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Submitted via [www.regulations.gov](http://www.regulations.gov)

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

The Education Law Center of Pennsylvania (“ELC–PA”) writes in response to the Department of Education’s (the Department) Notice of Proposed Rulemaking (“NPRM” or “proposed rules”). We echo the concerns voiced by our partners at the Leadership Conference on Civil and Human Rights and write separately to share our particular concerns regarding students in Pennsylvania’s publicly-funded Pre-Ks, kindergartens, elementary schools, middle schools, and high schools (“Pre-K–12” students).

ELC–PA is a non-profit legal advocacy organization dedicated to ensuring access to a quality public education for all children in Pennsylvania. For over 40 years, ELC-PA has worked to promote positive learning environments that are safe, developmentally appropriate, and inclusive for all students.

We are concerned that the proposed changes would make sexual harassment investigations even rarer in the Pre-K–12 context than they already are. ELC–PA has often had to push schools to take *any* action in the face of a student’s harassment allegations. Lowering schools’ obligations under Title IX will make it harder for advocates to ensure student safety is taken seriously. This would disproportionately impact our most marginalized students, who are more likely to experience sexual harassment. For example, 78% of LGBTQ K–12 students in Pennsylvania are harassed on the basis of their sexual orientation, 58% on the basis of their gender expression, and 52% on the basis of their gender;<sup>1</sup> nationally, 60% of Black girls are sexually harassed before the age of 18;<sup>2</sup> 56% of students ages 14-18 who are pregnant or

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<sup>1</sup> GLSEN, 2017 STATE SNAPSHOT: SCHOOL CLIMATE IN PENNSYLVANIA 1 (2019).

<sup>2</sup> See Hannah Giorgis, *Many women of color don’t go to the police after sexual assault for a reason*, THE GUARDIAN (Mar. 25, 2015, 7:49 AM), <https://www.theguardian.com/commentisfree/2015/mar/25/women-of-color-police-sexual-assault-racist-criminal-justice>. See also Sikivu Hutchinson, *#MeToo in Our Schools: Hearing Black Girls in the Sexual Abuse Backlash*, HUFFINGTON POST (Jan. 2, 2018, 12:30 PM),

parenting are kissed or touched without their consent;<sup>3</sup> and students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.<sup>4</sup>

Many of these students—particularly students of color, undocumented students,<sup>5</sup> LGBTQ students,<sup>6</sup> and students with disabilities—are already less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence and/or deportation. For these students, schools are often their only avenue for relief.

Below, we highlight our specific concerns with the proposed regulations as they relate to Pre-K–12 students. For the reasons articulated below, we strongly oppose the proposed changes, especially in light of the well-documented and often devastating impact that sexual harassment has on the emotional well-being and academic outcomes of children and adolescents.

### **I. The limited number of employees responsible for reporting harassment under the proposed rules ignores the realities of Pre-K–12 students.**

Under the proposed rules, schools would only be responsible for addressing sexual harassment when students file a formal complaint or report being a victim to one of a small subset of school employees who are charged with actual knowledge of the harassment—specifically, (i) a Title IX coordinator, (ii) a K–12 teacher (but only for student-on-student harassment, *not* employee-on-student harassment); or (iii) an official who has “the authority to institute corrective measures.”<sup>7</sup> This is a dramatic change, as the Department has long required schools to address *student-on-student* sexual harassment if almost any school employee<sup>8</sup> either knows about it or should reasonably have known about it.<sup>9</sup> This standard takes into account the reality that many students, particularly many Pre-K–12 students, do not have the sophistication or ability to file a formal complaint. Many students simply disclose sexual abuse to the adults they trust the most, assuming that those adults will act on their behalf. Expecting students to know which employees have authority to address the harassment and report exclusively to those

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[https://www.huffingtonpost.com/entry/metoo-in-our-schools-hearing-black-girls-in-the-sexual\\_us\\_5a4bab2de4b0d86c803c7994](https://www.huffingtonpost.com/entry/metoo-in-our-schools-hearing-black-girls-in-the-sexual_us_5a4bab2de4b0d86c803c7994) (referencing a Women’s Leadership Project survey that found that a majority of girls of color in three South L.A. schools “felt unsafe on campus and had experienced some form of sexual harassment.”).

<sup>3</sup> NATIONAL WOMEN’S LAW CENTER, LET HER LEARN: STOPPING SCHOOL PUSHOUT FOR GIRLS WHO ARE PREGNANT OR PARENTING 12 (2017) [hereinafter LET HER LEARN: PREGNANT OR PARENTING STUDENTS], <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting>.

<sup>4</sup> NATIONAL WOMEN’S LAW CENTER, LET HER LEARN: STOPPING SCHOOL PUSHOUT FOR: GIRLS WITH DISABILITIES 7 (2017) [hereinafter LET HER LEARN: GIRLS WITH DISABILITIES], <https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities>.

<sup>5</sup> See Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, NY TIMES (April 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3>.

<sup>6</sup> NATIONAL CENTER FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY: EXECUTIVE SUMMARY 12 (Dec. 2016) [hereinafter 2015 U.S. TRANSGENDER SURVEY], <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

<sup>7</sup> Proposed rule § 106.30.

<sup>8</sup> This duty applies to “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.” 2001 GUIDANCE, at 13.

<sup>9</sup> *Id.* at 14.

adults places an unreasonable burden on young children, including those who may not yet know how to read.

Under the proposed rules, if a Pre-K–12 student told a non-teacher school employee they trust—such as a guidance counselor, teacher aide, or athletics coach—that they had been sexually assaulted by another student, the school would have no obligation to help the student.<sup>10</sup> If a student told a teacher that she had been sexually assaulted by another teacher or other school employee, the school would have no obligation to help her.<sup>11</sup>

Sexual assault is already very difficult to talk about. Sections 106.44(a) and 106.30 would mean even when students find the courage to talk to the adult school employees they trust, schools would frequently have no obligation to respond. These proposed provisions would absolve some of the worst Title IX offenders of legal liability and deny students equal access to education.

## **II. The proposed definition of harassment improperly prevents schools from providing a safe learning environment.**

The proposed rule would create the untenable situation where schools would be *required* to ignore a student’s Title IX complaint if the harassment has not yet advanced to a point that it is actively harming a student’s education. Such changes are not merely procedural. They affect the lives of students like N.B., a nine-year-old Black boy, who was taunted by his classmates with sexually-charged slurs in the hallway shortly after beginning fourth grade.<sup>12</sup> Despite his mother’s reports of the harassment to school administrators, his school did nothing to intervene.<sup>13</sup> N.B.’s classmates continued to harass him, escalating their abuse to physical violence, forcing him to watch pornographic videos, and, ultimately, raping him.<sup>14</sup> It took several days, a suicide attempt, and troubling sexual behavior for N.B. to disclose that he was sexually assaulted. Like many survivors, it was easier for him to speak up before the harassment escalated to violence. Since this traumatic experience, N.B.—who did not suffer from any psychological issues prior to the harassment—has been diagnosed with severe anxiety and depression.<sup>15</sup> His depression has gotten so severe that it has culminated in several suicide attempts.<sup>16</sup> It is imperative for students like N.B. that the Department encourage schools to intervene when they are first notified of harassment, not only when it escalates to its most violent and traumatic manifestations.

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<sup>10</sup> See proposed rule § 106.30 (83 Fed. Reg. 61496) (for K-12, limiting notice to “a teacher in the elementary and secondary context with regard to student-on-student harassment).

<sup>11</sup> *See id.*

<sup>12</sup> *See* Sam Wood, *Lawsuit: Boy’s move to new school quickly became hell*, PHILLY.COM (May 6, 2014), [http://www.philly.com/philly/news/Lawsuit\\_Boys\\_move\\_to\\_new\\_school\\_quickly\\_became\\_hell.html](http://www.philly.com/philly/news/Lawsuit_Boys_move_to_new_school_quickly_became_hell.html).

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

Under the Department’s proposed, narrower definition of harassment, students would be forced to endure repeated and escalating levels of abuse, from a student or teacher, before their schools would be required to investigate and stop the harassment.

**III. Proposed rules §§ 106.30 and 106.45(b)(3) would *require* schools to ignore harassment that occurs outside of a school activity, even when it creates a hostile educational environment.**

We have assisted several students who were sexually assaulted by a classmate off school property where the incidents are related to and impact the school environment. Our clients are indicative of national trends, as only 8% of all sexual assaults occur on school property.<sup>17</sup> The Department’s proposed rules ignore the reality that sexual harassment which happens online or outside of a school activity can interfere with students’ education just as harassment on school grounds can. Many students we work with cannot concentrate in class if they are sharing a room with their alleged abuser and, when presented with the risk of this interaction, many students avoid school altogether. While schools generally do not have jurisdiction to discipline students for out-of-school behavior, schools should continue to meet their current legal obligation to address sexual harassment that interferes with students’ education through safety plans, the IEP process for students with disabilities, and other appropriate remedies which ensure nondiscriminatory, safe environments in which all students can learn.

**IV. Maintaining records of investigations for only three years will disadvantage young students.**

Proposed rule § 106.445(b)(7) requires schools to maintain records of sexual harassment investigations for only 3 years, effectively barring many Pre-K–12 students from seeking a civil remedy against their harasser or their school. Records of Title IX investigations may be vital evidence for a student who wishes to file a civil action against their harasser or their school. However, young people are barred from filing such a claim on their own prior to reaching the age of majority.<sup>18</sup> In the case of students who experience sexual harassment at a young age, the school could have ceased maintaining records of the investigation before the student even reaches the age of 18 and has the ability to vindicate their own rights.

Young people who experience sexual harassment or assault are uniquely unequipped to alert others to potential legal claims because their coping mechanisms, such as “denial, repression, and amnesia”, make it more difficult to speak about the harassment or abuse.<sup>19</sup> This is compounded for the students mentioned above who are already less likely than their peers to report sexual harassment due to their increased risk. Even those young people who do have the ability to speak about harassment or abuse may not have the benefit of a guardian who would bring a legal claim on their behalf. Federal and state laws have consistently recognized that it is

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<sup>17</sup> RAINN, *Scope of the Problem: Statistics*, <https://www.rainn.org/statistics/scope-problem>.

<sup>18</sup> See 23 Pa. Stat. and Cons. Stat. Ann. § 5101 (West) (barring minors from bringing most legal claims on their own behalf).

<sup>19</sup> Gregory G. Gordon, *Adult Survivors of Childhood Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule*, 20 PEPP. L. REV. 1359, 1366 (1993).

inappropriate to punish minors for the failure of a guardian to file a claim on the minor's behalf, and consequently toll the relevant statute of limitations periods until minors reach the age of majority and have the ability to vindicate their own rights.<sup>20</sup> While children benefit from minority tolling, much of the benefit of these lengthened deadlines would be lost if evidence surrounding the student's harassment and their schools' responses to it were unavailable.

**V. The proposed rules would allow schools to claim “religious” exemptions for violating Title IX with no warning to students or prior notification to the Department.**

The proposed rules permit schools to opt out of Title IX without notice or warning to the Department or students. Some religious schools receive public money through state voucher programs or by designation as an Approved Private School (APS) for children with disabilities.<sup>21</sup> Many of these schools discriminate against students on the basis of their gender nonconformity, including by disciplining students merely for their gender presentation.<sup>22</sup> The proposed rule could result in a parent unwittingly funneling public, taxpayer dollars to a school only to have their child experience discrimination. The proposed rules would allow schools to conceal their intent to discriminate, exposing students to harm, especially women and girls, LGBTQ students, pregnant or parenting students (including those who are unmarried), and students who access or attempt to access birth control or abortion.<sup>23</sup>

**VI. The proposed rules *requiring* schools to dismiss harassment complaints go beyond the Department's authority to effectuate the nondiscrimination provisions.**

Section 106.45(b)(3) of the proposed rules *requires* schools to dismiss complaints of sexual harassment if they don't meet specific narrow standards. If it's determined that harassment doesn't meet the improperly narrow definition of severe, pervasive, *and* objectively offensive harassment, it *must* be dismissed, per the command of the proposed rule. If severe, pervasive, *and* objectively offensive conduct occurs outside of an educational program or activity, including most off-campus or online harassment, it *must* be dismissed under the proposed rule. However, the Department lacks the authority to require schools to dismiss complaints of discrimination. Under Title IX, the Department is only authorized to issue rules “to effectuate the [anti-discrimination] provision of [Title IX].” Title IX does not delegate to the

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<sup>20</sup> See, e.g. *Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1213 (10th Cir. 2014) (applying New Mexico's minority tolling statute to the plaintiff's Title IX claim).

<sup>21</sup> See Rebecca Klein, *These Schools Get Millions of Tax Dollars to Discriminate against LGBTQ Students*, HUFFINGTON POST (Dec. 15, 2017, 10:03 AM), [https://www.huffingtonpost.com/entry/discrimination-lgbt-private-religious-schools\\_us\\_5a32a45de4b00dbbcb5ba0be?fbz7](https://www.huffingtonpost.com/entry/discrimination-lgbt-private-religious-schools_us_5a32a45de4b00dbbcb5ba0be?fbz7).

<sup>22</sup> See *id.*

<sup>23</sup> Transgender students are especially at risk because this proposed change threatens to compound the harms created by (i) the Department's decision in February 2017 to rescind Title IX guidance on the rights of transgender students; (ii) the Department's decision in February 2018 to stop investigating civil rights complaints from transgender students regarding access to sex-segregated facilities; and (iii) HHS's leaked proposal in October 2018 for the Department and other federal agencies to define “sex” to exclude transgender, non-binary, and intersex students. Erica L. Green et al., *‘Transgender’ Could Be Defined Out of Existence Under Trump Administration*, NEW YORK TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

Department the authority to tell schools *when they cannot* protect students against sex discrimination.<sup>24</sup>

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Instead of effectuating Title IX's prohibition on sex discrimination in schools, the proposed rules serve only to protect schools from liability when they fail to address complaints of sexual harassment and assault. ELC-PA calls on the Department of Education to immediately withdraw this NPRM and instead focus its energies on vigorously enforcing the Title IX requirements that the Department has relied on for decades, to ensure that schools promptly and effectively respond to sexual harassment.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact us to provide further information.

Sincerely,

Education Law Center Pennsylvania  
Maura McInerney, Esq., Legal Director  
Lizzy Wingfield, Esq., Stoneleigh Foundation Emerging Leader Fellow

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<sup>24</sup> See Michael C. Dorf, *The Department of Education's Title IX Power Grab*, VERDICT (Nov. 28, 2018), <https://verdict.justia.com/2018/11/28/the-department-of-educations-title-ix-power-grab>.