



CITY OF BOSTON • MASSACHUSETTS
OFFICE OF THE MAYOR
MARTIN J. WALSH

January 18, 2019

U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20202

Re: Dept. of Education Docket ID ED-2018-OCR-0064, RIN 1870-AA14, Comments in Response to Proposed Rulemaking: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Sir/Madam,

The City of Boston is writing to express opposition to regulations proposed by the Department of Education on November 29th, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Docket ID ED-2018-OCR-0064, RIN 1870-AA14.

The City of Boston is home to numerous educational institutions, including 29 colleges and universities, two community colleges, a robust Boston Public Schools system, and many charter, private and parochial K-12 schools. Combined, these institutions serve more than 200,000 students annually. There were 136,255 enrolled graduate and undergraduate students in Boston in 2017, not including approximately 15,000 students enrolled at the two community colleges¹; Boston Public Schools enrolled a total of 52,665 students from pre-Kindergarten through 12th grade for the 2017-2018 school year.²

Unfortunately, many students experience sexual harassment. National data indicates that 27% of college women have experienced some form of unwanted sexual contact,³ nearly half of grade 7-12 students experienced sexual harassment in the past academic year,⁴ and nearly two thirds of college students

¹ Boston Planning and Development Agency Research Division, Boston By the Numbers 2018 15 (2018), available at <http://www.bostonplans.org/getattachment/3e8bfac2-27c1-4b55-adee-29c5d79f4a38>.

² Massachusetts Department of Elementary and Secondary Education, School and District Profiles: Boston Enrollment Data, <http://profiles.doe.mass.edu/profiles/student.aspx?orgcode=00350000&orgtypecode=5&> (last visited Jan. 4, 2019).

³ Alan M. Gross et al., *An Examination of Sexual Violence Against College Women*, 12 *Violence Against Women* 288, 292 (2006).

⁴ Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment in School* (2013), available at <https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>

report experiencing sexual harassment.⁵ In the City of Boston in 2018 (January 1 through November 30), the Boston Police Department's Sexual Assault Unit investigated nearly 600 incidents of sexual assault, including rape, attempted rape and indecent assault and battery. In addition to those assaults, during the same time period, the Boston Police Department's Crimes Against Children Unit investigated an estimated 360 incidents of sex offenses relating to children, including child porn, indecent assault and battery, rape and sex offense other.⁶ One U.S. Department of Justice report stated that only twenty percent of college sexual assault survivors report the incident to law enforcement, suggesting that far more incidents of sexual harassment and assault take place than we know.⁷

To be clear, the City of Boston takes issue with aspects of the Department's definition of sexual harassment, articulated further below.

Following a review of the proposed Title IX rules, the City of Boston is concerned that the changes proposed would serve to diminish the ability of survivors of sexual assault and sexual harassment⁸ to receive equal education in both higher education and K-12 settings, which plainly goes against the spirit of Title IX. These rule changes would make it more difficult for survivors to access justice in an educational setting by providing a narrow definition of actionable sexual harassment, reducing the situations in which schools must address sexual harassment, creating a burdensome filing and hearing process that could re-traumatize survivors and discourage reporting, and mandating an unsuitable evidentiary standard for sexual harassment hearings.

For over 40 years, federal law has prohibited sex discrimination in federally funded educational settings. Title IX of the Education Amendments of 1972 states that:

*No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...*⁹

The predecessor to the Department of Education, the Department of Health, Education, and Welfare (HEW), issued the first Title IX regulations, which took effect in 1975.¹⁰ Since that time, the Department of Education has periodically issued guidance documents, but has not changed the regulations. In September 2017, the Department of Education rescinded some of these guidance documents but left in

⁵ Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus* (2005), available at <http://www.aauw.org/files/2013/02/drawing-the-line-sexual-harassment-on-campus.pdf>

⁶ Boston Police Dep't, Sexual Assault Unit and Crimes Against Children Unit - 2018 Caseload Data (Dec. 31, 2018).

⁷ Sofi Sinozich & Lynn Langton, Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013 9 (2014), available at <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

⁸ Here, we will use the term "sexual harassment" to encompass a broad range of situations which expose students to unwanted sexual behavior, or a variety of unwelcome gender-based actions, including but not limited to sexual assault.

⁹ 20 U.S.C. § 1681(a).

¹⁰ Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance, 83 Fed. Reg. 230 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

place the 2001 Guidance.¹¹ In November 2018, the Department proposed regulations that would significantly change how sexual harassment cases are handled in educational settings.

With so many K-12, undergraduate, and graduate students in the City of Boston, our city has a uniquely strong interest in the well-being of students. Sexual harassment should not undermine students' access to an equal education. As we consider the impact of these proposed Title IX regulations on students and educational institutions, the City of Boston holds some particular areas of concern. These concerns, outlined below, include restrictive proposed changes to the definition of sexual harassment, an onerous filing and hearing process, diminished opportunities for schools to take action against sexual harassment, and an onerous evidentiary standard.

I. A Narrow Definition of Sexual Harassment Allows Sexual Misconduct in Educational Settings

The proposed changes would harm students in the City of Boston by codifying a narrow definition of sexual harassment, **harming survivors through escalating harassment, reducing the number of survivors who could seek redress from educational institutions under Title IX, and diminishing accountability for offenders**. In the proposed rules, the Department of Education defines "sexual harassment" to mean:

*... either 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; or unwelcome conduct on the basis of sex that is so **severe, pervasive, and objectively offensive** [emphasis added] that it effectively denies a person equal access to the recipient's education program or activity; or sexual assault as defined in 34 CFR 668.46(a), implementing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).*

While the Department of Education previously provided guidance that defined sexual harassment as "any unwelcome conduct of a sexual nature,"¹²; the proposed regulations would significantly alter that definition to instead require conduct to be "severe, pervasive, and objectively offensive" in order to be sufficiently egregious for schools to take action. Requiring this higher bar for misconduct before Title IX comes into effect could force survivors to endure repeated harassment, or expose additional people to sexual harassment, before the conduct became "pervasive." This has no conceivable benefit to Boston-

¹¹ *Id.* In 2017, the Department of Education rescinded the 2011 Dear Colleague letter and the 2014 Q&A. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 24, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Sexual Violence (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

¹² Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Sexual Violence 3 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

based schools and exponential detriment to the City's students. Furthermore, this narrow definition of harassment goes against the City's public policy interests in safe, well-regulated educational settings. Title IX prohibits discrimination on the basis of sex in order to preserve students' right to an equal education, and students of all genders benefit from an educational setting that is free from sexual harassment. Addressing unwelcome sexual conduct promptly can discourage such behavior from escalating into incidents that effectively deny students access to education.

Additionally, the proposed limited definition of harassment could have even greater consequences for the City's elementary and secondary school students. An American Association of University Women (AAUW) survey found that nationally, 48 percent of students in grade 7-12 had experienced sexual harassment.¹³ By requiring misconduct to be repeated and severe before it is actionable under Title IX, these regulations would **deliberately expose young students in critical developmental stages to chronic and/or escalating inappropriate sexual behavior**. The consequences of sexual harassment are severe, and impact girls disproportionately:

*One-third (32 percent) of harassed students said they did not want to go to school as a result of the sexual harassment, including 37 percent of girls and 25 percent of boys. Another third (31 percent) of students said they felt sick to their stomach as a result of the sexual harassment (37 percent of girls and 21 percent of boys). Thirty percent of students said sexual harassment caused them to have a hard time studying (34 percent of girls and 24 percent of boys). Trouble sleeping was a problem for 19 percent of students, including 22 percent of girls and 14 percent of boys. Girls were more likely than boys to say they had a hard time sleeping for quite a while, rather than a short time.*¹⁴

Furthermore, schools' inability to respond under Title IX to behavior that does not fall within this narrowed definition of sexual harassment could discourage reporting of school-based sexual harassment, reducing accountability for perpetrators and undermining students' access to equal education. It could lead to confusion about whether unwanted sexual behavior that falls outside this definition can be addressed at all, and if so, what the process is.¹⁵ These regulations could negatively affect student survivors' educational attainments, including graduation rates, educational achievement, and emotional well-being, in a manner that could harm the economic and community lives of Boston students.

In sum, the City of Boston opposes the proposed definition of sexual harassment because would reduce schools' ability to address sexual harassment under Title IX in educational settings, with deleterious consequences for students, schools, and the greater community.

¹³ Catherine Hill & Holly Kearl, Crossing the Line: Sexual Harassment in School (2013), *available at* <https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>

¹⁴ Catherine Hill & Holly Kearl, Crossing the Line: Sexual Harassment in School 22 (2013), *available at* <https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

¹⁵ While student conduct codes and, in some circumstances, state law, may be able to fill the accountability void left by the narrow proposed Title IX and ensure consequences for sexual harassment in schools, this is an opt-in workaround that would need to be proactively adopted by educational institutions. Permitting some types of sex-based discrimination in educational settings is violative of the spirit of Title IX.

II. Burdensome Filing and Hearing Process for Survivors

The City of Boston is concerned that the proposed Title IX regulations, e.g. 34 CFR §106.30, would create a **burdensome reporting and hearing process** that could negatively affect Boston students by **re-traumatizing sexual harassment and assault survivors and discouraging reporting**. The regulations create structural deterrents to reporting incidents of sexual assault and harassment because they create a system that is not trauma-informed. Indeed, Docket ID ED-2018-OCR-0064 mentions several times the Department of Education's concern for the "stigma" of being accused of sexual misconduct, but does not suggest or utilize a trauma-informed approach for survivors.

Under the proposed rules, the official reporting process begins with a "formal complaint," which is a written document signed by the survivor or the Title IX coordinator. This may either be a survivor's report of their experience or the Title IX coordinator's report based on receiving multiple reports from multiple survivors about a single individual. This written, signed report must be received by an "official of the recipient [institution] who has authority to institute corrective measures on behalf of the recipient." As discussed below, the proposed regulations do not clearly define who this official is, which leaves survivors to research the correct official and potentially having to disclose their sexual harassment experiences to several strangers before locating the correct official. This process, and the shame and stigma which can accompany being a survivor of sexual harassment and assault, could deter survivors from coming forward.

This proposed regulation creates a **hazy process for survivors, burdening them with locating and reporting to the "right" school official in the aftermath of a difficult experience**. If a student were to experience sexual harassment and report it to a trusted professor or an academic advisor, it may not qualify as official reporting. This could discourage reporting both through the complexity of the reporting process, and by re-traumatizing survivors by forcing them to repeatedly tell their story to strangers. These proposed regulations move away from a trauma-informed perspective and could actively harm Boston students who seek to report.

Additionally, the proposed standards require schools' Title IX grievance processes to allow for a live hearing. It is well documented that survivors of sexual harassment, particularly sexual assault, may **experience new trauma, stigma, and fear about having to testify aloud about their experiences**, and this could further deter survivors from reporting their experiences.¹⁶ As the National Crime Victim Law Institute wrote, "Testifying in court can be particularly traumatic for rape victims. Facing the perpetrator in court and recalling horrifying and personal details of the rape forces the victims to 'relive the [crime] mentally and emotionally,' leading some to feel 'as though the sexual assault [is] recurring' and to re-experience 'a lack of control and terror.'"¹⁷

¹⁶ *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, Nat'l Crime Victim Law Inst. Violence Against Women Bulletin, September 2011, at 1-2, available at <https://law.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify>.

¹⁷ *Id.*

Despite the Department’s purported interest in due process, the Department’s proposed rules could effectively **permit more evidence about the survivor’s past sexual behaviors** than the Federal Rules of Evidence, because certain types of evidence would not require judicial evaluation. A survivor’s sexual history is not relevant to a current allegation of sexual harassment, and should not be permitted in these hearings.

To add to this, the proposed regulations require that the grievance procedures of institutions of higher education include live cross-examination at a hearing. Cross-examination, in which the **respondents “advisor” would get to publicly question the survivor’s experience, memory, and sexual behavior** (so long as the questions about sexual behavior are “to prove that someone other than the respondent committed the conduct alleged”¹⁸), could humiliate and re-traumatize those survivors brave enough to proceed, and would intimidate some survivors from reporting sexual harassment in the first place.

The proposed changes to the filing and hearing process for Title IX complaints, including an unclear reporting process, requiring live hearings, and mandatory cross examination, would all discourage reporting of sexual harassment and potentially harm a survivor’s mental health. For these reasons, the City of Boston opposes these changes.

III. Reduced Ability for Schools to Take Action to Address Sexual Harassment and Assault Under Title IX

The proposed regulations could **harm students and schools in the City of Boston by reducing the situations in which a school may take action** to address discrimination or reduced access to education on the basis of sex under Title IX. First, the proposed regulations would make it more difficult for survivors to officially report incidents of sexual assault and harassment in a way that obligates a school to take action (that is, in a way that makes the incidents “known” to the school). Second, the proposed regulations would restrict a school’s Title IX response to conduct that occurs “within its education program or activity.” The regulations would codify a rigid system where many instances of gender-based discrimination would not be within the school’s ability to adjudicate under Title IX.

The proposed regulations state that only educational institutions with “actual knowledge of sexual harassment” must respond to such events. In the past, the Department of Education’s guidance memoranda on this subject have held schools to a more stringent “constructive knowledge” standard. Under the proposed regulations, in order to have “actual knowledge,” the incident must be known to “an official... who has authority to institute corrective measures.” However, “the mere ability to 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.”¹⁹ The Department of Education goes on to say that “... determining who is an official to whom notice of sexual

¹⁸ Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance, 83 Fed. Reg. 230 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

¹⁹ Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance, 83 Fed. Reg. 230 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

harassment gives actual knowledge to the recipient will be fact-specific...” but specifies that notice to the school’s Title IX coordinator will confer “actual knowledge.”

This means that when an incident of sexual assault or harassment occurs in an education setting, even if it was witnessed directly by educational staff, the institution does not have to take action unless it is reported to the appropriate “official.” In K-12 settings, a teacher (though not a counselor or support staff) is considered such an official, but this is not the case in collegiate settings. Even if staff knew of an incident at a college, the college would not be responsible for taking corrective action unless it was reported to the designated official(s), reducing offender accountability. Finally, the proposed shift to an “actual knowledge” standard discourages educational institutions from actively learning of incidents of sex-based harassment and discrimination and being proactive in understanding campus and classroom cultures and preventing incidents before they begin. In sum, this change to the knowledge standard erodes protections for students who have experienced sexual assault or harassment.

The second way that these proposed regulations reduce schools’ ability to take action to address gender-based discrimination and diminish access to education is by **explicitly limiting the purview of Title IX complaints to “conduct that occurs within its education program or activity.”** While the proposed regulatory language would not per se exclude off campus incidents from the purview of Title IX, there is not enough guidance proffered about the myriad situations that stem from the educational program or activity setting but do not occur on campus. Several studies have found that the majority of sexual assaults among undergraduate students occurs off campus.²⁰ Limiting the purview of complaints to this conduct could harm Boston students by restricting the type of gender-based discrimination complaints that can be made under Title IX. For example, a high school student who is being sexually harassed by a classmate via social media may not be eligible for Title IX relief under these regulations, even if their harasser is someone with whom they must spend hours a day in a classroom. Similarly, it is not clear if a college student who is sexually assaulted by a classmate off campus is eligible to file a Title IX complaint. Schools, colleges and universities ought to have broad authority to address gender-based disparities in educational settings.

The City of Boston opposes these proposed regulations because they reduce the ability of educational institutions to take action against sexual harassment under the auspices of Title IX. Narrowing the official reporting process, reducing the situations in which the school must respond to inappropriate sexual behavior, and limiting the situations in which schools must respond to sexual harassment would be detrimental to Boston’s students and educational institutions.

²⁰ Christopher P. Krebs, et al., Nat’l Inst. of Justice, *The Campus Sexual Assault Study 2-4* (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>; Bonnie S. Fisher et al., *The Sexual Victimization of College Women* 23 (U.S. Dept. of Justice, 2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

IV. Restrictive Evidentiary Standard Rules Reduce Institution Autonomy, Diminish Impact of Survivor Testimony

Finally, these regulations could impose an unnecessarily high evidentiary standard for Title IX grievance hearings. These proposed rules would create a complex system where grievance evaluations under Title IX would only be able to use the preponderance of the evidence standard “if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.” Instead, the proposed regulations would direct recipient educational institutions to utilize the more stringent “clear and convincing” standard of evidence, requiring the complainant to prove that an allegation is substantially more likely than not to be true.

Past Department of Education guidance instructed educational institutions to use the lower evidentiary standard, and rightly so. Incidents of sexual harassment and assault often have few witnesses except the parties directly involved, and it is very difficult and stigmatizing for some survivors to testify about their experiences. **Raising this evidentiary standard likely would reduce reports of sexual harassment, because survivor testimony may no longer be enough evidence.** To prevail in this difficult reporting process, a survivor would need to be able to overcome a high evidentiary hurdle, in addition to the stigma and trauma that can accompany reliving such a difficult experience.

Furthermore, the proposed regulations create **collateral consequences for educational institutions’ conduct codes**. The proposed standards could force educational institutions to re-shape their entire conduct codes, even on matters unrelated to sexual harassment, in order to comply with the Department’s specific rules pertaining to Title IX. By dictating to educational institutions what evidentiary standards and sanctions may be used and when, the Department of Education removes educational institutions’ ability to utilize evidentiary standards and sanctions that are tailored to their own student body’s needs and sense of justice.

Because the proposed regulations would create a burdensome filing and hearing process for survivors of sexual harassment, as well as negatively affect educational institution’s ability to structure their own conduct code, the City of Boston opposes the proposed regulations for Title IX.

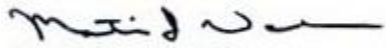
V. Conclusion

The proposed Title IX regulations would undermine the rights of Boston students who have experienced sexual harassment and assault. Whether in K-12 or undergraduate or graduate studies, students should not be discriminated against or excluded from educational opportunities due to their gender; women’s equality in our society requires that we address those violations in order to ensure access to education is not diminished by gender-based violence. Regrettably, the proposed rules would enable abusers and harassers to continue these behaviors by not holding them accountable, These regulations would create

a hostile Title IX complaint system, one that is more concerned about the “stigma and reputational harm that accompany an allegation of sexual misconduct”²¹ than the experiences and rights of survivors.

For the reasons discussed above, including our assertion that these proposed regulations would undermine gender equity in educational settings, we strongly oppose the proposed changes to the Title IX regulations. The Department of Education should refrain from changing the existing regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "Martin J. Walsh", with a long horizontal stroke extending to the right.

Martin J. Walsh
Mayor
City of Boston

²¹ Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance, 83 Fed. Reg. 230 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).