.6(h));

c. Revise all relevant policies, codes, handbooks, and grievance procedures for "Title IX sexual harassment," which may require multiple stages of review and approval under state or local law or school policy, 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.8(c));

d. Determine how to address "non-Title IX sexual harassment," which the school must dismiss under Title IX but can (and in some cases, must) address separately under codes of conduct or state law, 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(3)(i));

e. For postsecondary schools, determine which faculty and staff members must, may, or must only with a complainant's consent, report sexual harassment, 85 Fed. Reg. at 30,041;

f. Disseminate information about the new policies and procedures to the entire school community;

g. Revise all training materials and recordkeeping procedures, and post all revised training materials on schools' websites, 85 Fed. Reg. 30,575 (to be codified at 34 C.F.R. § 106.45(b)(1)(iii)), 85 Fed. Reg. 30,578 (to be codified at 34 C.F.R. § 106.45(b)(10));

h. Retrain all students, faculty, and staff on the new policies and procedures, including training the Title IX Coordinator, investigators, and decision-makers on the new grievance procedures; training decision-makers on how to make evidentiary decisions during a hearing and how to control cross-examination; and for primary and secondary schools, training all employees on the new

scope of sexual harassment under Title IX and how to report it; 85 Fed. Reg. at 30,574–75 (to be codified at 34 C.F.R. §§ 106.30, 106.45(b)(1)(iii));

i. If the school previously had not provided for live hearings by a board or hearing officer (separate from the investigator) and had not provided appeal rights, it must hire and train separate investigators, decision makers, and/or appeal officers, 85 Fed. Reg. at 30,577–78 (to be codified at 34 C.F.R. §§ 106.45(b)(7), (b)(8));

j. If the postsecondary school had not previously held live hearings, it must establish procedures and hire or appoint and train staff to serve as decision-makers, 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i));

k. For postsecondary schools, appoint or hire a pool of advisors who are willing to conduct cross-examinations for parties who do not have an advisor, 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)); and

l. Renegotiate bargaining agreements and revise procedures for employees, including those who were at-will employees, prior to the preemptive effect provision added in the Rule, 85 Fed. Reg. at 30,439.

161. Our schools must make many additional decisions—explicitly contemplated by Defendants in the preamble—about how to implement the Rule in a way that best provides for a safe and equitable education experience for all students. For example, Defendants note that postsecondary schools may consider adopting rules of decorum for live hearings to “forbid badgering a witness” or to “prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner.” 85 Fed. Reg. at 30,248, 30,319. Defendants also state that schools may develop non-disclosure or confidentiality agreements

(and concomitant enforcement mechanisms) to protect confidentiality when "a complainant reports sexual harassment but no formal complaint is filed," 85 Fed. Reg. at 30,296, or when providing the parties and advisors with all evidence directly related to the allegations, 85 Fed. Reg. at 30,304.

162. And our schools must make all of these important, difficult, and resource-intensive decisions in a thoughtful and deliberate way during the ongoing COVID-19 pandemic that has resulted in the closure, recommended closure, or remote operation of virtually all primary, secondary, and postsecondary schools in Plaintiff States.

163. Defendants' complicated changes to the Title IX regulations impose extraordinary and untenable administrative burdens and financial costs on education systems already facing unprecedented challenges due to a global health crisis of unknown duration. The crisis has required schools to provide new types of essential educational and support services while maintaining the health and safety of their staff and students.

164. At this time, school administrators are already busy completing the spring semester, implementing modified summer programs, and preparing for the upcoming academic year—which will almost certainly commence in the midst of the ongoing pandemic. In addition, many of the administrative bodies necessary to review and approve changes to a student code of conduct, faculty handbook, or sexual misconduct policy—such as a faculty senate, faculty council, or local school board—do not meet during the summer.

165. Defendants' unreasonable timeframe for compliance will also impose additional costs on schools at a time when many of them are facing severe budgetary constraints as a result of the COVID-19 public health crisis. By requiring schools to implement the Rule in less than three months, schools within Plaintiff States will likely have to re-direct staff and resources

dedicated to carrying out education-related operations during the pandemic to instead address the Rule's significant administrative requirements. Indeed, some already have.

166. Defendants' timeframe is impossible for our schools to comply with in a way that does not create confusion; impose greater burdens and costs on students, faculty, and staff; and ultimately undermine Title IX's mandate.

D. Regulatory Impact Analyses

167. Both the notice of proposed rulemaking and the Rule include a regulatory impact analysis ("RIA") prepared pursuant to Executive Orders 12866 and 13563.

168. Both RIAs are fatally flawed.

1. RIA in the Notice of Proposed Rulemaking

169. In the proposed rule, the Department estimated a net cost *savings* of between $286.4 million to $367.7 million over ten years based solely on an anticipated decrease in Title IX investigations and complaint filings caused by the proposed regulations.

170. But the Department failed to disclose the methodology upon which it relied in reaching is conclusions and provided only generalized estimates not grounded in evidence. The Department also failed to provide all of the underlying sources, studies, and reports on which it purportedly relied for the many assumptions critical to its cost-benefit analysis. As a result, the public was deprived of an opportunity to review and comment on these sources, in contravention of the APA.

171. The Department's failure to provide this information in the notice of proposed rulemaking deprived the public of an opportunity to meaningfully comment on the Department's estimates and assumptions.

172. In the Rule, the Department does not adequately explain its failure to provide the technical studies and data upon which it relied to prepare the RIA in the notice of proposed rulemaking. 85 Fed. Reg. 30,502–03.

2. RIA in the Rule

173. In the final Rule, the Department drastically changed its cost-benefit analysis from that in the notice of proposed rulemaking, ultimately concluding that the Rule's net *costs* will be between $48.6 million and $62.2 million over ten years. 85 Fed. Reg. at 30,569. The Department's explanation of this revised estimate is flawed and inadequate.

174. Incidents of sexual violence and harassment have health, monetary, and other costs to the survivors, to school campuses, and to States that will bear the costs when students who are subjected to sexual harassment receive no relief from their schools. These costs include drop-out rates, class withdrawals, absenteeism, mistrust of education institutions, and harm to mental and physical health, all of which are independently harmful and can contribute to poor academic performance. 85 Fed. Reg. at 30,544–45.

175. Although the Department acknowledged these harms and identified relevant studies that provide cost estimates in the proposed rule, it intentionally declined to include them in the cost-benefit analysis. 83 Fed. Reg. at 61,485; 85 Fed. Reg. at 30,538–46.

176. The Rule will have the likely consequence of subjecting more students to harassment because it narrows the scope of Title IX's protections. *See* Part II.A, *supra*. The narrowed scope both diminishes Title IX's deterrent effect and limits schools' ability to respond to harassment. Thus, the costs attendant to increased incidents of harassment that will follow from the Rule are a necessary piece of the cost-benefit analysis.

177. The Department anticipates a significant decrease in investigations of complaints as a result of the changes in the Rule. 85 Fed. Reg. at 30,550, 30,553–54, 30,548–49, 30,568

(stating that Title IX investigations will decrease by about 33 percent per year in colleges and universities and 50 percent per year in elementary and secondary schools as a result of the Rule). When investigations decrease, so do the number of responsibility findings and the number of sanctions issued to perpetrators of sexual harassment. These decreases have an appreciable impact on a school's ability to deter future and repeat sexually harassing conduct. Because fewer incidents of sexual harassment will be investigated under the Rule, the likelihood of this harassment being detected and punished will also be reduced, which in turn will reduce the system's general deterrent effect.

178. Rather than recognizing the costs associated with increased sexual harassment, the Department unreasonably determined that the Rule's new, narrow scope would result in a cost *savings*—almost $200 million from fewer investigations into formal complaints. 85 Fed. Reg. at 30,568. Even if the Department is correct about the projected cost savings, it arbitrarily disregards that the costs are saved precisely because the narrow scope of the Rule is contrary to Title IX's anti-discrimination mandate.

179. The Department also failed to analyze how the Rule will affect the national economy, despite at least one study cited by the Department in the notice of proposed rulemaking showing that the national economic burden of sexual violence is $263 billion a year—costs largely borne by States, state schools, and state public health care systems. 83 Fed. Reg. at 61,485 n.5.

180. The Department also failed to properly consider the substantial administrative, staffing, and training costs the Rule imposes. The Department's estimates of what will be required for recipients to implement the Rule do not fully account for all related costs States' education institutions will bear.

181. For example, the Department did not factor in all of the costs of hiring, training, and retraining staff to comply with Rule's new requirements.

182. When the Department did consider administrative costs, it made unrealistic assumptions, such as the amount of time school administrators and employees would need to review and implement the Rule. 85 Fed. Reg. at 30,567. And, as the Department admitted, the States' education institutions will shoulder those and any other unaccounted-for financial and administrative expenses. 85 Fed. Reg. at 30,549.

183. To the extent the Department's estimates assume that Title IX Coordinators and school attorneys need only read the eight pages of actual federal regulations, 85 Fed. Reg. at 30,567, this is irrational. The preamble, which itself is over 500 Federal Register pages, includes additional (improperly issued) requirements that appear nowhere in the regulations themselves and that the Department intends to enforce. *See* ¶ 160.a *supra*.

184. The cost of meeting these administrative burdens is compounded by the Department's imposed effective date that requires schools to redirect resources away from managing their responses to the COVID-19 pandemic.

185. Separately, the Rule provided inadequate estimates of the time recipients will need to expend responding to formal complaints of Title IX sexual harassment under the Rule's new procedures. 85 Fed. Reg. at 30,568–69.

186. The Department's RIA fails to account for the many costs associated with the Rule and is therefore arbitrary and capricious. And in changing its analysis so drastically, the Department failed to provide an adequate reasoned explanation justifying these new significant costs.

E. Procedural Flaws

187. The Rule failed to comply with the APA's procedural requirements.

188. The Rule contains new provisions that were not a logical outgrowth of, and could not have been anticipated based on, the notice of proposed rulemaking.

189. The Rule expressly preempts state laws if there is any "conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45." 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.6(h)). This regulatory provision was not disclosed to the public during the rulemaking process; to the contrary, the Department stated in the notice of proposed rulemaking that the proposed regulations will *not* have preemptive effect. *See* 83 Fed. Reg. at 61,468, 61,475. As a result, the States and the public were deprived of the opportunity to comment.

190. The Rule also allows for the consolidation of "formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(4)). But the notice of proposed rulemaking makes no mention of consolidation. As a result, the States and the public were deprived of the opportunity to caution the Department that any consolidation must be done with the consent of the parties and account for confidentiality, including the requirements of FERPA, state privacy laws, and any harms to students.

191. The Rule allows for dismissal of complaints if a "respondent is no longer enrolled or employed by the recipient," including if the respondent leaves a school during the investigation. 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R § 106.45(b)(3)(ii)). But, the notice of proposed rulemaking did not mention dismissal in this context at all and did not provide the States and the public with the opportunity to comment on the effect of such a dismissal.

192. The Rule contains a new confidentiality provision that is internally inconsistent with the existing confidentiality regulation already incorporated by reference from Title VI. The existing confidentiality provision states that the "identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder." 85 Fed. Reg. at 30,579 (to be re-codified at 34 C.F.R. § 106.81 (incorporating by reference 34 C.F.R. § 100.7(e))). The new confidentiality provision in the Rule only requires "the recipient," not the parties, to "keep confidential the identity of any individual who has made a report or complaint of sex discrimination." 85 Fed. Reg. at 30,578 (to be codified at 34 C.F.R. § 106.71). The notice of proposed rulemaking did not include this new confidentiality provision, depriving the States and the public of the opportunity to alert the Department to the inconsistency.

193. The Rule limits a victim's ability to benefit from Title IX protections by requiring that they be currently "participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R § 106.30 (*formal complaint*)). This requirement is not a logical outgrowth of, and could not have been anticipated based on, the notice of proposed rulemaking, which only referenced precluding Title IX's grievance process for an individual who has never been enrolled as a student of the school at which they are filing a complaint. 83 Fed. Reg. at 61,468.

194. The Rule inserts various severability provisions that allow the balance of the Rule to remain applicable even if provisions of the Rule are held invalid. 85 Fed. Reg. at 30,576–79 (to be codified at 34 C.F.R. §§ 106.9, 106.18, 106.24, 106.46, 106.62, 106.72). The notice of proposed rulemaking did not mention the severability provisions and, therefore, did not provide the States or the public with the opportunity to comment on the effect of such provisions.

195. The Rule's preamble also includes a number of additional mandates and prohibitions that the Department indicates it will enforce as if they have the force of law. Some of these provisions conflict with the Rule. *E.g.*, ¶¶ 130, 160.a, *supra*. None of these mandates and prohibitions are included in the Rule and, therefore, are unlawfully issued.

196. Finally, the Rule does not include the approval of United States Attorney General William P. Barr or his designate, as required by 20 U.S.C. § 1682 and Executive Order 12250.

III. THE RULE WILL CAUSE IMMEDIATE AND IRREPARABLE HARM TO PLAINTIFF STATES, SCHOOLS, AND STUDENTS.

197. The Rule will cause immediate, irreparable harm to the proprietary, sovereign, and quasi-sovereign interests of the States.

A. The Rule Will Harm Plaintiff States' Proprietary Interests

198. The States, both themselves and through their publicly administered education institutions, are directly regulated by the Rule. As a result, they will suffer direct proprietary harm because of the Rule.

199. Each of the States administers a system of primary and secondary public education that is funded by both state and federal money:

a. *Pennsylvania*: The Pennsylvania Constitution charges the Pennsylvania General Assembly with "provid[ing] for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const. Art. III § 14. The Commonwealth provides more than $12 billion each year to its 500 public school districts, which educate more than 1.72 million students each year in 2,865 schools. Pennsylvania also has approximately 3,000 nonpublic and private schools that range from pre-K to high school. Pennsylvania received more than $1.36 billion from the

Department in 2019 to support its primary and secondary education programs. Pennsylvania is scheduled to receive more than $1.4 billion from the Department in 2020.

b. *New Jersey*: The Constitution and legislature charge the State of New Jersey with maintaining a "thorough and efficient system of free public schools" for residents ages five through 18. N.J. Const. Art. VIII, Sec. IV, Para 2; N.J. Stat. Ann. § 18A:7F-44(b). New Jersey has approximately 1.4 million students enrolled in public schools in grades K-12. The State allocates funding to local school districts in accordance with the School Funding Reform Act of 2008, N.J. Stat. Ann. § 18A:7F-43 to -70. The State provides over $8.4 billion in funding to its 584 local public school districts. In 2018–2019, New Jersey received $923,564,548 in federal education funding from the Department, and $1,604,148 from other federal agencies related to K-12 education.

c. *California*: The State is the legal and political entity with plenary responsibility for educating all California public school students. The State has the constitutional responsibility to establish and maintain the system of common schools and a free education, Cal. Const. art. IX, § 5, and to ensure that all California public school students receive their fundamental right to equal educational opportunity, regardless of sex and other protected factors, *id.* art. I, § 7(a) & art. IV, § 16(a). The State funds and oversees the operation of the largest common system of public schools in the nation, which serves nearly 6.2 million children in more than 10,500 schools. In 2018–2019, the State provided $54.7 billion in General Funds to its 1,037 local public school

districts. California also received more than $8.6 billion from the U.S. Department of Education in 2018–2019, and is scheduled to receive more than $8.8 billion from the Department in 2019–2020.

d. *Colorado*: Colorado's constitution pledges that the State will establish and maintain a thorough and uniform system of free public schools where all residents between the ages of six and 21 may be educated. Colo. Const. art. IX, § 2. Colorado's children are entrusted to that system through the State's compulsory attendance laws. Colo. Const. art. IX § 11; Colo. Rev. Stat. § 22-33-104. In the 2018–2019 academic year, Colorado was home to 178 operating school districts, 1,888 schools, and over 900,000 students. For school year 2019–2020, Colorado provided approximately $7.6 billion in state funding to districts and charter schools. Colorado also received more than $450 million from the Department for school year 2019–2020.

e. *Delaware*: The Delaware Constitution charges the Delaware General Assembly with "provid[ing] for the establishment and maintenance of a general and efficient system of free public schools." Del. Const. Art. X, § 1. For the 2019–2020 school year, Delaware was home to 19 operating school districts, with 194 traditional public schools, 23 charter schools, with more than 140 thousand students enrolled, and approximately 88 private schools that range from kindergarten through high school, with more than 15 thousand students enrolled. Delaware provides more than $1.4 billion each year to its public schools, and receives approximately $130 million from the Department for its primary and secondary education programs.

f. *District of Columbia*: The District has 116 traditional public schools and 123 public charter schools with approximately 93,000 enrolled students, according to Fiscal Year 2019 data. The District received more than $103 million from the Department in 2019 to support its primary and secondary education programs. It is scheduled to receive more than $107 million in 2020.

g. *Illinois*: The Illinois Constitution charges the State to "provide for an efficient system of high quality public educational institutions and services." Ill. Const. Art. X. Illinois provides over $8.89 billion to its approximately 852 school districts. These school districts educate approximately 1.98 million students each year in 3,872 public schools. Illinois also has approximately 198,643 students enrolled in non-public institutions. In the 2018–2019 school year, Illinois received approximately $3.66 billion in federal funds for its elementary and secondary education programs.

h. *Massachusetts*: The Massachusetts Constitution requires that the Commonwealth provide adequate funding to educate all Massachusetts children. *McDuffy v. Secretary of Executive Office of Education*, 615 N.E.2d 516 (Mass. 1993). Massachusetts is home to 406 public preK-12 school districts, comprised of more than 1,800 schools and more than 950,000 students. Each year Massachusetts allocates more than $6 billion to these public school districts. To support its elementary and secondary programs, Massachusetts received approximately $689 million from the Department in Fiscal Year 2019 and is scheduled to receive almost $693 million from the Department in Fiscal Year 2020.

i. *Michigan*: The Michigan Constitution charges the Michigan Legislature with "maintain[ing] and support[ing] a system of free public elementary and secondary schools as defined by law." Mich. Const. art. VIII, § 2. Michigan provides more than $13 billion each year to its 836 public school districts and 56 intermediate school districts. The 3,400 school buildings in these districts educate more than 1.5 million students each year. Michigan received approximately $1.14 billion from the Department in 2019 to support its K-12 schools. Michigan is expected to receive over $1.18 billion from the Department for the 2020–2021 school year.

j. *Minnesota*: The Minnesota Constitution requires the legislature to establish a general and uniform system of public schools. Minn. Const. Art. XIII § 1. Minnesota has over 330 public school districts and 169 charter schools, which educate over 865,000 students. In Fiscal Year 2019, Minnesota spent approximately $9.588 billion on E-12 education, the largest single expenditure in its budget. In that year, Minnesota received approximately an additional $508 million in elementary and secondary funding from the Department.

k. *New Mexico*: The New Mexico constitution promises to establish and maintain a uniform, free public school system "sufficient for the education of, and open to, all the children of school age." N.M. Const. Art. 12, Sec. 1. In 2020, legislators appropriated $3.468 billion in state funds for public education from prekindergarten through secondary schools, or 45.5 percent of total recurring appropriations. In 2019, the definition of "school-age" was revised to include students through age 22. The Fiscal Year 2021 budget

increased recurring appropriations by $216 million, or 6.6 percent, with significant additional funding to increase educator compensation, provide additional services to at-risk students, and provide professional development and mentorship support for early career teachers. Total federal support for New Mexico's elementary and secondary schools was $406,133,433.

l. *North Carolina*: North Carolina's constitution guarantees the "right to the privilege of education" and charges the state with the "duty" to "guard and maintain that right." N.C. Const. art. I, § 15. North Carolina's constitution also requires that the State provide all of its students a "sound basic education." *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997). For the 2014–2015 school year, North Carolina was home to 115 operating school districts, 2,592 schools, and more than 1.53 million students. For the 2014–2015 academic year, North Carolina contributed more than $8.08 billion in state funding for operating expenses and received more than $1.44 billion in federal funding for operating expenses.

m. *Oregon*: The Oregon Constitution charges the Oregon Legislature with appropriating funds "sufficient to ensure that the state's system of public education meets quality goals established by law." Or. Const., Art. VIII, § 8. As of fall 2019 there were 582,661 K-12 students in Oregon. Of those, 179,985 are in grades 9-12. Those students attend more than 1,200 public schools organized into 197 school districts in the State of Oregon. The 2019–2021 Legislatively Adopted Budget includes $1.254 million in pass-through federal funds for K-12 programs.

n. *Rhode Island*: The Rhode Island Constitution charges the Rhode Island General Assembly to "promote public schools . . . and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education[.]" R.I. Const., Art. XII, § 1. The Rhode Island public elementary and secondary education system provides education to approximately 143,000 students each year. Additionally, the system has a cumulative annual budget of $2.2 billion and employs approximately 21,000 teachers, administrators and staff.

o. *Vermont*: The "right to public education is integral to Vermont's constitutional form of government and its guarantees of political and civil rights." Vt. Stat. Ann. tit. 16, § 1. The Vermont Agency of Education and the State's public educators are deeply committed to ensuring that all children in the State enjoy equal educational opportunity. Vermont has approximately 250 public schools that serve over 80,000 children. In 2019, the State provided over $1.37 billion in funding to its school districts. The Agency of Education is responsible for supervising the expenditure and distribution of all money appropriated by the State to support these schools. The Agency is also responsible for executing and monitoring federal education grants to Vermont schools on behalf of the federal government. Vermont received more than $103 million from the Department of Education in 2019 to support its primary and secondary education programs, and estimates receiving over $107 million in 2020.

p. *Virginia*: Under the Constitution of Virginia, the General Assembly is required to "provide for a system of free public elementary and secondary

schools for all children" in the Commonwealth. Va. Const. art. VIII, § 1. The General Assembly must also "ensure that an educational program of high quality is established and continually maintained." *Id.* These directives have been adopted in the Code of Virginia, *see* Va. Code Ann. § 22.1-2, and the Supreme Court of Virginia has confirmed that "education is a fundamental right" under the state Constitution. *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994). For the 2019–2020 school year, there were 2,106 public schools in Virginia, including 1,860 schools, 155 local centers, and 91 regional centers. These schools educated nearly 1.3 million students in grades K-12 in 2019. The Commonwealth provides approximately $7.3 billion each year in state funding to its school. In Fiscal Year 2019, Virginia received more than $710 million in federal funding to support the Commonwealth's primary and secondary education programs. Virginia has also already received nearly $634 million in federal funding for Fiscal Year 2020

q. *Washington*: The Washington Constitution provides that it is the "paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." Wash. Const. art. IX sec. 1; *see McCleary v. State*, 269 P.3d 227 (Wash. 2012). Under its current biennial budget for 2019–2021, Washington provides more than $27 billion to its public schools, which serve over 1.1 million K-12 students annually. Washington received approximately $728 million from the Department in 2019 to support its primary and

secondary public education programs, and is scheduled to receive approximately $745 million in 2020.

r. *Wisconsin*: The Wisconsin Constitution charges the legislature with providing the establishment of public schools, "which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years." Art. X §3, Wis. Constitution. Wisconsin provides more than $5 billion each year to its public schools, which educate more than 850,000 students each year in 2,216 schools. Wisconsin also has approximately 790 nonpublic and private schools that range from pre-K to high school. Wisconsin received more than $560 million from the Department in 2019 to support its primary and secondary education programs. Wisconsin is scheduled to receive more than $575 million from the Department in 2020.

200. Collectively, the States' systems of public primary and secondary education have an enrollment of more than 20 million students and receive more than $31 billion from the Department annually.

201. Because each State receives federal funding from the Department for primary and secondary education, each State and its public primary and secondary education systems are subject to the Rule.

202. In addition, each State funds, supports, and/or administers systems of postsecondary education:

a. *Pennsylvania:* The Pennsylvania State System of Higher Education ("PASSHE") is a state-owned, funded, and administered network of 14

postsecondary schools across the Commonwealth with a combined enrollment of over 90,000 students each year. 24 P.S. §§ 20-2001-A to 20-2020-A. Pennsylvania provides PASSHE with more than $450 million each year. In addition, the Commonwealth System of Higher Education ("CSHE") consists of four "state-related" universities in Pennsylvania—Lincoln University, Pennsylvania State University, the University of Pittsburgh, and Temple University—that together educate more than 170,000 students. These universities are considered public institutions, and Commonwealth officials appoint a designated number of trustees to the governing board of each institution. CSHE universities receive an annual, non-preferred financial appropriation from the state and offer discounted tuition to Commonwealth residents. Pennsylvania provides nearly $600 million to the CSHE universities each year. Pennsylvania also has 14 community colleges that educate more than 120,000 students each year with nearly $300 million in annual public funding. Finally, eight institutions in Pennsylvania are private but receive state funding: Drexel University, Johnson College, Lake Erie College of Osteopathic Medicine, Philadelphia College of Osteopathic Medicine, Salus University, Thomas Jefferson University, University of Pennsylvania, and The University of the Arts. Pennsylvania institutions of postsecondary education received more than $930 million from the Department in 2019 and are scheduled to receive more than $970 million in 2020.

b. *New Jersey*: New Jersey is home to four public research universities, seven State colleges and universities, 18 community colleges, and 15 independent

non-profit four-year colleges. Over 531,000 students are enrolled in higher education institutions across the State with over 300,000 enrolled in public colleges. New Jersey's public colleges and universities are state-funded institutions that are governed by state law. In Fiscal Year 2019, the State provided a total of $1.74 billion to public colleges and universities in direct operating aid, including fringe benefits. The State also appropriated $522 million in student financial aid assistance that is awarded directly to students attending both public and private institutions in New Jersey. In Fiscal Year 2018, the federal government provided public colleges and universities in the state of New Jersey a total of $1.59 billion in federal funding—this includes appropriations, operating, non-operating, and financial aid. Similarly, independent not-for-profit institutions in New Jersey received over $318 million in federal grants and contracts as well as student financial aid in Fiscal Year 2018.

c. *California*: California operates and funds a system of colleges and universities, which include the University of California, California State University, and Community College systems. Collectively, these colleges and universities serve more than 2.8 million students. As of the Budget Act of 2019, for the 2018–2019 Fiscal Year, the State provided $19.5 billion in General Fund and Property Tax to its colleges and universities. California also received an estimated $5.7 billion from the Department in the 2018–2019 Fiscal Year, and is scheduled to receive more than $7.1 billion from the Department in the 2019–2020 Fiscal Year for its colleges and universities.

d. *Colorado*: Colorado is home to 31 public universities and colleges, which collectively enroll more than 250,000 students. In Fiscal Year 2019–2020, Colorado provided $858 million from the general fund and $220.3 million in student aid. Colorado higher education institutions collectively received over $464.6 million from the Department in 2019 and are scheduled to receive more than $482.9 million in 2020.

e. *Delaware*: Delaware is home to eight universities and colleges, which collectively enroll more than 60,000 students. In Fiscal Year 2020, Delaware provided $247 million in funding to higher education institutions. Delaware higher education institutions collectively received $68 million from the Department in 2019 and are scheduled to receive more than $71 million in 2020.

f. *District of Columbia*: The University of the District of Columbia ("UDC") is the District of Columbia's public higher education institution. Over 4,000 students are enrolled at UDC, including the flagship university and the community college. For Fiscal Year 2020, UDC has a projected operating budget of $166.3 million, of which $33.5 million comes from federal grants and $8.3 million comes from District of Columbia agency grants.

g. *Illinois*: Illinois has approximately 208 higher education institutions, including public, private, and technical schools, and community colleges, with approximately 720,000 students. Illinois has 12 public universities with roughly 182,000 students. The largest of the public universities is the University of Illinois Urbana-Champaign, which enrolls over 52,000 students

each year. Illinois also has over 271,000 students enrolled in public community colleges. Illinois provides approximately $4 billion to its higher education institutions, including $1.167 billion to universities and $410 million to community colleges. Illinois received at least $1 billion from the Department in 2019 to support its postsecondary education programs and is scheduled to receive more than $1 billion in 2020.

h. *Massachusetts*: Massachusetts has 29 public colleges and universities, including 15 community colleges, nine state universities, and five separate campuses of the University of Massachusetts system. More than 260,000 students attend Massachusetts institutions of public higher education. Massachusetts provides $1.3 billion in annual support to its public colleges and universities. Massachusetts is also home to 92 private higher education institutions. Next to health care and finance, higher education is one of Massachusetts's largest industries, employing over 135,000 faculty, staff, and administrators. To support its postsecondary programs, Massachusetts received approximately $562 million from the Department in Fiscal Year 2019 and is scheduled to receive nearly $584 million from the Department in Fiscal Year 2020.

i. *Michigan*: The Michigan Constitution charges the Michigan Legislature with "appropriating moneys to maintain" ten public universities in the state. Mich. Const. art. VIII, § 4. These ten universities are governed independently through constitutionally created boards. *See id.* §§ 5–6. Five other universities in the state also receive state funding. In sum, over 280,000 students are

enrolled in these fifteen state-funded universities across the state. These universities received over $1.5 billion in state funding during the 2019–2020 Fiscal Year. Michigan is also home to 28 public community colleges. The Michigan Constitution requires the Michigan Legislature provide “financial support” for these colleges. *Id.* § 7. The community colleges received $414 million through state appropriations during the most recent fiscal year. Michigan institutions received more than $763 million from the Department in 2019 and are scheduled to receive more than $800 million in 2020.

j. *Minnesota*: Minnesota is home to the University of Minnesota, which includes five campuses, and the Minnesota State Colleges and Universities system, which includes seven universities and thirty community and technical colleges. Together, these public colleges and universities educate more than 415,000 students. In Fiscal Year 2020, the State is scheduled to provide $1.428 billion in funding to these colleges and universities. In the same year, postsecondary institutions in Minnesota are scheduled to receive an additional $479 million from the Department.

k. *New Mexico*: New Mexico has 24 public colleges and universities that deliver workforce training, adult education, and undergraduate and graduate degrees. New Mexico dedicated $905 million in state appropriations for its higher education system in the most recent fiscal year for some 75,000 full-time or full-time equivalent students. The Department provided approximately $400 million in student financial aid for higher education students in New Mexico for purposes of tuition at New Mexico higher education institutions.

l. *North Carolina:* North Carolina is home to 74 public universities and colleges, which collectively enroll more than 1.05 million students. In 2019, North Carolina higher education institutions collectively received more than $896 million from the Department and are scheduled to receive more than $937 million in 2020. For Fiscal Year 2019–2020, the UNC System received more than $3.0 billion in state funding. For Fiscal Year 2019–2020, the Community College System received more than $1.1 billion in state funding.

m. *Oregon:* Oregon has seven public universities, which had over 100,000 students enrolled in 2019, and seventeen community colleges, serving over 250,000 students in 2018–2019. In the 2017–2019 biennium state funding per full-time-equivalent student was over $7,900 per student in Oregon's public universities. For students in Oregon's community colleges, state funding in 2017–2019 was over $3,200 per full-time equivalent.

n. *Rhode Island:* Rhode Island is home to the University of Rhode Island, Rhode Island College, and the Community College of Rhode Island. Collectively, the Rhode Island higher education system provides instruction to approximately 43,000 undergraduate and graduate students each year**.** This system employs approximately 4,500 faculty and support staff and has a combined operating budget of approximately $1 billion per year**.**

o. *Vermont*: Vermont is home to the University of Vermont, the Vermont State Colleges, and a number of private colleges. In 2019, Vermont State Colleges enrolled over 11,060 students. The University of Vermont enrolled over 12,800. For Fiscal Year 2020, the State appropriated about $32 million to

fund the Vermont State Colleges and about $42 million to the University of Vermont. Vermont institutions received more than $50 million from the Department in 2019, and estimate receiving over $52 million in 2020.

p. *Virginia*: There are over 375 institutions of higher education operating in Virginia, including 39 public institutions, 30 private non-profit colleges and universities, five regional higher education centers, one public/private medical school, and over 300 for-profit, out-of-state, or vocational institutions. In 2019, there were over 525,000 students enrolled in Virginia's institutions of higher education. The current state budget in Virginia appropriated approximately $1.9 billion to higher education funding. Virginia's higher education institutions received more than $2.2 billion in federal funding in Fiscal Year 2019. Virginia also is home to 23 community colleges, in which 158,000 students were enrolled in 2019. Those community colleges received approximately $384 million in state funding in Fiscal Year 2019 and approximately $398 million in Fiscal Year 2020.

q. *Washington*: Washington has a "vital interest" in ensuring that accessible higher education opportunities are available to its residents. Wash. Rev. Code § 28B.07.010. Washington has six public baccalaureate colleges and universities: the University of Washington, Washington State University, Central Washington University, Eastern Washington University, Western Washington University, and the Evergreen State College. Washington also has a system of 30 public community and technical college districts comprised of 34 separate colleges, whose funding is coordinated by the Washington State

Board for Community and Technical Colleges. In addition, Washington is home to a number of independent, private colleges and a variety of other higher education institutions. Washington postsecondary institutions received approximately $444 million from the Department in 2019, and are scheduled to receive approximately $462 million in 2020. Washington's six public baccalaureate colleges and universities have a combined enrollment of over 116,000 students each year. Washington's community and technical colleges educate over 148,000 students each year. Altogether, Washington's operating budget for 2019–2021 provides over $4 billion to support the State's higher education system.

r. *Wisconsin*: Wisconsin is home to more than 70 universities and colleges that confer an Associate's degree or higher. All public universities in the State of Wisconsin are part of the University of Wisconsin System. The University of Wisconsin System is one of the largest systems of public higher education in the country, serving approximately 170,000 students each year through 13 universities across 26 campuses and a statewide extension network. Wisconsin higher education institutions collectively received $390 million from the Department in 2019 and are scheduled to receive more than $400 million in 2020.

203. Collectively, the States' systems of publicly supported higher education have an enrollment of more than 7 million students and receive more than $15 billion from the Department annually.

204. Each of the institutions in the States' systems of higher education receives federal funding and, as a result, is subject to the Rule.

205. To comply with the Rule by the August 14, 2020, deadline, primary, secondary, and postsecondary schools face a number of obstacles that will impose substantial direct costs on these State-sponsored institutions. *See* Part II.C, *supra*.

206. In addition, the ongoing national health emergency caused by the COVID-19 pandemic makes it nearly impossible for schools to review the Rule and revise their policies by August 14, 2020. As of filing, every primary and secondary school in all but one Plaintiff State has been ordered to physically close and to operate remotely. Primary and secondary schools in California have also been closed and conducting all operations remotely under mandatory public health orders since March 2020. Likewise, virtually all postsecondary schools in Plaintiff States are physically closed and operating remotely. All of Plaintiff States have imposed stay-at-home or safer-at-home orders that to some extent require students, faculty, and staff to work or engage in schooling from home. Schools in Plaintiff States do not know yet whether they will return in the fall for in-person classes.

207. The Rule will require state-sponsored institutions to adopt new, costly, unnecessary, and unduly burdensome grievance procedures, forcing them to bear additional costs. *See* Part II.A.3, *supra*.

208. Where a Plaintiff State's law and other federal laws, such as the Clery Act and VAWA, provide greater protections than the Rule, schools subject to these laws will need to create parallel code of conduct provisions and enforcement mechanisms—one addressing "Title IX sexual harassment" and one addressing "non-Title IX sexual harassment." So too will schools that wish to continue providing protections for students beyond the Rule out of concern for

campus safety and student well-being, to ensure the nondiscriminatory educational experience promised by Title IX, or both.

209. Having two code of conduct provisions and two enforcement mechanisms for sexual harassment claims will burden students and schools alike and lead to significant confusion. Schools must determine how to clearly and effectively communicate the existence of different policies and the differences between them, without indicating that one policy's protections and procedures take precedence over the other. Schools that receive notice of sexual harassment will first have to gather enough information to determine which policy to use so they can accurately advise the complainant on the process for pursuing a formal complaint. 85 Fed. Reg. at 30,574–75 (to be codified at 34 C.F.R. § 106.44(a) ("The Title IX Coordinator must promptly contact the complainant to . . . explain to the complainant the process for filing a formal complaint.")). Where the facts are unclear, relevant school administrators must take time to consult with general counsel and others, causing further delays. Where a school's Title IX office does not handle non-Title IX sexual harassment investigations, but the investigation reveals information indicating that harassment thought to fall outside of Title IX actually falls within it (or vice versa), school administrators must determine how to hand off evidence between different offices while clearly explaining to both parties what will happen next. And should a party disagree with the school's determination that the harassing conduct falls under the school's non-Title IX policy, the party can appeal and seek OCR review, adding further delays. 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(8)(i)).

210. The Rule's August 14 effective date will force schools to take temporary and emergency measures to implement the Rule's minimum requirements, limiting schools' ability to consult with students and others affected by the Rule in the process. Many schools and state or

local policies require this consultation before implementing such significant changes. The lack of engagement with and input from school communities will undermine the legitimacy of the resulting measures and potentially lead to lower compliance with the Rule's requirements.

211. The effective date of August 14, 2020, will also make it difficult for schools to take certain additional steps they consider important to protecting their students, employees, and others. For example, many schools may wish to craft non-disclosure agreements to protect the privacy of complainants and respondents during the pendency of an investigation or after resolution—but will not be able to do so before August 14.

212. The Rule will impede schools' efforts to prevent and respond to incidents of sexual harassment, including sexual assault. As a result, schools will be forced to devote additional resources to addressing the physical, emotional, psychological, and other consequences of sexual harassment.

213. Because they will face greater difficulties in combatting sexual harassment against students, schools will also be at risk of reputational harm as a result of the Rule.

214. All of these financial and other harms will be felt by state-sponsored education institutions—primary, secondary, and postsecondary—in the Plaintiff States. The States will suffer direct harm to their proprietary interests as a result of the Rule.

B. The Rule Will Harm Plaintiff States' Sovereign Interests

215. The Rule will directly harm the States' sovereign interests by interfering with their primary authority to enact and enforce their own laws governing education institutions within their borders, as well as interfere with the important parallel role States have traditionally played in eliminating discrimination within their borders.

216. The Rule will directly harm the States' sovereign interests by inhibiting their ability to protect students from sexual harassment, provide campuses free from sex

discrimination, and fulfill their educational missions to provide equal opportunity, benefit, and access to students without regard to sex—all while retaining necessary federal funds.

217. Traditionally, States have acted as the primary regulators of primary, secondary, and postsecondary education. Although the federal government has expanded its role in education, state and local officials continue to have primary responsibility for decisions relating to the oversight of education institutions.

218. State and local officials have primary responsibility for overseeing K-12 schools and for setting policies relating to elementary and secondary education:

a. *Pennsylvania*: The Pennsylvania Department of Education oversees the 500 public school districts, more than 170 public charter schools, public cyber charter schools, public Intermediate Units, the education of youth in State Juvenile Correctional Institutions, and Head Starts and publicly funded preschools. The Pennsylvania State Board of Education reviews and adopts regulations that govern educational policies and principles and establish standards governing the educational programs of the Commonwealth. The Board of Education also approves the creation of new school districts or changes in the boundaries of existing districts, manages the State School Fund and adopts master plans for basic education. Local school boards exercise primary responsibility over budgetary and other decisions for each school district.

b. *New Jersey*: The Constitution and legislature charge the State of New Jersey with maintaining a "thorough and efficient system of free public schools" for residents ages five through 18. N.J. Const. Art. VIII, Sec. IV, Para 2; N.J. Stat.

Ann. § 18A:7F-44(b). The State Board of Education has general supervision and control of public education in the state, with exception of higher education. N.J. Stat. Ann. § 18A:4-10. The Commissioner of Education has supervision of all schools in the state that receive support or aid from state appropriations, other than institutions of higher education. N.J. Stat. Ann. § 18A:4-23.

c. *California*: The State is the legal and political entity with plenary responsibility for educating all California public school students. The State funds and oversees the operation of the largest common system of public schools in the nation, which serves nearly 6.2 million children in more than 10,500 schools. The State has the constitutional responsibility to establish and maintain the system of common schools and a free education, Cal. Const., art. IX, § 5, and to assure that all California public school students receive their fundamental right to an equal educational opportunity, regardless of sex and other protected factors, *id.* art. I, § 7(a) & art. IV, § 16(a). The California State Superintendent of Public Instruction oversees the schools within the state. Cal. Const., Art. IX, § 2; Cal. Educ. Code § 33112. The California State Board of Education is responsible for adopting rules and regulations for elementary and secondary schools in California. Cal. Educ. Code § 33031.

d. *Colorado*: The Colorado State Board of Education oversees the Colorado Department of Education and has general supervision authority of public schools in Colorado. Colo. Const. art. IX § 1; Colo. Rev. Stat § 22-2-107.

e. *Delaware*: The Delaware Department of Education exercises “general control and supervision over” Delaware’s 19 operating public school districts, and has the ultimate responsibility for developing education policy, setting educational standards, and ensuring that school districts meet those standards. Del. Code Ann., tit. 14, § 121. The Delaware State Board of Education, by law, provides advice and guidance to the Delaware Secretary of Education on education policy, new initiatives, and budget requests, and approves regulations governing a wide variety of educational topics, including content standards, assessments, graduation requirements, educator evaluation, athletic regulations, and licensure and certification.

f. *District of Columbia*: The District of Columbia Office of the State Superintendent is the District of Columbia’s state education agency tasked with overseeing K-12 education in the District. The District of Columbia Public Schools (“DCPS”) is the traditional public school system in the District of Columbia. DCPS develops policies and codes of conduct for the traditional public schools in the District. DCPS engaged in a year-long resource-intensive process to update and ensure that its sexual harassment policies fully comport with prior guidance. That process is nearing completion; were this Rule to go into effect, DCPS would need to completely revamp its procedures at great cost of resource and time.

g. *Illinois*: The Illinois State Board of Education (“ISBE”), established under the Illinois School Code, administers elementary and secondary public education in the State of Illinois. ISBE oversees 852 public school districts, 141 public

charter schools, a state-operated educational facility, and numerous cooperatives and regional programs. ISBE reviews and adopts regulations that govern educational policies and principles and establishes standards governing K-12 education programs. *See* 105 ILCS 5/1A-4.

h. *Massachusetts*: The Massachusetts Department of Elementary & Secondary Education ("MA-DESE") serves as the chief regulator and administrator for the public preK-12 school system in Massachusetts. Among other responsibilities, MA-DESE distributes state and federal education money, licenses educators, helps districts implement learning standards, monitors schools and districts, and convenes districts to share best practices. The Massachusetts Board of Elementary and Secondary Education ("MA-BESE") is statutorily created and is comprised of 11 members, nine of whom are appointed by the Governor. MA-BESE's responsibilities include promulgating regulations governing schools and school districts, approving learning standards, deciding when to intervene in a low-performing school district, and hiring the MA-DESE commissioner. Local school committees oversee budget and other decisions for each district and establish educational goals and policies consistent with state law and statewide goals and standards instituted by MA-BESE.

i. *Michigan*: The Michigan Constitution vests the State Board of Education with "[l]eadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees," and the State

Board of Education "serve[s] as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith." Mich. Const. art. VIII, § 3. In the 2019–2020 school year, Michigan was home to 836 public school districts and 56 intermediate school districts with over 1.5 million students. While the school districts exercise primary responsibility over budgetary and other decisions for each district, the Michigan Department of Education implements federal and state legislative mandates in education and carries out the policies of the State Board of Education, and the State Board of Education has "leadership and general supervision over all public education." Mich. Const. art. VIII, § 3; Mich. Comp. Laws § 388.1009. The State Board of Education "serve[s] as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith." Mich. Const. art. VIII, § 3.

j. *Minnesota*: In Minnesota, local school boards "have the general charge of the business of the district, the school houses, and of the interests of the schools thereof." Minn. Stat. § 123B.02, subd. 1. The Commissioner of the Minnesota Department of Education "adopt[s] goals for and exercise[s] general supervision over public schools and public educational agencies in the state." Minn. Stat. § 127A.05, subd. 3.

k. *New Mexico*: The State regulates its 155 traditional secondary school districts and charter schools serving 330,029 students through the Public Education

Department, the State educational agency. The public school code applies to children from age five to 22. NMSA 1978, Sec. 22-1-2 (O).

l. *North Carolina:* The North Carolina State Board of Education and the North Carolina Department of Public Instruction have general supervisory authority of public schools in North Carolina. N.C. Gen. Stat. § 115C-10 to -22.

m. *Oregon*: Oregon law provides that the Oregon State Board of Education shall set standards for and adopt rules for governance of public kindergarten, elementary, and secondary schools. The State Board of Education is also required by statute to adopt rules providing that no public elementary or secondary school shall discriminate in determining participation in scholastic activities. ORS 326.051. "Discrimination" has the same meaning as set forth in Section 659.850 of the Oregon Revised Statutes, including discrimination on the basis of sex and sexual orientation. Section 326.111 of the Oregon Revised Statutes establishes the Oregon Department of Education to administer the functions exercised by the State Board of Education.

n. *Rhode Island*: The Rhode Island Department of Education oversees 36 school districts with 300 schools and over 143,000 students. The 17-member Rhode Island Board of Education was created by the Rhode Island General Assembly and is responsible for the governance of all public education in Rhode Island. The Commissioner of Elementary and Secondary Education is responsible for carrying out "the policies and programs formulated by the council on elementary and secondary education" and "distribution of state school funds in accordance with law and the regulations of the board" R.I.G.L. § 16-1-5.

o. *Virginia*: The Constitution of Virginia vests general supervision of the Commonwealth's public school system in the Board of Education. Va. Const. Art. VIII, § 4; *see also* Va. Code Ann. § 22.1-8. Standards of quality for the Commonwealth's school system are set by the Board of Education, subject to revision by the General Assembly. *See* Va. Const. Art. VIII, § 2. The Board of Education develops guidance and promulgates regulations for the administration of state programs. The Constitution further provides that, "[s]ubject to the ultimate authority of the General Assembly," the Board of Education has "primary responsibility and authority for effectuating the educational policy" of the Commonwealth. Va. Const. Art. VIII, § 5. The supervision of schools in each school division is vested in a local school board. *Id.* § 7; *see also* Va. Code Ann. § 22.1-28.

p. *Vermont*: Vermont's State Board of Education has the authority to establish and advance education policy for the State. Vt. Stat. Ann. tit. 16, § 164. Vermont's Secretary of Education has the authority to execute the policies adopted by the State Board; evaluate the program of instruction in Vermont's public schools; advise the Legislature concerning proposed laws affecting the public schools; supervise and direct the execution of laws relating to the public schools and ensure compliance; and supervise the expenditure and distribution of money appropriated by the State for public schools. Vt. Stat. Ann. tit. 16, § 212. The Secretary is also charged with annually determining whether students in each Vermont public school are provided educational

opportunities substantially equal to those provided in other public schools. Vt. Stat. Ann. tit. 16, § 165.

q. *Washington*: The Washington Office of the Superintendent of Public Instruction ("OSPI") oversees the State's K-12 education system, which includes 295 public school districts (approximately 2,000 schools) and six state-tribal education compact schools. The Superintendent of Public Instruction supervises all matters pertaining to public schools, including but not limited to certifying educators, administering a statewide student assessment system, maintaining a manual of the Washington state common school code, and establishing a coordinated program for the prevention of sexual abuse of K-12 students. *See* Wash. Rev. Code §§ 28A.300.040, 041, 160. While OSPI oversees the public school system statewide, the primary governing body of each K-12 school is its locally elected school board.

r. *Wisconsin*: The Wisconsin State Superintendent provides "general supervision" of all public K-12 schools and has the responsibility to "[a]scertain the condition of the public schools, stimulate interest in education and spread as widely as possible a knowledge of the means and methods which may be employed to improve the schools." Wis. Stat § 115.28(1).

219. Most States also exercise primary responsibility for regulating public postsecondary education in their borders:

a. *Pennsylvania*: The Pennsylvania Department of Education oversees the Commonwealth's Career and Technology Centers/Vocational Technical Schools and community colleges. The Pennsylvania State Board of Education

has the authority to review and adopt regulations that govern educational policies and principles and establish standards governing the educational programs of the Commonwealth, including the authority to adopt policies with regard to postsecondary schools, to regulate the community colleges, and to adopt master plans for higher education. The Pennsylvania State System of Higher Education is governed by a Board of Governors made up or appointed by Commonwealth officials. The Commonwealth System of Higher Education universities are governed by boards of trustees with a minority of representatives appointed by Commonwealth officials.

b. *New Jersey*: The Secretary of Higher Education is empowered to enforce the observance of State laws among institutions of higher education. N.J. Stat. Ann. § 18A:3B-34. The Secretary makes final administrative decisions over institutional licensure and university status as well as over a change in the programmatic mission of an institution under her purview. N.J. Stat. Ann. § 18A:3B-14. And the Secretary makes recommendations to the Governor and Legislature on higher education initiatives and programs of Statewide significance and implements Statewide planning on higher education. *Id.* The governing boards of each of New Jersey's public institutions of higher education "have authority over all matters concerning the supervision and operations of the institution including fiscal affairs, the employment and compensation of staff." N.J. Stat. Ann. § 18A:3B-6. They are required to compile and make public annual reports regarding their fiscal and governance condition. N.J. Stat. Ann. § 18:3B-35; N.J. Stat. Ann. § 18A:65-14.5. The

President's Council, consisting of the presidents of all higher education institutions that receive State funding, provide advice and policy recommendations to the Secretary of Higher Education. N.J. Stat. Ann. § 18A:3B-7, -8.

c. *California*: The University of California is a public trust formed under the California Constitution and funded by the State. Cal. Const., art. IX, § 9; Cal. Educ. Code § 92100 et seq. The nation's largest four-year public university system, the California State University system, is also part of the State of California's public higher education system and includes twenty-three campuses across the State. Cal. Educ. Code §§ 89001, 84001. The California Community Colleges are also part of the State of California's public higher education system. Cal. Const., art. XVI, § 8; Cal. Educ. Code §§ 66700, 70900. The California Constitution mandates and funds a system of free public schools, Cal. Const. art. IX, §§ 5, 6, and sets a minimum funding level for "the moneys to be applied by the State for the support of school districts and community college districts." Cal. Const., art. XVI, § 8(b). State law directs the Board of Governors of the California Community Colleges to prepare the system's budget, identify total revenue needs in order to properly serve the education system, and identify expenditures for the state general apportionment and for categorical programs, new programs, and budget improvements. Cal. Educ. Code § 70901(b)(5)(A)(I).

d. *Colorado*: The Colorado Commission on Higher Education, which is located in the Colorado Department of Higher Education, is the central policy and

coordinating board for higher education in the State of Colorado. Colo. Rev. Stat. §§ 23-1-102 and 24-1-114. The governing board of each institution of higher education is responsible for promulgating its institution's policies governing student conduct and discipline. Each institution is also responsible for establishing policies and procedures governing its faculty, administrative, and classified employees. Each of Colorado's institutions of higher education is governed by a board of regents, board of governors, or board of trustees (collectively, the "governing boards") either elected by the citizens of the state or appointed by the governor with the consent of the senate. Colo. Rev. Stat. §§ 23-20-102 (University of Colorado System), 23-30-102 (Colorado State University System), 23-40-104 (University of Northern Colorado), 23-41-101 (Colorado School of Mines), 23-51-102 (Adams State University), 23-52-102 (Fort Lewis College), 23-53-102 (Colorado Mesa University), 23-54-102 (Metropolitan State University of Denver), 23-56-102 (Western Colorado University), 23-60-104 (Colorado Community College System). Colorado statute also authorizes the creation of local district colleges. Colo. Rev. Stat. § 23-71-103. Colorado's two local district colleges are governed by governing boards elected by citizens of their districts.

e. *Delaware*: The Delaware Department of Education, through its Higher Education Office, works with Delaware's public and private higher education institutions to ensure students have access to high quality education, and is the lead communication agency on higher education with the Federal government. The Higher Education Office is also responsible for providing for the

licensure of any institution of higher education that offer courses, programs, or degrees within Delaware but are not incorporated or located in Delaware.

f. *District of Columbia*: The University of the District of Columbia is an independent agency governed by a Board of Trustees, which has the power to adopt policy regulations for the university, including those relating to gender discrimination and sexual harassment. *See* D.C. Code § 38-1202.01(a).

g. *Illinois*: The Illinois Board of Higher Education ("IBHE") is the coordinating body for the state's systems of colleges and universities. IBHE adopts regulations that govern educational policies and standards governing postsecondary education. IBHE recommends to the State the budgetary needs for operations, grants, and capital improvements for higher education institutions and agencies. It approves proposals by public university governing boards and the Illinois Community College Board for new units of instruction, research, or public service. It also reviews existing instruction, research, and public service programs to determine their continued educational and economic justification.

h. *Massachusetts:* The Massachusetts Department of Higher Education, along with the Massachusetts Board of Higher Education ("MA-BHE"), serves as coordinator of Massachusetts's system of public higher education and as the employer of record. MA-BHE promulgates regulations to govern the state's public higher education system, establishes overall goals for the system, reviews and approves admission and program standards and five-year plans for higher education institutions, and receives and disburses federal funds.

MA-BHE is a statutorily created agency comprised of 13 members, including nine members appointed by the Governor.

i. *Minnesota*: The Board of Trustees for the Minnesota State Colleges and Universities system has the authority to govern the seven universities and 30 colleges within its system. Minn. Stat. § 136F.06, subd. 1. The Office of Higher Education, which is headed by a Commissioner who is appointed by the Governor, oversees private colleges and universities in the State. Minn. Stat. § 136A.01, subd. 2.

j. *New Mexico*: The New Mexico Constitution establishes seven four-year public postsecondary institutions and ten two-year branch community colleges that are regulated by boards of regents. In addition, the State operates seven two-year independent community colleges regulated by community college boards. The New Mexico Higher Education Department oversees all of these postsecondary institutions.

k. *North Carolina*: The Board of Governors of the University of North Carolina has the responsibility for the planning, development, and overall governance of the UNC System, which is comprised of 17 constituent institutions. N.C. Gen. Stat. § 116, *et seq.* The Board of Governors has 24 voting members, elected by the North Carolina General Assembly to staggered four-year terms. Additionally, the president of the UNC Association of Student Governments serves as a nonvoting, ex officio member of the Board. The Board elects the President of the UNC System. The Board of Governors maintains The Code and the UNC Policy Manual. The Code incorporates the requirements of the

North Carolina constitution and General Statutes, as well as Board bylaws and other high-level policies. The UNC Policy Manual provides more specific direction and policies on university matters, including a system-wide policy to establish legally supportable, fair, effective, and efficient procedures for student disciplinary proceedings related to sexual harassment and Title IX violations (Chapter 700.4—Student Conduct and Discipline). The State Board of Community Colleges (CC State Board) is the governing authority for the 58 community colleges in the State. The CC State Board consists of 20 members—10 appointed by the governor, 8 elected by the General Assembly, and the lieutenant governor and the state treasurer, who serve as ex-officio members. The CC State Board establishes policies, regulations, and standards for the administrative offices and the institutions that comprise the Community College System.

l. *Oregon*: It is the law and policy of the State of Oregon to promote and support post-secondary education of its citizens, which benefits the economy of the State and the welfare of Oregonians. ORS §§ 350.001 et seq. The State regulates seven public universities in the State (ORS Chapter 352), as well as community colleges (ORS Chapter 341), and career and trade training (ORS Chapter 344). Section 350.050 *et seq.* of the Oregon Revised Statutes establishes the Higher Education Coordinating Commission, which sets standards for institutions of higher education. In addition to other policies and funding requirements, Oregon law requires all institutions of higher education to have written policies regarding sexual assault, harassment, stalking, and

dating violence that occur both on and off campus. ORS §§350.253, ORS 350.255

m. *Rhode Island*: The Council on Postsecondary Education provides oversight of the public higher education system in Rhode Island. The Council adopts standards, requires enforcement, and exercises general supervision over all public higher education in the state. R.I.G.L. § 16-59-4. Duties also include formulating broad policies to implement the goals and objectives of the Board of Education along with preparing and maintaining a 5-year budget for higher education that implements the financial recommendations of the Board of Education. The Rhode Island Office of the Postsecondary Commissioner supports the Board of Education and Council on Postsecondary Education as the State's higher education executive officer.

n. *Vermont*: The Vermont State Board of Education has the authority to issue certificates of approval and of degree-granting authority to post-secondary institutions in the state whose goals, objectives, programs, and resources meet State Board standards. Vt. Stat. Ann. tit. 16, § 176. Vermont's Higher Education Council reviews post-secondary institutions' eligibility for certain federal funding. Vt. Stat. Ann. tit. 16, § 2881. State officials make up a majority of the governing Board of Trustees for the Vermont State Colleges system, Vt. Stat. Ann. tit. 16, §§ 2172-74, and roughly half of the governing Board of Trustees for the University of Vermont, Vt. Stat. Ann. tit. 16, app. ch. 1 § 1-2.

o. *Virginia*: The State Council of Higher Education for Virginia ("SCHEV") is the Commonwealth's coordinating body for higher education. Pursuant to state statute, SCHEV "advocate[s] for and promote[s] the development and operation of an educationally and economically sound, vigorous, progressive, and coordinated system of higher education in the Commonwealth." Va. Code Ann. § 23.1-200. The coordination and governance of higher education in Virginia are shared responsibilities among the General Assembly, the Governor, the institutions of higher education, and SCHEV. The Governor appoints members to public institutions' Boards of Visitors, the State Board for Community Colleges, and SCHEV, and prepares and submits a biennial budget. The General Assembly confirms the Governor's nominations, adopts a biennial budget, and enacts legislation pertaining to higher education. SCHEV develops a statewide strategic plan and provides policy and funding recommendations. The governing boards at institutions of higher education set institutional policy goals and priorities, approve budget requests to the Governor and General Assembly, and ensure that institutions effectively and efficiently use state funds.

p. *Washington*: Each of Washington's six public baccalaureate colleges and universities and each of its 30 community and technical college districts is governed by a board of regents or board of trustees (collectively, the "governing boards") appointed by the governor with the consent of the senate. Wash. Rev. Code §§ 28B.20.100 (University of Washington), 28B.30.100 (Washington State University), 28B.35.100 (Regional

Universities), 28B.40.100 (The Evergreen State College), 28B.50.100 (Community & Technical Colleges). Each governing board is responsible for promulgating its institution's policies governing student conduct and discipline pursuant to Washington's Administrative Procedure Act, Wash. Rev. Code Chapter 34.05. *See* Wash. Rev. Code §§ 28B.20.130 (University of Washington), 28B.30.150 (Washington State University), 28B.35.120 (Regional Universities), 28B.40.120 (The Evergreen State College), 28B.50.140 (Community & Technical Colleges). Each institution is also responsible for establishing policies and procedures governing its faculty, administrative, and classified employees. This process includes negotiating collective bargaining agreements with those employees who are represented by unions.

q. *Wisconsin*: The Board of Regents of the University of Wisconsin System is granted the primary responsibility for governance of the University of Wisconsin System through enacting policies and promulgating rules for governing the system, planning for the future needs of the State for university education, ensuring the diversity of quality undergraduate programs while preserving the strength of the State's graduate training and research centers, and promoting the widest degree of institutional autonomy within the controlling limits of system-wide policies and priorities established by the board. Wis. Admin. Code § UWS 36.09. The State's Department of Safety and Professional Services' Educational Approval Program is charged with protecting the public by inspecting and approving private trade,

correspondence, business, and technical schools doing business within the state. Wis. Stat. § 440.52.

220. The States have primary responsibility for protecting the safety of their residents, including children in K-12 institutions and children and adults attending postsecondary schools.

221. Consistent with these responsibilities, the States have enacted laws and regulations to prevent discrimination on the basis of sex in education institutions and to protect the safety of students and others in K-12 and postsecondary schools. The States continue to vigorously enforce these laws and regulations:

a. *Pennsylvania*: Under Act 16 of 2019, postsecondary institutions in Pennsylvania must adopt a clear, understandable written policy on sexual harassment and sexual violence that informs victims of their rights under federal and state law, including the crime victims' bill of rights. The Pennsylvania Department of Education subsequently created a model sexual harassment and sexual violence policy for postsecondary schools. Pa. Dep't of Educ., *Sexual Violence and Sexual Harassment Model Sexual Misconduct Policy*. Pennsylvania institutions have until June 30, 2020, to comply.

b. *New Jersey*: Every public institution of higher education, elementary school and secondary school in New Jersey is required to adopt a policy included in its student code of conduct prohibiting harassment, intimidation, or bullying. N.J. Stat. Ann. § 18A:3B-68; N.J. Stat. Ann. § 18A:37-15. New Jersey law sets out particular standards for conduct that must be prohibited under this policy. *Id.* The New Jersey Law Against Discrimination ("LAD"), N.J. Stat. Ann. § 10:5-1 to-49, prohibits all primary, secondary and postsecondary

schools, except any school operated by a religious institution, from discriminating against students based on sex. This includes prohibiting sexual harassment "that a reasonable student of the same age, maturity level, and [sex] would consider sufficiently severe or pervasive enough to create an intimidating, hostile or offensive school environment[.]"N.J. Stat. Ann. § 10:5-5(f); 10:5-12(l); *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Education*, 189 N.J. 381, 402–03 (N.J. 2007). Schools are required to take action to prevent sexual harassment and must promptly address it if they knew or should have known about it. *Id.* at 407. The LAD provides for administrative or court enforcement by the State's Division on Civil Rights, as well as a private right of action. N.J. Stat. Ann. § 10:5-13. In May 2019, New Jersey enacted the Sexual Assault Victim's Bill of Rights, to ensure the dignity and safety of victims and their access to necessary services and investigative procedures. N.J. Pub. L. 2019-103.

c. *California*: The California Equity in Higher Education Act establishes the policy of the State of California to afford all persons equal rights and opportunities in postsecondary education institutions of the State. Cal. Educ. Code §§ 66251, 66252. As such, it is the policy of the State of California that all persons, regardless of sex, are free from discrimination of any kind in the postsecondary education institutions of the State. Cal. Educ. Code §§ 66270; 66281.5. State law authorizes the Board of Governors of the California Community Colleges, the Trustees of the California State University, and the Regents of the University of California to adopt regulations as required by law

to implement the nondiscrimination requirements set forth in state law. Cal. Educ. Code § 66271.1. Under state law, for K-12 students, the definition of sexual harassment includes unwelcome conduct of a sexual nature that has the purpose or effect of having a negative impact upon the individual's academic performance or of creating an intimidating, hostile, or offensive education environment. Students are protected from sexually harassing conduct, including cyber sexual bullying, that is related to a school activity or school attendance, including but not limited to acts that occur while a student is going to or coming from school, during lunch whether on or off campus, and while going to or coming from a school-sponsored activity. Cal. Educ. Code §§ 200 & 48900, et seq. Separate and apart from state law school discipline procedures, state law also establishes a detailed grievance process for promptly and equitably investigating and resolving complaints of sexual harassment and assault in K-12 schools under the state's Uniform Complaint Procedures. These procedures include collecting evidence from both parties, interviewing the parties and witnesses, issuing a letter of findings, and a right to appeal to the California Department of Education. Cal. Educ. Code, § 33315; Cal. Code Regs., tit. 5, §§ 4610, et seq. State law does not prohibit schools from acting outside the Uniform Complaint Procedures to more quickly address reports and complaints.

d. *Colorado*: Colorado law requires Colorado public universities and colleges to adopt sexual misconduct policies for enrolled students. Colo. Rev. Stat. § 23-5-146(2). These policies must contain fair, impartial, and prompt procedures

for the investigation of sexual misconduct, and require the college or university to complete an investigation or adjudicative process within an average of sixty to ninety days. *Id.* § 23-5-146(3)(d)(I). Although parties may have advisors during the process, those advisors are not permitted to speak and all questions for witnesses must go through the official individual or individuals conducting or participating in the investigation and adjudication process. *Id.* § 23-5-146(3)(d)(III)-(IV).

e. *Delaware*: Under Delaware law, each public school district and charter school is required to establish and disseminate a policy for responding to teen dating violence and sexual assault that includes guidelines on mandatory reporting and confidentiality, and protocols for responding to incidents of teen dating violence and sexual assault. Del. Code Ann. tit. 14, § 4166. Higher education institutions in Delaware with more than 1,000 students are required to offer to sexual assault victims to report incidents perpetrated by or against a student to law enforcement authorities servicing the institution, to inform victims of their rights under the Delaware Victims' Bill of Rights, to inform victims of available confidential medical and counseling services, and to report data to the State of Delaware to ensure compliance with the law. Higher education institutions are also required to provide training to responsible employees regarding the prevalence and nature of sexual assaults on college campuses, and the requirements of state and federal law. Del. Code Ann. tit. 14, ch. 90A.

f. *District of Columbia*: The District of Columbia City Council passed the D.C. School Safety Omnibus Act of 2018 ("DCSSOA") to promote and protect

District students' safety by preventing sexual harassment and dating violence against students by faculty, staff, and other students in District schools. The DCSSOA defines "sexual harassment" as "any unwelcome or uninvited sexual advances, requests for sexual favors, sexually motivated physical conduct, stalking, or other verbal or physical conduct of a sexual nature that can be reasonably predicted to: (A) Place the victim in reasonable fear of physical harm to his or her person; (B) Cause a substantial detrimental effect to the victim's physical or mental health; (C) Substantially interfere with the victim's academic performance or attendance at school; or (D) Substantially interfere with the victim's ability to participate in, or benefit from, the services, activities, or privileges provided by a school." D.C. Code § 38-952.01(5). The DCSSOA's broad definition of "sexual harassment" differs from the Rule's definition which restricts schools from investigating sexual harassment until it becomes "severe, pervasive, and objectively offensive." The D.C. Human Rights Act of 1977 ("DCHRA"), the country's most expansive state human rights law, protects District residents from sex discrimination in education institutions, which includes "deny[ing], restrict[ing], or . . . abridge[ing] or condition[ing] the use of, or access to, any of its facilities, services, programs, or benefits of any program or activity to any person otherwise qualified." D.C. Code § 2–1402.41.

g. *Illinois*: The Illinois School Code requires schools to create, maintain, and implement an age-appropriate policy on sexual harassment. 105 ILCS 5/10-20.69 (P.A. 101-418). The School Code also requires that all public school

classes that teach sex education in grades 6 through 12 must include course material and instruction about unwanted physical and verbal sexual advances and what may be considered sexual harassment or sexual assault. 105 ILCS 5/27-9.1(c)(8). In 2015, Illinois enacted the Preventing Sexual Violence in Higher Education Act ("PSVHEA") establishing requirements for all higher education institutions aimed at raising awareness about and addressing campus sexual violence, domestic violence, dating violence and stalking. The PSVHEA mandates that all universities "shall adopt a comprehensive policy concerning sexual violence, domestic violence, dating violence, and stalking consistent with governing federal and State law." 110 ILCS 155/10. It outlines detailed requirements schools must follow to address and prevent sexual violence.

h. *Massachusetts*: Massachusetts has several state laws which protect against sex discrimination and sexual harassment in education institutions. Mass. Gen. Laws ch. 151C, § 2(g) (fair educational practices); Mass. Gen. Laws ch. 76, § 5 (discrimination on the basis of sex); Mass. Gen. Laws ch. 12, § 11H (Massachusetts Civil Rights Act). Under Massachusetts law, prohibited sexual harassment by an education institution includes "any sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when: (i) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of the provision of the benefits, privileges or placement services or as a basis for the evaluation of academic achievement; or (ii) such advances, requests or

conduct have the purpose or effect of unreasonably interfering with an individual's education by creating an intimidating, hostile, humiliating or sexually offensive educational environment." Mass. Gen. Laws ch. 151C, § 1(e). The Massachusetts Commission Against Discrimination, a Massachusetts agency that investigates and adjudicates violations of anti-discrimination laws, enforces this prohibition for students seeking admission to any education institution or who are enrolled in vocational training institutions. Mass. Gen. Laws ch. 151C, § 3(a). The Massachusetts Board of Elementary and Secondary Education has promulgated regulations providing that: "All public schools shall strive to prevent harassment or discrimination based upon a student's race, color, sex, gender identity, religion, national origin or sexual orientation and all public schools shall respond promptly to such discrimination or harassment when they have knowledge of its occurrence." 603 Code Mass. Regs. 26.07(2). Massachusetts regulations contain requirements for schools' notification and complaint procedures for discrimination and harassment. 603 Code Mass. Regs. 26.08.

i. *Michigan*: Under Michigan state law, each local school district's board "shall adopt and implement a written sexual harassment policy." Mich. Comp. Laws § 380.1300a. State law further provides that the sexual harassment policies "shall prohibit sexual harassment by school district employees, board members and pupils directed toward other employees or pupils and shall specify penalties for violation of the policy." *Id.*

j. *Minnesota*: Under Minnesota law, in addition to the State's Human Rights Act that prohibits any educational institution from engaging in sex discrimination, Minn. Stat. § 363A.13, subd. 1, postsecondary institutions must have a written policy on sexual harassment and sexual violence, Minn. Stat. § 135A.15, subd. 1(b). The Minnesota State Colleges and Universities system has a policy that prohibits sexual harassment that is "directed at verbal or physical conduct that constitutes discrimination/harassment under state and federal law and is not directed at the content of speech." Its sexual violence policy states that it "is committed to eliminating sexual violence in all its forms." Minnesota law requires local school boards to adopt written sexual harassment policies and the Commissioner of the Minnesota Department of Education "maintain[s] and make[s] available to school boards a model sexual, religious, and racial harassment and violence policy." Minn. Stat. § 121A.03, subds. 1 & 2.

k. *Oregon*: Oregon has numerous policies against the sorts of conduct implicated in the Rule. Oregon law prohibits discrimination on the basis of sex. ORS 659A.030. Harassment (ORS 166.065) and offensive sexual contact (ORS 163.415) are crimes under Oregon law, as is offensive contact with a minor (ORS 163.479). Oregon Revised Code Section 342.700 et seq. requires all public school districts, education service districts and public charter schools to adopt a sexual harassment policy applicable to all students and staff. The law sets forth the requirements for the policies, including definitions and consequences for assault, unwanted physical and verbal contact, and demands for sexual favors. ORS 342.704.

l. *Rhode Island*: Under Rhode Island law, discrimination on the basis of sex is prohibited in all public elementary and secondary schools in the state. R.I.G.L. § 16-38-1.1. In 2007, the Lindsay Ann Burke Act was passed, requiring all schools to adopt a policy responding to allegations of teen dating and sexual violence. R.I.G.L. § 16-85-2. The Council on Postsecondary Education issued a Sexual Harassment and Sexual Violence policy in 2015 to prohibit all forms of sexual harassment and sexual violence that all faculty, staff and students at all higher education entities in Rhode Island must comply with.

m. *Virginia*: Virginia's General Assembly has enacted several statutes that protect victims of sexual assault. For example, Virginia Code § 23.1-808 requires review of sexual violence policies annually. Virginia Code § 23.1-806 requires that a review committee convene within 72 hours of a report of an alleged act of sexual violence and determine whether the matter should be referred to local law enforcement, and where the conduct may constitute a felony, contact the local Commonwealth's Attorney (subject to certain privacy protections). And Virginia Code § 23.1-807 requires that universities provide access to or enter into memoranda of understanding with sexual assault crisis centers or other victim support service.

n. *Vermont*: Under Vermont state law, "[i]t is the policy of the State of Vermont that all Vermont educational institutions provide safe, orderly, civil, and positive learning environments. Harassment, hazing, and bullying have no place and will not be tolerated in Vermont schools. No Vermont student should feel threatened or be discriminated against while enrolled in a Vermont

school." Vt. Stat. Ann. tit. 16, § 570(a). Therefore, Vermont law instructs that "[e]ach school board shall develop, adopt, ensure the enforcement of . . . harassment, hazing, and bullying prevention policies that shall be at least as stringent as model policies developed by the Secretary." *Id.* § 570(b). The Secretary of Education has developed model policies and procedures for the prevention of hazing, harassment, and bullying. Vermont statute also requires that the board of trustees or other governing body of each postsecondary school operating in Vermont adopt and ensure enforcement of a policy establishing that harassment, as defined by Vt. Stat. Ann. tit. 16, § 11(a)(26), is a form of unlawful discrimination and therefore prohibited. The board is also required to establish procedures to address complaints of discriminatory harassment and to initiate educational programs designed to prevent such conduct. Vt. Stat. Ann. tit. 16, § 178.

o. *Washington*: Washington law prohibits discrimination on the basis of sex in K-12 schools. Chapter 28A.640 Wash. Rev. Code. Regulations implementing this statute define sexual harassment for antidiscrimination purposes and establish required criteria for each school district's sexual harassment policy. Wash. Admin. Code §§ 392-190-056, 057. School districts are required to adopt sexual harassment policies and procedures that meet both state and federal antidiscrimination law requirements. The Washington State School Directors' Association has published model policies and procedures concerning issues such as harassment, gender inclusivity, and student discipline. Washington's Gender Equality in Higher Education Act, Chapter

28B.110 Wash. Rev. Code, prohibits discrimination on the basis of gender at Washington's higher education institutions. It requires each institution to develop and distribute policies and procedures for handling complaints of sexual harassment and sexual violence, as well as other rules and guidelines to eliminate sexual harassment and other forms of gender discrimination in higher education. Wash. Rev. Code § 28B.110.030(8). In 2014, the state legislature created a Campus Sexual Violence Prevention Task Force, which submitted its final report at the end of 2016. Among other things, the report contains summaries of initiatives launched by public and private institutions to combat sexual violence on campus, as well as positions and recommendations on many issues related to sexual violence prevention.

p. *Wisconsin*: Under Wisconsin law, each school board in charge of the K-12 public schools of the district bears the responsibility for developing policies prohibiting discrimination against pupils, including policies prohibiting discrimination on the basis of sex. Wis. Admin. Code §§ PI 9.01(1); 9.02(2). The Wisconsin Administrative Code provides that students, faculty, and staff within the University of Wisconsin System are subject to discipline, up to and including dismissal for engaging in acts of sex discrimination, including sexual assault, sexual harassment, dating violence, and stalking. Wis. Admin. Code §§ UWS 4, UWS 7, UWS 17. Additionally, University of Wisconsin System Board of Regents Policy 14-2 requires each school within the system to implement institutional procedures consistent with the policy, including providing education and training, defining prohibited conduct on the basis of

sex, identifying the institution's Title IX coordinator, designating responsible employees, and describing available counseling, medical, legal, and other resources for complainants, victims, and accused persons.

222. Where a Plaintiff State's law provide greater protections than the Rule, schools subject to these laws will need to create parallel code of conduct provisions and enforcement mechanisms—one addressing "Title IX sexual harassment" and one addressing "non-Title IX sexual harassment." *See* ¶¶ 208–209, *supra*.

223. The Rule will undermine the goals of State laws and regulations by discouraging reporting of sexual harassment, where, for example, victims do not wish to submit to cross-examination or disclosure of sensitive information required by the Rule, and by exacerbating the re-traumatization that could result from multiple rounds of interviews or adversarial cross-examination by an interested party.

224. Certain States require that policies governing K-12 and/or postsecondary schools be subject to a rigorous regulatory process to include, in some cases, notice and comment rulemaking. As a result, certain States will face difficulty in updating their regulations or policies in time to comply with the effective date of the Rule. For example,

a. *California*: Rulemaking by the California Department of Education, the California State Board of Education, and the State Superintendent of Public Instruction must comply with the requirements of California's Administrative Procedure Act. Cal. Gov't Code § 11340 et seq. These entities will need to engage in rulemaking to amend state policies relating to non-discrimination and complaint procedures for alleged violations of federal program statutes and regulations in California's schools. Compliance with California's

Administrative Procedure Act requires public notice of the express terms of the proposed regulation and an opportunity for public discussions of proposed regulations before regulations can be adopted. Cal. Gov't Code §§ 11346.2, 11346.4, 11346.45, 11346.5, 11346.6, 11346.8 .

b. *New Mexico*: To comply with the Rule's new requirements, postsecondary schools will have to change their regents, faculty, staff, and student policies, as well as the entire discrimination claims process. These changes must be made subject to New Mexico's regulatory requirements, which include a period of 30 days at a minimum between publication of a notice of proposed rule and a hearing on the rule. NMSA 1978, § 14-4-5.2.

c. *Wisconsin*: In Wisconsin, K-12 institutions must provide for a public hearing and opportunity for public commentary at a board meeting before the board for public schools in a particular district may adopt new non-discrimination policies or procedures. Wis. Admin. Code § PI 9.03(3). Similarly, administrative rules and procedures affecting the University of Wisconsin System of public higher education must go through Wisconsin's administrative rulemaking process, complete with a period of notice of the proposed rule and public comment. Prior to allowing a proposed rule to proceed to a period of public comment, the Wisconsin Legislative Council staff serves as the Administrative Rules Clearinghouse. An agency must submit a proposed rule to the Clearinghouse for review and comment, prior to holding a public hearing on the rule. The Clearinghouse then assigns a Clearinghouse Rule number to the proposed rule and reviews the statutory

authority under which the agency intends to promulgate the rule as well as the form, style and clarity of the rule. The Clearinghouse then submits a Clearinghouse Report to the agency with its comments about the rule.

225. The Rule will also harm the States' sovereign interests by requiring States with policies and laws that are consistent with Title IX's anti-discriminatory aims but conflict with the Rule's prescriptive grievance process to revise their codes, such as state employment laws, student privacy laws, and student discipline codes, in order to avoid having their laws preempted by the Rule, without even providing sufficient time for States to conduct such a review.

226. The States also have an interest in participating in the administrative process governing the Rule's adoption. The Department promulgated the Rule in a manner that deprived the States of a meaningful opportunity to participate in this process.

C. The Rule Will Harm Plaintiff States' Quasi-Sovereign Interests

227. Sexual harassment can lead to serious physical, emotional, psychological, and other harms. These harms can continue long after an incident or incidents of sexual harassment and can affect not just the individual subject to harassment, but friends, family members, and community members.

228. These harms are often exacerbated if the individual is forced to relive the incident of harassment in the context of investigatory, judicial, or other proceedings.

229. The Rule will undermine schools' efforts to combat sexual harassment, discourage reporting of sexual harassment, and cause increased harm to students and others who suffer sexual harassment in connection with educational programs.

230. In addition to causing harm to individuals who suffer sexual harassment, the Rule will undermine the educational mission of schools in the Plaintiff States, causing additional harm to students, faculty, staff, and other residents of the Plaintiff States.

231. The Rule will undermine State efforts to combat sexual harassment and ensure safe and equal educational experiences for all students. For example,

a. *New Jersey*: The New Jersey Attorney General issued revised statewide standards in 2018 on Supporting Victims of Sexual Assault. (AG Directive 2018-5). The dissemination and implementation of this Directive included stakeholder meetings with a wide variety of actors in all of New Jersey's 21 counties, including school administrators, victim advocates, and attorneys. In addition, the Office of the Secretary of Higher Education works with the State's public and private higher education institutions to ensure students have access to high quality education and serves as the lead communication agency on higher education with the Federal government. In 2019, the Governor signed Executive Order 61 (Murphy 2019), establishing a Safe and Inclusive Learning Environment working group (among 4 other groups) that was charged with developing an implementation guide for colleges and universities based on the 2017 NJ Task Force on Campus Sexual Assault report recommendations. The Secretary coordinated this wide variety of stakeholders from the State's higher education institutions to create an implementation plan including guidelines and best practices for schools carrying out sexual harassment investigations and grievance procedures.

b. *Virginia*: In 2014, then Governor Terry McAuliffe issued Executive Order 25, which established the Governor's Task Force on Combating Campus Sexual Violence. Attorney General Herring chaired the Task Force, which provided a final report and 21 recommendations to the Governor in May 2015. The work

> of the Task Force was a collaborative effort that included top state leaders and experts including Virginia's Secretaries of Education, Health and Human Services, and Public Safety and Homeland Security, representatives from higher education, student leaders, law enforcement, community advocates, and health professionals. The recommendations were designed to provide a safe and equitable learning and teaching environment for students, faculty members, and staff by enhancing institutional response to campus sexual violence with a sensitive and supportive approach to all parties involved.

232. The States have a quasi-sovereign interest in protecting the safety and well-being of their residents.

233. Protecting public health is one of the police powers reserved to the States. The States can reduce future health care costs when they effectively prevent their residents from being subjected to sexual harassment in their education institutions. The States have an interest in ensuring that funds are not diverted from other vital State priorities and programs towards treating increased numbers of sexual harassment victims due to the Rule's failure to provide sufficient protections to stop, prevent, and remedy sexual harassment and violence in State schools.

234. The States' interest is particularly strong in matters relating to the physical safety of their residents and in those relating to the protection of children. The Rule harms these interests by leaving many student victims and survivors of sexual harassment without adequate relief, exacerbating the effects of harassment and resulting in school communities that are less safe and unable to provide a nondiscriminatory environment, as required by Title IX.

CAUSES OF ACTION

COUNT I
Agency Action Not in Accordance With Law
(5 U.S.C. § 706(2)(A), (C)) – Title IX

235. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

236. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." 5 U.S.C. § 706(2)(A).

237. Title IX provides that no person in the United States shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" on "the basis of sex." 20 U.S.C. § 1681.

238. The purpose of Title IX is "to provide individual citizens effective protection against" discriminatory practices. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979). Title IX ensures that no student is excluded from participation in or denied the benefits of an education because of sexual harassment.

239. Congress created a robust administrative enforcement scheme for enforcing Title IX's prohibition on discrimination on the basis of sex.

240. The Rule violates Title IX in numerous ways, including by:

a. Narrowing the definition of sexual harassment;

b. Narrowing Title IX to apply only when sexual harassment occurs in a school's education program or activity and inside the United States;

c. Requiring a complainant to be "participating in or attempting to participate in the education program or activity" of the school at the time a formal complaint is filed; and

d. Placing schools at greater risk of losing federal funding if they fail to strictly satisfy every element of the Rule's prescriptive grievance process than if they respond to sexual harassment in a manner that is just short of clearly unreasonable.

241. Defendants have acted in violation of Title IX and the APA. The Rule is therefore unlawful and must be set aside.

COUNT II
Agency Action in Excess of Statutory Authority
(5 U.S.C. § 706(2)(C)) – Title IX

242. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

243. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

244. In Title IX, Congress authorized the Department only to issue rules and regulations that "effectuate the [substantive] provisions of" Title IX. 20 U.S.C. § 1682.

245. Although the Department relied on this authority in issuing the Rule, the Rule does not "effectuate" Title IX. The following provisions, among others, do not effectuate Title IX's prohibition of discrimination on the basis of sex:

a. Mandating that schools dismiss formal complaints if "the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States"; and

b. Mandating prescriptive grievance procedures for primary and secondary education that override local school discipline policies and practices that meet Supreme Court standards and allow for the flexibility needed to maintain safety.

246. Defendants have exceeded their statutory authority in violation of Title IX and the APA. The Rule is therefore unlawful and must be set aside.

COUNT III
Agency Action Not in Accordance With Law & in Excess of Statutory Authority
(5 U.S.C. § 706(2)(A), (C)) – FERPA

247. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

248. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

249. Defendants are charged with enforcing both Title IX and FERPA.

250. FERPA prohibits the "release" of student "education records" without the written consent of the student (or parent, where applicable). 20 U.S.C. § 1232g(b).

251. Schools must comply with FERPA when handling a Title IX matter. Subject to a limited exception, FERPA applies to Title IX disciplinary investigations, protecting the education records of all students involved.

252. The Rule violates FERPA by requiring schools to provide student education records beyond what is allowed by FERPA.

253. Defendants lack authority to implement these non-conflicting statutes in a way that creates a conflict and to resolve that conflict by superseding FERPA via a Title IX regulation.

254. Defendants have exceeded their statutory authority and acted in violation of FERPA and the APA. The Rule is therefore unlawful and must be set aside.

COUNT IV
Agency Action That Is Arbitrary, Capricious, and an Abuse of Discretion
(5 U.S.C. § 706(2)(A))

255. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

256. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, [and] an abuse of discretion." 5 U.S.C. § 706(2)(A).

257. A rule is arbitrary and capricious if, for example, the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

258. The following aspects of the Rule, among others, are arbitrary and capricious:

a. Requiring all schools to comply with the Rule by August 14, 2020;

b. Creating inconsistent requirements between the Rule's preamble and the Rule itself;

c. Proscribing standards for Title IX that are inconsistent with other civil rights laws applicable in schools;

d. Imposing requirements inconsistent with the Clery Act/VAWA by preventing schools from timely and effectively fulfilling their obligations under these statutes to investigate allegations of sexual assault both on and off campus;

e. Narrowing the definition of sexual harassment;

f. Limiting Title IX's protections to sexual harassment that occurs in a school's education program or activity or inside the United States;

g. Requiring a complainant to be participating in or attempting to participate in a school's education program or activity for a formal complaint to be filed;

h. Establishing other complaint filing barriers without regard to the unique needs of K-12 students;

i. Mandating that schools dismiss formal complaints if "the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States," but allowing schools to take action under other provisions of their code of conduct;

j. Limiting the remedies that a school can issue to only those directly applicable to the complainant and for the limited purpose of "restoring or preserving access" to the school;

k. Requiring postsecondary schools to provide live hearings with direct, oral cross-examination by a party's advisor, even if the complainant or respondent is a minor;

l. Requiring postsecondary schools to provide parties with advisors to conduct direct, oral cross-examination;

m. Requiring postsecondary schools to make immediate evidentiary decisions on the record during live hearings;

n. Preventing postsecondary schools from considering any statement unless the party or witness submits to live, direct, oral cross-examination;

o. Preventing K-12 schools from placing reasonable limitations on the parties' ability to discuss the allegations under investigation;

p. Requiring all schools to provide parties with all evidence directly related to the allegations, without regard for relevance, confidentiality, the protection of witnesses (who may be young minors), or the implications of sharing sensitive information with and about young children;

q. Prohibiting only school publications that "state" a discriminatory purpose or intent;

r. Eliminating the notice requirement for institutions controlled by a religious organization; and

s. Intentionally disregarding critical costs, providing inadequate and flawed assessments of the costs necessary to comply with the Rule, and providing inadequate justification for costs that the Rule imposes on schools.

259. In promulgating the Rule, Defendants have acted in a manner that is arbitrary, capricious, and an abuse of discretion in violation of the APA. The Rule is therefore unlawful and must be set aside.

COUNT V
Without Observance of Procedure Required by Law
(5 U.S.C. § 706(2)(D))

260. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

261. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

262. In issuing substantive rules, federal agencies are required to follow the notice and comment process set forth in the APA.

263. The agency must publish a "[g]eneral notice of proposed rule making" in the Federal Register. 5 U.S.C. § 553(b). That notice must describe "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3).

264. The agency must further provide "interested persons" an "opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c).

265. To comply with the APA's notice-and-comment requirements, the agency's final rule must be "a 'logical outgrowth' of the agency's proposed regulations." *Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 442 (D.C. Cir. 2012). The agency "must *itself* provide notice of a regulatory proposal." *Id.* at 462 (internal quotation marks omitted). A final rule is not a logical outgrowth if "interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." *Id.* at 461 (internal quotation marks omitted).

266. The Rule is not a logical outgrowth of the notice of proposed rulemaking. Specifically, the notice of proposed rulemaking failed to provide notice of provisions:

a. Explicitly preempting state and local laws that conflict with certain sections of the Rule;

b. Allowing for schools to consolidate complaints;

c. Allowing for dismissal if a respondent is no longer enrolled or employed by the recipient;

d. Creating a new confidentiality provision that is internally inconsistent with the existing confidentiality regulation already incorporated by reference from Title VI;

e. Prohibiting students from filing complaints if they are not participating in or attempting to participate in an education program or activity at the time of complaint filing; and

f. Purporting to make portions or sections of the Rule severable.

267. In addition, "[u]nder APA notice and comment requirements, among the information that must be revealed for public evaluation are the technical studies and data upon which the agency relies in its rulemaking." *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 236 (D.C. Cir. 2008) (internal quotation marks and brackets omitted). Agencies must provide these studies during the rulemaking "in order to afford interested persons meaningful notice and an opportunity for comment." *Id.* at 237. "[A]n agency [also] commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991).

268. Defendants failed to provide interested parties with methodology for its cost-benefit analysis and the technical reports and data on which the agency relied in preparing the

notice of proposed rulemaking. This prevented Plaintiff States and others from meaningfully commenting on the Department's estimates.

269. In promulgating a final rule, the agency must provide a statement of the "basis and purpose." 5 U.S.C. § 553(c). In this statement, the agency must "respond in a reasoned manner" to all public comments "that raise significant problems." *Am. Coll. of Emergency Physicians v. Price*, 264 F. Supp. 3d 89, 94 (D.D.C. 2017) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003)). "[F]ailure to address these comments, or at best its attempt to address them in a conclusory manner, is fatal to its defense." *Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 449 (D.C. Cir. 2012) (cleaned up).

270. Among others, the Department failed to provide an adequate explanation for:

a. Prohibiting only school publications that "state" a discriminatory purpose or intent;

b. Eliminating the notice requirement for institutions controlled by a religious organization; and

c. Not providing interested parties with technical reports and data on which the agency relied in preparing the notice of proposed rulemaking.

271. Any rule issued under Title IX must be approved by the President of the United States, who has delegated this authority to the Attorney General of the United States. 20 U.S.C. § 1682; Exec. Order No. 12,250, § 1-1, 45 Fed. Reg. 72,995 (Nov. 2, 1980).

272. The Rule does not state that it was approved by the Attorney General of the United States or his designate.

273. In promulgating the Rule, Defendants have failed to follow the procedural requirements of the APA and Title IX. The Rule is therefore unlawful and must be set aside.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff States request that this Court enter judgment in their favor and grant the following relief:

a. Postpone the effective date of the Rule pending judicial review under 5 U.S.C. § 705;

b. Declare the Rule unlawful pursuant to 5 U.S.C. § 706(2)(A), (C), & (D);

c. Preliminarily and permanently enjoin the Department and its officers, employees, and agents from applying and enforcing the Rule;

d. Vacate and set aside the Rule;

e. Award Plaintiff States reasonable costs and expenses, including attorneys' fees; and

f. Grant such other and further relief as the Court deems just and proper.

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FOR THE DISTRICT OF COLUMBIA

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Plaintiffs,

v.

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Washington, D.C. 20202

UNITED STATES DEPARTMENT OF EDUCATION 400 Maryland Avenue, S.W. Washington, D.C. 20202 UNITED STATES OF AMERICA, Defendants.	

INTRODUCTION

1. Plaintiffs Commonwealth of Pennsylvania, State of New Jersey, State of California, State of Colorado, State of Delaware, District of Columbia, State of Illinois, Commonwealth of Massachusetts, State of Michigan, State of Minnesota, State of New Mexico, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, Commonwealth of Virginia, State of Washington, and State of Wisconsin (collectively, "the Plaintiff States" or "the States") bring this action against Defendants Secretary Elisabeth D. DeVos, the U.S. Department of Education (the "Department"), and the United States of America to prevent implementation of the unlawful rule recently promulgated by the Department titled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020) (the "Title IX Rule" or "Rule").

2. If the Rule is permitted to take effect, students across the country will return to school in the fall with less protection from sexual harassment.[1] The Rule will reverse decades of effort to end the corrosive effects of sexual harassment on equal access to education—a commitment that, until now, has been shared by Congress and the Executive Branch across multiple elections and administrations, as well as by state and local officials and school

[1] Unless otherwise stated, this Complaint uses the term "sexual harassment" to encompass all forms of sexual harassment, including sexual violence and sexual assault.

administrators. And because of the Rule's impracticable effective date, primary, secondary, and postsecondary schools across the country will be required to completely overhaul their systems for investigating and adjudicating complaints of sexual harassment in less than three months, in the midst of a global pandemic that has depleted school resources, and with faculty, staff, and student stakeholders absent from their campuses due to the pandemic and, in many cases, on leave due to the summer.

3. The Department claims that its Rule effectuates Title IX of the Education Amendments Act of 1972 ("Title IX"), but in reality the Rule undercuts Title IX's mandate to eradicate sex discrimination in federally funded education programs and activities.[2] The Rule creates substantive and procedural barriers to schools' investigation and adjudication of sexual harassment complaints, and discourages students and others from making sexual harassment complaints. As a result, fewer sexual harassment complaints will be filed, and schools will be less well equipped to protect their students' safety and rid their programs and activities of the pernicious effects of sex discrimination.

4. The Rule is unlawful. Without adequate justification or explanation, the Rule strips away longstanding protections against sexual harassment in violation of Title IX's mandate to prevent and remedy sex discrimination, and in ways that conflict with other federal and state statutes and Supreme Court precedent. For example, the Rule will not allow a school to investigate and remedy an egregious but isolated incident of sexual harassment, including some forms of unwanted touching, under Title IX because such harassment is no longer sufficiently

[2] With only limited exception, Title IX applies to all entities that receive federal funds from the Department, including primary, secondary, and postsecondary public and private schools, as well as museums, libraries, cultural centers and other entities that operate education programs or activities. Unless otherwise stated, this Complaint uses the word "schools" to refer generally to all recipients of federal funding subject to Title IX and the new Title IX Rule.

"pervasive" to fall within the Rule's narrowed definition of sexual harassment. Similarly, the Rule will eliminate a school's ability to open a Title IX investigation into sexual harassment of a former student because that student is no longer "participating" in an education program or activity—even where the former student left school *because of the sexual harassment* and even if the alleged perpetrator remains associated with the campus. In addition, the Rule will prevent a school from investigating a Title IX complaint by a student who is sexually harassed by another student at an off-campus apartment because the harassment did not take place "under the substantial control" of the school, even if the harassment limits the student's ability to benefit from or access the education program or activity. These and the Department's other newly created limitations on Title IX proceedings have no basis in Title IX.

5. The Rule also creates arbitrary and unlawful procedural requirements that will chill reporting of sexual harassment and make it harder for schools to reach fair outcomes as they investigate and adjudicate those sexual harassment complaints that the Department still deems cognizable under Title IX. For example, in postsecondary schools, the Rule will require third-party advisors to conduct live, direct, oral cross-examination of the other party—even where the advisor selected is a parent or the other party's teacher and even where less traumatizing methods exist to allow parties to ask questions of each other.

6. The Department's imposition of one-size-fits-all formal procedures—regardless of the nature of the complaint or the institutional setting—will prevent schools from formulating fair and equitable grievance procedures based on schools' individual circumstances and expertise in providing equitable educational opportunities to their students. In addition, the Rule's mandate that schools dismiss from Title IX proceedings sexual harassment complaints that fall outside the Rule's ambit will result in many schools feeling compelled—as a matter of state law, to ensure

the nondiscriminatory educational experience promised by Title IX, or both—to create separate grievance processes to investigate and adjudicate the same underlying allegations: one for sexual harassment that satisfies the Department's crabbed standards, which can be adjudicated in "Title IX proceedings," and another for sexual harassment as it has been widely understood, which must be relegated to "non-Title IX proceedings." The incentives that the Rule creates for schools are inequitable if not perverse: a school risks its federal funding if it does not strictly comply with even one of the Department's new procedural requirements, but a school that fails to respond to sexual harassment, even in a manner that is just short of clearly unreasonable, may not lose its funding.

7. The Rule's defects stem in part from a flawed rulemaking process. The Department included in the final Rule new substantive provisions that are not a logical outgrowth of the proposed rule, negating the States' (and the public's) opportunity to comment on the consequences of these provisions. Further, the Department has buried even more requirements and prohibitions in its hundreds of pages of preamble and nearly two thousand footnotes, including some that conflict with the text of the final Rule itself. Moreover, the Department failed to provide the public with the data and analysis underlying the Rule, contributing to a cost-benefit analysis that arbitrarily and intentionally disregarded key factors, including the substantial and quantifiable mental health, physical health, emotional, and economic costs to students who are harmed as a result of the Rule.

8. The Department acknowledges that sexual harassment is a form of sex discrimination that can create an unsafe and unwelcoming school environment, interfering with students' learning, impacting their mental and physical health well after the conduct itself has ceased, and potentially affecting survivors' family, friends, and other community members. It

also acknowledges that these harms are often exacerbated if the individual is forced to relive the incident of harassment in the context of investigatory, judicial, or other proceedings, such as the grievance procedures required by the Rule. Nevertheless, the Rule the Department has issued will exacerbate and inflict untold irreparable harm on students nationwide, including the more than 20 million school-age children enrolled in the Plaintiff States' public education systems and over 7 million students enrolled in the Plaintiff States' higher education institutions.

9. According to the federal government's own data, sexual harassment against students remains pervasive and mostly unreported. With the Department's final Rule, sexual harassment will not become less common—but it will, as the Department acknowledges in the Rule, become even less regularly reported and remedied.

10. Compounding the harms imposed by the Rule is its unduly short effective date of August 14, 2020, which is itself an affront to schools and students. Schools nationwide will be forced to undertake wholesale revisions of their sexual harassment policies and procedures in less than three months, in the midst of the ongoing global health crisis caused by the novel coronavirus (COVID-19) pandemic, and while most students and many administrators and faculty are away from school for the summer. This will leave schools unable to engage students, faculty, staff, parents, and other affected stakeholders in their educational communities as they ordinarily would when undertaking such an initiative, and thus unable to complete required internal review and approval processes. The resulting rushed policies will cause confusion and mistrust and will lack the buy-in necessary for effective implementation. Under normal circumstances, requiring schools to overhaul their policies and procedures, re-negotiate collective bargaining agreements, and implement the Rule's hiring, training, and other requirements in less than three months would impose an extraordinarily difficult burden. Given

the ongoing uncertainty caused by the COVID-19 pandemic and the strain it has placed on education institutions, Defendants' decision to require compliance with the Rule by August 14, 2020, is inexplicable.

11. Plaintiffs respectfully request that the Court stay the effective date of the Rule pending judicial review; grant them declaratory and injunctive relief from the Rule, on a preliminary and permanent basis; vacate and set aside the Rule; and award them such other relief as is requested herein.

JURISDICTION AND VENUE

12. This action arises under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 553, 701–06. This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

13. This Court has authority to issue declaratory relief, injunctive relief, and other relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, and the APA, 5 U.S.C. §§ 702, 705–706.

14. This is a civil action in which Defendants are agencies of the United States or officers of such an agency. Venue is proper in this Court because a defendant resides in this district, a substantial part of the events giving rise to this action occurred in this district, and a plaintiff resides in this district and no real property is involved. *See* 28 U.S.C. § 1391(e)(1)(A)–(C).

PLAINTIFF STATES

15. Plaintiff Commonwealth of Pennsylvania is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Josh

Shapiro, the "chief law officer of the Commonwealth." Pa. Const. art. IV, § 4.1. Attorney General Shapiro brings this action on behalf of the Commonwealth pursuant to his statutory authority. 71 Pa. Stat. § 732-204.

16. Plaintiff State of New Jersey is a sovereign state of the United States of America. This action is being brought on behalf of the State by Attorney General Gurbir S. Grewal, the State's chief legal officer. N.J. Stat. Ann. § 52:17A-4(e), (g).

17. Plaintiff State of California is a sovereign state of the United States of America. This action is being brought on behalf of the State by California Attorney General Xavier Becerra, the State's chief law officer, Cal. Const., art. V, § 13, who has the duty to see that the laws of the State are uniformly and adequately enforced, and Governor Gavin Newsom, the State's chief executive officer, who is responsible for overseeing the operations of the State and ensuring that its laws are faithfully executed, Cal. Const., art. V, § 1.

18. Plaintiff State of Colorado is a sovereign state of the United States of America. This action is brought on behalf of the State of Colorado by Attorney General Phillip J. Weiser, who is the chief legal counsel of the State of Colorado, empowered to prosecute and defend all actions in which the state is a party. Colo. Rev. Stat. § 24-31-101(1)(a).

19. Plaintiff State of Delaware is a sovereign state of the United States of America. This action is brought on behalf of the State of Delaware by Attorney General Kathleen Jennings, the "chief law officer of the State." *Darling Apartment Co. v. Springer*, 22 A.2d 397, 403 (Del. 1941). General Jennings also brings this action on behalf of the State of Delaware pursuant to her statutory authority. Del. Code Ann., tit. 29, § 2504.

20. Plaintiff District of Columbia is a sovereign municipal corporation organized under the Constitution of the United States. It is empowered to sue and be sued, and it is the local

government for the territory constituting the permanent seat of the federal government. The District is represented by and through its chief legal officer, the Attorney General for the District of Columbia, Karl A. Racine. The Attorney General has general charge and conduct of all legal business of the District and all suits initiated by and against the District and is responsible for upholding the public interest. D.C. Code § 1-301.81.

21. Plaintiff State of Illinois is a sovereign state of the United States of America. This action is being brought on behalf of the State by Attorney General Kwame Raoul, the State's chief legal adviser to the State of Illinois. His powers and duties include acting in court on behalf of the State on matters of public concern. *See* 15 ILCS 205/4.

22. Plaintiff Commonwealth of Massachusetts is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Maura Healey, who has both statutory and common-law authority and responsibility to represent the public interest for the people of Massachusetts in litigation, as well as to represent the Commonwealth, state agencies, and officials in litigation. *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266-67 (Mass. 1977); Mass. Gen. Laws ch. 12, § 3.

23. Plaintiff State of Michigan is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Dana Nessel, the State of Michigan's chief law enforcement officer, pursuant to her statutory authority. Mich. Comp. Laws § 14.28.

24. Plaintiff State of Minnesota is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Keith Ellison, the chief law officer of the State. Minn. Stat. § 8.01.

25. Plaintiff State of New Mexico is a sovereign state of the United States of America. New Mexico is represented by its Attorney General, Hector Balderas, who is authorized to assert the state's interests in state and federal courts.

26. Plaintiff State of North Carolina is a sovereign state of the United States of America. This action is brought on behalf of the State of North Carolina by Attorney General Joshua H. Stein, who is the chief legal counsel of the State of North Carolina and who has both statutory and constitutional authority and responsibility to represent the State, its agencies, its officials, and the public interest in litigation. N.C. Gen. Stat. § 114-2.

27. Plaintiff State of Oregon, acting by and through the Attorney General of Oregon, Ellen F. Rosenblum, is a sovereign state of the United States of America. The Attorney General is the chief law officer of Oregon and is empowered to bring this action on behalf of the State of Oregon, the Governor, and the affected state agencies under Or. Rev. Stat. §§ 180.060, 180.210, and 180.220.

28. Plaintiff State of Rhode Island is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Peter F. Neronha, the State's chief legal officer. R.I.G.L. § 42-9-5; R.I. Const., art. IX § 12.

29. Plaintiff State of Vermont is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Thomas J. Donovan, Jr., the State's chief legal officer. *See* Vt. Stat. Ann. tit. 3, §§ 152, 157.

30. Plaintiff the Commonwealth of Virginia is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Mark R. Herring. As chief executive officer of the Department of Law, General Herring performs all

legal services in civil matters for the Commonwealth. Va. Const. art. V, § 15; Va. Code Ann. §§ 2.2-500, 2.2-507.

31. Plaintiff State of Washington is a sovereign state of the United States of America. Washington is represented herein by its Attorney General, Bob Ferguson, who is the State's chief legal adviser. The powers and duties of the Attorney General include acting in federal court on matters of public concern to the State.

32. Plaintiff State of Wisconsin is a sovereign state of the United States of America. This action is brought on behalf of the State of Wisconsin by Attorney General Joshua L. Kaul pursuant to his authority under Wis. Stat. § 165.015(6). Attorney General Kaul brings this action at the request of Governor Tony S. Evers pursuant to Wis. Stat. § 165.25(1m).

33. In filing this action, Plaintiff States seek to protect themselves and the students and schools in their States from harm caused by Defendants' illegal conduct and prevent further harm. Those injuries include harm to Plaintiff States' proprietary, sovereign, and quasi-sovereign interests.

DEFENDANTS

34. Defendant Elisabeth D. DeVos is Secretary of the United States Department of Education and is sued in her official capacity. Her principal address is 400 Maryland Avenue, S.W., Washington, D.C. 20202.

35. Defendant United States Department of Education is an executive agency of the United States of America. Its principal address is 400 Maryland Avenue, S.W., Washington, D.C. 20202.

36. Secretary DeVos is responsible for carrying out the duties of the Department of Education under the Constitution of the United States of America and relevant statutes, including Title IX of the Education Amendments Act of 1972.

FACTUAL ALLEGATIONS

I. STATUTORY AND REGULATORY BACKGROUND

A. Title IX of the Education Amendments of 1972

37. Congress enacted Title IX in 1972 to remedy "one of the great failings of the American educational system" that had plagued America's education institutions for generations, namely, "the continuation of corrosive and unjustified discrimination against women" that "reaches into all facets of education." 118 Cong. Rec. 5803 (1972) (remarks of Senator Birch Bayh, original sponsor of Title IX).

38. Title IX's mandate is broad and unequivocal: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 1972 Education Amendments Act, Pub. L. No. 92-318, § 901(a), 86 Stat. at 373 (codified at 20 U.S.C. § 1681(a)).

39. Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, which provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, Pub. L. No. 88352, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d).

40. Both Title IX and Title VI "sought to accomplish two related, but nevertheless somewhat different, objectives": "to avoid the use of federal resources to support discriminatory

practices" and "to provide individual citizens effective protection against those practices." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

41. Fifteen years after enacting Title IX, Congress enacted legislation clarifying that, if any part of an institution receives federal funding, the whole institution must comply with Title IX. Civil Rights Restoration Act of 1987, Pub. L. 100–259, 102 Stat. 28 (codified in relevant part at 20 U.S.C. § 1687), *superseding Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

42. To enforce Title IX, Congress "authorized and directed" every federal agency providing financial assistance to education programs or activities to "effectuate the provisions of" Title IX "by issuing rules, regulations, or orders of general applicability[.]" Pub. L. No. 92-318, § 902, 86 Stat. at 374 (codified at 20 U.S.C. § 1682). The Department is one of many federal agencies that provide financial assistance to education programs and activities.

43. As a result, any regulations issued by the Department pursuant to Title IX must "effectuate" Title IX's antidiscrimination mandate.

44. Congress further mandated that no agency can issue a rule, regulation, or order effectuating Title IX "unless and until approved by the President." Pub. L. No. 92-318, § 902, 86 Stat. at 374 (codified at 20 U.S.C. § 1682). In Executive Order 12250, the President delegated this authority to the U.S. Attorney General. Exec. Order No. 12250, § 1-1, 45 Fed. Reg. 72,995 (Nov. 2, 1980).

45. Congress empowered federal agencies to enforce their Title IX rules and regulations through "the termination of or refusal to grant or to continue assistance" or "by any other means authorized by law." Pub. L. No. 92-318, § 902, 86 Stat. at 374 (codified at 20 U.S.C. § 1682).

46. Although Congress created a robust administrative enforcement scheme in Title IX, it also provided that any school that violates the statute should first receive notice of noncompliance and be allowed to come into voluntary compliance with Title IX. Pub. L. No. 92-318, § 902, 86 Stat. at 374 (codified at 20 U.S.C. § 1682).

47. Congress provided for judicial review of any agency rule, regulation, or administrative enforcement decision issued to effectuate Title IX, which "shall not be deemed committed to unreviewable agency discretion." Pub. L. No. 92-318, § 903, 86 Stat. at 374–75 (codified at 20 U.S.C. § 1683).

48. Separate from this administrative enforcement scheme, victims of discrimination can enforce Title IX through an implied private right of action, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979), including against States, Rehabilitation Act Amendments of 1986, 100 Stat. 1845 (codified at 42 U.S.C. § 2000d–7).

49. In 1992, the Supreme Court confirmed that schools can be held liable for violating Title IX based on incidents of sexual harassment. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992). And it further held that the students who have experienced sexual harassment can seek money damages from schools in private civil suits. *Id.* at 75-76.

50. Since enacting Title IX, Congress has passed several other statutes reflecting its intent to provide strong protections for individuals subjected to sexual violence and assault.

51. In 1990, Congress passed the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the "Clery Act"), Pub. L. No. 101–542, 104 Stat. 2384 (codified at 20 U.S.C. § 1092(f)), which imposes on postsecondary schools specific reporting requirements about crimes committed on campus.

52. In 1994, Congress passed the Violence Against Women Act (“VAWA”), Pub. L. No. 103–322, 108 Stat. 1902 (codified at 34 U.S.C. §§ 12291–12512), which provides for federal funding to stop violent crimes committed against women.

53. In 2013, Congress passed the Campus Sexual Violence Elimination Act as part of the VAWA Reauthorization Act. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat.54 (codified at 20 U.S.C. § 1092(f)(8)(B)(iv) & (C)). The Campus Sexual Violence Elimination Act amended the Clery Act to better align it with Title IX and provide for a survivor-centered approach to prevention and enforcement in schools. It encouraged greater transparency at higher education institutions and required such institutions to prevent sexual violence, protect victims, and investigate and resolve on or off campus complaints of sexual violence, including domestic violence, stalking, and dating violence.

B. The Department’s 1975 Title IX Regulations

54. In 1975, the U.S. Department of Health, Education and Welfare, the Department of Education’s predecessor for matters relating to education, promulgated regulations to effectuate the antidiscrimination mandate of Title IX. 34 C.F.R. pt. 106.

55. The regulations required schools to “adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [the regulations].” 34 C.F.R. § 106.8(b).

56. The regulations also prohibited schools from using or distributing publications that “suggest[], by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex.” 34 C.F.R. § 106.9(b)(2).

57. Under the regulations, if the Department found that a school violated Title IX, the school “shall take such remedial action as the Assistant Secretary [for Civil Rights] deems necessary to overcome the effects of such discrimination.” 34 C.F.R. § 106.3(a).

58. Title IX provides an exemption for schools controlled by religious organizations if its application would be inconsistent with the religious tenets of the organization. Pub. L. No. 92-318, § 901(a)(3), 86 Stat. at 373 (codified at 20 U.S.C. § 1681(a)(3)). The regulations provided that any school that wished to claim the exemption was required to "submit[] in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization." 34 C.F.R. § 106.12(a)–(b).

59. A congressional hearing to review these regulations reaffirmed Congress's intent to make the protections against sex discrimination in Title IX co-extensive with Title VI's protections against discrimination based on race, color, and national origin. For example, Senator Bayh noted that Title IX "sets forth prohibition and *enforcement* provisions which generally parallel the provisions of Title VI." *Sex Discrimination Regulations: Hearings before the Subcommittee on Postsecondary Education of the Committee on Education and Labor*, H.R. 94th Cong., First Session, at 170 (June 17, 20, 23, 24, 25, & 26, 1975) (statement of Senator Bayh of Indiana (quoting from his February 28, 1972, statement, 118 Cong. Rec. 5807 (emphasis in original))).

60. The 1975 regulations were codified not only in the Department of Education's regulatory code, but also in the regulatory codes of 25 other agencies that also funded education programs.[3] *E.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities

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[3] *See* Agency for International Development, 22 C.F.R. pt. 229; Corporation for National and Community Service, 45 C.F.R. pt. 2555; Department of Agriculture, 7 C.F.R. pt. 15a; Department of Commerce, 15 C.F.R. pt. 8a; Department of Defense, 32 C.F.R. pt. 196; Department of Energy, 10 C.F.R. pt. 1042; Department of Health and Human Services, 45 C.F.R. pt. 86; Department of Homeland Security, 6 C.F.R. pt. 17; Department of Housing and Urban Development, 24 C.F.R. pt. 3; Department of Interior, 43 C.F.R. pt. 41; Department of

Receiving Federal Financial Assistance; Final Common Rule, 65 Fed. Reg. 52,858 (Aug. 30, 2000) (promulgating common rule to "promote consistent and adequate enforcement of Title IX" by the adopting agencies).

C. The Department's Policy on Unlawful Sexual Harassment

61. Since the 1980s, the Department has recognized that sexual harassment is a form of sex discrimination prohibited by Title IX.

62. Under the Reagan Administration, the Department's Office for Civil Rights ("OCR") recognized sexual harassment as a serious problem that was prohibited by Title IX and issued enforcement and policy guidance to all OCR regional directors accordingly. U.S. Dep't of Educ., Office for Civil Rights, Policy Mem., Antonio J. Califa, Director for Litigation Enforcement and Policy Services (Aug. 31, 1981) ("Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex . . . that denies, limits, provides different, or conditions the provision of aids, benefits, services, or treatment protected under Title IX."); *see also* Dep't of Educ., *Sexual Harassment: It's Not Academic Pamphlet* (1988)[4] (requiring education institutions, where sexual harassment is found, to "take immediate action to stop and prevent further harassment, as well as initiate appropriate remedial measures").

63. The Department's position has been consistent with interpretations of other anti-discrimination statutes.

Justice, 28 C.F.R. pt. 54; Department of Labor, 29 C.F.R. 36; Department of State, 22 C.F.R. pt. 146; Department of Transportation, 49 C.F.R. pt. 25; Department of Treasury, 31 C.F.R. pt. 28; Department of Veterans Affairs, 38 C.F.R. pt. 23; Environmental Protection Agency, 40 C.F.R. pt. 5; Federal Emergency Management Agency, 44 C.F.R. pt. 19; General Services Administration, 41 C.F.R. pt. 101-4; National Aeronautics and Space Administration, 14 C.F.R. pt. 1253; National Archives and Records Administration, 36 C.F.R. pt. 1211; National Science Foundation, 45 C.F.R. pt. 618; Nuclear Regulatory Commission, 10 C.F.R. 5; Small Business Administration, 13 C.F.R. pt. 113; Tennessee Valley Authority, 18 C.F.R. pt. 1317.

[4] https://files.eric.ed.gov/fulltext/ED330265.pdf.

64. Under Title VII of the Civil Rights Act of 1964, sexual harassment is actionable if, among other things, it creates a hostile environment because it is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986). Employees have a right to file a Title VII complaint after leaving employment for any reason.

65. The Department has likewise incorporated the disjunctive "severe, pervasive, or persistent" definition of hostile environment harassment into its enforcement of Title VI's prohibition of discrimination on the basis of race, color, and national origin. Department policy stated that "harassment need not result in tangible injury or detriment to the victims of the harassment" to create a hostile environment. *Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11,448, 11,450 (Mar. 10, 1994). The Department further recognized that Title VI and Title IX set similar legal standards. *Id.* at 11,451 n.2. Title VI does not limit who is able to file a complaint of harassment based on race, color, or national origin.

66. Beginning in 1997 and continuing until the promulgation of the Rule, OCR issued policy documents that established foundational requirements for how schools must respond to sexual harassment. The Department enforced these policies for more than two decades. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (Mar. 13, 1997) (the "1997 Policy"); *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed. Reg. 5512 (Jan. 19, 2001) (the "2001 Policy"); Stephanie Monroe, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Jan. 25, 2006) (the

"2006 Letter")[5]; Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Apr. 4, 2011, withdrawn Sept. 22, 2017) (the "2011 Letter")[6]; U.S. Dep't of Educ., *Questions and Answers on Title IX and Sexual Violence* (Apr. 24, 2014, withdrawn Sept. 22, 2017) (the "2014 Q&A")[7]; U.S. Dep't of Educ., *Q&A on Campus Sexual Misconduct* (Sept. 2017) (the "2017 Q&A").[8]

67. Both the 1997 Policy and the 2001 Policy went through a notice and comment process prior to final publication in the Federal Register. *Sexual Harassment Guidance: Peer Sexual Harassment*, 61 Fed. Reg. 42,728 (Aug. 16, 1996); *Sexual Harassment Guidance: Harassment of Students by School Employees*, 61 Fed. Reg. 52,172 (Oct. 4, 1996); *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 65 Fed. Reg. 66,092 (Nov. 2, 2000).

68. These policy documents set forth schools' obligation to provide students with an education experience free from sexual harassment. That obligation entails preventing sexual harassment, ending it when it occurs, preventing its recurrence, and remedying its effects.

69. In these policy documents, the Department consistently set forth and reaffirmed certain fundamental principles relating to administrative enforcement of Title IX with respect to sexual harassment: (1) schools are obligated to take affirmative steps to prevent sexual harassment, end harassment when it does occur, prevent its recurrence, and remedy its effects; (2) unlawful sexual harassment is defined as unwelcome conduct of a sexual nature that denies or limits a student's ability to participate in or benefit from the school's program based on sex;

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[5] https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html.

[6] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[7] https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[8] https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

(3) unlawful sexual harassment can be caused by both quid pro quo harassment and a hostile environment; (4) a hostile environment is created by conduct that is severe, persistent, *or* pervasive—in other words, sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program; (5) schools are required to address harassing conduct occurring outside an education program or activity if the conduct creates a hostile environment in an education program or activity; (6) schools must adopt prompt and equitable grievance procedures that allow for, among other things, adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; and (7) schools may incorporate Title IX sexual harassment policies and procedures into their broader codes of conduct and grievance procedures.

70. In these prior policy documents, the Department did not require schools to dismiss complaints that fell outside the scope of Title IX as defined by regulation; it did not limit who could file a complaint alleging unlawful sexual harassment; it did not dictate prescriptive grievance procedures; and it did not mandate the creation of policies and procedures for sexual harassment separate and apart from the schools' other civil rights policies, student codes of conduct, or faculty and employee handbooks.

71. The Department's policy on administrative enforcement of Title IX remained consistent after the Supreme Court set heightened standards for liability in cases brought under Title IX's implied private right of action for money damages. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998); *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 632 (1999) (requiring school's actual knowledge of, and deliberate indifference to, harassing conduct for purposes of private claim for money damages).

72. In two letters issued following *Gebser*, the Department advised that even after this decision, schools' obligations under the Department's administrative enforcement of Title IX remained unchanged. Richard W. Riley, U.S. Sec'y of Educ., U.S. Dep't of Educ., Dear Colleague Letter regarding *Gebser v. Lago Vista* (Aug. 31, 1998)[9]; Richard W. Riley, U.S. Sec'y of Educ., U.S. Dep't of Educ., Dear Colleague Letter regarding *Gebser v. Lago Vista* (Jan. 28, 1999).[10] The Department observed that the Supreme Court's decision did not alter the fundamental obligations of schools to take prompt action to address sexual harassment because the Court had "expressly distinguished the limits on private recovery of money damages from the Department of Education's enforcement of Title IX."

73. Subsequent Department policy documents continued to reaffirm the principles embodied in the 1997 Policy and to distinguish the Department's administrative enforcement of Title IX from private claims for money damages against schools. *E.g.*, 2001 Policy ("reaffirm[ing] OCR's standards for administrative enforcement of Title IX" and "re-ground[ing] these standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages"); 2006 Letter (stating that the 2001 Policy "outlines standards applicable to OCR's enforcement of compliance in cases raising sexual harassment issues" and distinguishing these standards from those "applicable to private Title IX lawsuits for monetary damages"); 2011 Letter (reaffirming the 2001 Policy while also supplementing it); 2014 Q&A (reaffirming the 2001 Policy while seeking to "further clarify the legal requirements and guidance articulated in the [2011 Letter] and the 2001 Guidance and include examples of

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[9] https://www2.ed.gov/offices/OCR/archives/pdf/AppC.pdf.

[10] https://www2.ed.gov/News/Letters/990128.html.

proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects").

74. In September 2017, the Department issued a letter withdrawing the 2011 Letter and the 2014 Q&A. Candice Jackson, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Sept. 22, 2017).[11] But the Department also issued a new interim Q&A that continued to explicitly reaffirm its 2001 Policy and many of the principles described above that had shaped Title IX enforcement for decades. 2017 Q&A.

II. THE DEPARTMENT'S NEW TITLE IX REGULATIONS

75. In 2018, Defendants published in the Federal Register a notice of proposed rulemaking to address sexual misconduct under Title IX. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462 (Nov. 29, 2018).

76. In a speech after the notice of proposed rulemaking was issued, Secretary DeVos suggested that students are over-reporting sexual harassment and making frivolous claims: "Too many cases involve students and faculty who have faced investigation and punishment simply for speaking their minds or teaching their classes. Any perceived offense can become a full-blown Title IX investigation. But if everything is harassment, then nothing is." Prepared Remarks by Secretary DeVos at the Independent Women's Forum Annual Awards Gala, U.S. Dep't of Educ. (Nov. 13, 2019).[12]

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[11] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

[12] https://www.ed.gov/news/speeches/prepared-remarks-secretary-devos-independent-womens-forum-annual-awards-gala.

77. Secretary DeVos's remarks are contrary to the federal government's own data, which indicates that, despite Title IX's success in reducing many forms of sex discrimination, sexual harassment remains widespread at all levels of education.

78. Data reported by the U.S. Department of Education, the U.S. Department of Justice's Bureau of Justice Statistics, and the Centers for Disease Control and Prevention all demonstrate extraordinarily high rates of sexual harassment against students. For example, the Bureau of Justice Statistics found that 20 percent of college women had been sexually assaulted since entering college and one in three female rape victims had been assaulted for the first time between the ages of 11 and 17.

79. Many other studies confirm these results. For example, a 2019 study found that one in four undergraduate women (25.9 percent), one in fifteen undergraduate men (6.8 percent), and one in four (22.8 percent) transgender or gender-nonconforming undergraduates have been sexually assaulted during college.

80. In late February, the Department of Education lamented the troubling rise of sexual assault in K-12 public schools. In grades 7–12, 56 percent of girls and 40 percent of boys are sexually harassed every year, with nearly a third of the harassment occurring online. More than 20 percent of girls ages 14 to 18 have been touched or kissed without their consent.

81. The vast majority of incidents of sexual harassment go unreported. One national study found that only 12 percent of college students who have experienced sexual assault reported the incident to their school or the police. That same study found that only two percent of female students aged 14–18 who were sexually assaulted reported the incident.

82. On March 27, 2020, many Plaintiff States sent a letter to Defendants asking for the Rule to be delayed during the public health emergency caused by the COVID-19 pandemic. Plaintiff States received no response.

83. Almost eighteen months after issuing the notice of proposed rulemaking, the Department published the final Rule in the Federal Register. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020). All schools must be in full compliance with the Rule by August 14, 2020.

84. The Rule establishes binding obligations that prescriptively dictate how schools must respond to allegations of sexual harassment, in many instances *limiting* the ability of schools to respond to conduct that Title IX seeks to prevent.

85. In promulgating the Rule, which sharply curtails investigation and enforcement, the Department has also upended decades of its own established policy. Much of this established policy went through two notice and comment processes in the late 1990s and early 2000s and has become well-established practice at schools in Plaintiff States.

86. In spite of conclusive evidence in the administrative record that sexual harassment incidents are on the rise and underreporting is a significant concern, Defendants improperly narrow Title IX by excluding all but the most egregious sexual harassment from its protections.

87. Defendants improperly eliminate protections for students who are denied equal access to education due to harassing conduct outside of a school's education program or activity, at, for example, an unauthorized fraternity party or in off-campus housing.

88. Defendants also improperly eliminate protections for students if sexual harassment occurs during a U.S. school-sponsored study abroad program, at a U.S. school's foreign campus, or during a U.S. school-sponsored foreign field trip.

89. Defendants improperly limit the circumstances under which a complainant or a school can file a formal complaint of sexual harassment.

90. Defendants unlawfully require schools to dismiss any complaint that falls outside of the Department's narrow interpretation of Title IX. As a result, schools will be compelled—as a matter of state law, to ensure the nondiscriminatory educational experience promised by Title IX, or both—to establish separate grievance procedures in order to pursue these complaints under their own codes of conduct. At the same time, Defendants make clear that they will withdraw federal funding from schools that inadvertently miscategorize complaints and adjudicate them using the "wrong" grievance procedure. *E.g.*, 85 Fed. Reg. at 30,221 & 30,283 n.1129.

91. The Rule turns Title IX on its head by placing schools at greater risk of losing federal funding if they fail to strictly implement each of the Rule's specified procedural requirements (by, for example, considering the statement of a complainant or witness who is unable or unwilling to testify at the live hearing) than if the response to sexual harassment itself is anything short of "clearly unreasonable."

92. Schools that fail to comply with all of the Rule's many complicated, novel, counterproductive, and burdensome requirements by August 14, 2020, face significant consequences as they could come under investigation by the Department, face enforcement actions, and lose billions of dollars of much-needed federal funding.

A. New Sexual Harassment Regulations

1. Limitations on the Scope of Unlawful Sexual Harassment

93. The Rule improperly narrows the definition of sexual harassment under Title IX to "conduct on the basis of sex that satisfies one or more of the following: (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or (3) 'Sexual assault' as defined in 20 U.S.C. 1092(f)(6)(A)(v),[13] 'dating violence' as defined in 34 U.S.C. 12291(a)(10), 'domestic violence' as defined in 34 U.S.C. 12291(a)(8), or 'stalking' as defined in 34 U.S.C. 12291(a)(30)." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.30(a) (*sexual harassment*)).

94. The first prong excludes "quid pro quo" harassment by students who may be in positions of authority with respect to other students regarding educational aid, benefits, or services but may not be considered "employees" under applicable state law. A teaching assistant, for example, may not be considered an employee by a school but may nevertheless exercise significant or sole control over another student's grades. In fact, a separate notice of proposed rulemaking issued by the National Labor Relations Board proposes to exclude student employees

[13] "Sexual assault" means "an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation." 20 U.S.C. 1092(f)(6)(A)(v). These offenses are limited to: forcible rape, forcible sodomy, sexual assault with an object, forcible fondling, incest, and statutory rape. FBI, *Uniform Crime Reporting Program: National Incident-Based Reporting System Offense Definitions* (2012), https://ucr.fbi.gov/nibrs/2012/resources/nibrs-offense-definitions.

from the definition of "employee" under the National Labor Relations Act. 84 Fed. Reg. 49,691 (Sept. 23, 2019). The Rule never acknowledges this proposal.

95. The second prong improperly elevates the definition of hostile environment sexual harassment in the context of Title IX's administrative enforcement scheme to the heightened standard used only for private civil actions that seek monetary damages. In requiring harassment to be "so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient's education program or activity" to qualify as hostile environment sexual harassment, Defendants impermissibly weaken the administrative enforcement scheme contemplated by Congress in enacting Title IX.

96. The Department's definition requires students to endure repeated and escalating levels of harassment to the point of risking school avoidance; detrimental mental health effects, such as increased risk of self-harm and depression; declines in attendance; withdrawal; and even dropout before the Rule permits schools to stop the discrimination under Title IX.

97. The Department's definition fails to address the unique circumstances for young children and children with disabilities who are unable to verbalize social-emotional and other safety concerns. The impact of such trauma on a student's ability to learn, and thus on access to education, may not be evident until much later, especially for students who may be nonverbal or have other difficulties expressing its impact. Such trauma impacts have far reaching consequences for a student's ability to stay in school, progress, and learn.

98. The Department's new definition of hostile environment sexual harassment conflicts with Title VII of the Civil Rights Act of 1964, which protects school employees, including student employees, from sexual harassment that is "sufficiently severe *or* pervasive to alter the conditions of the victim's employment[.]" *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67

(1986) (emphasis added). The anomalous result is that school employees are afforded more protection from sexual harassment under Title VII than students at those very same schools are afforded under the Department's interpretation of Title IX.

99. The Department also inexplicably deviates from the hostile environment harassment standard under Title VI of the Civil Rights Act of 1964, which protects individuals from harassment on the basis of race, color, or national origin if it is "severe, pervasive, or persistent"—even though the Department has consistently recognized the standard for harassment on the basis of sex and the standard for harassment on the basis of race, color, or national origin are coextensive. *Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11,448, 11,450 (Mar. 10, 1994).

100. These inconsistent standards are contrary to the purpose of Title IX, which is to eliminate sex discrimination in education, including sexual harassment. The Department fails to provide adequate justification for treating harassment on the basis of sex differently from harassment on the basis of race, color, national origin, and disability, such that schools must bear significantly higher administrative and financial burdens to remedy the unlawful conduct on the basis of sex.

101. Similarly, the Rule sets sexual harassment apart from all other conduct prohibited by Title IX, without adequate justification, thus providing less protection to survivors of sexual harassment than other victims under Title IX.

102. The Rule further narrows Title IX's sexual harassment prohibitions to protect students only if the harassing conduct occurs in a school's "education program or activity." The Rule defines "education program or activity" to "include[] locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in

which the sexual harassment occurs, and also include[] any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.44(a)).

103. This improperly excludes from Title IX's protection harassment that takes place *outside* an education program or activity but nonetheless causes a student to "be excluded from participation in" and "be denied the benefits of" an equal education *in* that education program or activity. For example, it would exclude sexual harassment in off-campus housing—where it often occurs.

104. This also effectively prevents schools from fulfilling their Clery Act/VAWA obligations to investigate all allegations of sexual assault, stalking, domestic violence, and dating violence both on and off campus.

105. The Rule further unlawfully limits Title IX so that it protects students from sex discrimination only when the discriminatory conduct occurs "against a person in the United States." 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.8(d)).

106. This limitation misinterprets Title IX. Sex discrimination may flow from discriminatory decisions by a federally funded school relating to sexual harassment that took place outside the United States. Additionally Title IX applies to "all of the operations" of that school's education programs and activities, including those that operate abroad. Defendants' invocation of the presumption against extraterritoriality does not apply.

107. Finally, the Rule requires schools, after receiving a formal complaint of sexual harassment, to "follow[] a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in

§ 106.30,[14] against a respondent." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.44(a)). A school that does not strictly implement the Department's specific procedures will violate the Rule and risk coming under investigation and ultimately losing federal funding.

108. At the same time, the Rule requires that schools, after receiving notice of sexual harassment, respond to that harassment only in a manner that is not deliberately indifferent, i.e., "clearly unreasonable in light of the known circumstances," 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.44(a)).

109. These inconsistent standards mean schools are at risk of losing federal funding if they fail to strictly implement the Department's uniform procedures for handling formal complaints, but face no risk to their funding if they respond to sexual harassment in a manner that is just short of clearly unreasonable.

2. Limitations on Filing and Responding to Complaints

110. The Rule mandates that "[a]t the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.30(a) (*formal complaint*)).

111. This limitation applies regardless of whether the formal complaint is signed by the victim of the harassment or by the Title IX Coordinator.

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[14] The Rule defines "supportive measures" as individualized "non-disciplinary, non-punitive services" offered to a complainant or a respondent to "restore or preserve equal access" to the education program or activity without "unreasonably burdening the other party." They can be offered before, after or without the filing of a formal complaint. Examples include counseling, increased security and monitoring, changes of housing or changes in class schedules. 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. 106.30(a) (*supportive measures*)).

112. Because all conduct meeting the Rule's elevated definition of sexual harassment must go through the Rule's grievance process, the Rule prevents schools from sanctioning or removing a student or employee who has sexually harassed victims not participating or attempting to participate in the school's education program or activity at the time the formal complaint is made.

113. This limitation improperly denies Title IX protection to former students who have left the school or transferred, even if *because of sexual harassment*, as well as to campus visitors or students from other schools who are harassed by school students or employees while participating in the school's education programs or activities on an intermittent basis. This limitation also fails to recognize that perpetrators of sexual harassment may go on to harass others if their conduct goes unaddressed, regardless of whether the perpetrator's original conduct was directed at a complainant participating in or attempting to participate in a school's education program or activity at the time that the formal complaint is made.

114. The Rule also mandates that schools *must* dismiss any complaint that "would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(3)(i)).

115. Although schools "must dismiss" these complaints, the Rule "does not preclude action under another provision of the recipient's code of conduct." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(3)(i)).

116. Defendants lack authority to require schools to dismiss complaints that do not meet Defendants' narrow interpretation of Title IX.

117. Requiring schools to develop separate "Title IX sexual harassment" and "non-Title IX sexual harassment" policies and grievance procedures will cause confusion among students, faculty, and staff; will pose complex administrative and financial burdens; will undermine timely Clery Act/VAWA compliance; and will discourage students, faculty, and staff from reporting sexual harassment. All of these consequences undermine the purpose of Title IX.

118. The Rule further eliminates the requirement in the existing 1975 regulation that remedies shall be designed to "overcome the effects" of discrimination and limits schools from issuing remedies that go beyond "restor[ing] or preserv[ing] access" for the individual complainant. 85 Fed. Reg. at 30,391 & 30,577 (to be codified at 34 C.F.R. §§ 106.3(a) & 106.45(7)(ii)(E)).

119. These limitations on schools' ability to fully redress a sexually hostile environment on campus are inconsistent with Title IX's nondiscrimination mandate and long-standing Department policy requiring schools to take steps "to eliminate any hostile environment that has been created," which may include interventions for an entire class "to repair the educational environment" or for an "entire school or campus." 2001 Policy at 16.

3. Prescriptive Grievance Process

120. The Rule mandates adopting certain arbitrary and unlawful procedural requirements that will chill reporting of sexual harassment and make it harder for schools to provide a fair process to all of their students.

121. The Rule requires that postsecondary schools "must provide for a live hearing," during which "the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)). This cross-

examination "must be conducted directly, orally, and in real time by the party's advisor of choice." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)).

122. As articulated in the preamble but not the Rule itself, the live-hearing requirement applies even if the complainant or respondent is a preschooler cared for at a university daycare center or a minor attending a university's college summer program, summer sports camp, or university-sponsored event for high school students.

123. The live-hearing requirement also applies to faculty and employees of postsecondary institutions accused of sexual harassment. This mandate conflicts with some State employment laws and investigation procedures for expeditiously investigating discrimination claims.

124. Direct, oral cross-examination risks traumatizing both complainants and respondents. Because the Rule prevents schools from placing reasonable limits on who may serve as a party's selected advisor, parties and witnesses may be cross-examined by anyone, even a parent or one's own teacher, which risks chilling reporting and deterring survivors from filing complaints.

125. The mandate for direct, oral cross-examination will impose litigation-like requirements on an investigation and decision-making process intended for an educational setting, without regard to schools' and students' unique needs or to existing state or local requirements. Schools may feel compelled to hire lawyers or arbitrators to serve as decision-makers to ensure that hearings remain fair and to enforce any school-created rules of decorum. These unaccounted-for costs will impose additional burdens on schools, chill reporting and complaint filing, and undermine schools' ability to fulfill their Title IX obligations.

126. Defendants arbitrarily reject less burdensome and less traumatizing methods of cross-examination, such as submitted questions via a neutral third party, which would still allow both parties to ask each other questions and fulfill the truth-seeking function while mitigating the likelihood of traumatization.

127. The Rule further mandates that if either party "does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)).

128. The Rule creates unaddressed inequities, such as when one party's advisor may be an attorney and the other party's advisor may be a volunteer untrained in effective cross-examination. These inequities are inconsistent with the nondiscrimination mandate of Title IX and contrary to the 1975 regulatory requirement that school processes be "prompt and equitable." To avoid inequitable hearings and to reduce the risk of litigation, schools may feel compelled to hire attorneys or specially trained advocates to serve as advisors. These unaccounted-for costs will impose additional burdens on schools and undermine schools' ability to fulfill their Title IX obligations.

129. The Rule further provides that during these hearings, "[b]efore a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)); *see also* 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)) (listing types of irrelevant questions).

130. In the preamble, the Rule arbitrarily and impermissibly forbids schools from adopting additional rules of evidence to ensure an equitable hearing. 85 Fed. Reg. 30,336–37. But the regulations themselves allow schools to adopt "provisions, rules, or practices other than those required by" 34 C.F.R. § 106.45 as long as they "apply equally to both parties." 85 Fed. Reg. at 30,575 (to be codified at 34 C.F.R. § 106.45(b)).

131. Classrooms are not courtrooms, and school decision-makers are typically not attorneys or judges. Instead, school decision-makers are normally administrators and faculty members. Requiring them to rule on the relevancy of every question and "explain any decision to exclude a question as not relevant"—an obligation not required of Article III judges, Fed. R. Evid. 103(c)—will impose significant burdens on schools as they will either need to try to train non-lawyer decision-makers in the rules of evidence or hire lawyers or arbitrators to fill the role.

132. The Rule further mandates that if a complainant, respondent, or witness "does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)). The Rule's preamble states that if a party does not appear at the hearing or refuses to submit to cross-examination, all of the party's statements are excluded, including the allegations that form the basis for the formal complaint itself and statements made in police and hospital reports. 85 Fed. Reg. at 30,347.

133. Because most schools lack subpoena power and are not permitted to compel parties or witnesses to attend hearings, this provision will undermine the ability of schools to

fully address known sexual harassment in their education programs and activities whenever witnesses or parties refuse, or are unable, to submit to direct, oral cross-examination.

134. The Rule does not impose the live hearing requirement on "other recipients that are not postsecondary institutions," even though these recipients may be museums, libraries, or cultural centers. 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(ii)). The Department fails to explain why only postsecondary institutions are required to hold live hearings with direct, oral cross-examination by a third-party advisor.

135. The Rule further states that schools must not "restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(5)(iii)).

136. This provision fails to take into account the particularly challenging situation presented in primary and secondary schools, where young students are in a close environment. These schools now will be unable to restrict young minor complainants and respondents from sharing sensitive information with other minors. This provision increases the risk of retaliation, harassment, and the disclosure of sensitive, confidential, and other legally protected information to third parties.

137. The Rule further requires schools to "[p]rovide both parties [and their third-party advisors] an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(5)(vi)). Schools must provide the evidence "in an electronic format or a hard copy."

138. The Rule's preamble suggests that schools "may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process)." 85 Fed. Reg. at 30,304. However, this clarification is set forth only in the preamble and not found in the text of the Rule.

139. As a result, schools—including and primary and secondary schools—will be required to provide *all* evidence collected during the investigation to both parties and their third-party advisors, without regard to relevancy, confidentiality, the need to protect witnesses (who may be young minors), or the implications of sharing sensitive information with and about young children. The suggestion of a non-disclosure agreement fails to account for the unique circumstances of primary and secondary education: While only a minor party's parent or guardian can sign the nondisclosure agreement, the school must still disclose the evidence to the minor complainant or respondent.

140. The Rule further prohibits schools from imposing "disciplinary sanctions or other actions that are not supportive measures"—i.e., actions that "unreasonably burden[]" one party, 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.30(a) (*supportive measures*))—unless the school follows "a grievance process that complies with § 106.45." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.44(a)).

141. This requirement ignores the unique circumstances of K-12 schools, which will be unable to address the safety of their students and campuses through well-established and constitutionally sound forms of discipline—such as detention or a one- or two-day suspension—without going through a process that requires a minimum of 20 days and a formal appeal process. 85 Fed. Reg. at 30,576–78 (to be codified at 34 C.F.R. §§ 106.45(b)(5)(vi) (requiring

schools to give parties at least 10 days to submit a written response to all evidence directly related to the allegations), (b)(5)(vii) (requiring schools to provide an investigative report fairly summarizing the relevant evidence at least 10 days prior to a hearing or other time of determination), (b)(8) (establishing appeal process)).

142. This prescriptive grievance process establishes procedural requirements for addressing allegations of sexual harassment that differ from the procedural requirements for addressing other types of discrimination. Not only will this create disparities in the treatment of members of different protected classes, contrary to Title IX's purpose, but it could also significantly complicate proceedings in which a single individual is accused of perpetrating multiple different types of discrimination.

143. Title IX does not give Defendants authority to establish rules for primary and secondary education institutions that upend and override local school discipline policies and practices which meet Supreme Court standards and which allow for the flexibility needed by school officials to maintain safety. Title IX authorizes the Department to issue regulations that prevent and remedy sex discrimination, but does not authorize regulations that dictate the particular process that must be used by schools when such process is unrelated to preventing and remedying sex discrimination and when other K-12 processes already ensure fundamental fairness.

144. Finally, the preamble to the Rule admonishes that the "choice to initiate the grievance process must remain within the control of the complainant unless the Title IX Coordinator has specific reasons justifying the filing of a formal complaint over the wishes of a complainant." 85 Fed. Reg. at 30,304. The preamble's requirement that the Title IX Coordinator

in a K-12 school set forth "specific reasons" before acting to protect a child is inconsistent with the *in loco parentis* status of school officials.

4. Family Educational Rights and Privacy Act

145. The Rule conflicts with the Family Educational Rights and Privacy Act of 1974 ("FERPA") and the Department's own FERPA regulations. Pub. L. No. 93-380, § 513, 88 Stat. 484, 571–74 (codified as amended at 20 U.S.C. § 1232g).

146. Defendants are charged with enforcing both FERPA and Title IX.

147. The Rule imposes new obligations on schools that conflict with FERPA, despite the Department's statement in the preamble that a recipient "may comply with both these regulations and FERPA." 85 Fed. Reg. at 30,422.

148. For example, the Rule requires that a school must provide both parties and their third-party advisors "an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint," including evidence the recipient does not intend to rely upon in reaching a determination regarding responsibility. 85 Fed. Reg. at 50,576 (to be codified at 34 C.F.R. §§ 106.45(b)(2)(i)(B) & (5)(vi)). However, FERPA prohibits the "release" of student "education records," which would include any such evidence containing information directly related to a student that is maintained by a school, without the written consent of the student (or parent, where applicable). 20 U.S.C. § 1232g(a)(4)(A), (b).

149. In addition, the Rule permits consolidating "formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(4)). However, FERPA limits any right to review and inspect education

records that include information on more than one student to "only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material." 20 U.S.C. § 1232g(a)(1)(A); *see Family Educational Rights and Privacy*, 73 Fed. Reg. 74,806, 74,832–33 (Dec. 9, 2008).

150. The Rule prohibits schools from taking reasonable steps—already widely used consistent with FERPA—that both provide a fair process and comply with Congress's directive to protect student privacy.

151. The Rule states that the "obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99." 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.6(e)).

152. Defendants lack authority to implement these non-conflicting statutes in a way that creates a conflict and to resolve that conflict by superseding FERPA via regulation.

B. Changes to Other Title IX Regulations

153. Defendants make unlawful changes to the Department's other Title IX regulations, specifically, to the prohibition on discriminatory publications and the procedure required to claim a religious exemption.

154. Before the Rule, schools were prohibited from "us[ing] or distribut[ing] a publication of the type described in this paragraph which *suggests, by text or illustration*, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part." 34 C.F.R. § 106.9(b)(2) (emphasis added).

155. The Rule amends this provision to prohibit a school only from "us[ing] or distribut[ing] a publication *stating* that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part." 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.8(b)(2)(ii) (emphasis added)).

156. Defendants fail to provide a reasoned explanation for eliminating this prohibition on publications that suggest discrimination—a prohibition that is intended to combat sex stereotyping—or any evidence that the standard used for over 40 years has somehow failed to accomplish the purpose of Title IX's antidiscrimination mandate. The arbitrary nature of this change is exemplified by adding a requirement in the Rule that "materials used to train Title IX Coordinators, investigators, decision-makers" and others "must not rely on sex stereotypes." 85 Fed. Reg. at 30,575 (to be codified at §106.45(b)(1)(iii)).

157. The Rule also upends the prior long-standing application of Title IX's religious exemption. The Rule no longer requires an institution controlled by a religious organization claiming an exemption from all or part of Title IX to provide written notice to the Department with a declaration identifying which part of Title IX or the regulations conflicts with a tenet of the religion. Instead, schools now may declare an exemption for the first time after receiving a Title IX complaint. 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.12(b)).

158. Defendants fail to provide a reasoned explanation for this change, which will now leave prospective students, parents, and others in the dark about whether non-exempt schools will comply with Title IX's anti-discrimination requirements. Defendants also failed to identify support for the purported burden on education institutions that request the exemption and any cost-savings resulting from the change.

C. Effective Date

159. The Rule's August 14, 2020, effective date fails to provide schools with adequate time to review and implement the new legal requirements in a way that fulfills Title IX's antidiscrimination mandate.

160. For example, by August 14, 2020, every school in Plaintiff States must:

a. Carefully review 547 Federal Register pages of preamble (and 1,971 footnotes), which improperly specify additional mandates and restrictions on schools and provide critical information found nowhere in the eight pages of regulations themselves as to how schools must implement the Rule, *e.g.*, 85 Fed. Reg. at 30,296 n.1162 (a Title IX coordinator can sign a formal complaint against the wishes of a complainant only if doing so "is not clearly unreasonable in light of the known circumstances," contrary to the plain language of the regulation); 85 Fed. Reg. at 30,287 n.1142 (suggesting that school can be found in noncompliance for using a respondent's informal statements, in response to a report of sexual assault, in a subsequently-filed formal complaint process, because the school did not give the respondent advance notice of the (informal) interview); 85 Fed. Reg. at 30,428 (stating that if recipient obtains evidence about a party's sexual predispositions directly related to allegations, the recipient should allow both parties and their advisors an opportunity to review, contrary to the plain language of the regulation); 85 Fed. Reg. at 30,273 (even though supportive measures for the respondent are not required, failure to provide a respondent with supportive measures could result in a deliberate indifference violation finding by the Department);

b. Determine if any state or local laws conflict with the regulations and are therefore preempted, 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.6(h));

c. Revise all relevant policies, codes, handbooks, and grievance procedures for "Title IX sexual harassment," which may require multiple stages of review and approval under state or local law or school policy, 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.8(c));

d. Determine how to address "non-Title IX sexual harassment," which the school must dismiss under Title IX but can (and in some cases, must) address separately under codes of conduct or state law, 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(3)(i));

e. For postsecondary schools, determine which faculty and staff members must, may, or must only with a complainant's consent, report sexual harassment, 85 Fed. Reg. at 30,041;

f. Disseminate information about the new policies and procedures to the entire school community;

g. Revise all training materials and recordkeeping procedures, and post all revised training materials on schools' websites, 85 Fed. Reg. 30,575 (to be codified at 34 C.F.R. § 106.45(b)(1)(iii)), 85 Fed. Reg. 30,578 (to be codified at 34 C.F.R. § 106.45(b)(10));

h. Retrain all students, faculty, and staff on the new policies and procedures, including training the Title IX Coordinator, investigators, and decision-makers on the new grievance procedures; training decision-makers on how to make evidentiary decisions during a hearing and how to control cross-examination; and for primary and secondary schools, training all employees on the new

scope of sexual harassment under Title IX and how to report it; 85 Fed. Reg. at 30,574–75 (to be codified at 34 C.F.R. §§ 106.30, 106.45(b)(1)(iii));

i. If the school previously had not provided for live hearings by a board or hearing officer (separate from the investigator) and had not provided appeal rights, it must hire and train separate investigators, decision makers, and/or appeal officers, 85 Fed. Reg. at 30,577–78 (to be codified at 34 C.F.R. §§ 106.45(b)(7), (b)(8));

j. If the postsecondary school had not previously held live hearings, it must establish procedures and hire or appoint and train staff to serve as decision-makers, 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i));

k. For postsecondary schools, appoint or hire a pool of advisors who are willing to conduct cross-examinations for parties who do not have an advisor, 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)); and

l. Renegotiate bargaining agreements and revise procedures for employees, including those who were at-will employees, prior to the preemptive effect provision added in the Rule, 85 Fed. Reg. at 30,439.

161. Our schools must make many additional decisions—explicitly contemplated by Defendants in the preamble—about how to implement the Rule in a way that best provides for a safe and equitable education experience for all students. For example, Defendants note that postsecondary schools may consider adopting rules of decorum for live hearings to “forbid badgering a witness” or to “prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner.” 85 Fed. Reg. at 30,248, 30,319. Defendants also state that schools may develop non-disclosure or confidentiality agreements

(and concomitant enforcement mechanisms) to protect confidentiality when "a complainant reports sexual harassment but no formal complaint is filed," 85 Fed. Reg. at 30,296, or when providing the parties and advisors with all evidence directly related to the allegations, 85 Fed. Reg. at 30,304.

162. And our schools must make all of these important, difficult, and resource-intensive decisions in a thoughtful and deliberate way during the ongoing COVID-19 pandemic that has resulted in the closure, recommended closure, or remote operation of virtually all primary, secondary, and postsecondary schools in Plaintiff States.

163. Defendants' complicated changes to the Title IX regulations impose extraordinary and untenable administrative burdens and financial costs on education systems already facing unprecedented challenges due to a global health crisis of unknown duration. The crisis has required schools to provide new types of essential educational and support services while maintaining the health and safety of their staff and students.

164. At this time, school administrators are already busy completing the spring semester, implementing modified summer programs, and preparing for the upcoming academic year—which will almost certainly commence in the midst of the ongoing pandemic. In addition, many of the administrative bodies necessary to review and approve changes to a student code of conduct, faculty handbook, or sexual misconduct policy—such as a faculty senate, faculty council, or local school board—do not meet during the summer.

165. Defendants' unreasonable timeframe for compliance will also impose additional costs on schools at a time when many of them are facing severe budgetary constraints as a result of the COVID-19 public health crisis. By requiring schools to implement the Rule in less than three months, schools within Plaintiff States will likely have to re-direct staff and resources

dedicated to carrying out education-related operations during the pandemic to instead address the Rule's significant administrative requirements. Indeed, some already have.

166. Defendants' timeframe is impossible for our schools to comply with in a way that does not create confusion; impose greater burdens and costs on students, faculty, and staff; and ultimately undermine Title IX's mandate.

D. Regulatory Impact Analyses

167. Both the notice of proposed rulemaking and the Rule include a regulatory impact analysis ("RIA") prepared pursuant to Executive Orders 12866 and 13563.

168. Both RIAs are fatally flawed.

1. RIA in the Notice of Proposed Rulemaking

169. In the proposed rule, the Department estimated a net cost *savings* of between $286.4 million to $367.7 million over ten years based solely on an anticipated decrease in Title IX investigations and complaint filings caused by the proposed regulations.

170. But the Department failed to disclose the methodology upon which it relied in reaching is conclusions and provided only generalized estimates not grounded in evidence. The Department also failed to provide all of the underlying sources, studies, and reports on which it purportedly relied for the many assumptions critical to its cost-benefit analysis. As a result, the public was deprived of an opportunity to review and comment on these sources, in contravention of the APA.

171. The Department's failure to provide this information in the notice of proposed rulemaking deprived the public of an opportunity to meaningfully comment on the Department's estimates and assumptions.

172. In the Rule, the Department does not adequately explain its failure to provide the technical studies and data upon which it relied to prepare the RIA in the notice of proposed rulemaking. 85 Fed. Reg. 30,502–03.

2. RIA in the Rule

173. In the final Rule, the Department drastically changed its cost-benefit analysis from that in the notice of proposed rulemaking, ultimately concluding that the Rule's net *costs* will be between $48.6 million and $62.2 million over ten years. 85 Fed. Reg. at 30,569. The Department's explanation of this revised estimate is flawed and inadequate.

174. Incidents of sexual violence and harassment have health, monetary, and other costs to the survivors, to school campuses, and to States that will bear the costs when students who are subjected to sexual harassment receive no relief from their schools. These costs include drop-out rates, class withdrawals, absenteeism, mistrust of education institutions, and harm to mental and physical health, all of which are independently harmful and can contribute to poor academic performance. 85 Fed. Reg. at 30,544–45.

175. Although the Department acknowledged these harms and identified relevant studies that provide cost estimates in the proposed rule, it intentionally declined to include them in the cost-benefit analysis. 83 Fed. Reg. at 61,485; 85 Fed. Reg. at 30,538–46.

176. The Rule will have the likely consequence of subjecting more students to harassment because it narrows the scope of Title IX's protections. *See* Part II.A, *supra*. The narrowed scope both diminishes Title IX's deterrent effect and limits schools' ability to respond to harassment. Thus, the costs attendant to increased incidents of harassment that will follow from the Rule are a necessary piece of the cost-benefit analysis.

177. The Department anticipates a significant decrease in investigations of complaints as a result of the changes in the Rule. 85 Fed. Reg. at 30,550, 30,553–54, 30,548–49, 30,568

(stating that Title IX investigations will decrease by about 33 percent per year in colleges and universities and 50 percent per year in elementary and secondary schools as a result of the Rule). When investigations decrease, so do the number of responsibility findings and the number of sanctions issued to perpetrators of sexual harassment. These decreases have an appreciable impact on a school's ability to deter future and repeat sexually harassing conduct. Because fewer incidents of sexual harassment will be investigated under the Rule, the likelihood of this harassment being detected and punished will also be reduced, which in turn will reduce the system's general deterrent effect.

178. Rather than recognizing the costs associated with increased sexual harassment, the Department unreasonably determined that the Rule's new, narrow scope would result in a cost *savings*—almost $200 million from fewer investigations into formal complaints. 85 Fed. Reg. at 30,568. Even if the Department is correct about the projected cost savings, it arbitrarily disregards that the costs are saved precisely because the narrow scope of the Rule is contrary to Title IX's anti-discrimination mandate.

179. The Department also failed to analyze how the Rule will affect the national economy, despite at least one study cited by the Department in the notice of proposed rulemaking showing that the national economic burden of sexual violence is $263 billion a year—costs largely borne by States, state schools, and state public health care systems. 83 Fed. Reg. at 61,485 n.5.

180. The Department also failed to properly consider the substantial administrative, staffing, and training costs the Rule imposes. The Department's estimates of what will be required for recipients to implement the Rule do not fully account for all related costs States' education institutions will bear.

181. For example, the Department did not factor in all of the costs of hiring, training, and retraining staff to comply with Rule's new requirements.

182. When the Department did consider administrative costs, it made unrealistic assumptions, such as the amount of time school administrators and employees would need to review and implement the Rule. 85 Fed. Reg. at 30,567. And, as the Department admitted, the States' education institutions will shoulder those and any other unaccounted-for financial and administrative expenses. 85 Fed. Reg. at 30,549.

183. To the extent the Department's estimates assume that Title IX Coordinators and school attorneys need only read the eight pages of actual federal regulations, 85 Fed. Reg. at 30,567, this is irrational. The preamble, which itself is over 500 Federal Register pages, includes additional (improperly issued) requirements that appear nowhere in the regulations themselves and that the Department intends to enforce. *See* ¶ 160.a *supra*.

184. The cost of meeting these administrative burdens is compounded by the Department's imposed effective date that requires schools to redirect resources away from managing their responses to the COVID-19 pandemic.

185. Separately, the Rule provided inadequate estimates of the time recipients will need to expend responding to formal complaints of Title IX sexual harassment under the Rule's new procedures. 85 Fed. Reg. at 30,568–69.

186. The Department's RIA fails to account for the many costs associated with the Rule and is therefore arbitrary and capricious. And in changing its analysis so drastically, the Department failed to provide an adequate reasoned explanation justifying these new significant costs.

E. Procedural Flaws

187. The Rule failed to comply with the APA's procedural requirements.

188. The Rule contains new provisions that were not a logical outgrowth of, and could not have been anticipated based on, the notice of proposed rulemaking.

189. The Rule expressly preempts state laws if there is any "conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45." 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.6(h)). This regulatory provision was not disclosed to the public during the rulemaking process; to the contrary, the Department stated in the notice of proposed rulemaking that the proposed regulations will *not* have preemptive effect. *See* 83 Fed. Reg. at 61,468, 61,475. As a result, the States and the public were deprived of the opportunity to comment.

190. The Rule also allows for the consolidation of "formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(4)). But the notice of proposed rulemaking makes no mention of consolidation. As a result, the States and the public were deprived of the opportunity to caution the Department that any consolidation must be done with the consent of the parties and account for confidentiality, including the requirements of FERPA, state privacy laws, and any harms to students.

191. The Rule allows for dismissal of complaints if a "respondent is no longer enrolled or employed by the recipient," including if the respondent leaves a school during the investigation. 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R § 106.45(b)(3)(ii)). But, the notice of proposed rulemaking did not mention dismissal in this context at all and did not provide the States and the public with the opportunity to comment on the effect of such a dismissal.

192. The Rule contains a new confidentiality provision that is internally inconsistent with the existing confidentiality regulation already incorporated by reference from Title VI. The existing confidentiality provision states that the "identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder." 85 Fed. Reg. at 30,579 (to be re-codified at 34 C.F.R. § 106.81 (incorporating by reference 34 C.F.R. § 100.7(e))). The new confidentiality provision in the Rule only requires "the recipient," not the parties, to "keep confidential the identity of any individual who has made a report or complaint of sex discrimination." 85 Fed. Reg. at 30,578 (to be codified at 34 C.F.R. § 106.71). The notice of proposed rulemaking did not include this new confidentiality provision, depriving the States and the public of the opportunity to alert the Department to the inconsistency.

193. The Rule limits a victim's ability to benefit from Title IX protections by requiring that they be currently "participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R § 106.30 (*formal complaint*)). This requirement is not a logical outgrowth of, and could not have been anticipated based on, the notice of proposed rulemaking, which only referenced precluding Title IX's grievance process for an individual who has never been enrolled as a student of the school at which they are filing a complaint. 83 Fed. Reg. at 61,468.

194. The Rule inserts various severability provisions that allow the balance of the Rule to remain applicable even if provisions of the Rule are held invalid. 85 Fed. Reg. at 30,576–79 (to be codified at 34 C.F.R. §§ 106.9, 106.18, 106.24, 106.46, 106.62, 106.72). The notice of proposed rulemaking did not mention the severability provisions and, therefore, did not provide the States or the public with the opportunity to comment on the effect of such provisions.

195. The Rule's preamble also includes a number of additional mandates and prohibitions that the Department indicates it will enforce as if they have the force of law. Some of these provisions conflict with the Rule. *E.g.*, ¶¶ 130, 160.a, *supra*. None of these mandates and prohibitions are included in the Rule and, therefore, are unlawfully issued.

196. Finally, the Rule does not include the approval of United States Attorney General William P. Barr or his designate, as required by 20 U.S.C. § 1682 and Executive Order 12250.

III. THE RULE WILL CAUSE IMMEDIATE AND IRREPARABLE HARM TO PLAINTIFF STATES, SCHOOLS, AND STUDENTS.

197. The Rule will cause immediate, irreparable harm to the proprietary, sovereign, and quasi-sovereign interests of the States.

A. The Rule Will Harm Plaintiff States' Proprietary Interests

198. The States, both themselves and through their publicly administered education institutions, are directly regulated by the Rule. As a result, they will suffer direct proprietary harm because of the Rule.

199. Each of the States administers a system of primary and secondary public education that is funded by both state and federal money:

a. *Pennsylvania*: The Pennsylvania Constitution charges the Pennsylvania General Assembly with "provid[ing] for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const. Art. III § 14. The Commonwealth provides more than $12 billion each year to its 500 public school districts, which educate more than 1.72 million students each year in 2,865 schools. Pennsylvania also has approximately 3,000 nonpublic and private schools that range from pre-K to high school. Pennsylvania received more than $1.36 billion from the

Department in 2019 to support its primary and secondary education programs. Pennsylvania is scheduled to receive more than $1.4 billion from the Department in 2020.

b. *New Jersey*: The Constitution and legislature charge the State of New Jersey with maintaining a "thorough and efficient system of free public schools" for residents ages five through 18. N.J. Const. Art. VIII, Sec. IV, Para 2; N.J. Stat. Ann. § 18A:7F-44(b). New Jersey has approximately 1.4 million students enrolled in public schools in grades K-12. The State allocates funding to local school districts in accordance with the School Funding Reform Act of 2008, N.J. Stat. Ann. § 18A:7F-43 to -70. The State provides over $8.4 billion in funding to its 584 local public school districts. In 2018–2019, New Jersey received $923,564,548 in federal education funding from the Department, and $1,604,148 from other federal agencies related to K-12 education.

c. *California*: The State is the legal and political entity with plenary responsibility for educating all California public school students. The State has the constitutional responsibility to establish and maintain the system of common schools and a free education, Cal. Const. art. IX, § 5, and to ensure that all California public school students receive their fundamental right to equal educational opportunity, regardless of sex and other protected factors, *id.* art. I, § 7(a) & art. IV, § 16(a). The State funds and oversees the operation of the largest common system of public schools in the nation, which serves nearly 6.2 million children in more than 10,500 schools. In 2018–2019, the State provided $54.7 billion in General Funds to its 1,037 local public school

districts. California also received more than $8.6 billion from the U.S. Department of Education in 2018–2019, and is scheduled to receive more than $8.8 billion from the Department in 2019–2020.

d. *Colorado*: Colorado's constitution pledges that the State will establish and maintain a thorough and uniform system of free public schools where all residents between the ages of six and 21 may be educated. Colo. Const. art. IX, § 2. Colorado's children are entrusted to that system through the State's compulsory attendance laws. Colo. Const. art. IX § 11; Colo. Rev. Stat. § 22-33-104. In the 2018–2019 academic year, Colorado was home to 178 operating school districts, 1,888 schools, and over 900,000 students. For school year 2019–2020, Colorado provided approximately $7.6 billion in state funding to districts and charter schools. Colorado also received more than $450 million from the Department for school year 2019–2020.

e. *Delaware*: The Delaware Constitution charges the Delaware General Assembly with "provid[ing] for the establishment and maintenance of a general and efficient system of free public schools." Del. Const. Art. X, § 1. For the 2019–2020 school year, Delaware was home to 19 operating school districts, with 194 traditional public schools, 23 charter schools, with more than 140 thousand students enrolled, and approximately 88 private schools that range from kindergarten through high school, with more than 15 thousand students enrolled. Delaware provides more than $1.4 billion each year to its public schools, and receives approximately $130 million from the Department for its primary and secondary education programs.

f. *District of Columbia*: The District has 116 traditional public schools and 123 public charter schools with approximately 93,000 enrolled students, according to Fiscal Year 2019 data. The District received more than $103 million from the Department in 2019 to support its primary and secondary education programs. It is scheduled to receive more than $107 million in 2020.

g. *Illinois*: The Illinois Constitution charges the State to "provide for an efficient system of high quality public educational institutions and services." Ill. Const. Art. X. Illinois provides over $8.89 billion to its approximately 852 school districts. These school districts educate approximately 1.98 million students each year in 3,872 public schools. Illinois also has approximately 198,643 students enrolled in non-public institutions. In the 2018–2019 school year, Illinois received approximately $3.66 billion in federal funds for its elementary and secondary education programs.

h. *Massachusetts*: The Massachusetts Constitution requires that the Commonwealth provide adequate funding to educate all Massachusetts children. *McDuffy v. Secretary of Executive Office of Education*, 615 N.E.2d 516 (Mass. 1993). Massachusetts is home to 406 public preK-12 school districts, comprised of more than 1,800 schools and more than 950,000 students. Each year Massachusetts allocates more than $6 billion to these public school districts. To support its elementary and secondary programs, Massachusetts received approximately $689 million from the Department in Fiscal Year 2019 and is scheduled to receive almost $693 million from the Department in Fiscal Year 2020.

i. *Michigan*: The Michigan Constitution charges the Michigan Legislature with "maintain[ing] and support[ing] a system of free public elementary and secondary schools as defined by law." Mich. Const. art. VIII, § 2. Michigan provides more than $13 billion each year to its 836 public school districts and 56 intermediate school districts. The 3,400 school buildings in these districts educate more than 1.5 million students each year. Michigan received approximately $1.14 billion from the Department in 2019 to support its K-12 schools. Michigan is expected to receive over $1.18 billion from the Department for the 2020–2021 school year.

j. *Minnesota*: The Minnesota Constitution requires the legislature to establish a general and uniform system of public schools. Minn. Const. Art. XIII § 1. Minnesota has over 330 public school districts and 169 charter schools, which educate over 865,000 students. In Fiscal Year 2019, Minnesota spent approximately $9.588 billion on E-12 education, the largest single expenditure in its budget. In that year, Minnesota received approximately an additional $508 million in elementary and secondary funding from the Department.

k. *New Mexico*: The New Mexico constitution promises to establish and maintain a uniform, free public school system "sufficient for the education of, and open to, all the children of school age." N.M. Const. Art. 12, Sec. 1. In 2020, legislators appropriated $3.468 billion in state funds for public education from prekindergarten through secondary schools, or 45.5 percent of total recurring appropriations. In 2019, the definition of "school-age" was revised to include students through age 22. The Fiscal Year 2021 budget

increased recurring appropriations by $216 million, or 6.6 percent, with significant additional funding to increase educator compensation, provide additional services to at-risk students, and provide professional development and mentorship support for early career teachers. Total federal support for New Mexico's elementary and secondary schools was $406,133,433.

l. *North Carolina*: North Carolina's constitution guarantees the "right to the privilege of education" and charges the state with the "duty" to "guard and maintain that right." N.C. Const. art. I, § 15. North Carolina's constitution also requires that the State provide all of its students a "sound basic education." *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997). For the 2014–2015 school year, North Carolina was home to 115 operating school districts, 2,592 schools, and more than 1.53 million students. For the 2014–2015 academic year, North Carolina contributed more than $8.08 billion in state funding for operating expenses and received more than $1.44 billion in federal funding for operating expenses.

m. *Oregon*: The Oregon Constitution charges the Oregon Legislature with appropriating funds "sufficient to ensure that the state's system of public education meets quality goals established by law." Or. Const., Art. VIII, § 8. As of fall 2019 there were 582,661 K-12 students in Oregon. Of those, 179,985 are in grades 9-12. Those students attend more than 1,200 public schools organized into 197 school districts in the State of Oregon. The 2019–2021 Legislatively Adopted Budget includes $1.254 million in pass-through federal funds for K-12 programs.

n. *Rhode Island*: The Rhode Island Constitution charges the Rhode Island General Assembly to "promote public schools . . . and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education[.]" R.I. Const., Art. XII, § 1. The Rhode Island public elementary and secondary education system provides education to approximately 143,000 students each year. Additionally, the system has a cumulative annual budget of $2.2 billion and employs approximately 21,000 teachers, administrators and staff.

o. *Vermont*: The "right to public education is integral to Vermont's constitutional form of government and its guarantees of political and civil rights." Vt. Stat. Ann. tit. 16, § 1. The Vermont Agency of Education and the State's public educators are deeply committed to ensuring that all children in the State enjoy equal educational opportunity. Vermont has approximately 250 public schools that serve over 80,000 children. In 2019, the State provided over $1.37 billion in funding to its school districts. The Agency of Education is responsible for supervising the expenditure and distribution of all money appropriated by the State to support these schools. The Agency is also responsible for executing and monitoring federal education grants to Vermont schools on behalf of the federal government. Vermont received more than $103 million from the Department of Education in 2019 to support its primary and secondary education programs, and estimates receiving over $107 million in 2020.

p. *Virginia*: Under the Constitution of Virginia, the General Assembly is required to "provide for a system of free public elementary and secondary

schools for all children" in the Commonwealth. Va. Const. art. VIII, § 1. The General Assembly must also "ensure that an educational program of high quality is established and continually maintained." *Id.* These directives have been adopted in the Code of Virginia, *see* Va. Code Ann. § 22.1-2, and the Supreme Court of Virginia has confirmed that "education is a fundamental right" under the state Constitution. *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994). For the 2019–2020 school year, there were 2,106 public schools in Virginia, including 1,860 schools, 155 local centers, and 91 regional centers. These schools educated nearly 1.3 million students in grades K-12 in 2019. The Commonwealth provides approximately $7.3 billion each year in state funding to its school. In Fiscal Year 2019, Virginia received more than $710 million in federal funding to support the Commonwealth's primary and secondary education programs. Virginia has also already received nearly $634 million in federal funding for Fiscal Year 2020

q. *Washington*: The Washington Constitution provides that it is the "paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." Wash. Const. art. IX sec. 1; *see McCleary v. State*, 269 P.3d 227 (Wash. 2012). Under its current biennial budget for 2019–2021, Washington provides more than $27 billion to its public schools, which serve over 1.1 million K-12 students annually. Washington received approximately $728 million from the Department in 2019 to support its primary and

secondary public education programs, and is scheduled to receive approximately $745 million in 2020.

r. *Wisconsin*: The Wisconsin Constitution charges the legislature with providing the establishment of public schools, "which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years." Art. X §3, Wis. Constitution. Wisconsin provides more than $5 billion each year to its public schools, which educate more than 850,000 students each year in 2,216 schools. Wisconsin also has approximately 790 nonpublic and private schools that range from pre-K to high school. Wisconsin received more than $560 million from the Department in 2019 to support its primary and secondary education programs. Wisconsin is scheduled to receive more than $575 million from the Department in 2020.

200. Collectively, the States' systems of public primary and secondary education have an enrollment of more than 20 million students and receive more than $31 billion from the Department annually.

201. Because each State receives federal funding from the Department for primary and secondary education, each State and its public primary and secondary education systems are subject to the Rule.

202. In addition, each State funds, supports, and/or administers systems of postsecondary education:

a. *Pennsylvania:* The Pennsylvania State System of Higher Education ("PASSHE") is a state-owned, funded, and administered network of 14

postsecondary schools across the Commonwealth with a combined enrollment of over 90,000 students each year. 24 P.S. §§ 20-2001-A to 20-2020-A. Pennsylvania provides PASSHE with more than $450 million each year. In addition, the Commonwealth System of Higher Education ("CSHE") consists of four "state-related" universities in Pennsylvania—Lincoln University, Pennsylvania State University, the University of Pittsburgh, and Temple University—that together educate more than 170,000 students. These universities are considered public institutions, and Commonwealth officials appoint a designated number of trustees to the governing board of each institution. CSHE universities receive an annual, non-preferred financial appropriation from the state and offer discounted tuition to Commonwealth residents. Pennsylvania provides nearly $600 million to the CSHE universities each year. Pennsylvania also has 14 community colleges that educate more than 120,000 students each year with nearly $300 million in annual public funding. Finally, eight institutions in Pennsylvania are private but receive state funding: Drexel University, Johnson College, Lake Erie College of Osteopathic Medicine, Philadelphia College of Osteopathic Medicine, Salus University, Thomas Jefferson University, University of Pennsylvania, and The University of the Arts. Pennsylvania institutions of postsecondary education received more than $930 million from the Department in 2019 and are scheduled to receive more than $970 million in 2020.

b. *New Jersey*: New Jersey is home to four public research universities, seven State colleges and universities, 18 community colleges, and 15 independent

non-profit four-year colleges. Over 531,000 students are enrolled in higher education institutions across the State with over 300,000 enrolled in public colleges. New Jersey's public colleges and universities are state-funded institutions that are governed by state law. In Fiscal Year 2019, the State provided a total of $1.74 billion to public colleges and universities in direct operating aid, including fringe benefits. The State also appropriated $522 million in student financial aid assistance that is awarded directly to students attending both public and private institutions in New Jersey. In Fiscal Year 2018, the federal government provided public colleges and universities in the state of New Jersey a total of $1.59 billion in federal funding—this includes appropriations, operating, non-operating, and financial aid. Similarly, independent not-for-profit institutions in New Jersey received over $318 million in federal grants and contracts as well as student financial aid in Fiscal Year 2018.

c. *California*: California operates and funds a system of colleges and universities, which include the University of California, California State University, and Community College systems. Collectively, these colleges and universities serve more than 2.8 million students. As of the Budget Act of 2019, for the 2018–2019 Fiscal Year, the State provided $19.5 billion in General Fund and Property Tax to its colleges and universities. California also received an estimated $5.7 billion from the Department in the 2018–2019 Fiscal Year, and is scheduled to receive more than $7.1 billion from the Department in the 2019–2020 Fiscal Year for its colleges and universities.

d. *Colorado*: Colorado is home to 31 public universities and colleges, which collectively enroll more than 250,000 students. In Fiscal Year 2019–2020, Colorado provided $858 million from the general fund and $220.3 million in student aid. Colorado higher education institutions collectively received over $464.6 million from the Department in 2019 and are scheduled to receive more than $482.9 million in 2020.

e. *Delaware*: Delaware is home to eight universities and colleges, which collectively enroll more than 60,000 students. In Fiscal Year 2020, Delaware provided $247 million in funding to higher education institutions. Delaware higher education institutions collectively received $68 million from the Department in 2019 and are scheduled to receive more than $71 million in 2020.

f. *District of Columbia*: The University of the District of Columbia ("UDC") is the District of Columbia's public higher education institution. Over 4,000 students are enrolled at UDC, including the flagship university and the community college. For Fiscal Year 2020, UDC has a projected operating budget of $166.3 million, of which $33.5 million comes from federal grants and $8.3 million comes from District of Columbia agency grants.

g. *Illinois*: Illinois has approximately 208 higher education institutions, including public, private, and technical schools, and community colleges, with approximately 720,000 students. Illinois has 12 public universities with roughly 182,000 students. The largest of the public universities is the University of Illinois Urbana-Champaign, which enrolls over 52,000 students

each year. Illinois also has over 271,000 students enrolled in public community colleges. Illinois provides approximately $4 billion to its higher education institutions, including $1.167 billion to universities and $410 million to community colleges. Illinois received at least $1 billion from the Department in 2019 to support its postsecondary education programs and is scheduled to receive more than $1 billion in 2020.

h. *Massachusetts*: Massachusetts has 29 public colleges and universities, including 15 community colleges, nine state universities, and five separate campuses of the University of Massachusetts system. More than 260,000 students attend Massachusetts institutions of public higher education. Massachusetts provides $1.3 billion in annual support to its public colleges and universities. Massachusetts is also home to 92 private higher education institutions. Next to health care and finance, higher education is one of Massachusetts's largest industries, employing over 135,000 faculty, staff, and administrators. To support its postsecondary programs, Massachusetts received approximately $562 million from the Department in Fiscal Year 2019 and is scheduled to receive nearly $584 million from the Department in Fiscal Year 2020.

i. *Michigan*: The Michigan Constitution charges the Michigan Legislature with "appropriating moneys to maintain" ten public universities in the state. Mich. Const. art. VIII, § 4. These ten universities are governed independently through constitutionally created boards. *See id.* §§ 5–6. Five other universities in the state also receive state funding. In sum, over 280,000 students are

enrolled in these fifteen state-funded universities across the state. These universities received over $1.5 billion in state funding during the 2019–2020 Fiscal Year. Michigan is also home to 28 public community colleges. The Michigan Constitution requires the Michigan Legislature provide “financial support” for these colleges. *Id.* § 7. The community colleges received $414 million through state appropriations during the most recent fiscal year. Michigan institutions received more than $763 million from the Department in 2019 and are scheduled to receive more than $800 million in 2020.

j. *Minnesota*: Minnesota is home to the University of Minnesota, which includes five campuses, and the Minnesota State Colleges and Universities system, which includes seven universities and thirty community and technical colleges. Together, these public colleges and universities educate more than 415,000 students. In Fiscal Year 2020, the State is scheduled to provide $1.428 billion in funding to these colleges and universities. In the same year, postsecondary institutions in Minnesota are scheduled to receive an additional $479 million from the Department.

k. *New Mexico*: New Mexico has 24 public colleges and universities that deliver workforce training, adult education, and undergraduate and graduate degrees. New Mexico dedicated $905 million in state appropriations for its higher education system in the most recent fiscal year for some 75,000 full-time or full-time equivalent students. The Department provided approximately $400 million in student financial aid for higher education students in New Mexico for purposes of tuition at New Mexico higher education institutions.

l. *North Carolina:* North Carolina is home to 74 public universities and colleges, which collectively enroll more than 1.05 million students. In 2019, North Carolina higher education institutions collectively received more than $896 million from the Department and are scheduled to receive more than $937 million in 2020. For Fiscal Year 2019–2020, the UNC System received more than $3.0 billion in state funding. For Fiscal Year 2019–2020, the Community College System received more than $1.1 billion in state funding.

m. *Oregon:* Oregon has seven public universities, which had over 100,000 students enrolled in 2019, and seventeen community colleges, serving over 250,000 students in 2018–2019. In the 2017–2019 biennium state funding per full-time-equivalent student was over $7,900 per student in Oregon's public universities. For students in Oregon's community colleges, state funding in 2017–2019 was over $3,200 per full-time equivalent.

n. *Rhode Island:* Rhode Island is home to the University of Rhode Island, Rhode Island College, and the Community College of Rhode Island. Collectively, the Rhode Island higher education system provides instruction to approximately 43,000 undergraduate and graduate students each year**.** This system employs approximately 4,500 faculty and support staff and has a combined operating budget of approximately $1 billion per year**.**

o. *Vermont*: Vermont is home to the University of Vermont, the Vermont State Colleges, and a number of private colleges. In 2019, Vermont State Colleges enrolled over 11,060 students. The University of Vermont enrolled over 12,800. For Fiscal Year 2020, the State appropriated about $32 million to

fund the Vermont State Colleges and about $42 million to the University of Vermont. Vermont institutions received more than $50 million from the Department in 2019, and estimate receiving over $52 million in 2020.

p. *Virginia*: There are over 375 institutions of higher education operating in Virginia, including 39 public institutions, 30 private non-profit colleges and universities, five regional higher education centers, one public/private medical school, and over 300 for-profit, out-of-state, or vocational institutions. In 2019, there were over 525,000 students enrolled in Virginia's institutions of higher education. The current state budget in Virginia appropriated approximately $1.9 billion to higher education funding. Virginia's higher education institutions received more than $2.2 billion in federal funding in Fiscal Year 2019. Virginia also is home to 23 community colleges, in which 158,000 students were enrolled in 2019. Those community colleges received approximately $384 million in state funding in Fiscal Year 2019 and approximately $398 million in Fiscal Year 2020.

q. *Washington*: Washington has a "vital interest" in ensuring that accessible higher education opportunities are available to its residents. Wash. Rev. Code § 28B.07.010. Washington has six public baccalaureate colleges and universities: the University of Washington, Washington State University, Central Washington University, Eastern Washington University, Western Washington University, and the Evergreen State College. Washington also has a system of 30 public community and technical college districts comprised of 34 separate colleges, whose funding is coordinated by the Washington State

Board for Community and Technical Colleges. In addition, Washington is home to a number of independent, private colleges and a variety of other higher education institutions. Washington postsecondary institutions received approximately $444 million from the Department in 2019, and are scheduled to receive approximately $462 million in 2020. Washington's six public baccalaureate colleges and universities have a combined enrollment of over 116,000 students each year. Washington's community and technical colleges educate over 148,000 students each year. Altogether, Washington's operating budget for 2019–2021 provides over $4 billion to support the State's higher education system.

r. *Wisconsin*: Wisconsin is home to more than 70 universities and colleges that confer an Associate's degree or higher. All public universities in the State of Wisconsin are part of the University of Wisconsin System. The University of Wisconsin System is one of the largest systems of public higher education in the country, serving approximately 170,000 students each year through 13 universities across 26 campuses and a statewide extension network. Wisconsin higher education institutions collectively received $390 million from the Department in 2019 and are scheduled to receive more than $400 million in 2020.

203. Collectively, the States' systems of publicly supported higher education have an enrollment of more than 7 million students and receive more than $15 billion from the Department annually.

204. Each of the institutions in the States' systems of higher education receives federal funding and, as a result, is subject to the Rule.

205. To comply with the Rule by the August 14, 2020, deadline, primary, secondary, and postsecondary schools face a number of obstacles that will impose substantial direct costs on these State-sponsored institutions. *See* Part II.C, *supra*.

206. In addition, the ongoing national health emergency caused by the COVID-19 pandemic makes it nearly impossible for schools to review the Rule and revise their policies by August 14, 2020. As of filing, every primary and secondary school in all but one Plaintiff State has been ordered to physically close and to operate remotely. Primary and secondary schools in California have also been closed and conducting all operations remotely under mandatory public health orders since March 2020. Likewise, virtually all postsecondary schools in Plaintiff States are physically closed and operating remotely. All of Plaintiff States have imposed stay-at-home or safer-at-home orders that to some extent require students, faculty, and staff to work or engage in schooling from home. Schools in Plaintiff States do not know yet whether they will return in the fall for in-person classes.

207. The Rule will require state-sponsored institutions to adopt new, costly, unnecessary, and unduly burdensome grievance procedures, forcing them to bear additional costs. *See* Part II.A.3, *supra*.

208. Where a Plaintiff State's law and other federal laws, such as the Clery Act and VAWA, provide greater protections than the Rule, schools subject to these laws will need to create parallel code of conduct provisions and enforcement mechanisms—one addressing "Title IX sexual harassment" and one addressing "non-Title IX sexual harassment." So too will schools that wish to continue providing protections for students beyond the Rule out of concern for

campus safety and student well-being, to ensure the nondiscriminatory educational experience promised by Title IX, or both.

209. Having two code of conduct provisions and two enforcement mechanisms for sexual harassment claims will burden students and schools alike and lead to significant confusion. Schools must determine how to clearly and effectively communicate the existence of different policies and the differences between them, without indicating that one policy's protections and procedures take precedence over the other. Schools that receive notice of sexual harassment will first have to gather enough information to determine which policy to use so they can accurately advise the complainant on the process for pursuing a formal complaint. 85 Fed. Reg. at 30,574–75 (to be codified at 34 C.F.R. § 106.44(a) ("The Title IX Coordinator must promptly contact the complainant to . . . explain to the complainant the process for filing a formal complaint.")). Where the facts are unclear, relevant school administrators must take time to consult with general counsel and others, causing further delays. Where a school's Title IX office does not handle non-Title IX sexual harassment investigations, but the investigation reveals information indicating that harassment thought to fall outside of Title IX actually falls within it (or vice versa), school administrators must determine how to hand off evidence between different offices while clearly explaining to both parties what will happen next. And should a party disagree with the school's determination that the harassing conduct falls under the school's non-Title IX policy, the party can appeal and seek OCR review, adding further delays. 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(8)(i)).

210. The Rule's August 14 effective date will force schools to take temporary and emergency measures to implement the Rule's minimum requirements, limiting schools' ability to consult with students and others affected by the Rule in the process. Many schools and state or

local policies require this consultation before implementing such significant changes. The lack of engagement with and input from school communities will undermine the legitimacy of the resulting measures and potentially lead to lower compliance with the Rule's requirements.

211. The effective date of August 14, 2020, will also make it difficult for schools to take certain additional steps they consider important to protecting their students, employees, and others. For example, many schools may wish to craft non-disclosure agreements to protect the privacy of complainants and respondents during the pendency of an investigation or after resolution—but will not be able to do so before August 14.

212. The Rule will impede schools' efforts to prevent and respond to incidents of sexual harassment, including sexual assault. As a result, schools will be forced to devote additional resources to addressing the physical, emotional, psychological, and other consequences of sexual harassment.

213. Because they will face greater difficulties in combatting sexual harassment against students, schools will also be at risk of reputational harm as a result of the Rule.

214. All of these financial and other harms will be felt by state-sponsored education institutions—primary, secondary, and postsecondary—in the Plaintiff States. The States will suffer direct harm to their proprietary interests as a result of the Rule.

B. The Rule Will Harm Plaintiff States' Sovereign Interests

215. The Rule will directly harm the States' sovereign interests by interfering with their primary authority to enact and enforce their own laws governing education institutions within their borders, as well as interfere with the important parallel role States have traditionally played in eliminating discrimination within their borders.

216. The Rule will directly harm the States' sovereign interests by inhibiting their ability to protect students from sexual harassment, provide campuses free from sex

discrimination, and fulfill their educational missions to provide equal opportunity, benefit, and access to students without regard to sex—all while retaining necessary federal funds.

217. Traditionally, States have acted as the primary regulators of primary, secondary, and postsecondary education. Although the federal government has expanded its role in education, state and local officials continue to have primary responsibility for decisions relating to the oversight of education institutions.

218. State and local officials have primary responsibility for overseeing K-12 schools and for setting policies relating to elementary and secondary education:

a. *Pennsylvania*: The Pennsylvania Department of Education oversees the 500 public school districts, more than 170 public charter schools, public cyber charter schools, public Intermediate Units, the education of youth in State Juvenile Correctional Institutions, and Head Starts and publicly funded preschools. The Pennsylvania State Board of Education reviews and adopts regulations that govern educational policies and principles and establish standards governing the educational programs of the Commonwealth. The Board of Education also approves the creation of new school districts or changes in the boundaries of existing districts, manages the State School Fund and adopts master plans for basic education. Local school boards exercise primary responsibility over budgetary and other decisions for each school district.

b. *New Jersey*: The Constitution and legislature charge the State of New Jersey with maintaining a "thorough and efficient system of free public schools" for residents ages five through 18. N.J. Const. Art. VIII, Sec. IV, Para 2; N.J. Stat.

Ann. § 18A:7F-44(b). The State Board of Education has general supervision and control of public education in the state, with exception of higher education. N.J. Stat. Ann. § 18A:4-10. The Commissioner of Education has supervision of all schools in the state that receive support or aid from state appropriations, other than institutions of higher education. N.J. Stat. Ann. § 18A:4-23.

c. *California*: The State is the legal and political entity with plenary responsibility for educating all California public school students. The State funds and oversees the operation of the largest common system of public schools in the nation, which serves nearly 6.2 million children in more than 10,500 schools. The State has the constitutional responsibility to establish and maintain the system of common schools and a free education, Cal. Const., art. IX, § 5, and to assure that all California public school students receive their fundamental right to an equal educational opportunity, regardless of sex and other protected factors, *id.* art. I, § 7(a) & art. IV, § 16(a). The California State Superintendent of Public Instruction oversees the schools within the state. Cal. Const., Art. IX, § 2; Cal. Educ. Code § 33112. The California State Board of Education is responsible for adopting rules and regulations for elementary and secondary schools in California. Cal. Educ. Code § 33031.

d. *Colorado*: The Colorado State Board of Education oversees the Colorado Department of Education and has general supervision authority of public schools in Colorado. Colo. Const. art. IX § 1; Colo. Rev. Stat § 22-2-107.

e. *Delaware*: The Delaware Department of Education exercises "general control and supervision over" Delaware's 19 operating public school districts, and has the ultimate responsibility for developing education policy, setting educational standards, and ensuring that school districts meet those standards. Del. Code Ann., tit. 14, § 121. The Delaware State Board of Education, by law, provides advice and guidance to the Delaware Secretary of Education on education policy, new initiatives, and budget requests, and approves regulations governing a wide variety of educational topics, including content standards, assessments, graduation requirements, educator evaluation, athletic regulations, and licensure and certification.

f. *District of Columbia*: The District of Columbia Office of the State Superintendent is the District of Columbia's state education agency tasked with overseeing K-12 education in the District. The District of Columbia Public Schools ("DCPS") is the traditional public school system in the District of Columbia. DCPS develops policies and codes of conduct for the traditional public schools in the District. DCPS engaged in a year-long resource-intensive process to update and ensure that its sexual harassment policies fully comport with prior guidance. That process is nearing completion; were this Rule to go into effect, DCPS would need to completely revamp its procedures at great cost of resource and time.

g. *Illinois*: The Illinois State Board of Education ("ISBE"), established under the Illinois School Code, administers elementary and secondary public education in the State of Illinois. ISBE oversees 852 public school districts, 141 public

charter schools, a state-operated educational facility, and numerous cooperatives and regional programs. ISBE reviews and adopts regulations that govern educational policies and principles and establishes standards governing K-12 education programs. *See* 105 ILCS 5/1A-4.

h. *Massachusetts*: The Massachusetts Department of Elementary & Secondary Education ("MA-DESE") serves as the chief regulator and administrator for the public preK-12 school system in Massachusetts. Among other responsibilities, MA-DESE distributes state and federal education money, licenses educators, helps districts implement learning standards, monitors schools and districts, and convenes districts to share best practices. The Massachusetts Board of Elementary and Secondary Education ("MA-BESE") is statutorily created and is comprised of 11 members, nine of whom are appointed by the Governor. MA-BESE's responsibilities include promulgating regulations governing schools and school districts, approving learning standards, deciding when to intervene in a low-performing school district, and hiring the MA-DESE commissioner. Local school committees oversee budget and other decisions for each district and establish educational goals and policies consistent with state law and statewide goals and standards instituted by MA-BESE.

i. *Michigan*: The Michigan Constitution vests the State Board of Education with "[l]eadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees," and the State

Board of Education "serve[s] as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith." Mich. Const. art. VIII, § 3. In the 2019–2020 school year, Michigan was home to 836 public school districts and 56 intermediate school districts with over 1.5 million students. While the school districts exercise primary responsibility over budgetary and other decisions for each district, the Michigan Department of Education implements federal and state legislative mandates in education and carries out the policies of the State Board of Education, and the State Board of Education has "leadership and general supervision over all public education." Mich. Const. art. VIII, § 3; Mich. Comp. Laws § 388.1009. The State Board of Education "serve[s] as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith." Mich. Const. art. VIII, § 3.

j. *Minnesota*: In Minnesota, local school boards "have the general charge of the business of the district, the school houses, and of the interests of the schools thereof." Minn. Stat. § 123B.02, subd. 1. The Commissioner of the Minnesota Department of Education "adopt[s] goals for and exercise[s] general supervision over public schools and public educational agencies in the state." Minn. Stat. § 127A.05, subd. 3.

k. *New Mexico*: The State regulates its 155 traditional secondary school districts and charter schools serving 330,029 students through the Public Education

Department, the State educational agency. The public school code applies to children from age five to 22. NMSA 1978, Sec. 22-1-2 (O).

l. *North Carolina:* The North Carolina State Board of Education and the North Carolina Department of Public Instruction have general supervisory authority of public schools in North Carolina. N.C. Gen. Stat. § 115C-10 to -22.

m. *Oregon*: Oregon law provides that the Oregon State Board of Education shall set standards for and adopt rules for governance of public kindergarten, elementary, and secondary schools. The State Board of Education is also required by statute to adopt rules providing that no public elementary or secondary school shall discriminate in determining participation in scholastic activities. ORS 326.051. "Discrimination" has the same meaning as set forth in Section 659.850 of the Oregon Revised Statutes, including discrimination on the basis of sex and sexual orientation. Section 326.111 of the Oregon Revised Statutes establishes the Oregon Department of Education to administer the functions exercised by the State Board of Education.

n. *Rhode Island*: The Rhode Island Department of Education oversees 36 school districts with 300 schools and over 143,000 students. The 17-member Rhode Island Board of Education was created by the Rhode Island General Assembly and is responsible for the governance of all public education in Rhode Island. The Commissioner of Elementary and Secondary Education is responsible for carrying out "the policies and programs formulated by the council on elementary and secondary education" and "distribution of state school funds in accordance with law and the regulations of the board" R.I.G.L. § 16-1-5.

o. *Virginia*: The Constitution of Virginia vests general supervision of the Commonwealth's public school system in the Board of Education. Va. Const. Art. VIII, § 4; *see also* Va. Code Ann. § 22.1-8. Standards of quality for the Commonwealth's school system are set by the Board of Education, subject to revision by the General Assembly. *See* Va. Const. Art. VIII, § 2. The Board of Education develops guidance and promulgates regulations for the administration of state programs. The Constitution further provides that, "[s]ubject to the ultimate authority of the General Assembly," the Board of Education has "primary responsibility and authority for effectuating the educational policy" of the Commonwealth. Va. Const. Art. VIII, § 5. The supervision of schools in each school division is vested in a local school board. *Id.* § 7; *see also* Va. Code Ann. § 22.1-28.

p. *Vermont*: Vermont's State Board of Education has the authority to establish and advance education policy for the State. Vt. Stat. Ann. tit. 16, § 164. Vermont's Secretary of Education has the authority to execute the policies adopted by the State Board; evaluate the program of instruction in Vermont's public schools; advise the Legislature concerning proposed laws affecting the public schools; supervise and direct the execution of laws relating to the public schools and ensure compliance; and supervise the expenditure and distribution of money appropriated by the State for public schools. Vt. Stat. Ann. tit. 16, § 212. The Secretary is also charged with annually determining whether students in each Vermont public school are provided educational

opportunities substantially equal to those provided in other public schools. Vt. Stat. Ann. tit. 16, § 165.

q. *Washington*: The Washington Office of the Superintendent of Public Instruction ("OSPI") oversees the State's K-12 education system, which includes 295 public school districts (approximately 2,000 schools) and six state-tribal education compact schools. The Superintendent of Public Instruction supervises all matters pertaining to public schools, including but not limited to certifying educators, administering a statewide student assessment system, maintaining a manual of the Washington state common school code, and establishing a coordinated program for the prevention of sexual abuse of K-12 students. *See* Wash. Rev. Code §§ 28A.300.040, 041, 160. While OSPI oversees the public school system statewide, the primary governing body of each K-12 school is its locally elected school board.

r. *Wisconsin*: The Wisconsin State Superintendent provides "general supervision" of all public K-12 schools and has the responsibility to "[a]scertain the condition of the public schools, stimulate interest in education and spread as widely as possible a knowledge of the means and methods which may be employed to improve the schools." Wis. Stat § 115.28(1).

219. Most States also exercise primary responsibility for regulating public postsecondary education in their borders:

a. *Pennsylvania*: The Pennsylvania Department of Education oversees the Commonwealth's Career and Technology Centers/Vocational Technical Schools and community colleges. The Pennsylvania State Board of Education

has the authority to review and adopt regulations that govern educational policies and principles and establish standards governing the educational programs of the Commonwealth, including the authority to adopt policies with regard to postsecondary schools, to regulate the community colleges, and to adopt master plans for higher education. The Pennsylvania State System of Higher Education is governed by a Board of Governors made up or appointed by Commonwealth officials. The Commonwealth System of Higher Education universities are governed by boards of trustees with a minority of representatives appointed by Commonwealth officials.

b. *New Jersey*: The Secretary of Higher Education is empowered to enforce the observance of State laws among institutions of higher education. N.J. Stat. Ann. § 18A:3B-34. The Secretary makes final administrative decisions over institutional licensure and university status as well as over a change in the programmatic mission of an institution under her purview. N.J. Stat. Ann. § 18A:3B-14. And the Secretary makes recommendations to the Governor and Legislature on higher education initiatives and programs of Statewide significance and implements Statewide planning on higher education. *Id.* The governing boards of each of New Jersey's public institutions of higher education "have authority over all matters concerning the supervision and operations of the institution including fiscal affairs, the employment and compensation of staff." N.J. Stat. Ann. § 18A:3B-6. They are required to compile and make public annual reports regarding their fiscal and governance condition. N.J. Stat. Ann. § 18:3B-35; N.J. Stat. Ann. § 18A:65-14.5. The

President's Council, consisting of the presidents of all higher education institutions that receive State funding, provide advice and policy recommendations to the Secretary of Higher Education. N.J. Stat. Ann. § 18A:3B-7, -8.

c. *California*: The University of California is a public trust formed under the California Constitution and funded by the State. Cal. Const., art. IX, § 9; Cal. Educ. Code § 92100 et seq. The nation's largest four-year public university system, the California State University system, is also part of the State of California's public higher education system and includes twenty-three campuses across the State. Cal. Educ. Code §§ 89001, 84001. The California Community Colleges are also part of the State of California's public higher education system. Cal. Const., art. XVI, § 8; Cal. Educ. Code §§ 66700, 70900. The California Constitution mandates and funds a system of free public schools, Cal. Const. art. IX, §§ 5, 6, and sets a minimum funding level for "the moneys to be applied by the State for the support of school districts and community college districts." Cal. Const., art. XVI, § 8(b). State law directs the Board of Governors of the California Community Colleges to prepare the system's budget, identify total revenue needs in order to properly serve the education system, and identify expenditures for the state general apportionment and for categorical programs, new programs, and budget improvements. Cal. Educ. Code § 70901(b)(5)(A)(I).

d. *Colorado*: The Colorado Commission on Higher Education, which is located in the Colorado Department of Higher Education, is the central policy and

coordinating board for higher education in the State of Colorado. Colo. Rev. Stat. §§ 23-1-102 and 24-1-114. The governing board of each institution of higher education is responsible for promulgating its institution's policies governing student conduct and discipline. Each institution is also responsible for establishing policies and procedures governing its faculty, administrative, and classified employees. Each of Colorado's institutions of higher education is governed by a board of regents, board of governors, or board of trustees (collectively, the "governing boards") either elected by the citizens of the state or appointed by the governor with the consent of the senate. Colo. Rev. Stat. §§ 23-20-102 (University of Colorado System), 23-30-102 (Colorado State University System), 23-40-104 (University of Northern Colorado), 23-41-101 (Colorado School of Mines), 23-51-102 (Adams State University), 23-52-102 (Fort Lewis College), 23-53-102 (Colorado Mesa University), 23-54-102 (Metropolitan State University of Denver), 23-56-102 (Western Colorado University), 23-60-104 (Colorado Community College System). Colorado statute also authorizes the creation of local district colleges. Colo. Rev. Stat. § 23-71-103. Colorado's two local district colleges are governed by governing boards elected by citizens of their districts.

e. *Delaware*: The Delaware Department of Education, through its Higher Education Office, works with Delaware's public and private higher education institutions to ensure students have access to high quality education, and is the lead communication agency on higher education with the Federal government. The Higher Education Office is also responsible for providing for the

licensure of any institution of higher education that offer courses, programs, or degrees within Delaware but are not incorporated or located in Delaware.

f. *District of Columbia*: The University of the District of Columbia is an independent agency governed by a Board of Trustees, which has the power to adopt policy regulations for the university, including those relating to gender discrimination and sexual harassment. *See* D.C. Code § 38-1202.01(a).

g. *Illinois*: The Illinois Board of Higher Education ("IBHE") is the coordinating body for the state's systems of colleges and universities. IBHE adopts regulations that govern educational policies and standards governing postsecondary education. IBHE recommends to the State the budgetary needs for operations, grants, and capital improvements for higher education institutions and agencies. It approves proposals by public university governing boards and the Illinois Community College Board for new units of instruction, research, or public service. It also reviews existing instruction, research, and public service programs to determine their continued educational and economic justification.

h. *Massachusetts:* The Massachusetts Department of Higher Education, along with the Massachusetts Board of Higher Education ("MA-BHE"), serves as coordinator of Massachusetts's system of public higher education and as the employer of record. MA-BHE promulgates regulations to govern the state's public higher education system, establishes overall goals for the system, reviews and approves admission and program standards and five-year plans for higher education institutions, and receives and disburses federal funds.

MA-BHE is a statutorily created agency comprised of 13 members, including nine members appointed by the Governor.

i. *Minnesota*: The Board of Trustees for the Minnesota State Colleges and Universities system has the authority to govern the seven universities and 30 colleges within its system. Minn. Stat. § 136F.06, subd. 1. The Office of Higher Education, which is headed by a Commissioner who is appointed by the Governor, oversees private colleges and universities in the State. Minn. Stat. § 136A.01, subd. 2.

j. *New Mexico*: The New Mexico Constitution establishes seven four-year public postsecondary institutions and ten two-year branch community colleges that are regulated by boards of regents. In addition, the State operates seven two-year independent community colleges regulated by community college boards. The New Mexico Higher Education Department oversees all of these postsecondary institutions.

k. *North Carolina*: The Board of Governors of the University of North Carolina has the responsibility for the planning, development, and overall governance of the UNC System, which is comprised of 17 constituent institutions. N.C. Gen. Stat. § 116, *et seq.* The Board of Governors has 24 voting members, elected by the North Carolina General Assembly to staggered four-year terms. Additionally, the president of the UNC Association of Student Governments serves as a nonvoting, ex officio member of the Board. The Board elects the President of the UNC System. The Board of Governors maintains The Code and the UNC Policy Manual. The Code incorporates the requirements of the

North Carolina constitution and General Statutes, as well as Board bylaws and other high-level policies. The UNC Policy Manual provides more specific direction and policies on university matters, including a system-wide policy to establish legally supportable, fair, effective, and efficient procedures for student disciplinary proceedings related to sexual harassment and Title IX violations (Chapter 700.4—Student Conduct and Discipline). The State Board of Community Colleges (CC State Board) is the governing authority for the 58 community colleges in the State. The CC State Board consists of 20 members—10 appointed by the governor, 8 elected by the General Assembly, and the lieutenant governor and the state treasurer, who serve as ex-officio members. The CC State Board establishes policies, regulations, and standards for the administrative offices and the institutions that comprise the Community College System.

l. *Oregon*: It is the law and policy of the State of Oregon to promote and support post-secondary education of its citizens, which benefits the economy of the State and the welfare of Oregonians. ORS §§ 350.001 et seq. The State regulates seven public universities in the State (ORS Chapter 352), as well as community colleges (ORS Chapter 341), and career and trade training (ORS Chapter 344). Section 350.050 *et seq.* of the Oregon Revised Statutes establishes the Higher Education Coordinating Commission, which sets standards for institutions of higher education. In addition to other policies and funding requirements, Oregon law requires all institutions of higher education to have written policies regarding sexual assault, harassment, stalking, and

dating violence that occur both on and off campus. ORS §§350.253, ORS 350.255

m. *Rhode Island*: The Council on Postsecondary Education provides oversight of the public higher education system in Rhode Island. The Council adopts standards, requires enforcement, and exercises general supervision over all public higher education in the state. R.I.G.L. § 16-59-4. Duties also include formulating broad policies to implement the goals and objectives of the Board of Education along with preparing and maintaining a 5-year budget for higher education that implements the financial recommendations of the Board of Education. The Rhode Island Office of the Postsecondary Commissioner supports the Board of Education and Council on Postsecondary Education as the State's higher education executive officer.

n. *Vermont*: The Vermont State Board of Education has the authority to issue certificates of approval and of degree-granting authority to post-secondary institutions in the state whose goals, objectives, programs, and resources meet State Board standards. Vt. Stat. Ann. tit. 16, § 176. Vermont's Higher Education Council reviews post-secondary institutions' eligibility for certain federal funding. Vt. Stat. Ann. tit. 16, § 2881. State officials make up a majority of the governing Board of Trustees for the Vermont State Colleges system, Vt. Stat. Ann. tit. 16, §§ 2172-74, and roughly half of the governing Board of Trustees for the University of Vermont, Vt. Stat. Ann. tit. 16, app. ch. 1 § 1-2.

o. *Virginia*: The State Council of Higher Education for Virginia ("SCHEV") is the Commonwealth's coordinating body for higher education. Pursuant to state statute, SCHEV "advocate[s] for and promote[s] the development and operation of an educationally and economically sound, vigorous, progressive, and coordinated system of higher education in the Commonwealth." Va. Code Ann. § 23.1-200. The coordination and governance of higher education in Virginia are shared responsibilities among the General Assembly, the Governor, the institutions of higher education, and SCHEV. The Governor appoints members to public institutions' Boards of Visitors, the State Board for Community Colleges, and SCHEV, and prepares and submits a biennial budget. The General Assembly confirms the Governor's nominations, adopts a biennial budget, and enacts legislation pertaining to higher education. SCHEV develops a statewide strategic plan and provides policy and funding recommendations. The governing boards at institutions of higher education set institutional policy goals and priorities, approve budget requests to the Governor and General Assembly, and ensure that institutions effectively and efficiently use state funds.

p. *Washington*: Each of Washington's six public baccalaureate colleges and universities and each of its 30 community and technical college districts is governed by a board of regents or board of trustees (collectively, the "governing boards") appointed by the governor with the consent of the senate. Wash. Rev. Code §§ 28B.20.100 (University of Washington), 28B.30.100 (Washington State University), 28B.35.100 (Regional

Universities), 28B.40.100 (The Evergreen State College), 28B.50.100 (Community & Technical Colleges). Each governing board is responsible for promulgating its institution's policies governing student conduct and discipline pursuant to Washington's Administrative Procedure Act, Wash. Rev. Code Chapter 34.05. *See* Wash. Rev. Code §§ 28B.20.130 (University of Washington), 28B.30.150 (Washington State University), 28B.35.120 (Regional Universities), 28B.40.120 (The Evergreen State College), 28B.50.140 (Community & Technical Colleges). Each institution is also responsible for establishing policies and procedures governing its faculty, administrative, and classified employees. This process includes negotiating collective bargaining agreements with those employees who are represented by unions.

q. *Wisconsin*: The Board of Regents of the University of Wisconsin System is granted the primary responsibility for governance of the University of Wisconsin System through enacting policies and promulgating rules for governing the system, planning for the future needs of the State for university education, ensuring the diversity of quality undergraduate programs while preserving the strength of the State's graduate training and research centers, and promoting the widest degree of institutional autonomy within the controlling limits of system-wide policies and priorities established by the board. Wis. Admin. Code § UWS 36.09. The State's Department of Safety and Professional Services' Educational Approval Program is charged with protecting the public by inspecting and approving private trade,

correspondence, business, and technical schools doing business within the state. Wis. Stat. § 440.52.

220. The States have primary responsibility for protecting the safety of their residents, including children in K-12 institutions and children and adults attending postsecondary schools.

221. Consistent with these responsibilities, the States have enacted laws and regulations to prevent discrimination on the basis of sex in education institutions and to protect the safety of students and others in K-12 and postsecondary schools. The States continue to vigorously enforce these laws and regulations:

a. *Pennsylvania*: Under Act 16 of 2019, postsecondary institutions in Pennsylvania must adopt a clear, understandable written policy on sexual harassment and sexual violence that informs victims of their rights under federal and state law, including the crime victims' bill of rights. The Pennsylvania Department of Education subsequently created a model sexual harassment and sexual violence policy for postsecondary schools. Pa. Dep't of Educ., *Sexual Violence and Sexual Harassment Model Sexual Misconduct Policy*. Pennsylvania institutions have until June 30, 2020, to comply.

b. *New Jersey*: Every public institution of higher education, elementary school and secondary school in New Jersey is required to adopt a policy included in its student code of conduct prohibiting harassment, intimidation, or bullying. N.J. Stat. Ann. § 18A:3B-68; N.J. Stat. Ann. § 18A:37-15. New Jersey law sets out particular standards for conduct that must be prohibited under this policy. *Id.* The New Jersey Law Against Discrimination ("LAD"), N.J. Stat. Ann. § 10:5-1 to-49, prohibits all primary, secondary and postsecondary

schools, except any school operated by a religious institution, from discriminating against students based on sex. This includes prohibiting sexual harassment "that a reasonable student of the same age, maturity level, and [sex] would consider sufficiently severe or pervasive enough to create an intimidating, hostile or offensive school environment[.]"N.J. Stat. Ann. § 10:5-5(f); 10:5-12(l); *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Education*, 189 N.J. 381, 402–03 (N.J. 2007). Schools are required to take action to prevent sexual harassment and must promptly address it if they knew or should have known about it. *Id.* at 407. The LAD provides for administrative or court enforcement by the State's Division on Civil Rights, as well as a private right of action. N.J. Stat. Ann. § 10:5-13. In May 2019, New Jersey enacted the Sexual Assault Victim's Bill of Rights, to ensure the dignity and safety of victims and their access to necessary services and investigative procedures. N.J. Pub. L. 2019-103.

c. *California*: The California Equity in Higher Education Act establishes the policy of the State of California to afford all persons equal rights and opportunities in postsecondary education institutions of the State. Cal. Educ. Code §§ 66251, 66252. As such, it is the policy of the State of California that all persons, regardless of sex, are free from discrimination of any kind in the postsecondary education institutions of the State. Cal. Educ. Code §§ 66270; 66281.5. State law authorizes the Board of Governors of the California Community Colleges, the Trustees of the California State University, and the Regents of the University of California to adopt regulations as required by law

to implement the nondiscrimination requirements set forth in state law. Cal. Educ. Code § 66271.1. Under state law, for K-12 students, the definition of sexual harassment includes unwelcome conduct of a sexual nature that has the purpose or effect of having a negative impact upon the individual's academic performance or of creating an intimidating, hostile, or offensive education environment. Students are protected from sexually harassing conduct, including cyber sexual bullying, that is related to a school activity or school attendance, including but not limited to acts that occur while a student is going to or coming from school, during lunch whether on or off campus, and while going to or coming from a school-sponsored activity. Cal. Educ. Code §§ 200 & 48900, et seq. Separate and apart from state law school discipline procedures, state law also establishes a detailed grievance process for promptly and equitably investigating and resolving complaints of sexual harassment and assault in K-12 schools under the state's Uniform Complaint Procedures. These procedures include collecting evidence from both parties, interviewing the parties and witnesses, issuing a letter of findings, and a right to appeal to the California Department of Education. Cal. Educ. Code, § 33315; Cal. Code Regs., tit. 5, §§ 4610, et seq. State law does not prohibit schools from acting outside the Uniform Complaint Procedures to more quickly address reports and complaints.

d. *Colorado*: Colorado law requires Colorado public universities and colleges to adopt sexual misconduct policies for enrolled students. Colo. Rev. Stat. § 23-5-146(2). These policies must contain fair, impartial, and prompt procedures

for the investigation of sexual misconduct, and require the college or university to complete an investigation or adjudicative process within an average of sixty to ninety days. *Id.* § 23-5-146(3)(d)(I). Although parties may have advisors during the process, those advisors are not permitted to speak and all questions for witnesses must go through the official individual or individuals conducting or participating in the investigation and adjudication process. *Id.* § 23-5-146(3)(d)(III)-(IV).

e. *Delaware*: Under Delaware law, each public school district and charter school is required to establish and disseminate a policy for responding to teen dating violence and sexual assault that includes guidelines on mandatory reporting and confidentiality, and protocols for responding to incidents of teen dating violence and sexual assault. Del. Code Ann. tit. 14, § 4166. Higher education institutions in Delaware with more than 1,000 students are required to offer to sexual assault victims to report incidents perpetrated by or against a student to law enforcement authorities servicing the institution, to inform victims of their rights under the Delaware Victims' Bill of Rights, to inform victims of available confidential medical and counseling services, and to report data to the State of Delaware to ensure compliance with the law. Higher education institutions are also required to provide training to responsible employees regarding the prevalence and nature of sexual assaults on college campuses, and the requirements of state and federal law. Del. Code Ann. tit. 14, ch. 90A.

f. *District of Columbia*: The District of Columbia City Council passed the D.C. School Safety Omnibus Act of 2018 ("DCSSOA") to promote and protect

District students' safety by preventing sexual harassment and dating violence against students by faculty, staff, and other students in District schools. The DCSSOA defines "sexual harassment" as "any unwelcome or uninvited sexual advances, requests for sexual favors, sexually motivated physical conduct, stalking, or other verbal or physical conduct of a sexual nature that can be reasonably predicted to: (A) Place the victim in reasonable fear of physical harm to his or her person; (B) Cause a substantial detrimental effect to the victim's physical or mental health; (C) Substantially interfere with the victim's academic performance or attendance at school; or (D) Substantially interfere with the victim's ability to participate in, or benefit from, the services, activities, or privileges provided by a school." D.C. Code § 38-952.01(5). The DCSSOA's broad definition of "sexual harassment" differs from the Rule's definition which restricts schools from investigating sexual harassment until it becomes "severe, pervasive, and objectively offensive." The D.C. Human Rights Act of 1977 ("DCHRA"), the country's most expansive state human rights law, protects District residents from sex discrimination in education institutions, which includes "deny[ing], restrict[ing], or . . . abridge[ing] or condition[ing] the use of, or access to, any of its facilities, services, programs, or benefits of any program or activity to any person otherwise qualified." D.C. Code § 2–1402.41.

g. *Illinois*: The Illinois School Code requires schools to create, maintain, and implement an age-appropriate policy on sexual harassment. 105 ILCS 5/10-20.69 (P.A. 101-418). The School Code also requires that all public school

classes that teach sex education in grades 6 through 12 must include course material and instruction about unwanted physical and verbal sexual advances and what may be considered sexual harassment or sexual assault. 105 ILCS 5/27-9.1(c)(8). In 2015, Illinois enacted the Preventing Sexual Violence in Higher Education Act ("PSVHEA") establishing requirements for all higher education institutions aimed at raising awareness about and addressing campus sexual violence, domestic violence, dating violence and stalking. The PSVHEA mandates that all universities "shall adopt a comprehensive policy concerning sexual violence, domestic violence, dating violence, and stalking consistent with governing federal and State law." 110 ILCS 155/10. It outlines detailed requirements schools must follow to address and prevent sexual violence.

h. *Massachusetts*: Massachusetts has several state laws which protect against sex discrimination and sexual harassment in education institutions. Mass. Gen. Laws ch. 151C, § 2(g) (fair educational practices); Mass. Gen. Laws ch. 76, § 5 (discrimination on the basis of sex); Mass. Gen. Laws ch. 12, § 11H (Massachusetts Civil Rights Act). Under Massachusetts law, prohibited sexual harassment by an education institution includes "any sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when: (i) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of the provision of the benefits, privileges or placement services or as a basis for the evaluation of academic achievement; or (ii) such advances, requests or

conduct have the purpose or effect of unreasonably interfering with an individual's education by creating an intimidating, hostile, humiliating or sexually offensive educational environment." Mass. Gen. Laws ch. 151C, § 1(e). The Massachusetts Commission Against Discrimination, a Massachusetts agency that investigates and adjudicates violations of anti-discrimination laws, enforces this prohibition for students seeking admission to any education institution or who are enrolled in vocational training institutions. Mass. Gen. Laws ch. 151C, § 3(a). The Massachusetts Board of Elementary and Secondary Education has promulgated regulations providing that: "All public schools shall strive to prevent harassment or discrimination based upon a student's race, color, sex, gender identity, religion, national origin or sexual orientation and all public schools shall respond promptly to such discrimination or harassment when they have knowledge of its occurrence." 603 Code Mass. Regs. 26.07(2). Massachusetts regulations contain requirements for schools' notification and complaint procedures for discrimination and harassment. 603 Code Mass. Regs. 26.08.

i. *Michigan*: Under Michigan state law, each local school district's board "shall adopt and implement a written sexual harassment policy." Mich. Comp. Laws § 380.1300a. State law further provides that the sexual harassment policies "shall prohibit sexual harassment by school district employees, board members and pupils directed toward other employees or pupils and shall specify penalties for violation of the policy." *Id.*

j. *Minnesota*: Under Minnesota law, in addition to the State's Human Rights Act that prohibits any educational institution from engaging in sex discrimination, Minn. Stat. § 363A.13, subd. 1, postsecondary institutions must have a written policy on sexual harassment and sexual violence, Minn. Stat. § 135A.15, subd. 1(b). The Minnesota State Colleges and Universities system has a policy that prohibits sexual harassment that is "directed at verbal or physical conduct that constitutes discrimination/harassment under state and federal law and is not directed at the content of speech." Its sexual violence policy states that it "is committed to eliminating sexual violence in all its forms." Minnesota law requires local school boards to adopt written sexual harassment policies and the Commissioner of the Minnesota Department of Education "maintain[s] and make[s] available to school boards a model sexual, religious, and racial harassment and violence policy." Minn. Stat. § 121A.03, subds. 1 & 2.

k. *Oregon*: Oregon has numerous policies against the sorts of conduct implicated in the Rule. Oregon law prohibits discrimination on the basis of sex. ORS 659A.030. Harassment (ORS 166.065) and offensive sexual contact (ORS 163.415) are crimes under Oregon law, as is offensive contact with a minor (ORS 163.479). Oregon Revised Code Section 342.700 et seq. requires all public school districts, education service districts and public charter schools to adopt a sexual harassment policy applicable to all students and staff. The law sets forth the requirements for the policies, including definitions and consequences for assault, unwanted physical and verbal contact, and demands for sexual favors. ORS 342.704.

l. *Rhode Island*: Under Rhode Island law, discrimination on the basis of sex is prohibited in all public elementary and secondary schools in the state. R.I.G.L. § 16-38-1.1. In 2007, the Lindsay Ann Burke Act was passed, requiring all schools to adopt a policy responding to allegations of teen dating and sexual violence. R.I.G.L. § 16-85-2. The Council on Postsecondary Education issued a Sexual Harassment and Sexual Violence policy in 2015 to prohibit all forms of sexual harassment and sexual violence that all faculty, staff and students at all higher education entities in Rhode Island must comply with.

m. *Virginia*: Virginia's General Assembly has enacted several statutes that protect victims of sexual assault. For example, Virginia Code § 23.1-808 requires review of sexual violence policies annually. Virginia Code § 23.1-806 requires that a review committee convene within 72 hours of a report of an alleged act of sexual violence and determine whether the matter should be referred to local law enforcement, and where the conduct may constitute a felony, contact the local Commonwealth's Attorney (subject to certain privacy protections). And Virginia Code § 23.1-807 requires that universities provide access to or enter into memoranda of understanding with sexual assault crisis centers or other victim support service.

n. *Vermont*: Under Vermont state law, "[i]t is the policy of the State of Vermont that all Vermont educational institutions provide safe, orderly, civil, and positive learning environments. Harassment, hazing, and bullying have no place and will not be tolerated in Vermont schools. No Vermont student should feel threatened or be discriminated against while enrolled in a Vermont

school." Vt. Stat. Ann. tit. 16, § 570(a). Therefore, Vermont law instructs that "[e]ach school board shall develop, adopt, ensure the enforcement of . . . harassment, hazing, and bullying prevention policies that shall be at least as stringent as model policies developed by the Secretary." *Id.* § 570(b). The Secretary of Education has developed model policies and procedures for the prevention of hazing, harassment, and bullying. Vermont statute also requires that the board of trustees or other governing body of each postsecondary school operating in Vermont adopt and ensure enforcement of a policy establishing that harassment, as defined by Vt. Stat. Ann. tit. 16, § 11(a)(26), is a form of unlawful discrimination and therefore prohibited. The board is also required to establish procedures to address complaints of discriminatory harassment and to initiate educational programs designed to prevent such conduct. Vt. Stat. Ann. tit. 16, § 178.

o. *Washington*: Washington law prohibits discrimination on the basis of sex in K-12 schools. Chapter 28A.640 Wash. Rev. Code. Regulations implementing this statute define sexual harassment for antidiscrimination purposes and establish required criteria for each school district's sexual harassment policy. Wash. Admin. Code §§ 392-190-056, 057. School districts are required to adopt sexual harassment policies and procedures that meet both state and federal antidiscrimination law requirements. The Washington State School Directors' Association has published model policies and procedures concerning issues such as harassment, gender inclusivity, and student discipline. Washington's Gender Equality in Higher Education Act, Chapter

28B.110 Wash. Rev. Code, prohibits discrimination on the basis of gender at Washington's higher education institutions. It requires each institution to develop and distribute policies and procedures for handling complaints of sexual harassment and sexual violence, as well as other rules and guidelines to eliminate sexual harassment and other forms of gender discrimination in higher education. Wash. Rev. Code § 28B.110.030(8). In 2014, the state legislature created a Campus Sexual Violence Prevention Task Force, which submitted its final report at the end of 2016. Among other things, the report contains summaries of initiatives launched by public and private institutions to combat sexual violence on campus, as well as positions and recommendations on many issues related to sexual violence prevention.

p. *Wisconsin*: Under Wisconsin law, each school board in charge of the K-12 public schools of the district bears the responsibility for developing policies prohibiting discrimination against pupils, including policies prohibiting discrimination on the basis of sex. Wis. Admin. Code §§ PI 9.01(1); 9.02(2). The Wisconsin Administrative Code provides that students, faculty, and staff within the University of Wisconsin System are subject to discipline, up to and including dismissal for engaging in acts of sex discrimination, including sexual assault, sexual harassment, dating violence, and stalking. Wis. Admin. Code §§ UWS 4, UWS 7, UWS 17. Additionally, University of Wisconsin System Board of Regents Policy 14-2 requires each school within the system to implement institutional procedures consistent with the policy, including providing education and training, defining prohibited conduct on the basis of

sex, identifying the institution's Title IX coordinator, designating responsible employees, and describing available counseling, medical, legal, and other resources for complainants, victims, and accused persons.

222. Where a Plaintiff State's law provide greater protections than the Rule, schools subject to these laws will need to create parallel code of conduct provisions and enforcement mechanisms—one addressing "Title IX sexual harassment" and one addressing "non-Title IX sexual harassment." *See* ¶¶ 208–209, *supra*.

223. The Rule will undermine the goals of State laws and regulations by discouraging reporting of sexual harassment, where, for example, victims do not wish to submit to cross-examination or disclosure of sensitive information required by the Rule, and by exacerbating the re-traumatization that could result from multiple rounds of interviews or adversarial cross-examination by an interested party.

224. Certain States require that policies governing K-12 and/or postsecondary schools be subject to a rigorous regulatory process to include, in some cases, notice and comment rulemaking. As a result, certain States will face difficulty in updating their regulations or policies in time to comply with the effective date of the Rule. For example,

a. *California*: Rulemaking by the California Department of Education, the California State Board of Education, and the State Superintendent of Public Instruction must comply with the requirements of California's Administrative Procedure Act. Cal. Gov't Code § 11340 et seq. These entities will need to engage in rulemaking to amend state policies relating to non-discrimination and complaint procedures for alleged violations of federal program statutes and regulations in California's schools. Compliance with California's

Administrative Procedure Act requires public notice of the express terms of the proposed regulation and an opportunity for public discussions of proposed regulations before regulations can be adopted. Cal. Gov't Code §§ 11346.2, 11346.4, 11346.45, 11346.5, 11346.6, 11346.8 .

b. *New Mexico*: To comply with the Rule's new requirements, postsecondary schools will have to change their regents, faculty, staff, and student policies, as well as the entire discrimination claims process. These changes must be made subject to New Mexico's regulatory requirements, which include a period of 30 days at a minimum between publication of a notice of proposed rule and a hearing on the rule. NMSA 1978, § 14-4-5.2.

c. *Wisconsin*: In Wisconsin, K-12 institutions must provide for a public hearing and opportunity for public commentary at a board meeting before the board for public schools in a particular district may adopt new non-discrimination policies or procedures. Wis. Admin. Code § PI 9.03(3). Similarly, administrative rules and procedures affecting the University of Wisconsin System of public higher education must go through Wisconsin's administrative rulemaking process, complete with a period of notice of the proposed rule and public comment. Prior to allowing a proposed rule to proceed to a period of public comment, the Wisconsin Legislative Council staff serves as the Administrative Rules Clearinghouse. An agency must submit a proposed rule to the Clearinghouse for review and comment, prior to holding a public hearing on the rule. The Clearinghouse then assigns a Clearinghouse Rule number to the proposed rule and reviews the statutory

authority under which the agency intends to promulgate the rule as well as the form, style and clarity of the rule. The Clearinghouse then submits a Clearinghouse Report to the agency with its comments about the rule.

225. The Rule will also harm the States' sovereign interests by requiring States with policies and laws that are consistent with Title IX's anti-discriminatory aims but conflict with the Rule's prescriptive grievance process to revise their codes, such as state employment laws, student privacy laws, and student discipline codes, in order to avoid having their laws preempted by the Rule, without even providing sufficient time for States to conduct such a review.

226. The States also have an interest in participating in the administrative process governing the Rule's adoption. The Department promulgated the Rule in a manner that deprived the States of a meaningful opportunity to participate in this process.

C. The Rule Will Harm Plaintiff States' Quasi-Sovereign Interests

227. Sexual harassment can lead to serious physical, emotional, psychological, and other harms. These harms can continue long after an incident or incidents of sexual harassment and can affect not just the individual subject to harassment, but friends, family members, and community members.

228. These harms are often exacerbated if the individual is forced to relive the incident of harassment in the context of investigatory, judicial, or other proceedings.

229. The Rule will undermine schools' efforts to combat sexual harassment, discourage reporting of sexual harassment, and cause increased harm to students and others who suffer sexual harassment in connection with educational programs.

230. In addition to causing harm to individuals who suffer sexual harassment, the Rule will undermine the educational mission of schools in the Plaintiff States, causing additional harm to students, faculty, staff, and other residents of the Plaintiff States.

231. The Rule will undermine State efforts to combat sexual harassment and ensure safe and equal educational experiences for all students. For example,

a. *New Jersey*: The New Jersey Attorney General issued revised statewide standards in 2018 on Supporting Victims of Sexual Assault. (AG Directive 2018-5). The dissemination and implementation of this Directive included stakeholder meetings with a wide variety of actors in all of New Jersey's 21 counties, including school administrators, victim advocates, and attorneys. In addition, the Office of the Secretary of Higher Education works with the State's public and private higher education institutions to ensure students have access to high quality education and serves as the lead communication agency on higher education with the Federal government. In 2019, the Governor signed Executive Order 61 (Murphy 2019), establishing a Safe and Inclusive Learning Environment working group (among 4 other groups) that was charged with developing an implementation guide for colleges and universities based on the 2017 NJ Task Force on Campus Sexual Assault report recommendations. The Secretary coordinated this wide variety of stakeholders from the State's higher education institutions to create an implementation plan including guidelines and best practices for schools carrying out sexual harassment investigations and grievance procedures.

b. *Virginia*: In 2014, then Governor Terry McAuliffe issued Executive Order 25, which established the Governor's Task Force on Combating Campus Sexual Violence. Attorney General Herring chaired the Task Force, which provided a final report and 21 recommendations to the Governor in May 2015. The work

> of the Task Force was a collaborative effort that included top state leaders and experts including Virginia's Secretaries of Education, Health and Human Services, and Public Safety and Homeland Security, representatives from higher education, student leaders, law enforcement, community advocates, and health professionals. The recommendations were designed to provide a safe and equitable learning and teaching environment for students, faculty members, and staff by enhancing institutional response to campus sexual violence with a sensitive and supportive approach to all parties involved.

232. The States have a quasi-sovereign interest in protecting the safety and well-being of their residents.

233. Protecting public health is one of the police powers reserved to the States. The States can reduce future health care costs when they effectively prevent their residents from being subjected to sexual harassment in their education institutions. The States have an interest in ensuring that funds are not diverted from other vital State priorities and programs towards treating increased numbers of sexual harassment victims due to the Rule's failure to provide sufficient protections to stop, prevent, and remedy sexual harassment and violence in State schools.

234. The States' interest is particularly strong in matters relating to the physical safety of their residents and in those relating to the protection of children. The Rule harms these interests by leaving many student victims and survivors of sexual harassment without adequate relief, exacerbating the effects of harassment and resulting in school communities that are less safe and unable to provide a nondiscriminatory environment, as required by Title IX.

CAUSES OF ACTION

COUNT I
Agency Action Not in Accordance With Law
(5 U.S.C. § 706(2)(A), (C)) – Title IX

235. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

236. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." 5 U.S.C. § 706(2)(A).

237. Title IX provides that no person in the United States shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" on "the basis of sex." 20 U.S.C. § 1681.

238. The purpose of Title IX is "to provide individual citizens effective protection against" discriminatory practices. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979). Title IX ensures that no student is excluded from participation in or denied the benefits of an education because of sexual harassment.

239. Congress created a robust administrative enforcement scheme for enforcing Title IX's prohibition on discrimination on the basis of sex.

240. The Rule violates Title IX in numerous ways, including by:

a. Narrowing the definition of sexual harassment;

b. Narrowing Title IX to apply only when sexual harassment occurs in a school's education program or activity and inside the United States;

c. Requiring a complainant to be "participating in or attempting to participate in the education program or activity" of the school at the time a formal complaint is filed; and

d. Placing schools at greater risk of losing federal funding if they fail to strictly satisfy every element of the Rule's prescriptive grievance process than if they respond to sexual harassment in a manner that is just short of clearly unreasonable.

241. Defendants have acted in violation of Title IX and the APA. The Rule is therefore unlawful and must be set aside.

COUNT II
Agency Action in Excess of Statutory Authority
(5 U.S.C. § 706(2)(C)) – Title IX

242. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

243. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

244. In Title IX, Congress authorized the Department only to issue rules and regulations that "effectuate the [substantive] provisions of" Title IX. 20 U.S.C. § 1682.

245. Although the Department relied on this authority in issuing the Rule, the Rule does not "effectuate" Title IX. The following provisions, among others, do not effectuate Title IX's prohibition of discrimination on the basis of sex:

a. Mandating that schools dismiss formal complaints if "the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States"; and

b. Mandating prescriptive grievance procedures for primary and secondary education that override local school discipline policies and practices that meet Supreme Court standards and allow for the flexibility needed to maintain safety.

246. Defendants have exceeded their statutory authority in violation of Title IX and the APA. The Rule is therefore unlawful and must be set aside.

COUNT III
Agency Action Not in Accordance With Law & in Excess of Statutory Authority
(5 U.S.C. § 706(2)(A), (C)) – FERPA

247. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

248. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

249. Defendants are charged with enforcing both Title IX and FERPA.

250. FERPA prohibits the "release" of student "education records" without the written consent of the student (or parent, where applicable). 20 U.S.C. § 1232g(b).

251. Schools must comply with FERPA when handling a Title IX matter. Subject to a limited exception, FERPA applies to Title IX disciplinary investigations, protecting the education records of all students involved.

252. The Rule violates FERPA by requiring schools to provide student education records beyond what is allowed by FERPA.

253. Defendants lack authority to implement these non-conflicting statutes in a way that creates a conflict and to resolve that conflict by superseding FERPA via a Title IX regulation.

254. Defendants have exceeded their statutory authority and acted in violation of FERPA and the APA. The Rule is therefore unlawful and must be set aside.

COUNT IV
Agency Action That Is Arbitrary, Capricious, and an Abuse of Discretion
(5 U.S.C. § 706(2)(A))

255. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

256. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, [and] an abuse of discretion." 5 U.S.C. § 706(2)(A).

257. A rule is arbitrary and capricious if, for example, the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

258. The following aspects of the Rule, among others, are arbitrary and capricious:

a. Requiring all schools to comply with the Rule by August 14, 2020;

b. Creating inconsistent requirements between the Rule's preamble and the Rule itself;

c. Proscribing standards for Title IX that are inconsistent with other civil rights laws applicable in schools;

d. Imposing requirements inconsistent with the Clery Act/VAWA by preventing schools from timely and effectively fulfilling their obligations under these statutes to investigate allegations of sexual assault both on and off campus;

e. Narrowing the definition of sexual harassment;

f. Limiting Title IX's protections to sexual harassment that occurs in a school's education program or activity or inside the United States;

g. Requiring a complainant to be participating in or attempting to participate in a school's education program or activity for a formal complaint to be filed;

h. Establishing other complaint filing barriers without regard to the unique needs of K-12 students;

i. Mandating that schools dismiss formal complaints if "the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States," but allowing schools to take action under other provisions of their code of conduct;

j. Limiting the remedies that a school can issue to only those directly applicable to the complainant and for the limited purpose of "restoring or preserving access" to the school;

k. Requiring postsecondary schools to provide live hearings with direct, oral cross-examination by a party's advisor, even if the complainant or respondent is a minor;

l. Requiring postsecondary schools to provide parties with advisors to conduct direct, oral cross-examination;

m. Requiring postsecondary schools to make immediate evidentiary decisions on the record during live hearings;

n. Preventing postsecondary schools from considering any statement unless the party or witness submits to live, direct, oral cross-examination;

o. Preventing K-12 schools from placing reasonable limitations on the parties' ability to discuss the allegations under investigation;

p. Requiring all schools to provide parties with all evidence directly related to the allegations, without regard for relevance, confidentiality, the protection of witnesses (who may be young minors), or the implications of sharing sensitive information with and about young children;

q. Prohibiting only school publications that "state" a discriminatory purpose or intent;

r. Eliminating the notice requirement for institutions controlled by a religious organization; and

s. Intentionally disregarding critical costs, providing inadequate and flawed assessments of the costs necessary to comply with the Rule, and providing inadequate justification for costs that the Rule imposes on schools.

259. In promulgating the Rule, Defendants have acted in a manner that is arbitrary, capricious, and an abuse of discretion in violation of the APA. The Rule is therefore unlawful and must be set aside.

COUNT V
Without Observance of Procedure Required by Law
(5 U.S.C. § 706(2)(D))

260. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

261. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

262. In issuing substantive rules, federal agencies are required to follow the notice and comment process set forth in the APA.

263. The agency must publish a "[g]eneral notice of proposed rule making" in the Federal Register. 5 U.S.C. § 553(b). That notice must describe "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3).

264. The agency must further provide "interested persons" an "opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c).

265. To comply with the APA's notice-and-comment requirements, the agency's final rule must be "a 'logical outgrowth' of the agency's proposed regulations." *Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 442 (D.C. Cir. 2012). The agency "must *itself* provide notice of a regulatory proposal." *Id.* at 462 (internal quotation marks omitted). A final rule is not a logical outgrowth if "interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." *Id.* at 461 (internal quotation marks omitted).

266. The Rule is not a logical outgrowth of the notice of proposed rulemaking. Specifically, the notice of proposed rulemaking failed to provide notice of provisions:

a. Explicitly preempting state and local laws that conflict with certain sections of the Rule;

b. Allowing for schools to consolidate complaints;

c. Allowing for dismissal if a respondent is no longer enrolled or employed by the recipient;

d. Creating a new confidentiality provision that is internally inconsistent with the existing confidentiality regulation already incorporated by reference from Title VI;

e. Prohibiting students from filing complaints if they are not participating in or attempting to participate in an education program or activity at the time of complaint filing; and

f. Purporting to make portions or sections of the Rule severable.

267. In addition, "[u]nder APA notice and comment requirements, among the information that must be revealed for public evaluation are the technical studies and data upon which the agency relies in its rulemaking." *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 236 (D.C. Cir. 2008) (internal quotation marks and brackets omitted). Agencies must provide these studies during the rulemaking "in order to afford interested persons meaningful notice and an opportunity for comment." *Id.* at 237. "[A]n agency [also] commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991).

268. Defendants failed to provide interested parties with methodology for its cost-benefit analysis and the technical reports and data on which the agency relied in preparing the

notice of proposed rulemaking. This prevented Plaintiff States and others from meaningfully commenting on the Department's estimates.

269. In promulgating a final rule, the agency must provide a statement of the "basis and purpose." 5 U.S.C. § 553(c). In this statement, the agency must "respond in a reasoned manner" to all public comments "that raise significant problems." *Am. Coll. of Emergency Physicians v. Price*, 264 F. Supp. 3d 89, 94 (D.D.C. 2017) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003)). "[F]ailure to address these comments, or at best its attempt to address them in a conclusory manner, is fatal to its defense." *Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 449 (D.C. Cir. 2012) (cleaned up).

270. Among others, the Department failed to provide an adequate explanation for:

a. Prohibiting only school publications that "state" a discriminatory purpose or intent;

b. Eliminating the notice requirement for institutions controlled by a religious organization; and

c. Not providing interested parties with technical reports and data on which the agency relied in preparing the notice of proposed rulemaking.

271. Any rule issued under Title IX must be approved by the President of the United States, who has delegated this authority to the Attorney General of the United States. 20 U.S.C. § 1682; Exec. Order No. 12,250, § 1-1, 45 Fed. Reg. 72,995 (Nov. 2, 1980).

272. The Rule does not state that it was approved by the Attorney General of the United States or his designate.

273. In promulgating the Rule, Defendants have failed to follow the procedural requirements of the APA and Title IX. The Rule is therefore unlawful and must be set aside.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff States request that this Court enter judgment in their favor and grant the following relief:

a. Postpone the effective date of the Rule pending judicial review under 5 U.S.C. § 705;

b. Declare the Rule unlawful pursuant to 5 U.S.C. § 706(2)(A), (C), & (D);

c. Preliminarily and permanently enjoin the Department and its officers, employees, and agents from applying and enforcing the Rule;

d. Vacate and set aside the Rule;

e. Award Plaintiff States reasonable costs and expenses, including attorneys' fees; and

f. Grant such other and further relief as the Court deems just and proper.

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