

January 30, 2019

Submitted via www.regulations.gov

Kenneth L. Marcus
Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

RE: Docket No. ED-2018-OCR-0064, RIN 1847-AA14
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving
Federal Financial Assistance

Dear Mr. Marcus:

We are writing on behalf of the Chicago Alliance Against Sexual Exploitation (CAASE) in response to the Department of Education's (ED) Notice of Proposed Rulemaking to express our strong opposition to the proposed rules relating to sexual harassment as published in the Federal Register on November 29, 2018.

The Chicago Alliance Against Sexual Exploitation is a nonprofit committed to ending all forms of sexual harm through legal services, policy advocacy, and education programs. Our legal team represents approximately 200 victims of sexual violence in Cook County, Illinois annually. In addition, we are the only agency in the Chicago area providing victims' rights law representation to survivors of sexual assault. Our prevention team focuses on 7th through 12th graders, and particularly focuses on educating boys and young men.

Our attorneys have represented students who have survived sexual assault committed by strangers, by their boyfriends or girlfriends, their parents or family members, their friends or acquaintances, and their teachers, coaches, or other school staff. Regardless of who commits the sexual assault, CAASE is there to help the student maintain safe access to their schooling. We are concerned that portions of these proposed regulations will make schools less safe for survivors and could in fact lead to more incidents of sexual assault.

According to the National Sex Offender Public Website, it is estimated that approximately 1 in 6 boys and 1 in 4 girls are sexually abused before the age of 18. A yearlong Associated Press investigation uncovered about 17,000 official reports of sexual assaults made by students between the fall of 2011 and spring of 2015, and a longitudinal study found that 68% of girls surveyed experienced at least one sexual harassment victimization experience in high school compared to 55% of boys. These figures likely are low, because sexual violence is underreported and some states do not keep track of school sexual violence. For a variety of reasons, many student victims choose not to report sexual harassment and violence to authorities or to their schools. They may be afraid or ashamed, feel uncomfortable discussing what happened, fear getting their perpetrator in trouble, or believe they should be able to handle it on their own. The new changes to Title IX will make it even less likely that student victims will come forward and will make it more difficult to get help for those who choose to disclose, which will be harmful to those victims and the rest of the school community.

Proposed Rule 106.44(e)(1)

Under the proposed new definition of sexual harassment (106.44(e)(1)), schools would be required to ignore all but the very worst cases of harassment. If a school only addresses harassment that denies a student's access to education, students will be forced to endure repeated and escalating levels of abuse before they are able to receive help from their schools. A student could report sexual harassment to the proper official, and that harassment could have occurred at school, yet the school would still be required to ignore the complaint if the harassment does not yet deny the student's access to education. It is difficult enough for a student survivor of harassment to come forward in the first place. When schools do not actively support a student survivor following a disclosure of sexual violence, they send a clear message to the survivor that they do not deserve support and that their emotional and physical well-being is not a priority. And once a student has been turned away and told that the school cannot do anything to help them, it is unlikely they will make a second report if the harassment escalates or continues.

Before a student has been denied access to their education under the law, they may experience many negative and harmful effects of harassment. A student who has been harassed may begin to skip class to avoid their perpetrator, missing important lessons. They may struggle to focus and concentrate on their studies, and their grades may suffer as a result. They may miss team practices or club meetings, and they may begin to exhibit symptoms of depression, anxiety, disordered eating, or post-traumatic stress disorder. In fact, according to the National Women's Law Center's (NWLC) report titled "Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence," 68% of survivors surveyed reported having difficulty concentrating at school, which inevitably has a detrimental effect on academic performance. Thirty percent of survivors reported missing school because they felt they would be unsafe at school or on their way there. But these real and harmful effects would likely not be enough to trigger a school intervention. And, unfortunately, the Department of Education has not made clear the exact point at which a student will be considered to have been denied access to their education. As a result, there will likely be confusion around this and, without clarity, different schools may use a different standard to determine whether educational access has been denied.

By the time the school would be legally required to intervene, the negative educational and personal effects could be serious and irreversible. The student might be unable to get into a college, miss out on a scholarship, or be unable to graduate. They might also experience many harmful and long-term emotional, psychological, and physical effects of the harassment as well. According to National Women's Law Center report, children who experience trauma are 32.6 times more likely to have behavioral and learning problems than children who are not exposed to trauma. And research has also shown that a traumatic experience, such as sexual violence, can change the functioning of a child's brain, which has long- and short-term consequences on mental health. Students should not be forced to wait for harassment to become "bad enough" to be able to report it and be protected by their schools.

The proposed definition of sexual harassment also requires more severe and persistent sexual conduct than Title VII's definition of sexual harassment in the workplace. This creates a perverse effect of requiring children to be more severely sexually harassed in schools than adults would have to be in the workplace before any action is legally required to stop it. This idea is disturbing and senseless.

Proposed Rule 106.44(a)

These new regulations would force schools to ignore sexual violence that does not take place on campus or at a school event (106.44(a)). This is troubling because many incidents of sexual harassment and misconduct experienced by K-12 and university students take place off campus and online. We have seen many cases in which K-12 students were assaulted at a friend's house or at a party, and in many of our university cases, students were assaulted at their own off-campus apartments. And today, many instances

of sexual harassment take place over social media. Under the proposed regulations, a school would not be permitted to investigate or required to take action in any of those situations.

Our client, Grace*, was assaulted by an upperclassman at an apartment building during her first week of high school. The school told her that they would not investigate because the assault happened off campus. As a result, her assailant received no punishment and Grace received no protection from him. Grace continues to see her assailant every day at school. Nearly every time she sees him, he tries to talk to her, calls her name, taps her shoulder, winks at her, or otherwise tries to get her attention. He has also contacted her on social media. She is struggling to concentrate in class, and her grades have suffered as a result. She does not feel safe going to school every day.

If a school does not initiate an investigation, a student victim like Grace often has no choice but to continue seeing their assailant each day in class, in the hallways, and in the lunchroom. This can be further traumatizing and unsafe for a survivor, and it can also severely hinder their ability to focus and learn. A student survivor cannot be expected to continue on with their life and their studies without interruption, knowing their assailant is in the same room or building and has not even been questioned. The effects of sexual harassment and assault can permeate every aspect of a survivor's life, regardless of where it took place. A school should not be limited to protecting students who were harmed within its walls or its programs and investigating only those incidents. Additionally, without an investigation, a school will not go through the important process of determining whether a student has created a hostile environment or is a potential threat to other students. This does a dangerous disservice to both the accusing student and the rest of the school community.

Additionally, the criminal justice system and the civil legal process are not adequate substitutes for action taken by a school. Rape kits can take a year or more to process, and if prosecutors actually decide to file charges, criminal cases often drag on for years before any resolution is reached. A student survivor might have graduated or left school by the time the case is finished. In Illinois, survivors of sexual assault can petition a civil court for a Civil No Contact Order against their perpetrator, but that is not an option in every state. We have seen that judges presiding over protective order cases are reluctant to prescribe to schools how they must comply with these orders. And, in many states, a minor will need to involve a parent in order to engage in the process to obtain a protective order. For these and many other reasons, students need to be able to rely on their schools to support and protect them.

The off-campus rule also conflicts with Department of Education practice, given that OCR recently removed partial funding from Chicago Public Schools for failure to cooperate with OCR's investigation of "serious and pervasive violations under Title IX." These investigations arose from two complaints that involved assaults that took place off campus.

Proposed Rule 106.44(e)(6)

The proposed regulations will allow schools to ignore sexual violence that is reported to the majority of school employees (106.44(e)(6)). If a K-12 student is harassed or assaulted by a fellow classmate, they can report it to a teacher, and the school would be responsible for addressing it. But if a K-12 student is assaulted by a staff member, they must report it to the Title IX Coordinator. If they report to a teacher that they have been assaulted by a staff member, the school is not required to respond. Many students do not know who the Title IX Coordinator is and where to find them. We have seen that schools often do not have their own Title IX Coordinators, meaning that on any given day a student would not be able to walk to that person's office and easily make a report. And it is confusing for students to have to report to a different person depending on the identity of the perpetrator.

Under these regulations, if a K-12 student were to tell a trusted coach, guidance counselor, or teacher's aide that they have been assaulted, the school would have no duty to investigate the complaint. This policy will reduce liability for schools and make it easier for them to avoid addressing--or even cover up--sexual misconduct. It will also place all of the responsibility on students to tell the correct official and place the blame on them if they report their assault to the wrong staff member. This will make the process of coming forward even more difficult, and it will limit survivors' ability to access support from their school.

Under employment law, employers are liable for harassment by its employees if it knew or *should have* known about the harassment and failed to take appropriate corrective action. As with the proposed definition of sexual harassment, this proposed regulation creates the effect of leaving students in school less protected than employees in the workplace. This proposed regulation serves only to protect institutions. The Department of Education should be striving to support students and keep them safe rather than protecting schools and limiting their responsibility.

Proposed Rule 106.45(b)(6)

Under the proposed regulations, schools would be allowed to use informal resolution procedures, like mediation, to address cases of sexual misconduct (106.45(b)(6)). Mediation and other informal resolution procedures are inappropriate ways of addressing sexual misconduct, and guidance issued by previous administrations reflects that. Mediation is a strategy often used in situations of conflict, wherein both sides take responsibility for their actions and come to a compromise. In cases of sexual harassment or assault, the survivor is never at fault and should not be encouraged or pressured to simply "work things out" with their assailant.

The proposed regulations state that the parties must voluntarily agree to participate in informal resolution procedures, but it is extremely difficult to ensure that mediation is truly voluntary because of the power dynamics at play within schools. This is especially true for students at K-12 schools, students with disabilities, and students at religious schools, as these students are more likely to be pressured by their schools to agree to an informal resolution procedure and feel that they do not have another meaningful choice.

We are currently representing a student, Samantha*, who was assaulted multiple times at school by a classmate. Her parents went to the school for what they were told would be a meeting with the principal, the perpetrator's parents, and the school counselors. The survivor was unexpectedly brought into the meeting, and she and her parents were blindsided by the presence of the perpetrator. Samantha left the room in fear, and then the principal told her that no one would believe her if she were not present and that the meeting would be her only chance to share her truth. She reluctantly joined the meeting, but it did not feel voluntary to the survivor or her parents. They were not told of any other options to address and resolve the issue and felt they had no other choice but to participate in this meeting. If a high school student and her mother and father felt unable to refuse participation in an informal resolution procedure, it stands to reason that many other students navigating the Title IX system will similarly feel they have no choice but to engage in the process.

In Samantha's case, it was very damaging for her to face her assailant in that way, and our other clients who have gone through informal resolution procedures have experienced them as harmful and traumatizing as well. Under the new regulations, though, if a student decides the informal resolution process is too traumatizing or that they would prefer a formal investigation, the school will be allowed to prevent them from resuming a formal complaint. This is extremely concerning because schools would be able to use these informal resolution procedures as a way to avoid investigating sexual misconduct or making a decision to sanction offenders. And K-12 students may not understand that one consequence of

agreeing to an informal resolution procedure is that they are waiving their right to change their mind and request a formal investigation in the future.

Proposed Rule 106.44(e)(4)

Student survivors of sexual violence may need support from their schools following the traumatic experience. According to the NWLC report, children who experience trauma are 32.6 times more likely to experience behavioral and learning problems than children who are not exposed to trauma. Twenty-five percent of survivors, more than twice the rate of girls overall, reported in the survey that they had been in a physical fight in school, which suggests that children who have suffered trauma need more support to help them recover and relate to others in productive, non-violent ways. And research has also shown that a traumatic experience such as sexual violence can alter the functioning of a child's brain, which can have both long-term and short-term consequences for mental health and well-being.

Students at K-12 schools may also need extensions for assignments, more time for exams, schedule changes to avoid seeing their perpetrator, no-contact orders, safety plans, counseling, and other accommodations. The proposed rules allow for non-disciplinary, nonpunitive supportive measures that protect the safety of all parties but do not unreasonably burden the other party. On the surface, this sounds harmless and even helpful. In some instances, it might be. But to avoid being found to have acted with deliberate indifference, a school may offer weak supportive measures "designed to" assist the student that do not actually help the survivor to stay in school. For example, if a survivor wanted an order prohibiting their perpetrator from contacting them, the school would have to issue a mutual no-contact order, which suggests that the survivor is at least partially responsible for the violence perpetrated against them. The survivor would not be able to obtain a one-way no-contact order because such an order may be considered a punitive measure against the perpetrator. The school might then refuse to discipline the perpetrator when he sends the survivor messages and find ways to run into them at school. In many cases, perpetrators manipulate their victims into violating the no-contact orders and use these orders as a form of retaliation. For example, a perpetrator might send friends to bother and harass the survivor, and if the survivor asks the perpetrator to tell those friends to stop, the survivor could be suspended for violating the no-contact order.

In another example, a school might be unwilling and unable to transfer a perpetrator to another class, lunch, or homeroom because it would "unreasonably burden" them, thereby forcing a survivor to change their own schedule in order to avoid the perpetrator. A survivor should not be further inconvenienced and harmed as a result of an understandable desire to be safe and avoid the person who violated them. While this is an issue in all levels of schooling, it is especially problematic in high schools, where there might only be one AP English class or one special education class. If a survivor's only options are to change their own schedule or stay in the class, they will be forced to make the painful choice between missing out on an important educational opportunity or continuing to see their perpetrator every day in class.

In contrast to the proposed rules, the Clery Act, which applies to colleges and universities, does not require accommodations for student survivors to be "non-disciplinary" or "non-punitive," or not to "unreasonably burden[] the other party." Title IX similarly should not make those requirements.

We are concerned about these particular proposed regulations because we see them as some of the most harmful to students. But we also take issue with many more of the changes to Title IX implementation that have been proposed by the Department of Education. These regulations will cause students to be less safe at school, and we adamantly oppose their adoption. We request that the Department of Education withdraw the proposed regulations immediately.