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Submitted via www.regulations.gov

Kenneth L. Marcus
Assistant Secretary for Civil Rights
U.S. 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,

As the nation's leading organization for LGBTQ families and those who wish to form them, Family Equality Council represents a community of parents, children, grandparents, and grandchildren that reaches across the United States. We write to express our strong opposition to Proposed Regulation ED-2018-OCR-0064, published in the Federal Register on November 29, 2018.

LGBTQ youth experience higher rates of sexual harassment in schools than their peers, so the U.S. Department of Education's proposed additions and amendments to Title IX's implementing regulations regarding sexual harassment have a direct impact on our community. Unfortunately, instead of enforcing Title IX to protect students from mistreatment and discrimination, these proposed rules undermine basic protections and create additional obstacles for survivors, as well as allow schools to opt out of Title IX's requirements without any advance notice. While these proposed regulations are detrimental to all students, the impact is heightened for LGBTQ students who are at a greater risk to begin with.

LGBTQ students are at a heightened risk for experiencing sexual assault and harassment and face many barriers to reporting sexual assault to authorities.

According to the 2017 National School Climate Survey (NSCS), a staggering number of LGBTQ students – **over 80%** – experience harassment or assault at school, and **over 57%** were sexually assaulted at school.¹ All too often, the impact on the victims includes missed educational opportunities or even dropping out of school. The NSCS found that LGBTQ students who faced higher levels of in-school victimization were three times more likely to have missed school in the past month because they felt unsafe, were less likely to plan to pursue post-secondary education, and had lower GPAs than other students.²

¹ Kosciw, J. G., Greytak, E. A., Zongrone, A. D., Clark, C. M., & Truong, N. L. (2018). *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*. New York, NY: GLSEN, pp. 23-26.

² *Id.* at p. 43.

As with other survivors, LGBTQ students' experiences of sexual assault and harassment frequently go unreported. In fact, in 2017, the majority of LGBTQ students who were harassed or assaulted at school did not report these incidents to school staff.³ The most common reasons students cited for not reporting were doubts that school officials would help and fears that reporting the incidents would make the situation worse.⁴ Many LGBTQ students also were uncomfortable approaching school staff, fearing they would be mistreated, disbelieved, or blamed by the staff for their own assault.⁵

Students who did report their experiences to school staff often found that the response was inadequate. Sixty percent said that school staff did nothing in response or just told them to ignore the harassment. And, over one in five (21%) students who reported harassment said that school staff told them to change their behavior to avoid harassment (i.e., they were told not to act "so gay" or not to dress in a certain way).⁶

As discussed below, instead of working with students and schools to decrease these barriers, the Department's proposed regulations exacerbate them by making it even harder for students to report harassment and get the help they need to be able to continue their education.

The proposed rules redefine sexual harassment and create obstacles to reporting and investigations that will discourage survivors from coming forward, putting students in danger and subverting the purpose of Title IX.

Section 106.30 of the proposed regulation narrowly redefines sexual harassment under Title IX, allowing schools to ignore all but the worst cases and adding an additional requirement that the harassment must effectively deny equal access to education, such as causing a student to drop out. Under this definition, a student who is subjected to severe harassment but remains in school may not be protected, creating the perverse effect of requiring students to leave school and/or otherwise drastically interrupt their education for action to be taken. As previously mentioned, missed educational opportunities are a frequent and unfortunate result of harassing behavior – the purpose of Title IX is to prevent these missed opportunities, not to require a victim to suffer them.

Further, under §§ 106.30 and 106.45(b)(3), schools are required to ignore harassment that occurs outside of school activities, even when the harassment directly impacts the victim's education. Over 80% of undergraduate college students live off-campus,⁷ and most sexual assaults occur in students' homes and rooms. Further, risks increase as students spend more time online. A 2011 study showed that 30% of all students in grades 7-12 experienced sexual harassment online, which negatively impacted their desire to go to school, study, and sleep, and increased

³ *Id.* at p. 28.

⁴ *Id.* at p 29.

⁵ *Id.*

⁶ *Id.* at p.31.

⁷ U.S. Dep't of Housing and Urban Dev., *Barriers to Success: Housing Insecurity for US. College Students*, pp. 9-10 (Feb 2015), available at https://www.huduser.gov/portal/periodicals/insight/insight_2.pdf.

absenteeism.⁸ Preventing schools from investigating incidents that occur under these circumstances ignores reality for many students and exacerbates the danger for students off-campus.

An additional barrier placed by the proposed regulation is in § 106.44, which states that schools must respond only when they have “actual knowledge,” defined as notice to a Title IX coordinator, an official “with authority to institute corrective measures,” or a teacher in the elementary-secondary level. This is a far departure from prior enforcement of Title IX and puts a heavy burden on victims. Research shows that many students do not report because they are unsure to whom to make the report.⁹ Requiring victims to seek out a specific individual likely will result in more reports that are not acted upon and more victims who are stifled from reporting. Even if students do find the “right” person to report to, this section alters the standard of evaluating a school’s response from reasonableness to “deliberate indifference. Thus, schools are shielded from accountability even when they mishandle or do the bare minimum when responding to a report, thereby exacerbating victims’ existing concerns of an ineffective response from the school.

Additionally, § 106.45 creates new requirements for grievance procedures that schools must adopt, and the proposed procedures inequitably favor the named harasser. For example, § 106.45(b)(4)(i) requires schools to apply a higher standard of proof – clear and convincing evidence – to sexual harassment complaints. This increases the burden of proof on the victim and is both inequitable and impractical. The Department’s justification for applying the clear and convincing evidence standard focuses solely on the potential consequences to the respondent while failing to consider the grave emotional, mental, and financial consequences to the victim, as well as the impact on the victim’s education. Moreover, application of this higher standard is impractical as most sexual assaults are committed by someone the victim knows and take place in private¹⁰ where there are only two witnesses – the victim and the assailant – and there is little corroborating evidence. As another example of the gross inequity of the new proposed grievance procedures, § 106.45(b)(3)(vii) mandates that colleges and universities retraumatize survivors by forcing them to submit to live cross-examination by their named harasser’s advisor of choice. Again, the Department failed to properly consider the devastating impact of such a cross-examination on the survivor and the deterrent effect that such a rule will have on survivors when deciding whether to report the harassment or assault that occurred.

All students deserve to have the support of their school and any harassment they face investigated and properly redressed under Title IX. However, the changes detailed above have the opposite result. In an environment where so many survivors are hesitant to report, including LGBTQ students who already suffer higher rates of sexual assault and harassment than their

⁸ Hill, Catherine & Kearn, Holly, “*Crossing the Line*”: *Sexual Harassment at School* at 11, 25. American Association of University Women (Nov 2001), available at <https://www.aauw.org/research/crossing-the-line/>.

⁹ Holland, Kathryn J. & Cortina, Lilia M., “*It Happens to Girls All the Time*”: *Examining Sexual Assault Survivors’ Reasons for Not Using Campus Supports*. *American Journal of Community Psychology*, 59(1), 50-64 (March 2017).

¹⁰ “Perpetrators of Sexual Violence: Statistics,” RAINN, at <https://www.rainn.org/statistics/perpetrators-sexual-violence>.



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peers, imposing these additional obstacles will further the chilling effect on the survivor. Students who see that other students' reports were not acted upon, were mishandled, or resulted in re-traumatization are likely to be further discouraged from reporting their own experiences.

Changes to § 106.12 would allow religious colleges and universities to discriminate without warning, placing LGBTQ students at higher risk.

Current Title IX regulations allow religious institutions to claim an exemption from Title IX by providing a written notification to the Department detailing the regulatory provisions that are inconsistent with their religious tenets. The proposed rule eliminates this provision and allows religious institutions to raise its exemption *after* the discrimination has occurred.

Many LGBTQ students are people of faith and should not have to avoid attending religious colleges and universities due to a lack of transparency. Churches and religious institutions – even those within the same faith tradition -- are not always consistent in their acceptance of LGBTQ people, thus many students may not realize that a college or university may not be welcoming based solely on the faith tradition of the institution.

Students deserve the opportunity to select a school based on full information regarding a university's ability and possible intent to legally discriminate against the student. For some students, this information may lead them to choose a different school or transfer to another university. Without communication between religious institutions and the Department of Education clarifying the school's religious exemption, current and prospective students and their families will lack the information necessary to make informed decisions and are at risk for not understanding the consequences of attending a particular institution.

Conclusion

As the proposed regulation undermines protections for survivors of sexual harassment and assault and puts students at a higher risk of discrimination, it is contrary to the purpose of Title IX, and we urge the Department not to adopt these provisions.

Respectfully,

A handwritten signature in black ink that reads "Denise E. Brogan-Kator".

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A handwritten signature in black ink that reads "Mary Rohmiller".

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