

United States Senate

WASHINGTON, DC 20510

June 3, 2020

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Dear Secretary DeVos:

We write in strong opposition to the final rule you released last month on Title IX and sexual assault and harassment. Not only does your misguided rule make it harder for students to report sexual assault and harassment, and create confusion for schools about their responsibilities, but the timing of the rule is completely inappropriate in light of the COVID-19 crisis. As schools across the country remain closed and struggle to continue supporting students, while also working to understand how to reopen and provide services safely, asking them to implement this rule in 100 days is grossly unfair and unrealistic. We urge you to prioritize students' safety, revoke the final rule, and instead work to help make schools across the country safer for all students, whether the threat is sexual assault and harassment or COVID-19.

While the Department of Education's (the Department) final rule incorporates some changes from the draft rule, it still fails to offer schools the clarity and authority needed to adequately enforce Title IX protections. For instance, the overly narrow definition of sexual harassment means schools will investigate fewer incidents and students will be discouraged from reporting harassment that does not meet the restrictive definition adopted by the Department. Similarly, the rule prevents schools from investigating incidents that occur during a study abroad program or are outside of a school's program or activity, including many incidents of sexual harassment that occur off-campus or online. For students who are sexually harassed, assaulted, or stalked in off-campus housing, including at an unrecognized fraternity, the rule would mean having to continue to attend a class with or taught by their rapist or abuser.

The rule also requires schools to dismiss complaints if the complainant is no longer a student or interested in becoming a student in the future, even if they transferred or dropped out due to the harassment. A student would also not be able to pursue a complaint after they graduate if they no longer plan to engage in official school-related events. Furthermore, schools would be able to dismiss a complaint at any time, even during a pending investigation, if the respondent is no longer enrolled or employed by the school. This would allow both the school and the individual to avoid responsibility.

Additionally, by limiting schools' responsibility to situations in which they have 'actual knowledge' of harassment or assault, schools will be able to ignore incidents they reasonably should have known about. Accordingly, institutions of higher education will be all but immune from liability under Title IX if students report an incident to the wrong person. Under your rule, Michigan State University would not have faced any responsibility for those incidents involving

Larry Nassar because students reported the abuse to coaches or athletic trainers rather than the Title IX Coordinator or to particular high-ranking officials.

In general, the rule makes it harder for survivors to feel comfortable coming forward. By requiring the schools to presume there was no wrongdoing, students coming forward will have the impression the school assumes they are not telling the truth. Additionally, by allowing schools to use the preponderance of the evidence standard in student sexual harassment investigations only if they utilize it for faculty sexual harassment investigations, even though many employees are contractually required to use the clear and convincing standard, the rule will force schools into using a standard that favors the respondents and tilts against complainants, and is inherently not reflective of the equitable nature of Title IX.

The requirement of live hearings with direct cross-examination in institutions of higher education is similarly harmful, and the exclusion of information that could be considered hearsay evidence is broader than under the Federal Rules of Evidence. The Department acknowledges it has heard from survivors who indicated the live nature of the interaction, whether in the same room or not, would have deterred them from coming forward, and yet the Department disregarded that concern and adopted that policy, which requires direct cross-examination in institutions of higher education and allows it in K-12 settings. Additionally, the new provisions in the rule around hearsay would require schools to exclude all oral and written statements from the complainant, respondent, or any individual, including police officers, nurses or other students, if that individual is not able or refuses to be cross-examined. While the final rule allows the use of technology in lieu of requiring students to be in the same room, it fails to provide guidance as to what steps must be taken to ensure privacy and also does not provide any options for accommodations for students with disabilities or English language learners – and instead allows for delays if these accommodations, which are required under federal civil rights laws, are not available in a timely manner. Concerns with live hearings can also be particularly grave for students experiencing domestic violence, who would be required to participate in a live hearing with their abuser. In summary, by singling out sexual assault, harassment, domestic violence, stalking and dating violence, all of which disproportionately impact women and girls, as the only types of misconduct where additional investigation and hearing procedures apply, the Department is suggesting people reporting these incidents are inherently less trustworthy. That is inherently discriminatory against women and girls and is unacceptable.

Finally, the rule includes new provisions regarding retaliation, preempting state laws, and new bases for dismissals of complaints, that were not included in the draft rule and that stakeholders have not been able to weigh in on. Protecting against retaliation is an important aspect of encouraging survivors to come forward, but stakeholders should be afforded the ability to suggest improvements to the Department's approach and to question whether the approach allows for carve-outs that are counterproductive to addressing retaliation concerns. Additionally, by preempting state efforts that conflict with the rule, the Department is preventing states from taking action that would increase protections for survivors. The federal rulemaking process provides for a notice and comment period to allow stakeholders to participate for significant

actions, and by failing to allow stakeholders that opportunity, the Department is circumventing an important part of the process.

The rule also will lead to challenges for students of color, students with disabilities, LGBTQIA+ students, low-income students, and others who face barriers to education. The rule fails to recognize the intersectional nature of many forms of harassment and discrimination, and the rule's proscriptive policies will be particularly harmful to those without access to resources and legal counsel. By focusing on creating barriers for students to bring claims forward, rather than on what schools must do to actually protect the rights of students, the rule further exacerbates inequities for students already at risk.

Overall, this rule is harmful for students, and is cumbersome and difficult for schools to implement. At a time when schools across the country are straining to stay afloat and figure out whether they will be able to open their doors to students in the fall, this rule is an unfair, unrealistic, and unnecessary burden on them. Rather than ask schools to undertake this effort, the Department should rescind this rule and instead work on prioritizing the safety of all students. Thank you in advance for your consideration of this request.

Sincerely,

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