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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 1870–AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Mr. Marcus:

On behalf of the approximately 4000 members and supporters of the American Association of University Women Maryland (AAUW Maryland), I write in response to the Department of Education's (ED) Notice of Proposed Rulemaking ("NPRM" or "proposed rules") to express our strong opposition to the proposed rules relating to sexual harassment, including assault as published in the Federal Register on November 29, 2018.

Since 1881, AAUW has fought for the rights of women in education and the workplace. Through its Legal Advocacy Fund, AAUW has provided plaintiff support in numerous cases of sexual harassment and discrimination in education. Our research and advocacy funds support educating policymakers and promoting solutions to obstacles faced by women and families throughout society. All of our work leads to the conclusion that students cannot learn or work in environments that are not safe because of sexual harassment, including assault.

Sexual harassment pervades the lives of students. According to research by AAUW, sexual harassment can have damaging effects on academic outcomes, careers, families and even the health of those affected. Student activism on college campuses has brought to light a culture in which sexual harassment is still pervasive, and its harm too often ignored. AAUW research has found that women on college campuses and girls in junior high and high school frequently experience sexual harassment, sexual abuse or assault, and other crimes or behavior that constitute sex discrimination under Title IX. These experiences hurt their ability to focus on their academic goals and can diminish their equal access to educational opportunities.

In Crossing the Line: Sexual Harassment at School, AAUW found nearly half of students in grades 7-12 experienced harassment in the 2010–11 school year (56 percent of girls and 40

percent of boys).[1] Of that number, 87 percent said it had a negative effect on them. Furthermore, nearly two-thirds of college students experience sexual harassment at some point during college, including nearly one-third of first-year students, according to AAUW's Drawing the Line: Sexual Harassment on Campus.[2]

We believe Maryland's educational ecosystem has a problem identifying and handling sexual harassment, including assault at all levels of education. Even though several peer reviewed studies find sexual harassment to be rampant, 68.6 percent of higher education campuses in Maryland reported zero incidents of sexual assault, including rape and fondling, domestic violence, dating violence, and stalking — a shocking statistic given how frequently these incidents occur on campuses.[3] In addition, 85.9 percent of the public schools with students in grades 7 through 12 in Maryland disclosed zero reported allegations of harassment or bullying on the basis of sex.[4] These numbers do not square with what research shows students experience. Despite schools' legal obligation to address these issues, improvement in both welcoming students' reports of sexual harassment and violence — and accurately disclosing those incidents in annual reporting—has been slow at all levels of education. These findings further demonstrate our need for full enforcement of strong Title IX and the Clery Act provisions, not a rollback of critical protections for students who experience incidents that are already frequently under- and inaccurately reported.

Sexual harassment should never be the end of anyone's education. Yet these proposed rules would make schools more dangerous for all students.

Schools would be allowed—and, in many cases, required—to ignore students who report sexual harassment. For example:

- ***Notice:*** In many instances, schools would not be responsible for addressing sexual harassment, even when school employees knew about the harassment. For example, if a K-12 student told a non-teacher school employee they trust—such as a playground supervisor, guidance counselor, or athletics coach—that they had been sexually assaulted, their school would have no obligation to help them. If a K-12 student told a teacher that they had been sexually assaulted by a school employee, their school would have no obligation to help them. If a college student told their RA, TA, or professor that they had been raped, the school would have no obligation to help them. Under the proposed rules, Michigan State and Penn State would have had no responsibility to stop Larry Nassar and Jerry Sandusky—just because their victims reported sexual abuse to athletic trainers and coaches instead of employees with the "authority to institute corrective measures." In contrast, current Title IX guidance requires schools to respond to sexual harassment if almost any school employee either knows about it or should reasonably have known about it.
- ***Off-campus/online:*** Schools would be required to ignore harassment that occurs outside of a school activity, including most off-campus and online harassment. This conflicts with Title IX's statutory language, which does not depend on where the underlying conduct occurred but instead prohibits discrimination that "exclude[s a person] from participation in, . . . denie[s a person] the benefits of, or . . . subject[s a person] to discrimination under any education program or activity . . . ." (20 U.S.C. § 1681(a)). Current Title IX guidance also

recognizes this responsibility, as does the Clery Act, which requires colleges and universities to address sexual assault and other campus crimes.

- ***Definition of harassment:*** Schools would be required to ignore harassment until it becomes quite severe and harmful and denies a student educational opportunities. If a student is turned away by their school after reporting sexual harassment, they are unlikely to report a second time when the harassment escalates. And even if a school would be legally required to intervene later on, it may already be too late—the student might already be ineligible for an important AP course, disqualified from applying to a dream college, or derailed from graduating altogether. In contrast, both the Supreme Court and current Title IX guidance define "sexual harassment" as "unwelcome conduct of a sexual nature," requiring a response by the school before it effectively forces a student out of class or school.
- ***Deliberate indifference:*** Schools would be allowed to treat survivors poorly as long as the school follows various procedures in place, regardless of how those procedures fail to help or harm survivors. As long as a school ticked various procedural boxes, the school's response to harassment complaints could not be challenged. In contrast, current Title IX guidance requires schools to act "reasonably" in response to known sexual harassment by investigating, providing remedies, and preventing the harassment from occurring again.
- ***Supportive measures:*** Schools would be allowed to give survivors weak (or even harmful) "supportive measures." For example, a school might be barred from transferring a rapist to another class or dorm because it would "unreasonably burden" that him, thereby forcing a survivor to change all of her own class and housing assignments in order to avoid her rapist. In contrast, 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."
- ***Religious exemptions:*** Religious schools would be able to claim "religious" excuses for violating Title IX, even if the school had never before requested a religious exemption from ED. Students who are women and girls, LGBTQ students, pregnant or parenting students (including those who are unmarried), and/or students who access or attempt to access birth control or abortion would not know in advance whether the student's school is claiming the right to discriminate against them without any liability.

And in the rare cases when schools would be required to respond, they would be allowed—or even required—to deny harassment victims of due process. For example:

- ***Timeframe:*** There would be no clear timeframe for investigations, and schools would be able to delay taking any action if there is also an ongoing criminal investigation. Students who report sexual harassment should never be forced to wait months, or even more than a year, for any resolution of their complaints. In contrast, 2014 Title IX guidance (since rescinded) recommended that schools finish investigations within 60 days, and prohibited schools from delaying a Title IX investigation just because there was an ongoing criminal investigation.
- ***Presumption of no harassment:*** Schools would be required to presume that no harassment occurred. This presumption would exacerbate the rape myth that women and girls "lie" about sexual assault, when in fact more than 1 in 5 girls ages 14-18 are kissed or touched without their consent; and more than 1 in 5 women, nearly 1 in 18 men, and nearly 1 in 4 transgender and gender-nonconforming students are sexually assaulted in college. This presumption would also ignore the reality that men and boys are far more likely to be victims of

sexual assault than to be falsely accused of it. This presumption would also harm women and girls of color, LGBTQ students, pregnant and parenting students, and students with disabilities—all of whom are subject to harmful stereotypes that make schools less likely to believe them when they report sexual harassment. In contrast, current Title IX rules require schools to treat both students "equitabl[y]" and not make any presumptions about either student's credibility.

- ***Standard of proof:*** Many schools would be required to use an inappropriate and more demanding standard of proof to investigate sexual harassment than to investigate other types of student misconduct. The preponderance of the evidence—which means "more likely than not"—is the only standard of proof that treats both sides equally, and is consistent with Title IX's requirement that grievance procedures be "equitable." It is also the standard of proof used by federal courts in all civil rights cases, including all Title IX cases. In contrast, "clear and convincing evidence" is a standard of proof that tilts investigations in favor of the named perpetrator. It is inappropriate to use in any civil rights proceeding, especially school proceedings.
- ***Cross-examination:*** Survivors in college and graduate school would be required to submit to live cross-examination by their rapist's advisor of choice. This would further traumatize college and graduate school survivors who seek help through Title IX and would discourage many students--parties and witnesses--from participating in a Title IX complaint. Furthermore, survivors with disabilities (including many who develop mental illness such as post-traumatic stress disorder because of the assault) should not be required to submit to live cross-examination by their assailant's advisor. They should instead have the right to accommodations under Section 504 of the Rehabilitation Act and the ADA (e.g., written questions or live questioning by a neutral official, as the proposed rules would allow in K-12 schools).
- ***Appeals:*** Schools would be required to give unequal appeal rights with respect to sanctions. For example, if a student is found responsible for sexual harassment and given a disproportionately severe sanction, the perpetrator would be allowed to appeal for lower sanctions. However, if a perpetrator is given a sanction that is merely a slap on the wrist (e.g., a 1-day suspension for a rape), the survivor would not be allowed to seek more appropriate sanctions. In contrast, the previous guidance required schools to provide equal appeal rights—including equal grounds for appeal, and the Title IX rules require schools to treat both students "equitabl[y]."
- ***Mediation:*** Schools would be allowed to pressure survivors into mediation with their assailants. Mediation is never appropriate for resolving sexual assault, because sexual assault is never the victim's fault.

For the reasons detailed above, ED should immediately withdraw its current proposal and dedicate its efforts to advancing policies that ensure equal access to education for all students, including students who experience sexual harassment.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact Erin Prangley at erin.prangley@gmail.com to provide further information.

Erin Prangley
AAUW Maryland
Vice President, Policy

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[1] American Association of University Women. *Crossing the Line Sexual Harassment at School* (2013) at https://www.aauw.org/research/crossing-the-line/.
[2] American Association of University Women. *Drawing the Line: Sexual Harassment on Campus* (2005) at https://www.aauw.org/files/2013/02/drawing-the-line-sexual-harassment-on-campus.pdf.
[3] AAUW analysis of 2016 Clery Act reports, 2018.
[4] AAUW analysis of 2015-16 Civil Rights Data Collection, 2018