January 17, 2019

U.S. Secretary of Education Betsy DeVos
c/o Brittany Bull
U.S. Department of Education
400 Maryland Avenue SW, Room 6E310
Washington, DC 20202


Dear Secretary DeVos,

The Boston Area Rape Crisis Center works to end sexual violence. We do this by empowering survivors of sexual violence to heal and providing education and advocacy for the social change needed to prevent sexual violence. We provide free, confidential support to survivors of sexual violence and their families and friends. We also provide training to high schools, colleges, police, organizations, and communities on how to respond to survivors and create cultures that prevent sexual violence in the first place.

We are writing to express our concern that the proposed rule issued by the Office of Civil Rights of the U.S. Department of Education (OCR-DOE) titled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” reinforces myths about sexual violence, favors offenders, and undermines procedural justice for survivors.

Campus sexual assault and harassment is a serious problem. More than one in 10 (11.7%) of the 150,000 respondents to a 2015 survey of college students by the Association of American Universities. 2015. Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct. Available online at

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1 Association of American Universities. 2015. Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct. Available online at
American Universities (AAU) reported having experienced nonconsensual sexual contact. Nearly one-quarter (23.1%) of female students and those “identifying as transgender, genderqueer, non-conforming, [or] questioning,” report having experienced nonconsensual sexual contact. Most victims of rape on campus (70%) are assaulted by a friend or acquaintance. The damage to student survivors of sexual assault is significant: In the aftermath of sexual assault, it is not uncommon for survivors to become depressed and anxious, fall behind in their school work, and even drop out of school.2

Under Title IX, the 1972 law mandating equal access to educational opportunities regardless of sex, schools are required to provide “prompt and equitable resolution of student and employee complaints”3 based on sex discrimination. The first complaint citing Title IX as a remedy to sexual harassment and assault was reported in 19774 and case law has firmly established that sexual violence is an issue of gender-based discrimination.5 When school leaders ignore the pervasiveness of sexual violence in school and campus culture and neglect to put systems in place to change this culture, they are maintaining barriers that interfere with equal access to educational opportunities for student survivors of sexual assault, as well as those who have been accused of sexual assault.

The failure of institutions of higher education to live up to their obligations under Title IX is well documented. “Sexual Assault on Campus,” a year-long investigation by the Center for Public Integrity published in 2009, found that students reporting instances of sexual assault saw their lives “turned upside down” and students found guilty of committing assaults “often face little or no punishment from school judicial systems.” The investigation spurred Congressional hearings and eventually resulted in the 2011 publication of Title IX Guidance to schools from the Obama Administration.

We welcomed the 2011 Title IX Guidance as a first step toward implementing the systemic change needed to reduce sexual violence in schools, and it has been successful.

https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Clima te_Survey_12_14_15.pdf

4 Alexander v. Yale, 631 F.2d 178 (2d Cir. 1980).
In 2017, the AAU released an extensive report showing that the Guidance has had a demonstrably positive impact. A survey of 55 of the 62 leading research universities that make up AAU’s membership found that all of them had “developed, redefined, or enhanced programs to assist victims of sexual assault and misconduct” since 2011. Additionally, 95% are now coordinating data sharing among college departments, including public safety departments, to more effectively address sexual assault on campus, and more than 90% have increased resources to support survivors and train students and staff.

Despite this progress, many problems remain. Some schools have continued to ignore their obligations to provide equal access to educational opportunities regardless of sex. In 2016, an outside, independent evaluation of Baylor University’s response to multiple reports of sexual harassment and violence made between 2012 and 2015 found “a fundamental failure by Baylor to implement Title IX of the Education Amendments of 1972 (Title IX)” and that “Baylor’s efforts to implement Title IX were slow, ad hoc, and hindered by a lack of institutional support and engagement by senior leadership.”

Some schools responded to the 2011 Title IX Guidance with overly broad, poorly implemented policies, such as requiring that all school employees become mandatory reporters of sexual assault and harassment. In 2017, Sine Anahita, an associate professor of sociology at the University of Alaska Fairbanks, which has such a policy in place, detailed its unintended consequences in Academe Magazine, the journal of the American Association of University Professors. One of the most consequential, she reports, is that it “robs students” who confide in a mandatory reporter, such as a professor or academic advisor, of determining “whether, and if so when, and how, to report the crime” because once a mandatory reporter has learned of the crime they must report it—even if the survivor does not want them to.

Better systems for reporting and responding to incidents of sexual assault at schools are clearly needed. Those who have been accused of sexual assault as well as survivors

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deserve an orderly process for adjudication of sexual assault complaints. But the remedies put forth in the proposed rule as written are poised to make things worse for all in significant ways.

**The new proposed rule reinforces myths about sexual harassment, abuse, and assault**

The prevalence of false reports of sexual violence is low.  
9 10 Yet myths persist that most reports of sexual violence are untrue and/or that victims can be held partly or fully responsible based on what they were wearing, where they were, and/or whether they were under the influence of drugs or alcohol when they were attacked.

The proposed new rule reinforces these myths in two significant ways. First, the new “requirements for grievance procedures” mandates that schools must begin with the “presumption that the respondent is not responsible for the alleged conduct.” The only way to do this is by presuming that the person who filed the formal complaint is lying. Second, schools may now “facilitate an informal resolution process, such as mediation, that does not involve a full investigation.” Mediation assists people who are engaged in a dispute and can be an effective tool when both parties bear responsibility. The only way to resolve a formal complaint of sexual harassment via mediation is by requiring the victim to bear responsibility for what happened—this is just one of many reasons that mediation is completely inappropriate, problematic, and harmful in cases of sexual assault and harassment.

We urge OCR-DOE to retain the grievance procedures in the current Guidance, which prohibit mediation and require schools to treat all students equitably when investigating reports of Title IX violations.

**The new proposed rules favor offenders**

The proposed new rule favors students reported to have committed sexual harassment in several significant ways. First, it gives schools the option of choosing between two standards of proof when deciding Title IX school grievance hearings: preponderance of the evidence or clear and convincing evidence. Under preponderance of the evidence, the

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person making the allegation of harm is required to show that there is a greater than 50 percent chance that the claim is true. Deciding grievance hearings based on clear and convincing evidence requires the student who is making the report to prove that the allegation is substantially more likely than not to be true.

Standard of evidence is a matter of procedural due process. It correlates to the potential penalties or sanctions that could be imposed. The maximum penalty that an educational institution can impose is expulsion from school. There is no loss of liberty or professional licensure or status. In supporting a higher standard of proof for deciding Title IX violations, the proposed new rule cites the “heightened stigma” experienced by a student found in violation of a Title IX offense. “Stigma” is not a penalty imposed by the school and should not be a factor in determining the proper standard of evidence.

Previous Title IX Guidance set preponderance of the evidence as the evidentiary standard in deciding Title IX grievance hearings, which is the standard used by federal courts when ruling on civil rights cases. Discrimination based on sex in educational institutions constitutes a civil rights violation, so the preponderance of the evidence standard is the appropriate one for Title IX grievance hearings. Additionally, the proposed regulations would permit schools to set a higher standard of evidence for Title IX violations and a lower one for other violations of a school's code of conduct, which amounts to a system of unequal treatment. In this system, students who experience discrimination based on sex can be treated differently during a grievance hearing than students who make complaints based on other issues. The proposed regulation is itself a form of discrimination because it creates an unequal system of adjudication.

The role of the Department of Education with respect to Title IX is to ensure that schools act to protect students from discrimination. The application of a higher standard of evidence for violations of Title IX is not supportable under the law or in the interest of protecting the rights of students to be free from sex discrimination while attending school and it favors those reported to have engaged in sex discrimination.

Second, the proposed new rule will require facts to be decided during a live hearing during which students may cross examine each other through an advocate of their choosing, such as a faculty advisor, parent, or attorney. The potential for a live hearing to serve as a major deterrent to reporting as well re-traumatizing a survivor during these adversarial questioning sessions is high, and the effectiveness of cross examination in determining
facts in such situations is in doubt. That is why most courts that have ruled on due process requirements in such cases have found that determining facts via written questions and answers is sufficient.\textsuperscript{11}

Third, the proposed new rules establish different grounds for appeal for students involved in a Title IX investigation. A student found guilty of sexual harassment may appeal the sanction issued by the school. A student found to have been sexually harassed can only appeal the remedies offered by the school to restore access to education. This means that if a school punishes an offender with an inordinately light sanction, the student who was harmed cannot appeal the sanction.

We urge OCR-DOE to retain the preponderance of the evidence standard of proof; prohibition on live cross examination; and requirement that appeals be based on equal grounds articulated in the current Guidance.

\textbf{The new proposed rule will result in remedies that come too late to help survivors of sexual violence}

Under the proposed rule, the definition of sexual harassment is narrowed to such an extent that a school would not be obligated to respond to a formal complaint unless the complaint reported a physical assault; a request for sexual contact in exchange for “an aid, benefit, or service” that is otherwise freely available at the school, such as grades based solely on academic performance; or actions that are “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school’s] education program or activity.”

This definition excludes far more common manifestations of sexual harassment such as making sexually demeaning threats or jokes, or threats passed off as jokes. This behavior is pervasive in college athletics programs\textsuperscript{12} and, if left unchecked, can result in significant harm. For example, between at least 2013 and 2015, the Amherst College men’s cross country teams maintained an e-mail thread containing sexually demeaning, offensive, and vulgar observations about female students at the school as well as other comments that

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were racist, homophobic, and transphobic.\(^{13}\) When one member of the team described the thread as “one of the most fucked up things” he’d ever read, the team captains said that comments on the e-mail chain were not meant to be taken seriously, with one writing, “please know that most everything said on the email chain is a joke.” The athlete who complained about Amherst College cross country team e-mail thread ultimately transferred to another school because of “the toxic athletic culture he experienced on the men’s cross-country team.” Meanwhile, two years after it was reported that the Harvard men’s soccer team\(^{14}\) maintained a Google doc that contained sexually explicit and offensive descriptions of the physical appearances of athletes on the women’s team, one of the affected athletes, who quit the women’s team as a result, wrote that she continues to struggle\(^{15}\) with the effects of the harassment.

Since the proposed new rule does not require corrective action until severe harm has occurred, it encourages schools to respond to complaints of Title IX violations in ways that are all but guaranteed to come too late to help. We urge OCR-DOE to retain the definition of sexual harassment outlined in the current Title IX guidance and used by the U.S. Supreme Court in civil cases: “unwelcome conduct of a sexual nature.”

**The new proposed rule will result in procedures that discourage reporting Title IX violations**

Research shows that most incidents of school-based sexual harassment or assault are never reported.\(^{16}\) The primary reasons for not doing so are “shame, guilt, embarrassment, not wanting friends and family to know; concerns about confidentiality; and fear of not being believed.”\(^{17}\)

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\(^{13}\) Ahn Daniel, Mayer Helen, Wohlforth Sam. 2016, Dec. 11. “Men’s Cross Country Maintained Misogynistic, Racist Email Chain.” The Indicator. Available online at https://theindicator.wordpress.amherst.edu/special-reports/mens-cross-country-maintained-misogynistic-racist-email-chain#more-332


\(^{17}\) Marjorie R. Sable DrPH MSW, Fran Danis PhD, MSW, Denise L. Mauzy MSW & Sarah K. Gallagher MSW (2006) Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students, Journal of American College Health, 55:3, 157-162,
Fortunately, there is a wealth of evidence-based best practices developed over decades of direct service work with survivors from which to draw when designing sexual assault reporting procedures. The most effective reporting systems are flexible enough to give survivors as much control as possible over how they report sexual harassment and assault, including the option to maintain anonymity and/or report the crime without pursuing criminal charges.

The proposed rule gives only one reporting option for students who have been sexually harassed or assaulted. They must file a “formal complaint” with the school’s Title IX Coordinator or another official who “has the authority to institute corrective measures on behalf” of the school. Additionally, filing a formal complaint will automatically trigger the school’s “grievance procedures.” At the start of an investigation, schools that prohibit “knowingly making false statements” in their code of conduct must send a letter to each student in the investigation warning them that could be disciplined for making false statements during the grievance proceedings. Thus, a student reporting sexual harassment or assault will have to weigh the risks not just of participating in a proceeding that is stacked against them to begin with, but of participating in a proceeding that might result in their being punished if they are not believed.

We urge OCR-DOE to require survivor-based reporting requirements of sexual harassment and assault in the proposed rule. Guidelines for reporting sexual assault adopted by the U.S. Department of Defense in 2004 provide a model for schools, colleges, and universities. In 2004, after years of media reports of widespread sexual assault occurring within each branch of the military, the Office of Sexual Assault and Response of the U.S. Department of Defense reformed the sexual assault reporting process. Until then, the military’s strict chain of command put many survivors in the position of having to report their assault to the person who had committed the offense, or to a close colleague of the offender. Today, survivors can report a sexual assault directly to the Office of Sexual Assault and Response or to outsiders, including health-care providers and civilian law enforcement. Survivors are given the option of remaining anonymous and requesting that their report not be forwarded along to any other authority.

The new procedures made it much safer for survivors to report incidents of sexual assault and harassment. Within two years of overhauling the reporting process, reports of sexual assault from active duty military personnel dramatically increased, giving the military
much more accurate assessments of the true rates and risks of sexual assault. With that information, much more effective interventions were designed and implemented to lessen those risks. As a result, recent surveys of servicemembers have found that rates of sexual assault of active duty women have been cut in half and rates of sexual assault of active duty men have been cut by two-thirds.²⁸

The new proposed rule makes it impossible to provide procedural justice for survivors

Procedural justice is the simple act of taking sexual violence complaints seriously and implementing transparent response policies and protocols. In addition to the reasons outlined above, the proposed new rule makes it impossible for schools to provide procedural justice impossible in several significant ways. First, schools seeking an exemption from Title IX on religious grounds will no longer be required to send a letter to OCR-DOE requesting the exemption by asserting that the school is controlled by a religious organization and identifying which parts of the law conflict with the school’s religious tenets. Without these letters, it will be impossible for the U.S. Department of Education or any other entity to track which schools are choosing to opt out of Title IX provisions, the date at which they opted out, and on what grounds. This means that prospective and current students at religious schools effectively have no way of knowing what their rights are.

Second, schools will no longer need to complete a Title IX investigation within 60 days. The proposed new rule only requires “reasonably prompt timeframes” and can delay an investigation indefinitely if an outside criminal investigation is also taking place. This means that students who report sexual harassment or assault might have to wait months or even longer for an investigation to be completed, and they will have no way of knowing how long the investigation is likely to take.

Third, and most significantly, the proposed new rule dramatically eases the threshold by which a school can be found to be in violation of Title IX. Since 1997, OCR-DOE has required schools to respond promptly and with appropriate remedies in response to sexual harassment. The proposed new rule would require proof that a school had been “deliberately indifferent” to complaints and that recommended remedies were “clearly unreasonable” to be in violation of their Title IX civil rights obligations. What this lowering

of expectations means: schools will not be held accountable for providing the necessary and appropriate response to sexual violence. What message does this send to survivors considering coming forward? That it’s okay if schools do a mediocre or bad job. This is unacceptable.

We urge OCR-DOE to require schools to “take immediate and appropriate steps to investigate or otherwise determine what occurred” and “take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects,” as outlined in the 2014 “Questions and Answers on Title IX and Sexual Violence.”

Thank you for the opportunity to provide this feedback.

Sincerely,

Gina Scaramella, LICSW
Executive Director
The Boston Area Rape Crisis Center