January 28, 2019

Brittany Bull
U.S. Department of Education
400 Maryland Avenue SW, Room 6E310
Washington, DC 20202

Re: Docket ID ED–2018–OCR–0064

Dear Ms. Bull:

Safety Advisors for Educational Campuses, LLC (SAFE Campuses, LLC), a social entrepreneurship organization devoted to safer learning environments, offers the attached analysis (in a word searchable format PDF document) in response to the U.S. Department of Education's request for comments on proposed amendments to regulations implementing Title IX of the Education Amendments of 1972 (Title IX).

The Title IX Notice of Proposed Rulemaking (NPRM) would significantly narrow the scope of sex-discrimination that educational programs can address under Title IX, and would impose an unprecedented level of bureaucracy on incidents that are addressed. The NPRM readily acknowledges that this would reduce the number of cases dealt with by educational programs, although the estimates are at best speculative. The increased complexity is likely to reduce the ability of programs to effectively remedy sex-discrimination and or significantly increase the cost of doing so.

Our team, with more than 100 years of combined experience working with sex-discrimination and sexual violence issues in education, believes the proposed regulations are discriminatory, are inconsistent with established case law, and would make educational programs in the United States less safe. We therefore oppose their adoption.

Sincerely,

S. Daniel Carter, President

Taylor Parker, Title IX Associate

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Safety Advisors for Educational Campuses, LLC Analysis

Title IX Notice of Proposed Rulemaking
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, ED-2018-OCR-0064-0001

January 28, 2019

Safety Advisors for Educational Campuses, LLC (SAFE Campuses, LLC), a social entrepreneurship organization devoted to safer learning environments, offers this analysis in response to the U.S. Department of Education's request for comments on proposed amendments to regulations implementing Title IX of the Education Amendments of 1972 (Title IX). Our team, with more than 100 years of combined experience working with sex-discrimination and sexual violence issues in education, believes the proposed regulations are discriminatory, are inconsistent with established case law, and would make educational programs in the United States less safe. We therefore oppose their adoption.

The Title IX Notice of Proposed Rulemaking (NPRM) would significantly narrow the scope of sex-discrimination that educational programs can address under Title IX, and would impose an unprecedented level of bureaucracy on incidents that are addressed. The NPRM readily acknowledges that this would reduce the number of cases dealt with by educational programs, although the estimates are at best speculative. The increased complexity is likely to reduce the ability of programs to effectively remedy sex-discrimination and or significantly increase the cost of doing so.

The Proposed Rules Would Discriminate Based on Sex

We are particularly concerned that the NPRM in implementing a law designed to prevent sex-discrimination in federally funded educational programs is itself discriminatory. The Education Department (ED) through their Office for Civil Rights (OCR) is charged with enforcing multiple civil-rights laws, however, none of those, including the comparable Title VI, are being subject to a proposed rule that would narrow their scope and make preventing discrimination more difficult.

"Title IX was modeled after Title VI of the Civil Rights Act of 1964, which prohibits race discrimination in programs receiving federal funds," observed the U.S. Supreme Court

(Supreme Court) in 1998 while interpreting Title IX.[1] "The two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds."[2] Congress intended these laws to operate identically. "The procedural requirements of both Acts should be identical," said U.S. Representative Bella S. Abzug in 1974 as part of a Congressional review of the original proposed Title IX regulations.[3]

In issuing the NPRM ED is singling out women and girls, the principal victims of sex-discrimination and thus the principal beneficiaries of laws geared towards preventing it like Title IX, for less favorable treatment than other protected groups. The discriminatory nature of this action is at direct odds with the purpose of Title IX to prevent sex-discrimination, is contrary to Congressional intent as recognized by the Supreme Court, and violates the tenants of equal protection enshrined in the U.S. Constitution.

The Proposed Definitions are Inconsistent With Supreme Court Precedent

The NPRM proposes definitions, to be added at 34 CFR § 106.30, that deviate from longstanding guidance which has been extensively adopted by educational programs, that conflate administrative enforcement with standards set for money damages by the Supreme Court, and that would render administrative standards even more narrow than those in money damages cases. We believe that these changes would reverse progress made by educational programs to combat sex-discrimination, and could potentially subject programs to money damages if they comply with the regulations but still fall short of standards established by the Supreme Court.

Actual Knowledge

The Supreme Court held in 1998 "that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond."[4] In adopting this standard the Court carefully distinguished that it was not establishing a standard to determine what constituted a violation of Title IX but rather what met the higher threshold for money damages.

Addressing administrative enforcement the Court held that "the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate...We have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements."[5]

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[1] *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 275 (1998).
[2] *Id.*, at 286.
[3] 120 Cong. Rec. 24222 (1974).
[4] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998).
[5] *Id.*, at 292.

The NPRM would eliminate the longstanding requirement for administrative enforcement, articulated by ED guidance at least as early as 1997, that educational programs remedy sex-based harms referred to as "sexual harassment" when they have constructive notice and instead not permit them to respond under Title IX absent the higher "actual knowledge" standard adopted by the Supreme Court cases involving money damages. Additionally, the NPRM would define "actual notice" significantly more narrowly than the Supreme Court.

As explained by ED first in 1997 and again in 2001's "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" ("2001 guidance") constructive notice means that "A school has notice if a responsible employee 'knew, or in the exercise of reasonable care should have known,' about the harassment." As provided by the NPRM "Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment."

Formal Complaint

The standard used by ED has long been when "a school that knows, or reasonably should know, about possible harassment" which includes sexual assault they "must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation." The NPRM would not only require actual knowledge, but a formal written and signed report made to an authority with the power to remedy the situation.

Under the NPRM a school that knew or should have known about a hostile environment would be under no obligation to act absent a signed written complaint, and in fact would be unable to respond under Title IX. While the stated purpose is to align more closely with Supreme Court precedent "actual notice" has never been defined by the Supreme Court to include a written and signed complaint.

On and Off-Campus Misconduct

In the definition of "Formal complaint" the NPRM uses the terminology "conduct within its education program or activity" which absent additional context is likely to mislead and confuse recipients about the scope of their responsibility to address sex-discrimination under Title IX. Contrary to case law, which the NPRM purports to seek to better align with, this incorrectly suggests that educational programs would both not be obligated to respond to and would be precluded from responding under Title IX to conduct occurring outside of areas directly under their control, such as the private apartment of a student at an institution of higher education. Where off-campus harassment causes a hostile environment in the educational setting, it creates a nexus between off-campus misconduct and the educational program.[6]

[6] *Crandell v. New York College, Osteopathic Medicine*, 87 F. Supp. 2d 304, 315-316 (S.D.N.Y. 2000).

With respect to the most serious sex-based harms, such as rape, Courts have consistently held in after-the-fact claims that educational programs may be liable for damages for the hostile education environment that may exist within the program in which both the victim and their assailant participate. The following are among the most salient examples:

> The court agrees that a reasonable jury could conclude that further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university. (*Kelly v. Yale Univ.*, No. 01-cv-01591, 2003 WL 1563424 (D. Conn. Mar. 26, 2003))

> Thus, even absent actual post-assault harassment…the fact that he and plaintiff attended school together could be found to constitute pervasive, severe, and objectively offensive harassment. (*Doe ex rel. Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 444 (D. Conn. 2006))

> Thus, the discriminatory harm can include the harm faced by student-victims who are rendered vulnerable to future harassment and either leave school or remain at school and endure an educational environment that constantly exposes them to a potential encounter with their harasser or assailant. (*Doe 1 v. Baylor University*, 240 F. Supp. 3d 646, 660 (W.D. Tex. 2017))

If educational programs are led to believe Title IX isn't applicable to sex-based harms which may have occurred outside their program, but which nevertheless impact participants in it the victims of such harms would be left unprotected, and the educational programs may be subject to civil liability if they fail to remedy it.

Sexual Harassment

The NPRM would for the first time adopt a regulatory definition of "sexual harassment" under Title IX. This is among the most problematic aspects of the NPRM as other forms of sex-based harms aren't addressed, and the definition proposed is based primarily on one courts have specifically created in cases where money damages are involved which are quite different than administrative enforcement matters. Additionally, the proposed definition, when read in totality with the NPRM, would establish a higher standard for administrative enforcement than money damages potentially subjecting educational programs to needless civil liability if they met the regulatory standard but not that set by the Court.

The proposed definition is comprised of three components – "(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 on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to

the recipient's education program or activity; or (3) Sexual assault, as defined in 34 CFR 668.46(a)." Given our areas of expertise we focus our comments on the latter two elements.

Currently in ED's administrative enforcement cases "Sexual harassment is unwelcome conduct of a sexual nature…Sexual violence is a form of sexual harassment prohibited by Title IX." Title IX is invoked when "the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program."

Adopting a narrower standard the NPRM would define "sexual harassment" in this context as "Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or… Sexual assault". While based on a Supreme Court opinion, this standard is actually even more limited because the Supreme Court held in 1999 that institutions may be liable for money damages when the conduct is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[7]

The NPRM would require actual deprivation of access to the educational program or activity itself not merely the opportunities or benefits provided by it, a standard that need not even be met in a case for money damages. The Court interpretation is broader and includes deprivation of "educational opportunities or benefits" not the whole program. Harms short of driving a victim of discrimination out of school, such as forcing them out of a class or housing, which are common challenges may no longer trigger an obligation to respond under the proposed definition significantly disadvantaging victims. This conflict with precedent could also expose schools to civil liability if they meet the regulatory standard but not the one set by the Court.

Historically both courts and ED have held that conduct that also meets the definition of criminal sexual assault, including rape, is a sex-based harm under Title IX without carving out a separate definition. For example, the Court in *Kelly v. Yale Univ.*, No. 01-cv-01591 (2003) held that "There is no question that a rape, as alleged by Kelly, constitutes severe and objectively offensive sexual harassment under the standard set forth in Davis. Soper v. Hoben, 195 F.3d 845, 855 (6th Cir. 1999) (assertion that victim was raped, sexually abused and harassed 'obviously qualifies' as severe, pervasive, and objectively offensive sexual harassment)." Accordingly, a separate definition is unnecessary, and application of the criminal law standards found in 34 CFR 668.46(a) are inappropriate in a civil-rights context.

Deliberate Indifference

In assessing an educational program's response ED currently uses a "reasonableness" standard to assess "schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence." The NPRM would adopt a "deliberate indifference" standard currently used in cases only where money damages are at issue. This means that the response,

[7] *Davis v. Monroe County Board of Education*, 526 U.S. 629, 650 (1999).

or lack thereof, is "clearly unreasonable in light of the known circumstances." As discussed above the Court clearly differentiated the standards for money damages, and set a much higher bar in such cases than is appropriate for administrative enforcement.

The Proposed Grievance Procedures Exceed the Secretary's Rulemaking Authority

The NPRM would establish, under the new 34 CFR § 106.45, a complex bureaucratic process exclusively for responding to a "formal complaint" of "sexual harassment". We do not believe that this type of one-size fits all approach is appropriate for the myriad types of educational programs Title IX applies to or that the Secretary has adequately justified any need for this prescriptive process under rulemaking authority. Here the Secretary has apparently substituted their judgement in place of the lawmaking authority of the legislative branch, and the interpretive authority of the judicial branch.

Certainly proceedings under Title IX should be fair to all involved, including the complainant and respondent. The unique "grievance procedures" for "sexual harassment", however, are far more complex than is needed to accomplish this, and in fact seem geared to favor the respondent over the complainant. This is at odds with fundamental fairness and something that the authority for can not be derived from Title IX, a statute designed to protect victims of sex-discrimination.

The NPRM, for example, would require that "An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent; such remedies must be designed to restore or preserve access to the recipient's education program or activity. An equitable resolution for a respondent must include due process protections before any disciplinary sanctions are imposed". This statement is framed not in the context of a victim of sex-discrimination, but rather expressly speaks in terms of a finding "against the respondent" and requires "due process" for the respondent without any corresponding protections for the complainant.

The use of the term "due process" in this context is also problematic for two other reasons. First, the nature of "due process" in these types of proceedings is currently a rapidly evolving area of the law. Second, Title IX applies to both public and private educational programs that receive federal funding, and "due process" is not applicable to private institutions.

The NPRM prematurely purports to decide whether particular actions violate the Constitution or federal law on an issue that the Supreme Court has never squarely addressed: whether there is a protected life, liberty, and/or property interest in continued enrollment in higher education. Furthermore, the requirements prematurely decide what is constitutionally required for an area of law that lower courts have differed on in opinion, thus, preventing the judicial branch from fully exploring this area. Finally, the proposed regulations rest on policy argument, rather than legal requirement.

The Supreme Court has not established a bright-line rule delineating what "due process" is required to protect students from erroneous depravations regarding their continued enrollment in higher education. In refraining to establish such a rule, the Court has frequently emphasized that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[8]

Courts have held that, although there are some minimal "due process" requirements that need to be provided to students facing disciplinary sanctions, this policy is limited by careful restraint in judicial interposition in the operation of public education.[9] Applying the factors articulated by the Supreme Court in determining the appropriate level of "due process" required for students accused of sex-discrimination will vary based upon the severity of the disciplinary consequences, the type of case and evidence available, and the resources that the educational program would be required to expend in providing procedural safeguards.

Because of the requirement of state action for Constitutional "due process" protection private educational programs are not required to provide respondents with the same protections that state educational programs are. Instead the "rights" of respondents in private educational programs are predominantly contractual, arising from institutional policies, handbooks, and other programming. For both private and public universities in particular, many of the new "due process" cases are a direct result of promising such process to students in contract.[10]

We take note that ED, in conjunction with the U.S. Department of Justice, on July 3, 2018 announced the withdrawing of sub-regulatory guidance issued under Title IV of the Civil Rights Act of 1964 (Title IV), 42 U.S.C. §§ 2000c et seq., and Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d et seq. on grounds similar to the concerns we raise about the NPRM:

> The Departments have reviewed the documents and have concluded that they advocate policy preferences and positions beyond the requirements of the Constitution, Title IV, and Title VI. Moreover, the documents prematurely decide, or appear to decide, whether particular actions violate the Constitution or federal law. By suggesting to public schools, as well as recipients of federal funding, that they take action or refrain from taking action beyond plain legal requirements, the documents are inconsistent with governing principles for agency guidance documents.[11]

Conclusion

These steps to narrow the scope of Title IX's protections are counter to over 21 years of progress towards combatting sex-based harms across educational programs in the United States.

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[8] *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 86 (1978) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 367 U. S. 895 (1961).
[9] *Goss v. Lopez*, 419 U.S. 565, 578 (1975).
[10] *Havlik v. Johnson & Wales U.*, 509 F.3d 25, 34-35 (1st Cir. 2007).
[11] https://content.govdelivery.com/accounts/USED/bulletins/1fbe0e1

At SAFE Campuses, LLC our team has over 100 years of combined experience combatting sex-based harms in education, and we stand with those institutions and colleagues at educational institutions who won't back away from working to effectively prevent and respond to sex-based harms. Students and employees at institutions that don't hold this ground, however, shouldn't be afforded less protections. Because the NPRM would irresponsibly reverse more than 21 years of progress in combatting sex-based harms we oppose it.