

January 30, 2019

Kenneth L. Marcus
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 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 Assistant Secretary Marcus:

We are scholars at the Williams Institute at the UCLA School of Law, a research institution that conducts social science and legal research and analysis of issues affecting LGBT people, including in education. We write to comment on certain provisions of the Department's proposal to amend rules implementing Title IX of the Education Amendments of 1972 as published in the Federal Register on November 29, 2018. These comments focus on those provisions of the proposed regulations on which we have particular expertise. We do not express our views on any of the provisions of the proposed regulations that are not discussed herein.

Founded 18 years ago, the Williams Institute is widely-recognized for its high-quality, independent, and rigorous research and analysis of data about LGBT people. Indeed, the U.S. Supreme Court and other courts, legislatures, executives, and government agencies have expressly relied on our research, as have educational institutions and businesses. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (citing amicus brief of Gary J. Gates); Dep't of Leg. Serv's, Maryland Gen. Assembly, Fiscal & Policy Note on Sen. Bill 2018 (2018) (citing Williams Institute research on conversion therapy); U.S. Dep't of Health & Human Serv's, Nondiscrimination in Health Programs and Activities, Final Rule, 81 Fed. Reg. 31376, 31457 (2016) (citing Williams Institute research on healthcare coverage).

I. LGBT Students Confront Harassment and Assault in School

Title IX protections against discrimination, harassment, and violence on the basis of sex are of vital importance to LGBT students, because such discrimination, harassment, and violence against LGBT students remains pervasive (though is underreported to authorities), and is damaging to their health, well-being, and education.

Recent data from K-12

- The 2017 Youth Risk Behavior Survey (YRBS), a nationally representative government survey of students in grades 9 through 12, found that LGB students were more likely to say that they experienced bullying than heterosexual students. One-third (33%) of LGB students said that they had been bullied on school property in the past year compared to 17% of

heterosexual students, and 27% of LGB students reported that they had been electronically bullied in the past year compared to 13% of heterosexual students.¹

- The 2017 National School Climate Survey (NSCS), a survey of 23,000 LGBTQ students ages 13 to 21 conducted by GLSEN, found that over 80% of LGBTQ students had experienced harassment or assault in school.² Respondents reported a range of negative experiences including verbal harassment, electronic harassment, physical harassment, physical assault, and sexual harassment. The students said that they were most frequently targeted because of their sexual orientation or gender identity. For example, 70% of LGBTQ students said that they were verbally harassed, 29% said that they were physically harassed, and 12% said that they were physically assaulted because of their sexual orientation.³ Similarly, 60% of LGBTQ students said that they were verbally harassed, 24% said that they were physically harassed, and 11% said that they were physically assaulted because of their gender expression.⁴
- The 2015 U.S. Transgender Survey, a national survey of 27,700 transgender adults, found that among transgender respondents who were out as transgender when they were k-12 students, 54% said that they had been verbally harassed, 24% said that they had been physically attacked, and 13% said that they had been assaulted while in k-12 schools.⁵
- A 2013 survey of over 10,000 LGBT and non-LGBT youth conducted by the Human Rights Campaign found that LGBT youth were more likely than non-LGBT youth to say that they had been verbally harassed or physically assaulted at school. About half (51%) of LGBT youth said that they had been verbally harassed or called names compared to 25% of non-LGBT youth, and 17% of LGBT youth said they had been physically assaulted, kicked, or shoved compared to 10% non-LGBT youth.⁶

Recent data from higher education

- The 2017 AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct found that LGBT undergraduate and graduate students were more likely than non-LGBT students to say that they had experienced sexual harassment and sexual assault. Sixty percent of lesbian or gay students and 69% of bisexual students said they had experienced sexual harassment while in college or graduate school compared to 46% of heterosexual students.⁷ LGBT students were also more likely to experience nonconsensual sexual contact by physical force or incapacitation than heterosexual students: 14% of gay or lesbian students and 25% of

¹ Laura Kann et al., *Youth Risk Behavior Surveillance – United States, 2017*, 67 MORBIDITY AND MORTALITY WEEKLY REPORT 1, 18-19 (2018).

² JOSEPH G. KOSCIW ET AL., GLSEN, 2017 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION’S SCHOOLS 23-26 (2018).

³ *Id.*

⁴ *Id.*

⁵ SANDY JAMES ET AL., 2015 U.S. TRANSGENDER SURVEY 11 (2016).

⁶ HUMAN RIGHTS CAMPAIGN, GROWING UP LGBT IN AMERICA: HRC YOUTH SURVEY REPORT KEY FINDINGS 16 (2013).

⁷ DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 104 (2017).

bisexual students reported experiencing non-consensual sexual contact while in college or graduate school compared to 11% of heterosexual students.⁸

- Additionally, in response to the AAU survey, three-quarters (75%) of transgender, genderqueer, and gender non-conforming (TGQN) undergraduate students and 69% of TGQN graduate students reported experiencing sexual harassment while in school compared to 62% of cisgender female undergraduates, 43% of cisgender male undergraduates, 44% of cisgender female graduate students, and 30% of cisgender male graduate students.⁹
- In response to the 2015 U.S. Transgender Survey, 24% of respondents who were out as transgender in college or vocational school reported that they had been verbally, physically, or sexually harassed at school.¹⁰

Discrimination, harassment, and violence lead to negative outcomes and health disparities for LGBT people

What is more, research connects the discrimination, harassment, and violence that LGBT people experience to a variety of negative outcomes and population health disparities, compared to non-LGBT people.

- In response to the 2017 YRBS, LGB high school students were more than twice as likely to report feeling sad or hopeless and more likely to report suicidal thoughts than heterosexual students. Nearly two-thirds (63%) of LGB students said that during the past year, they felt so sad or hopeless that they stopped doing their normal activities for two or more weeks in a row compared to 28% of heterosexual students.¹¹ In addition, almost half (48%) of LGB students reported that they had seriously considered suicide in the past year compared to 13% of heterosexual students, and 23% of LGB students said they had attempted suicide in the past year compared to 5% of heterosexual students.¹²
- LGB respondents to the 2017 YRBS were also more likely than non-LGB respondents to report that they did not go to school at least once in the prior month because they felt unsafe (10% of LGB students compared to 6% of non-LGB students).¹³
- Sixty-percent of LGBTQ respondents to the 2017 NSCS said that they felt unsafe at school because of their sexual orientation and 45% said that they felt unsafe because of their gender expression.¹⁴ Over one-third (35%) of LGBTQ students said that they had missed at least one day of school in the past month because they felt unsafe, and 18% of LGBTQ students had to change schools because they felt unsafe or uncomfortable.¹⁵

⁸ *Id.* at 102.

⁹ *Id.* at 87.

¹⁰ JAMES ET AL., *supra* note 5 at 131.

¹¹ Kann et al., *supra* note 1 at 23-24.

¹² *Id.* at 24-26.

¹³ *Id.* at 19.

¹⁴ KOSCIW ET AL., *supra* note 2 at 14-16.

¹⁵ *Id.*

- The 2017 NSCS also found that LGBTQ students who had experienced victimization at school had lower GPAs, were less likely to go to college, and had higher levels of depression and lower self-esteem than students who were not victimized.¹⁶
- In response to the 2015 U.S. Transgender Survey, respondents who had negative experiences at k-12 school were more likely to have attempted suicide and to have experienced psychological distress than respondents who did not have negative experiences when they were students.¹⁷ In addition, 17% of respondents who were out as transgender when they were k-12 students said that they experienced such severe harassment as a student that they had to leave school as a result.¹⁸
- A 2009 report by the National Education Association found that, nationwide, approximately half of LGBT students who said that they experienced frequent or severe verbal harassment because of their sexual orientation or gender identity missed school at least once a month, and about 70% who said they experienced frequent or severe physical harassment missed school more than once a month.¹⁹ The report also found that LGBT youth were almost twice as likely to consider dropping out of school as their non-LGBT peers.²⁰
- Several other studies have also linked bullying of LGBT youth to poorer academic performance and higher rates of absenteeism for these students.²¹

LGBT students underreport discrimination, harassment, and violence

Another challenge for LGBT students is not feeling safe or comfortable to report discrimination, harassment, and violence.

- The 2017 NSCS found that the majority of LGBTQ k-12 students who experienced harassment or assault did not report the incidents to school staff. Over half (55%) of LGBTQ students said they never reported the incidents to school staff, and 27% said they reported

¹⁶ *Id.* at 43.

¹⁷ JAMES ET AL., *supra* note 5 at 132.

¹⁸ *Id.* at 11.

¹⁹ ROBERT KIM, NATIONAL EDUC. ASSN., REPORT ON THE STATUS OF GAY, LESBIAN, BISEXUAL AND TRANSGENDER PEOPLE IN EDUCATION: STEPPING OUT OF THE CLOSET, INTO THE LIGHT 30 (2009), <http://www.nea.org/assets/docs/HE/glbstatus09.pdf>.

²⁰ *Id.*

²¹ E.g., Joseph P. Robinson & Dorothy L. Espelage, *Bullying Explains Only Part of LGBTQ-Heterosexual Risk Disparities: Implications for Policy and Practice*, 41 EDUC. RESEARCHER 309 (2012); Alicia L. Fedewa & Soyeon Ahn, *The Effects of Bullying and Peer Victimization on Sexual-Minority and Heterosexual Youths: A Quantitative Meta-Analysis of the Literature*, 7 J. GLBT FAMILY STUDIES 398 (2011); Shelley L. Craig & Mark S. Smith, *The Impact of Perceived Discrimination and Social Support on the School Performance of Multiethnic Sexual Minority Youth*, YOUTH SOC'Y 1 (2011); ELIZABETH M. DIAZ & JOSEPH G. KOSCIW, GLSEN, SHARED DIFFERENCES: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS OF COLOR IN OUR NATION'S SCHOOLS (2009); MASS. DEP'T OF EDUC., MASSACHUSETTS HIGH SCHOOL STUDENTS AND SEXUAL ORIENTATION: RESULTS OF THE 2009 YOUTH RISK BEHAVIOR SURVEY; Jennifer Pearson, Chandra Muller & Lindsey Wilkinson, *Adolescent Same-Sex Attraction and Academic Outcomes: The Role of School Attachment and Engagement*, 54 SOC. PROBLEMS 523 (2007); Stephen T. Russell, Hinda Seif & Nhan L. Truong, *School Outcomes of Sexual Minority Youth in the United States: Evidence from a National Study*, 24 J. ADOL. 111 (2001).

incidents to school staff only sometimes.²² Most students (60%) who did report incidents to school staff said that staff did not do anything in response or told the student to ignore the harassment.²³

- The 2017 AAU survey found that transgender, genderqueer, and gender non-conforming undergraduate and graduate students were less likely to report incidents of sexual harassment and assault to an agency or program than cisgender students. For example, 41% of TGQN students who had experienced penetration by force said that they did not report the incident compared to 26% of cisgender female and 23% of cisgender male students who experienced the same.²⁴ And, 15% of TGQN students said that they did not report sexual harassment, compared to 9% of cisgender female and 5% of cisgender male students.²⁵ TGQN students were also less likely than cisgender students to say that they believed that campus officials would take action against the offenders if they reported the incidents.²⁶

II. LGBT Students Are Protected Under Title IX

As you know, Title IX prohibits discrimination on the basis of sex in educational programs and activities receiving Federal funding. An increasing number of courts have interpreted Title IX Title VII, and similar statutes to prohibit discrimination on the basis of gender identity and sexual orientation, because discrimination on either of these bases is discrimination on the basis of sex. The U.S. Court of Appeals for the Sixth Circuit, among other courts and the EEOC, have held that discrimination against someone because of their gender identity, transgender status, or gender transition is discrimination on the basis of sex. *See, e.g., Equal Emp. Opp. Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018) (Title VII); *M.A.B. v. Board of Education of Talbot County*, 286 F. Supp. 3d 704 (D. Md. March 12, 2018) (Title IX); *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012) (Title VII). As the Sixth Circuit explained in *R.G. & G.R. Harris Funeral Homes*, discrimination on the basis of gender identity, transgender status, or transitioning gender is inherently sex-based. 884 F.3d at 577.

Similarly, two U.S. Courts of Appeals sitting en banc, among other courts and the EEOC, have held that sexual orientation discrimination is per se sex discrimination under Title VII. *See, e.g., Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017); *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015). As the Second Circuit explained in *Zarda*, because “sex is necessarily a factor in sexual orientation[,]” “sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination.” 883 F.3d at 112.

But whether or not OCR agrees with those legal interpretations, and we acknowledge case law to the contrary, it is clear that Title IX prohibits discrimination on the basis of sex stereotyping.

²² KOSCIW ET AL., *supra* note 2 at 28.

²³ *Id.* at 31.

²⁴ CANTOR ET AL., *supra* note 7 at 110.

²⁵ *Id.* at 112.

²⁶ *Id.* at 116.

See, e.g., U.S. Dep’t of Justice, Title IX Legal Manual, <https://www.justice.gov/crt/title-ix> (discussing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)). Sex stereotyping underlies discrimination, harassment, and assaults against LGBT students qua LGBT people. Indeed, as several courts have recently held: “By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.” *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) (citing *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004)). Likewise, courts have held that sexual orientation discrimination cannot be untangled from stereotypes about how people should behave and look in terms of sex. See, e.g., *Zarda*, 883 F.3d at 119-23.

OCR has recognized that LGBT students are protected under Title IX²⁷ and OCR must make good on its obligation to enforce Title IX in this regard. And such enforcement would, research suggests, benefit all students in terms of safer schools and better mental health. For example, a recent study found that anti-bullying statutes that expressly protected students from bullying based on sexual orientation were associated with lower risk for suicide attempts and serious attempts requiring medical attention and lower risk for forced sexual intercourse. These statutes were also associated with feeling safe at school or on the way to or from school. Importantly, the results did not differ by sexual orientation, indicating that explicitly protecting against anti-LGBT bullying benefits all students.

III. The Proposed Regulations Reduce Schools’ Obligations to Prevent and Address Sexual Harassment and Assault

A. Standards Governing School Accountability

Proposed Section 106.44(a) sets out the core standards under which the Department proposes to hold schools accountable for sexual harassment and assault. The Section provides that:

A recipient with **actual knowledge** of **sexual harassment** in an education program or activity of the recipient against a person in the United States must respond in a manner that is not **deliberately indifferent**. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

(Emphasis added.)

²⁷ See e.g., U.S. Dep’t of Justice and U.S. Dep’t of Education, Dear Colleague Letter (Feb. 22, 2017) (“All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.”).

As the Department acknowledges, these standards depart from the longstanding interpretations that have historically governed the Department's enforcement of Title IX. As the preamble to the proposed regulations explicitly recognizes,

proposed section 106.44(a) would adopt standards that depart from those set forth in prior guidance and OCR enforcement of Title IX. The Department's guidance and enforcement practices have taken the position that constructive notice – as opposed to actual notice – triggered a recipient's duty to respond to sexual harassment; that recipients had a duty to respond to a broader range of sex- based misconduct than the sexual harassment defined in the proposed regulation; and that recipients' response to sexual harassment should be judged under a reasonableness standard, rather than under the deliberate indifference standard adopted by the proposed regulation²⁸.

Each of these changes stands to place students, including LGBT students in particular, at risk of increased levels of harassment and assault and, by reducing the obligations of schools to prevent and address harassment in effective ways, threatens to undermine the safety of school climates. The standards further put schools at risk of being found liable in court for failing to meet their responsibility under the statute to take “prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects.”²⁹

○ Notice Requirements

Under the proposed regulations, schools are required to address harassment only if specified officials have “actual knowledge” of its occurrence. As Section 106.44(e) makes clear, the Department proposes to significantly constrain the circumstances in which it will find the level of notice that will trigger this obligation:

(6) *Actual knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment. Imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge.

This is a substantial weakening of currently applicable standards. Under the 2001 guidance, OCR requires that schools address student-on-student harassment if a broad swathe of

²⁸ 83 Fed. Reg. 61468-69.

²⁹ U.S. Dep't of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> at iii (hereinafter *2001 Guidance*).

employees³⁰ “knew, or in the exercise of reasonable care should have known”³¹ about the harassment. In the context of employee-on-student harassment, the 2001 Guidance requires schools to address the harassment when an employee “is acting (or . . . reasonably appears to be acting) in the context of carrying out . . . responsibilities over students” and engages in sexual harassment, “whether or not the [school] has ‘notice’ of” it.³²

While the Supreme Court has required that particular school officials have actual notice of sexual harassment before a school can be held liable for *damages*, see *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998) (employee on student harassment); *Davis v. Monroe Cty. Bd. Of Educ.*, 526 U.S. 629 (1999) (student on student harassment), the Court has made clear that this standard does not “define the scope of behavior that Title IX proscribes.”³³ As OCR stated in its 2001 Guidance, there is good reason to recognize this distinction: “[i]n contrast [to private lawsuits for money damages], the process of administrative enforcement requires agencies such as OCR to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.”³⁴

There are critical practical and policy, as well as legal, reasons to hold schools accountable for failing to respond to harassment even in circumstances in which there is insufficient “notice” to trigger damages liability. The proposed regulations require not only that there be “actual knowledge” of the harassment before a school is obligated to address it, but that that knowledge be gained by a Title IX coordinator; a K-12 teacher (but only for student-on-student harassment, *not* employee-on-student harassment); or an official who has “the authority to institute corrective measures.” But these standards ignore the reality that many students who disclose sexual harassment may do so to employees who do not have the authority to institute corrective measures, both because students seeking help turn to the adults they trust the most and because students are not informed about which employees have authority to address the harassment. Particularly in K-12 schools, it is unreasonable to expect students to understand that their schools will take action to address harassment only if the students have reported the problem to a very narrow subset of school employees.

Moreover, the “actual knowledge” requirement of the proposed regulations creates perverse incentives for schools to shield themselves from knowledge of harassment in school programs. In order to maximize the safety of their students, schools should be encouraged to institute effective procedures to take appropriate action to address harassment – even before it amounts to a legal violation for which the schools can be liable in damages. Section 106.44 contravenes that goal and stands to undermine the safety of school environments.

³⁰ “Responsible employees” are defined in the Guidance to include “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.

³¹ *Id.*

³² *2001 Guidance* at 10.

³³ *Davis*, 526 U.S. at 639.

³⁴ *2001 Guidance* at iii-iv.

○ Definition of Sexual Harassment

The proposed regulations define the “hostile environment” sexual harassment that schools are obligated to address as “[u]nwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.” Section 106.44(e)(1)(ii).

But this definition is problematic in two ways. First, the proposed regulations suggest that schools have no obligation to act until the harassment has reached a level that could subject the school to damages liability under Title IX. But the goal of Title IX is to create safe and equitable learning environments for students – a goal that is undermined unless schools are expected to take steps that will prevent unwelcome conduct from developing *into* the type of hostile environment that will amount to a violation of the law for which they can be held liable in damages. There are numerous steps that schools can – and should be required to – undertake when unwelcome conduct (short of a hostile environment) occurs in their programs and activities, including publicizing the school’s anti-harassment policies, offering training for staff and students, or engaging in school-wide conversations about appropriate behavior. Where schools decline to take appropriate remedial steps in response to the warning signs of conduct that may create a hostile environment – and where there is no accountability for their failure to do so – the risks to student safety can be dramatically increased.

Moreover, the proposed regulations require that the harassment be “severe, pervasive, *and* objectively offensive” before schools are obligated to address it. Section 106.44(e)(1)(ii) (emphasis added). While that conjunctive formulation was adopted in *Davis* as the standard to govern school liability for monetary damages, it is inappropriate to apply it when assessing school responsibility to take steps to prevent harassment or to respond effectively when it occurs.

It is indisputable that schools cannot, and should not, police all social interactions (and even unpleasant ones) and thus that Title IX requires a level of seriousness before unwelcome conduct becomes unlawful. “It is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists.”³⁵ But as OCR recognized in the *2001 Guidance*, “[o]nce a school has notice of *possible* sexual harassment of students – whether carried out by employees, other students, or third parties – it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.”³⁶

That standard is satisfied, in the context of OCR assessment of the sufficiency of a school’s response, by requiring that the harassment be severe *or* pervasive. As noted above, to satisfy the purposes of Title IX, OCR enforcement should incentivize schools to take appropriate action to prevent harassment from becoming so severe and pervasive that it could result in damages

³⁵ *2001 Guidance* at 6.

³⁶ *2001 Guidance* at 15 (emphasis added).

liability. To do otherwise would mean that schools could not be held accountable if they failed to respond to a complaint that a student was, for example, subjected to a single rape or sexual assault because such rape or assault may not satisfy the pervasiveness required under the proposed regulation. Similarly, the proposed standard would create confusion about a school's responsibility to act in response to repeated complaints of bullying that was not adjudged by the school to be sufficiently "severe". The standard of the proposed regulations disserves students and undermines the goals of Title IX.

Requiring schools to take appropriate action to address unwelcome conduct based on sex that is severe *or* pervasive also aligns with the standards of Title VII, with which Title IX is often read in concert.³⁷ Particularly given the *parens patriae* role that schools often play with regard to their students, it is inappropriate to provide students with less protection than is accorded to employees of the schools in which they are enrolled.

○ *Application of deliberate indifference standard*

As noted above, Proposed Section 106.44(a) imposes on schools the obligation to respond to sexual harassment of which the school has actual knowledge only in a way that is "not deliberately indifferent." The section goes on to state that "[a] recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in the light of the known circumstances." *Id.*

The deliberate indifference standard provides considerably less protection for students who are subject to harassment than the longstanding standards enforced by OCR for almost two decades. *See 2001 Guidance* at 12 (schools must "take *prompt and effective corrective action* to end the harassment and prevent its recurrence" in response to student-on-student harassment) (emphasis added). As OCR recognized in the Guidance, "if, upon notice, the school fails to take prompt, effective action, the school's own inaction has permitted the student to be subjected to a hostile environment that denies or limits the student's ability to participate in or benefit from the school's program on the basis of sex." *Id.*

Although the Supreme Court in *Gebser* and *Davis* adopted deliberate indifference as the applicable standard for assessing damages liability, OCR – as it has itself recognized in the proposed regulations – "is not required to adopt the deliberate indifference standard articulated by the Court" for purposes of its administrative enforcement.³⁸ And there are compelling reasons for OCR not to do so. By adopting the deliberate indifference standard for assessing liability across the board, the proposed regulations reduce schools' obligations to take action to address harassment and assault in ways that protect their students before those students would be eligible to seek monetary damages. By insulating schools from any accountability for responding to

³⁷ *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (harassment violates Title VII when it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'" (internal citations omitted); *see also* EEOC, *Policy guidance on Current Issues of Sexual Harassment* (March 1990), available at <https://www.eeoc.gov/policy/docs/currentissues.html> ("a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severe the harassment, the less need to show a repetitive series of incidents").

³⁸ 83 Fed. Reg. 61468.

harassment as long as the schools' actions were not "clearly unreasonable," the proposed regulations contravene OCR's longstanding understanding that "[p]reventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn."³⁹

As is true with regard to the proposed requirement that harassment be both severe and pervasive before a school is obligated to respond, the proposed rule's treatment of deliberate indifference also means that school employees subject to harassment will have greater protection under the law than do their students. Under Title VII, if an employee is harassed by a coworker or other third party, the employer is liable under negligence principles, "*i.e.*, if the employer knew or reasonably should have known about the harassment but failed to take remedial action".⁴⁰ If the employee is harassed by a supervisor, the employer is automatically liable if the harassment resulted in a tangible employment action such as firing or demotion, and otherwise unless the employer can prove that it exercised reasonable care to prevent and correct promptly the harassing behavior and the employee unreasonably failed to take advantage of opportunities offered by the school to address the harassment.⁴¹ These standards require that schools exercise a higher duty of care for employees than the standard OCR would apply for students in the charge of those employees, even for those who are minors.

B. Standards Governing Claims for Religious Exemptions

Under the current Title IX regulations, religious schools may claim religious exemptions by notifying the Department in writing and identifying which Title IX provisions conflict with the schools' religious beliefs. 34 CFR 106.12 (a), (b). The proposed rules remove that requirement and permit schools to opt out of Title IX compliance in response to a complaint, without advance notice or warning to the Department or students. Proposed Regulation, Section 106.12(b).

This proposed change to longstanding legal standards would enable schools to mount post-hoc efforts to shield themselves from liability if harassment complaints are filed against them, but not to have notified the Department – or their students – that they believe that certain provisions of Title IX do not apply to them. But students and parents should have the opportunity to make determinations about school attendance based on full information about a school's commitment to non-discrimination obligations; knowledge that a school intends to claim exemptions from those obligations could lead students to make different choices in evaluating school options.

Moreover, the standard of the proposed regulations is in some tension with the current and proposed requirement that schools "notify" applicants, students, and employees that they do not discriminate on the basis of sex. 34 CFR 106.9(a); Proposed Rule 106.8(b)(1). Where OCR is prepared to countenance claims for exemptions once complaints of discrimination have been filed, any such "notification" can become hollow and deceptive.

³⁹ 2001 Guidance at ii.

⁴⁰ *Vance v. Ball State Univ.*, 570 U.S. 421, 427 (2013).

⁴¹ *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998).

Additionally, we are unaware of any religious beliefs that would condone subjecting students to an unsafe learning environment. While religious institutions may assert that there are tensions between their religious beliefs and certain Title IX requirements with regard to nondiscrimination, it is unclear which – if any – religious tenets would conflict with Title IX obligations for schools to prevent, and respond appropriately to, harassment and assault on the basis of sex. Facilitating religious objections under these circumstances thus would upset the careful balance that Title IX draws between civil rights and religious liberties.

C. Refusal to seek damages in administrative enforcement

Proposed 106.3(a) provides that OCR may order schools to “take such remedial action as [it] deems necessary to remedy the violation,” but explicitly bars “assessment of damages against the recipient” as part of the remedy. This exclusion deprives OCR of a potentially applicable remedy that can provide relief to a claimant and create a deterrent effect on an educational institution that is found liable for a violation of Title IX. And given that the rescission of federal funding is often a draconian remedy, limiting its enforcement and remedial options can mean that OCR will be unable to seek any effective remedy for violations for which it is unwilling to impose the sanction of fund rescission.

IV. Conclusion

Thank you for the opportunity to submit comments on the proposed regulations. Please do not hesitate to contact Jocelyn Samuels at samuels@law.ucla.edu with questions or for further information.

Sincerely,

Jocelyn Samuels
Christy Mallory
Adam Romero

The Williams Institute
UCLA School of Law