AMERICAN ASSOCIATION FOR ACCESS, EQUITY AND DIVERSITY

January 30, 2019

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

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

Dear Mr. Marcus:

On behalf of the American Association for Access, Equity and Diversity (AAAED), herewith are our comments regarding the Notice of Proposed Rulemaking published by the U.S. Department of Education on November 29, 2018.

I. INTRODUCTION

Founded in 1974 as the American Association for Affirmative Action (AAAA), AAAED is the longest-serving national not-for-profit association of professionals and institutions dedicated to the promotion of equal opportunity, compliance and diversity. AAAED has nearly forty-five years of leadership in providing professional training to members, enabling them to be more successful and productive in their careers. It also promotes understanding and advocacy of affirmative action and other equal opportunity laws to enhance the tenets of access, inclusion and equality in employment, economic and educational opportunities. Nearly one-half of the association's members work for public and private institutions of higher education, including community colleges as well as research institutions. Among our members are vice chancellors, equal opportunity professionals, Title IX coordinators, chief diversity officers, equity and inclusion practitioners and deans of students for diversity, equity and inclusion.

AAAED's Professional Development and Training Institute, established in 1991, provides training in Title IX Law and Investigations and offers webinars on the subject. At the association's National Conference and Annual Meeting, AAAED also provides certificate training on Title IX Law and Investigations. Lastly, in recent years, the association's board of directors has met with the leadership of OCR during its annual meeting in Washington, DC and appreciates the time that the agency has taken to share its views regarding the enforcement of laws and policies under its jurisdiction.

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As the name of our association implies, we are committed to working in an environment that promotes equal opportunity in higher education. Moreover, as stewards for our institutions, we are committed to achieving compliance with both the letter of Title IX of the Education Amendments of 1972 and the spirit of the law, which is to eliminate discrimination at educational institutions receiving Federal financial assistance.[1]

II. GENERAL OBSERVATIONS

We appreciate the Department's efforts to engage in the notice and comment process and we further appreciate the opportunity to comment. We also wish to commend the Department for the considerable amount of work that was done for these proposed regulations. However, while we understand the importance of clarity and instituting a process that will ensure fairness for both respondents as well as complainants of sexual harassment and assault, and while we acknowledge the Department's efforts to generate institutional savings, we submit that any benefits incurred by these regulations will be effectively offset by the potential chilling effect caused by many of its proposed policy changes including: the re-definition of harassment, the requirement for live hearings, the imposition of cross-examination as a factfinding process, and the cost of creating a quasi-judicial system of adjudication.

One can only conclude, from a careful review of these proposed regulations, that in its effort to balance the rights of the accused as well as survivors, the Department has engaged in over-correction. As a result, the thresholds for coverage and resolution are so high that a victim of sexual harassment or assault will be effectively discouraged from seeking redress. If promulgated, these regulations could send survivors back into the shadows, making them less likely to come forward with their trauma. As a result, we will lose the substantial progress our institutions and members have made in the past decade.

III. TITLE IX AND ITS MISSION: NONDISCRIMINATION

In 1972, Title IX of the Education Amendments of 1972 was signed into law by President Richard M. Nixon and later renamed for former Representative Patsy Mink (D-HI), the first woman of color and Asian American to serve in Congress. The Senate sponsor of the legislation, Senator Birch Bayh (R-IN), enunciated the purpose of the bill, which was "to combat 'the continuation of corrosive and unjustified discrimination against women in the American educational system.'"[2]

In 2017, thirty-seven United States Senators introduced Resolution 201 on the continuing importance of Title IX. In the Resolution, the Senators called upon the Justice and Education Departments to, *inter alia*: "protect the rights of students to have safe learning environments by working to ensure schools prevent and respond to discrimination and harassment on the basis of sex, including: sexual assault, harassment, domestic and dating violence, sex stereotyping and discrimination or harassment on the basis of actual or perceived sexual orientation and gender identity.[3] While the resolution acknowledges that much progress

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[1] 20 U.S.C. 1681 et seq.

[2] U.S. Department of Justice, Title IX Legal Manual, 118 Cong. Rec. 5803 (1972). https://www.justice.gov/crt/title-ix#II.%C2%A0%C2%A0%20Synopsis%20of%20Purpose%20of%20Title%20IX,%20Legislative%20History,%20and%20Regulations

[3] [Congressional Record Volume 163, Number 107 (Thursday, June 22, 2017)] SENATE RESOLUTION 201--AFFIRMING THE IMPORTANCE OF TITLE IX, APPLAUDING THE INCREASE IN EDUCATIONAL OPPORTUNITIES AVAILABLE TO WOMEN AND GIRLS, AND RECOGNIZING THE TREMENDOUS AMOUNT OF WORK LEFT TO...
(Senate - June 22, 2017), https://www.congress.gov/congressional-record/2017/6/22/senate-section/article/s3736-1?q=%7B%22search%22%3A%5B%22title+ix+and+harassment%22%5D%7D&s=5&r=7

has been made, the issues of sexual harassment and assault continue to require the government's attention.

In her remarks on Title IX enforcement, Secretary DeVos acknowledged that Title IX was later named for Rep. Mink, who, in the Secretary's words, was "herself a victim of both sex-based and race-based discrimination as a third-generation Japanese-American." The Secretary then stated:

> So let me be clear at the outset: acts of sexual misconduct are reprehensible, disgusting, and unacceptable. They are acts of cowardice and personal weakness, often thinly disguised as strength and power.
> Such acts are atrocious, and I wish this subject didn't need to be discussed at all.
> Every person on every campus across our nation should conduct themselves with self-respect and respect for others.
> But the current reality is a different story.
> Since becoming Secretary, I've heard from many students whose lives were impacted by sexual misconduct: students who came to campus to gain knowledge, and who instead lost something sacred.
> We know this much to be true: one rape is one too many.
> One assault is one too many.
> One aggressive act of harassment is one too many.
> One person denied due process is one too many.
> This conversation may be uncomfortable, but we must have it. It is our moral obligation to get this right.[4]

Sexual harassment is intersectional in scope. It affects students based on their LGBTQ status, race, color, disability as well as sex. Men and boys are more likely to be victims of harassment than those who are falsely accused.[5]

A Campus Climate Survey on Sexual Assault and Sexual Misconduct conducted by the American Association of Universities (AAU) in 2015 reported that:

- Overall, 11.7 percent of student respondents across 27 universities reported experiencing nonconsensual sexual contact by physical force, threats of physical force, or incapacitation since they enrolled at their university.
- The incidence of sexual assault and sexual misconduct due to physical force, threats of physical force, or incapacitation among female undergraduate student respondents was 23.1 percent, including 10.8 percent who experienced penetration.
- Overall rates of reporting to campus officials and law enforcement or others were low, ranging from five percent to 28 percent, depending on the specific type of behavior.
- The most common reason for not reporting incidents of sexual assault and sexual misconduct was that it was not considered serious enough. Other reasons included because they were "embarrassed, ashamed or that it would be too emotionally difficult," and because they "did not think anything would be done about it."

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[4] U.S. Department of Education, Secretary DeVos Prepared Remarks on Title IX Enforcement, September 7, 2017, https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement

[5] Kingkade, Tyler, Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It, Huffington Post, 12/08/2014 08:44 pm ET Updated Oct 16, 2015, "According to a 2010 paper from the Centers for Disease Control and Prevention, about 40 percent of gay men, 47 percent of bisexual men and 21 percent of heterosexual men in the U.S. "'have experienced sexual violence other than rape at some point in their lives'." https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html

- More than six in 10 student respondents (63.3 percent) believe that a report of sexual assault or sexual misconduct would be taken seriously by campus officials.[6]

Despite the progress that academic institutions have made in recent years, sexual assault continues to be a pervasive problem on college and university campuses. Unfortunately, the Secretary's proposed regulations, discussed herein, do not contribute to the progress that must continue if we are to eliminate the most egregious acts of discrimination on campus: sexual harassment and sexual assault.

IV. THE FOLLOWING CONSTITUTE OUR PRIMARY CONCERNS REGARDING THE PROPOSED REGULATIONS:

A. SEXUAL HARASSMENT DEFINITION.[7] The proposed regulation would adopt a definition of sexual harassment which is so limited, it would fail to protect most victims:

> The proposal is as follows:
>
> (1) Sexual harassment means:
> (i) 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;
> (ii) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
> (iii) Sexual assault, as defined in 34 CFR 668.46(a).

We appreciate the Secretary's acknowledgement of the "high stakes" involved regarding sexual misconduct. In our view, however, the revised definition of "unwelcome conduct" that is "so severe, pervasive, **and** objectively offensive…" is so restrictive that it may not protect victims from the most virulent forms of sex discrimination.

The OCR's Title IX Guidance issued in 2011 defines sexual harassment as:

> "Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.[8]
>
> As explained in OCR's 2001 Guidance, when a student sexually harasses another student, the harassing conduct creates a hostile environment if 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.[9]

We believe the definition of sexual harassment set forth in the 2011 guidance is appropriately broad in scope and is more likely to protect the victim without being overly burdensome to the institution or the agency. Having to prove, as the Secretary recommends, all three components of the definition, to wit:

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[6] AAU Climate Survey on Sexual Assault and Sexual Misconduct (2015), https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015

[7] Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Federal Register, vol. 83, No. 230, November 29, 2018, Proposed Rules, at 83 Fed. Reg. 61496 (Definitions). https://www.govinfo.gov/content/pkg/FR-2018-11-29/pdf/2018-25314.pdf

[8] OCR Dear Colleague Letter, April 4, 2011 (Archived), p.3. https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html

[9] Ibid.

that the action was **severe**, **pervasive** *and* **objectively offensive** would, in our view, be a virtually insurmountable burden and would fail to protect vulnerable students, who are, in most instances, minors or very young adults. For example, if a female student is the victim of verbal harassment when she walks by a construction site every day, must she simply ignore this behavior because it is not "severe, pervasive and objectively offensive" enough? Where is the line drawn? In our view this language runs counter to the mission of the educational institution and the intent of the framers of Title IX.

We also suggest that the 2011 definition is more consistent with the definition used for employment cases:

> "Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2*) the conduct is severe **or** pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive*."[10]

In its comments on this Notice of Proposed Rulemaking, the Leadership Conference on Civil and Human Rights was also critical of the altered definition of sexual harassment and the provision that the Department would mandate dismissal of complaints of harassment that do not meet this standard. The Leadership Conference wrote:

> Under this definition, even if a student bravely reports sexual harassment to the "right person," their school would still be required to ignore the student's Title IX complaint until the harassment has already denied them an education. Under the proposed rules a school would be required to dismiss such a complaint even if it involved harassment of a minor student by a teacher or other school employee.[11]

The proposed definition would also intensify the reluctance of victims to report the harassment or assault.[12] We therefore call on the Secretary to withdraw the proposed definition of sexual harassment, restore the definition used in the 2011 Dear Colleague or language that is used in the Title VII context.

We also disagree with the Secretary's view that the purpose of Title IX is [only] to prohibit sexual conduct that "[j]eopardizes a person's equal access to an education." This appears to be an extraordinarily limited reading of the statute. Is an institution of higher education in compliance with Title IX if it simply moves a student from a class where the faculty member has been a sexual predator, arguing that the student continues to have equal access to an education? If the student is harassed by his faculty advisor but manages to get all As, does he have an acceptable complaint of sexual harassment? Is the institution in compliance as long as a student who is being stalked by another student can get to class? If he is verbally harassed while walking past a sorority, is the act of walking on campus a program or activity?

B. NOTICE TO THE INSTITUTION: The Secretary's proposed rule states that "consistent with Supreme Court precedent and the text of Title IX, a school would be obligated to respond when:

- the school has **actual knowledge** of sexual harassment;
- that occurred within the school's own "education program or activity"

[10] Equal Employment Opportunity Commission, "Harassment," https://www.eeoc.gov/laws/types/harassment.cfm
[11] Leadership Conference on Civil and Human Rights, Comments to the Notice of Proposed Rulemaking, January 30, 2019 at 2. Joint Comment Title IX NPRM, http://civilrightsdocs.info/pdf/policy/letters/2019/Joint-Comment-Title-IX-NPRM-01302019-Final.pdf
[12] Ibid., p. 3. "Research shows that many college survivors of sexual assault do not report to their schools because survivors have normalized or minimized the violence inflicted, perceiving it to be "'insufficiently severe'."

- against a "person in the United States."[13]

See sec. 106.30.[14] Once again, this proposal appears to severely limit the number of persons to whom a student may go to seek redress from an act of harassment or sexual violence. Those individuals presumably include Title IX coordinators or any official with authority to institute corrective measures.

The proposed regulations explain the more stringent definition as responding to the Department's "commitment to the rule of law" and define the conduct that rises to the level of a Title IX violation as conduct "serious enough to jeopardize a person's equal access to the recipient's education program or activity." The proposed regulations also aim to "c*onfine"* a recipient's Title IX obligations to sexual harassment of which it has actual knowledge.[15] It is not clear why the Secretary needs to confine the reach of an institution's obligations where sexual harassment and assault continues to be such a serious and pervasive problem on college campuses.

Further, the Secretary chooses not to apply the longstanding principles of constructive notice and *respondeat superior*, most often used in the employment context, to issues of harassment in higher education.[16] Thus, if a member of the faculty is told about an act of harassment, the institution is not deemed to have received actual knowledge.[17] The student affected must take the additional step of informing the person designated to have actual knowledge and who has authority to take corrective measures.

While the Secretary chose to severely constrain the individuals responsible for action under Title IX in higher education, the same is not the case in the elementary/secondary context, however. It is unclear why this distinction is made as the argument that the K-12 institutions serve *in loco parentis* is not persuasive. While the students attending colleges and universities are a few years older than students in the K-12 context they are no less deserving of the institutions' protection against one of the most virulent forms of discrimination.

The language **"Against a person in the United States"** raises questions about the reach of Title IX when programs or activities are conducted outside the United States. For example, does Title IX's coverage include Study Abroad programs? If an athletics or musical team participates in an engagement in a foreign country and students are victims of harassment or assault, are they protected by Title IX? Unless the Department wishes to limit the scope of Title IX to persons participating in programs or activities within the United States, the language needs clarification as does the provision that pertains to off-campus conduct.[18]

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[13] U.S. Department of Education Proposed Title IX Regulation Fact Sheet, https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf

[14] "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."

[15] Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Federal Register, vol. 83, No. 230, November 29, 2018, Proposed Rules, at 61465. https://www.govinfo.gov/content/pkg/FR-2018-11-29/pdf/2018-25314.pdf

[16] Ibid., p. 61466. "Imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge." Sec. 106.30.

[17] Ibid., p. 61466. Proposed sec. 106.44: "The mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient."

[18] Ibid.

C. **DUE PROCESS PROTECTIONS & RELIABLE OUTCOMES**: To achieve fairness and reliable outcomes, the proposed regulation would require due process protections, including:

- A presumption of innocence throughout the grievance process, with the burden of proof on the school;
- Live hearings in the higher education context;
- A prohibition of the single-investigator model, instead requiring a decision-maker separate from the Title IX Coordinator or investigator;
- The clear and convincing evidence or preponderance of the evidence standard, subject to limitations;
- The opportunity to test the credibility of parties and witnesses through cross-examination, subject to "rape shield" protections;
- Written notice of allegations and an equal opportunity to review the evidence;
- Title IX Coordinators, investigators, and decision-makers free from bias or conflicts of interest; and
- Equal opportunity for parties to appeal, where schools offer appeals.[19]

Like others who represent institutions of higher education or staff,[20] we find these proposed regulations to be unacceptably prescriptive, particularly when the Department purports to reduce the burden of regulations on covered institutions. "One size does not fit all;" colleges and universities range from the largest, most well-endowed research institutions to small liberal arts and community colleges. They also have varying budgets and complying with the regulations as proposed will only add to the burden on their financial resources for an outcome that is speculative at best. Moreover, the single investigator model is often used in the employment context. The Department has not provided any evidence that this type of model is flawed.

a. **Live Hearings and Cross-Examination**.[21] In this section of the proposed regulations, the Department is seeking to convert an education-based disciplinary process to a quasi-judicial one. The reasoning for imposing such a prescriptive and adversarial process in a matter that requires the utmost sensitivity and discretion eludes us. Clearly, it is important to protect the rights of respondents, but to impose a new, expensive and contentious process upon educational institutions is extremely ill-advised and most importantly, will create a chilling effect on the victims that Title IX was enacted to protect.

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[19] U.S. Department of Education Proposed Title IX Regulation Fact Sheet, https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf

[20] See, e.g., AICUM Statement on U.S. Department of Education on the Department's proposed changes to Title IX, January 23, 2019, at p.2: "This restrictive mandate is inappropriate for many institutions and the underlying requirements may deter complainants from reporting discrimination and harassment and undermine Title IX's objective of protecting the educational environment." http://aicum.org/wp-content/uploads/2019/01/AICUM-public-comments-on-Notice-of-Proposed-Rulemaking-%E2%80%9CNPRM%E2%80%9D-amending-regulations-implementing-Title-IX-of-the-Education-Amendments-of-1972-Title-IX%E2%80%9D-Docket-ID-ED-2018-OCR-0064.pdf; See also Comments of the Association of Title IX Administrators (ATIXA), January 28, 2019, https://atixa.org/wordpress/wp-content/uploads/2019/01/ATIXA-NPRM-Comments-FInal.pdf

[21] 106.45(2)(b)(3) (vii) "For institutions of higher education, the recipient's grievance procedure must provide for a live hearing. At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party's advisor of choice, notwithstanding the discretion of the recipient under subsection 106.45(b) (3) (iv) to otherwise restrict the extent to which advisors may participate in the proceedings. If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party for to conduct cross-examination." *See also*, 83 Fed. Reg. 61498.

It is difficult enough to have survivors of harassment and assault come forward and file a complaint in an environment of fear and insecurity where the most intimate aspects of their lives may be exposed. To insist on a live hearing with cross-examination, where the respondent may be armed with the most experienced, well-heeled counsel as advocate is to create a process doomed to fail. Even the most stalwart of adults would be intimidated by such a scheme. Our criminal processes, where counsel is appointed for the indigent, are so inadequate due to the imbalance of well-funded prosecutors with overburdened, court-appointed lawyers, it is unthinkable to consider imposing such a flawed system on young adults who are already victimized by an act of sexual violence.

Faculty, who were hired to teach, are for the most part unskilled to serve as advocates or advisors, nor should they want to be. Their time is already limited with teaching, counseling and research along with other duties assigned by the institution. Having to take sides in a dispute may also impinge upon their relationships with students where trust is a primary goal.

This process will also create the anomalous result that a faculty member at a private university, who is accused of sexual harassment, may be accorded more protections before dismissal, including a live hearing and an advisor, than faculty accused of other offenses.

Moreover, the proposed process ignores the administrative mechanisms already in place at agencies enforcing equal employment opportunity laws, for instance. Both the Equal Employment Opportunity Commission and the U.S. Department of Labor's Office of Federal Contract Compliance Programs have administrative and investigatory processes that have worked well for many years. The primary process for achieving resolution of a complaint is conciliation, not litigation. Only where conciliation efforts fail do the agencies resort to the more adversarial models. Coupled with internal complaint resolution processes that exist in the private sector, it is not clear why such mechanisms should not be used in the higher education context instead of the more expensive and burdensome quasi-judicial, if not criminal judicial structure imposed here.

Another question raised by this section is whether the proposed regulations constitute an overreach, exceeding the authority of the Department under Title IX and whether they breach the principle of academic freedom. Requiring a grievance procedure *per se* may be appropriate. Imposing such a restrictive and extensive procedure on an academic institution, without flexibility, in the name of due process, is in our view, exceeding the agency's authority. We recommend that the Department re-think this proposal and solicit more input from the academic sector about "How much process is due" in a collegiate setting where *education* is the primary mission. This also goes beyond any known case law related to the grievance and investigatory process embodied in these regulations.[22]

b. **Clear and convincing vs. Preponderance of the Evidence Standard**. The proposed regulations introduce a more demanding standard of proof: The Clear and Convincing Standard vs. the less onerous Preponderance of the Evidence Standard.[23] The preponderance standard may only be used if

[22] See Comments submitted by the Association of Title IX Administrators (ATIXA): "Mandating a live hearing at both public and private postsecondary institutions raises significant concerns that ED is overstepping its authority, as a required live hearing constitutes a significant due process element with no real basis in gender equity." P. 31. https://atixa.org/wordpress/wp-content/uploads/2019/01/ATIXA-NPRM-Comments-FInal.pdf

[23] 106.45(b)(4)(i): (4) Determination regarding responsibility.
(i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply 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

it is also used for other conduct code violations not involving sexual harassment but that carry the same maximum disciplinary sanction. The Department goes further and mandates that the institution must apply the same standard of evidence used against students as it does for cases involving faculty and other employees.

The Department has not sufficiently explained why it insists on the more stringent standard in sexual harassment cases under Title IX. We are not unmindful of the potential effect that an adverse decision could have on an individual accused of sexual harassment. However, the result is no different in the case of a faculty member sustaining the same result after a Title VII investigation.

Moreover, in our view, reaching into the institution's treatment of employment beyond that covered under Title IX goes too far. OCR does not have jurisdiction over cases involving Title VII of the Civil Rights Act of 1964 or any other employment statute and should not presume that it does.

We also understand that the preponderance of the evidence standard is that used administratively in other civil rights cases such as those alleging employment discrimination under Title VII or racial harassment under Title VI.[24] By imposing a different standard under Title IX in sexual violence and other forms of gender-based harassment cases, the agency is effectively codifying a different standard of proof in one category of civil rights law against all others.

Moreover, this higher bar could have the unintended consequence of applying to individuals who allege that they were unfairly accused of sexual violence or harassment. We therefore recommend that the Department maintain the preponderance of the evidence standard for the sake of continuity and consistency with the judicial (civil) and administrative standard used in other civil rights cases.[25] Further, changing the Title IX internal enforcement mechanisms or evidentiary standard would inevitably lead to other civil rights cases, including Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 and Title VII of the Civil Rights Act of 1964, where respondents would seek similar treatment, burdening an already resource-constrained process.

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must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty. *See also*, 83 Fed. Reg. 61499.

[24] See Amy Chmielewski, Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault, Brigham Young University Education and Law Journal, Volume 2013 | Number 1, Article 8, at 151: "Civil rights causes of action have consistently been adjudicated using the preponderance standard."

[25] See Title IX and the Preponderance of the Evidence: a White Paper, https://www.documentcloud.org/documents/3006873-Title-IX-Preponderance-White-Paper-Signed-8-7-16.html#document/p1. A survey conducted of 191 colleges revealed that approximately 80 percent used the preponderance standard prior to the 2011 Dear Colleague Letter. Ibid. at p. 7.

V. CONCLUSION

The Department has heard the concerns of those who would argue that the previous guidance may have tilted too heavily in favor of survivors and that the due process rights of respondents were abrogated. On balance, however, we submit that the proposed regulations constitute an over-correction; that they are so onerous, if not draconian, they will effectively vitiate the rights of survivors and could compromise their access to Federally-funded educational programs and activities. Taking a sword to a problem that requires at best a pen to promote fairness for all is not the approach we would endorse.

We recommend that the Department withdraw these proposed regulations and take more time to hear from all sides of this issue, including the vast array of colleges and universities and equal education opportunity practitioners, including AAAED members - many of whom are Title IX Coordinators, who have the expertise to adjudicate these matters. These individuals can provide the Department with evidence-based solutions that will promote due process and fairness to all parties. We respectfully urge the Department to talk to these individuals and learn what truly works and where they need the agency's support.

Further, we urge the Department to let the recipients of federal financial assistance craft their own grievance and adjudication procedures based on their circumstances and missions and consistent with established law and evidentiary standards. We need more than one process; we need something that will support the uniqueness of each institution. We submit that the role of OCR, as any Federal agency, is to provide support, not prescriptive internal mandates, so that the institutions can ensure that their policies comply with the law and meet the expectation of a fair process for all.

In conclusion, we at AAAED believe there is a way to ensure fairness for both parties without undermining the letter and the spirit of the Education Amendments of 1972 as envisioned by Senator Bayh and Representative Mink, or by returning to the *status quo ante*.

Thank you for the opportunity to submit these comments.

Respectfully,

Shirley J. Wilcher

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