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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA – UAW

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VICE-PRESIDENTS: TERRY DITTES • CINDY ESTRADA • RORY L. GAMBLE

January 28, 2019

Brittany Bull, Esq.  
U.S. Department of Education  
400 Maryland Avenue SW, Room 6E310  
Washington, DC 20202

Re:    **Docket ID ED-2018-OCR-0064**  
      **Formal Comment – Notice of Proposed Rulemaking**  
      **Nondiscrimination on the Basis of Sex in Education Programs or Activities**  
      **Receiving Federal Financial Assistance**

Dear Ms. Bull:

On behalf of more than seventy thousand members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (“UAW”) and its affiliated Local Unions, employed at public and private universities around the United States, I write in response to the Department of Education’s (“ED” or “Department”) Notice of Proposed Rulemaking (“NPRM” or “proposed regulations”) to express the UAW’s strong opposition to the proposed regulations relating to sexual harassment as published in the Federal Register on November 29, 2018. The UAW has a long history of fighting to expand civil rights, has long supported robust enforcement of Title IX as a mechanism to ensure fair and equal access to a quality education at our universities, and sees these proposed regulations as a major step backwards.

The UAW represents academic student employees, postdoctoral scholars, and academic researchers at public and private universities around the United States, including the University of California and the Lawrence Berkeley National Laboratory, California State University, Columbia University, the University of Connecticut, Harvard University, the University of Massachusetts, the New School for Social Research, New York University, and the University of Washington. Our members include graduate and undergraduate students who work as research and teaching assistants while pursuing degrees, as well as postdoctoral scholars who have already completed their doctoral degrees and who conduct research in academia, and professional researchers. The majority of our members are relatively short-term employees, many with semester-long or year-long contracts that are subject to renewal at the end of each term. Their continued assignments and success are often at the discretion of an individual professor or a select group of superiors who have significant control over the employee’s future career opportunities. A robust and timely resolution process to any complaints of sexual assault or harassment is thus critical. As numerous recent studies show, sexual assault and harassment happen far too frequently in graduate and post-graduate school programs. For a young scholar, this can mean not only lack of equal access to education but also exclusion from a fair chance at an academic career in the United States’ world-renowned universities. The proposed regulations would exacerbate these existing issues rather than effecting positive change, therefore, for the reasons explained below, the UAW opposes their adoption.

**I.        DEFINITIONS AND RECIPIENT’S RESPONSE TO SEXUAL HARASSMENT ALLEGATIONS**  
**(PROPOSED SECTIONS 106.30 and 106.44)**

**A. The Proposed Regulations in Sections 106.30 and 106.44 Create Inappropriate Roadblocks to Proper Investigation of Credible Sexual Assault and Harassment Allegations and Are Not Supported by Supreme Court Precedent.**  
(Proposed Sections 106.30, 106.44(a), and 106.44(b)).

Contradicting the purpose and intent of Title IX, the proposed regulations create conditions that would limit a recipient's requirement to even investigate a claim of sexual assault or harassment. All credible allegations of sexual assault or harassment should be investigated, and the proposed regulations that restrict a recipient's duty to respond to a complaint based on "actual knowledge" (proposed regulation 106.30); narrow the definition of "sexual harassment" (proposed regulation 106.30); and only require the recipient to show more than "deliberate indifference" to actually address the allegations (proposed regulation 106.44(a)) completely eviscerate any possibility for a survivor to have effective relief at the outset of making a complaint. Furthermore, Supreme Court precedent does not justify the adoption of these regulations, which conflate the standard relating to a **private cause of action for monetary damages** under Title IX with **general liability and administrative enforcement** by the Department under Title IX.

The plain language of Title IX states the purpose of the statute: "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...." 20 U.S.C., § 1681(a). "Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also 'to provide individual citizens **effective protection** against those practices.'" *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005) [emphasis added] (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)).

The Supreme Court has noted its "repeated holdings construing 'discrimination' under Title IX broadly," explaining that it "covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach." *Id.* at 174. See also *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) ("There is no doubt that if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language." (cited in *Jackson*, 544 U.S. at 175)); S. Rep. No. 100-64, at 5 (1987) ("Congress also intended that Title IX, the first of several discrimination statutes modeled on Title VI, also be broadly interpreted."). "Indeed, the word 'broad' is used 35 times in the legislative history of the 1987 amendment [to Title IX] alone. *Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1125 (D. Kan. 2017).

Despite Congress's intent for Title IX to be broadly construed, the proposed changes in Sections 106.30 and 106.44 drastically narrow Title IX's protections by incorrectly relying upon two Supreme Court cases relating specifically to the standard for a complainant's private cause of action under Title IX for monetary damages. The private right of action and damages analysis in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) does not apply to the Department's or Secretary's enforcement of Title IX or a recipient's administrative process for investigating complaints. Accordingly, it is inappropriate to use these cases' private right of action analysis to justify a misguided attempt to narrow the statute's mandate of broad administrative enforcement by the Department.

*Gebser* and *Davis* set forth the standards under which a complainant can recover money damages from a recipient in a lawsuit. *Gebser* was a suit for money damages brought by a student who was sexually harassed by a teacher, while *Davis* was a similar lawsuit involving student-on-student harassment. In *Gebser*, the court held that the student could not recover money damages absent a showing that an official of the recipient with certain authority had actual notice of the teacher's misconduct and was deliberately indifferent. *Davis* added that a student could not recover money damages in a lawsuit against a recipient in a case of student-on-student harassment absent a showing of that the harassment was "so severe, pervasive, and objectively offensive" that "the victims are effectively denied equal access to an institution's resources and opportunities." *Davis*, 526 U.S. at 651.

Those cases, however, were not about the general and broad standard for administrative enforcement of Title IX. They were not meant to be the basis upon which a recipient's investigation of a complaint of sexual

harassment is to be triggered, or the scope of the recipient's investigation of such complaints. The Court's scrutiny of a **complainant's** efforts to get monetary damages from a recipient is a wholly different subject than the **Department's** obligations to enforce Title IX by ensuring that government funds are not used to support discrimination on the basis of sex and that recipients are appropriately investigating credible complaints of sexual harassment. Indeed, the Court reiterated in *Gebser* that, even if the complainant could not establish discrimination to recover monetary damages, "Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate, 20 U.S.C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute." *Gebser*, 524 U.S. at 292. By conflating a private right of action to sue a recipient for money damages with the recipient's investigation of complaints and the Department's obligations to enforce the statute, the proposed regulations substantially diminish the protections of Title IX.

**B. Actual Knowledge**  
(Proposed sections 106.30 and 106.44(a))

Improperly based upon *Gebser* and *Davis*, proposed sections 106.30 and 106.44(a) severely narrow a survivor's ability to obtain effective relief when coming forward with allegations of sexual harassment. A recipient would have no obligation to even respond to, let alone investigate, a credible complaint of sexual harassment unless it had "actual knowledge", which is extremely narrowly defined to include a recipient's Title IX Coordinator or, in higher education, an official of the recipient who has authority to institute corrective measures on behalf of the recipient. "The mere ability 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." Proposed section 106.30.

Thus, even if a survivor reaches out to a university administrator, that would not qualify as "actual knowledge" of the allegation by the recipient unless that administrator happened to have authority to institute corrective measures. Rather than purportedly providing clearer avenues for survivors for effective relief, the proposed actual knowledge language would funnel all claims through an extremely limited number of Title IX Coordinators and create greater uncertainty, because the average person does not know who the recipient deems to have authority to institute corrective measures. Furthermore, this would wrongfully incentivize funding recipients to make it more difficult for survivors to report in order to reduce "actual knowledge" of claims that might lead to liability.

**C. Sexual Harassment**  
(Proposed section 106.30)

Even if the narrow "actual knowledge" threshold is met to trigger the recipient's duty to respond to a credible allegation, the proposed regulation's restricted definition of sexual harassment—again improperly based upon *Gebser* and *Davis*—would further restrict a survivor's ability to achieve redress.

The "quid pro quo" type of sexual harassment would be narrowed to only "unwelcome sexual conduct." Proposed section 106.30. This definition would allow a recipient to ignore complaints from survivors struggling with educational and work opportunities predicated on unwanted touching, sexual banter, texting and online harassment, and other forms of sexual harassment that might not clearly rise to "unwelcome sexual conduct" from obtaining any relief.

Proposed section 106.30 would also take *Davis's* limitation on collection of money damages for student-on-student sexual harassment to limit a recipient's obligation to respond to or investigate complaints only to those involving "[u]nwelcoming 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." Again, such a narrow definition would undermine a survivor's ability to obtain relief, and further veers from the congressional intent behind Title IX.

Furthermore, it is also worth noting that although this definition of actionable harassment appears in *Davis*, the Court's cited support for the definition was a Title VII employment-based sexual harassment case,

*Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). However, *Meritor* (and numerous cases decided since) defined sexual harassment more expansively as conduct that is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Id.* Thus, the proposed definition of sexual harassment triggering a recipient’s obligation to investigate or even respond to a complaint is even narrower than the definition of sexual harassment that is actionable in a lawsuit for monetary and other damages against an employer.

The Supreme Court has emphasized that Title VII is a “vastly different statute” than Title IX. *Jackson*, 544 U.S. at 175. In contrast to Title VII, “Title IX is a broadly written general prohibition on discrimination” with only narrow and specific exceptions to that broad prohibition. *Id.* Thus, the proposed regulation’s definition of sexual harassment, which is even more restrictive than actionable conduct under Title VII, is totally inconsistent with Congress’s intent that Title IX be “a strong and comprehensive measure [that] is needed to provide women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.” 118 Cong.Rec. 5804 (1972).

**D. Deliberate Indifference**  
(Proposed sections 106.44(a) and 106.44(b))

Departing from prior guidance and OCR enforcement of Title IX, under the proposed Section 106.44, the recipient’s response does not even have to be reasonable, but merely “not deliberately indifferent.” Proposed section 106.44(a). While the proposed regulations should be encouraging survivors of sexual harassment to come forward and feel confidence in the system, the deliberate indifference standard—again, improperly based upon *Gebser* and *Davis*—would have the exact opposite effect.

The proposed regulations state: “A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.” Proposed section 106.44(a). If the recipient merely follows procedures consistent with responding to a formal complaint, it is not deliberately indifferent, and its response does not otherwise constitute discrimination under Title IX. Proposed section 106.44(b). Providing a “safe harbor” for recipients for merely filing a formal complaint and following procedures—notwithstanding the lack of any reasonable attempt to actually investigate and resolve the matter—does not provide the effective protection envisioned under Title IX.

The impetus for survivors to come forward would be drastically reduced if the expected response from the recipient would be only a little more than deliberate indifference. Survivors would not want to subject themselves to the thought of reliving trauma, fear of potential retaliation by the harasser, and concerns regarding personal scrutiny to simply have their Title IX paperwork processed and essentially rubber stamped.

**II. GRIEVANCE PROCEDURES FOR FORMAL COMPLAINTS OF SEXUAL HARASSMENT**  
**(PROPOSED SECTION 106.45)**

If a survivor of sexual harassment or assault is able to jump over the multiple hurdles that proposed sections 106.30 and 106.44 erect for having a recipient actually investigate his or her complaint, under the proposed regulations he or she would then be faced with an investigation that is ineffective because of a lack of timelines, a heightened standard of proof that inappropriately favors the respondent, and other conditions that are antithetical to the protections of Title IX.

**A. The Lack of Clear Timeframes Deprives Complainants with Effective Protections Pursuant to Title IX**  
(Proposed section 106.45(b)(1)(v))

Although the proposed section states that there should be “reasonably prompt timeframes for conclusion of the grievance process,” the section allows for “temporary delays” and extensions for “good cause” with simply written notice, without the ability to contest the extensions. The proposed section lacks a clear

timeframe for investigations, and recipients would be able to delay taking any action if there is also an ongoing criminal investigation.

By the time the Title IX Office has engaged in its investigation, often months after the initiation of the complaint, many of the key witnesses are already gone or fail to have a clear recollection of the events due to the passage of time. Similarly, when the Title IX Office has completed its investigation, complainants may already have stopped working for the University due to the cessation of their contract.

Purported “good cause” extensions have had a particularly negative impact on the UAW’s members. For example, in California, the average number of calendar days between the campus office issuing its investigation report and a faculty respondent receiving discipline was 220. California State Auditor, Report 2017-125, June 2018, p. 13. Several faculty cases lasted much longer—310 days and 385 days, and in an extreme case, the campus took 600 days from the date the campus office issued the report to the date it terminated the respondent. *Id.* The proposed section 106.45(b)(1)(v) does nothing to remedy those serious issues of untimeliness that are depriving survivors of an effective remedy, which effective workplace recourse may provide.

**B. The Proposed Regulations Veer from the Congressional Purpose of the Statute Which Was Drafted with an “Unmistakable Focus on the Benefited Class”—Not the Alleged Harasser**  
(Proposed section 106.45(b))

The language in Title IX “which expressly identifies the class Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes...and other laws enacted for the protection of the general public.” *Cannon*, 441 U.S. at 691. Congress “draft[ed] Title IX with an unmistakable focus on the benefited class...” *Id.* “Title IX explicitly confers a benefit on persons discriminated against on the basis of sex...” *Id.* at 694.

**1. The proposed regulations misunderstand the purpose of the statute**  
(Proposed section 106.45(b)(1)(i))

While it is true that there may be instances when a respondent is actually discriminated on the “basis of sex,” that element should not be assumed. Alleged harassers should not be automatically entitled to rights “on the basis of sex.” Generally, if someone is accused of breaking the law or violating school policy, either validly or invalidly, that person would not be discriminated on the basis of his or her sex, but rather examined on the basis of the purported misconduct, regardless of sex. Thus, the proposed addition of various protections for respondents and emphasis placed on concern for the educational opportunities for respondents departs from the intent of Title IX to protect survivors of sexual harassment—who are supposed to be the benefited class.

**2. The proposed regulations interfere with survivors’ rights to a fair hearing by granting favorable presumptions to respondents.**  
(Proposed section 106.45(b)(1)(iv))

Further ignoring the statutory intent to benefit persons discriminated against, proposed section 106.45(b)(1)(iv) creates a mandatory presumption that the respondent is not responsible for the alleged conduct until a determination is made at the conclusion of the grievance process. While criminal defendants are presumed innocent until proven guilty, Title IX administrative investigations are not criminal proceedings. Even in civil litigation, a defendant is not presumed to be the prevailing party or presumed not to have committed misconduct. Rather than unfairly assume respondent’s lack of responsibility for the misconduct at the outset by issuing a general presumption, the focus of any investigation should be instead on reviewing whether the evidence meets the requisite preponderance of the evidence standard of proof. A presumption is therefore not appropriate in this context.

Proposed Section 106.45(b)(1)(iv)’s presumption that the respondent is not responsible for the alleged conduct is even more concerning in light of proposed section 106.45(b)(3)(i), which states that the burden

of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility must rest on the recipient. Thus, taken together, if recipient engages in a mediocre investigation, the likelihood is that the respondent will be presumed not to be responsible for the alleged misconduct, and the complainant may be denied an effective remedy for the sexual harassment that he or she is facing.

**3. The proposed regulations improperly permit confrontational litigation tactics in an administrative proceeding.**

(Proposed section 106.45(b)(3)(vii))

The proposed regulations require that live hearings be conducted at institutions for higher education, and allow for “cross-examination . . . conducted by the party’s advisor of choice....” Proposed section 106.45(b)(3)(vii). These requirements for a live hearing and subjecting complainants to potential cross-examination by attorneys is: (1) unnecessary to gather relevant evidence, (2) possibly detrimental to effectuating the purpose of Title IX, especially for survivors who might choose not to report for fear being subjected to an onslaught of highly invasive questions by an experienced attorney, and (3) for the aforementioned reasons, needlessly likely to re-traumatize the survivor by shifting from a trauma-informed hearing process to a trial.

Furthermore, proposed section 106.45(b)(3)(vii) allows for purported “evidence” of complainant’s sexual behavior or predisposition “if the evidence concerns specific incidents of the complainant’s sexual behavior with respect to the respondent and is offered to prove consent.” The questions pertaining to evidence of sexual behavior or predisposition are also not relevant to determine consent—since prior consent is not determinative of future consent—and that proposed language should thus be removed.

The NPRM’s reliance upon Federal Rule of Evidence 412 is also misplaced, because this Rule does not govern administrative proceedings under Title IX. In any event, proposed section 106.45(b)(3)(vii) inappropriately relies upon Rule 412(b)(1)(B)’s exception in criminal cases, which states that such evidence of sexual behavior or sexual predisposition may be entered as evidence in a criminal case if offered to prove consent. As noted previously, Title IX administrative proceedings are not criminal proceedings. The life and liberty implications in a criminal proceeding are not present in an administrative Title IX proceeding, and thus a criminal case exception should not be applied here.

If Federal Rule of Evidence 412 were to apply at all, which we do not contend, the civil case exception would be more appropriate since loss of educational opportunities would be more akin to loss of a job or home than loss of life or liberty. The civil exception states, “the court may admit evidence offered to prove a survivor’s sexual predisposition if its probative value substantially outweighs the danger of harm to any survivor and of unfair prejudice to any party. The court may admit evidence of a survivor’s reputation only if the survivor has placed it in controversy.” Fed. R. Evid. 412(b)(2). Again, however, even that narrower civil exception need not be applied, as the default that all such evidence is inadmissible should apply to the administrative proceedings at hand. See Fed. R. Evid. 412(a).

**C. The Preponderance of the Evidence Is the Correct Standard in Title IX Administrative Proceedings**

(Proposed section 106.45(b)(4)(i))

The prior guidance requiring the “preponderance of the evidence” standard—which comports with the general standard of evidence in civil cases, including employment termination proceedings—should be reinstated and complied with by recipients. A “clear and convincing” evidence standard values potentially keeping someone on campus who may have engaged in sexual harassment, sexual violence, or other sexual misconduct, over protecting someone who may be a survivor of the same. As stated above, the unmistakable focus of Title IX is to protect survivors from discrimination based on sex—not to subjugate their rights to protect persons alleged of misconduct. See *Cannon*, 441 U.S. at 691, 694.

The danger of allowing the “clear and convincing” evidence standard is especially apparent when viewed in combination with the other proposed regulations. As proposed, the burden of proof would rest with the recipient (proposed section 106.45(b)(3)(i)), and yet the recipient would not need to follow even the

standard of care of a reasonable person—only deliberate indifference that is not clearly unreasonable (proposed sections 106.44(a) and 106.44(b)). Coupled with a “clear and convincing” evidence standard, these provisions would likely create an insurmountable hurdle for a survivor to achieve effective redress from sexual harassment through the grievance process.

**D. Recipient-Instigated “Informal Resolution Process” Would Not Help Effectuate the Purpose of Title IX**  
(Proposed section 106.45(b)(6))

Proposed section 106.45(b)(6) would allow a recipient to, “at any time,” initiate an “informal resolution process, such as mediation,” upon written notice by the recipient. It is expected that recipients would take advantage of such an informal resolution process to save on costs, time, and effort. However, this proposed section improperly allows a recipient to circumvent a complainant’s opportunity to have his or her matter fully investigated.

Although the proposed section requires the voluntary, written consent of the parties (proposed section 106.45(b)(6)(ii)), there is a likelihood that survivors would be nudged by recipients to sign off on mediation, touting a quicker resolution to someone who is already vulnerable, without the survivor fully understanding the consequences of accepting informal resolution. This is especially true where the proposed regulations place other hurdles in a survivor’s path, including, as discussed above, the prospects of a delayed investigation and a hostile cross-examination by the respondent’s attorney. In light of these and other challenges, a complainant may feel undue pressure by the recipient to be “reasonable” and try to informally work out the situation with their harasser.

**III. CLARIFYING AMENDMENTS TO EXISTING REGULATIONS  
(PROPOSED SECTIONS 106.3(a) and 106.12)**

**A. The Supreme Court’s Decisions Do Not Justify the Proposed Revisions to Regulation 106.3.**  
(Proposed section 106.3(a))

Currently, proposed regulation 106.3(a) provides that “[i]f the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.” Proposed section 106.3(a) would alter this by expressly preventing the Assistant Secretary from assessing damages upon a recipient. The purported basis for this change is the Supreme Court’s decision in *Gebser*, where the Court observed that the Department’s regulations “do not appear to contemplate” a situation in which the Department would demand payment of money damages from a recipient. *Gebser*, 524 U.S. at 288-89. However, the Court did not hold that Title IX itself would bar the Assistant Secretary from seeking damages from a recipient. Indeed, the Court in *Gebser* went on to emphasize the Department’s “authority to promulgate and enforce requirements that effectuate the statute’s nondiscrimination mandate.” *Gebser*, 524 U.S. at 292. Without any legal support or other explanation for the proposed regulation’s alteration of section 106.3(a) appears to be arbitrary and contradictory to the intent of Title IX.

**B. Religious Organizations Should Not Be Allowed to Forego Written Assurance of Religious Exemption**  
(Proposed section 106.12)

At present, Title IX does not apply “to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.” 20 U.S.C., § 1681(a)(3). While proposed section 106.12 purports to “clarify” existing law, it would actually make a substantive change to it by allowing religious organizations to circumvent compliance with Title IX, regardless of whether the statute actually conflicts with the religious tenets of the organization. Under proposed section 106.12, most religious organizations would be able to avoid

compliance with Title IX by making a post hoc assertion of conflict when faced with the prospect of being investigated by the Department. As of 2018, under current regulations, 79 colleges and universities have successfully requested exemptions to Title IX protections; the proposed regulation would likely allow many more to avoid them. In particular, this expanded exemption may cause lesbian, gay, bisexual, transgender and queer (“LGBTQ”) survivors, who are also protected by Title IX, to be deprived of effective redress of their complaints of sexual harassment or assault.<sup>1</sup> Proposed section 106.12 should be removed because, by its plain terms, 20 U.S.C. §1681(a)(3) was not intended to provide all religious organizations a carte blanche exemption from Title IX.

### **Executive Summary:**

In summary, the proposed changes to Sections 106.30, 106.44, 106.45, 106.3, and 106.12 of title 34 of the Code of Federal Regulations will: 1) narrow the range of cases in which a recipient must respond to cases of harassment; 2) weaken the grievance procedures currently in place for survivors; and 3) institute other amendments that run counter to the intent of Title IX and frustrate a survivor’s ability to obtain any effective recourse from harassment.

First, the proposed regulations regarding a recipient’s response to harassment are not supported by Supreme Court precedent. They require a high standard of “actual knowledge,” coupled with a more narrow definition of harassment (based on objectively severe and pervasive criteria, as opposed to the “broad,” “strong and comprehensive” protections intended by Title IX), to which the recipient must only respond with more than “deliberate indifference.” These changes limit the cases in which a recipient would be obligated to respond to harassment, chilling survivors from coming forward in the first place to seek redress, and then depriving those who do come forward with any guarantee of a reasonable response.

Second, the proposed regulations regarding grievance procedures further prevent justice for survivors. For instance, the formal complaint process lacks clear timelines, creating barriers to both reporting and safety, and allowing extensions that would deprive those with short-term appointments the ability to obtain timely relief. Additionally, the proposed regulations would favor the alleged harasser during of the investigation, contradicting Title IX’s clear intent, as recognized by the Supreme Court, to protect the person discriminated against, not the alleged discriminator. Within this context of weakened procedural recourse, the survivor is wholly dependent on the recipient (which only must act with more than deliberate indifference) to gather sufficient evidence to meet a high clear and convincing evidence standard and overcome a presumption that the alleged harasser has not engaged in alleged misconduct. Title IX was not meant to present survivors with such insurmountable hurdles to obtaining effective relief from sexual assault and harassment.

Finally, the proposed regulations arbitrarily remove a tool from the Assistant Secretary’s toolbox to hold recipients accountable, and create a very real danger that survivors at religious institutions of higher education will be unprotected by Title IX.

In plain language, the proposed regulations would have a disastrous effect on the pursuit of equity in education, both for the UAW’s members and across all of higher education. The UAW therefore advises against adopting them in the strongest possible terms. Research demonstrates that across industries, higher education has the second highest rate of sexual harassment after only the military.<sup>2</sup> The proposed regulations would only exacerbate this crisis.

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<sup>1</sup> See Movement Advancement Project, *Title IX, Religious Exemptions and Campus Climate: LGBT Protections in Higher Education* (Oct. 2018), <http://www.lgbtmap.org/file/Title-IX-Religion-Higher-Education-Final.pdf>.

<sup>2</sup> Ilies, R., Hauserman, N., Schwochau, S., and Stibal, J., *Reported incidence rates of work-related sexual harassment in the United States: Using meta-analysis to explain reported rate disparities*, *Personnel Psychology*, 56(3), 607–631. (2003), <https://doi.org/10.1111/j.1744-6570.2003.tb00752.x>.



The standards currently set by Title IX and its implementing regulations represent the bare minimum needed to ensure our members are afforded equitable access to their work and education. The proposed changes would make higher education less accessible to those who experience sexual harassment and would massively deter reporting. Reporting rates are already incredibly low, some research indicating as low as 3% of actual occurrences,<sup>3</sup> often because survivors feel that if they report, nothing will be done, they will be re-traumatized, or their careers will suffer. The Department should withdraw these proposed regulations and instead establish stronger policies that make reporting a viable option for survivors, thus advancing the inclusion of underrepresented groups in higher education.

Many of our members report that experiences with harassment have led them not to seek opportunities for advancement they otherwise would have, and in some cases to leave higher education altogether. Strong protections from discrimination are vital for ensuring that the workers the UAW represents are able to undertake the cutting-edge research and world-class instruction that makes America's universities so renowned. A university where sexual harassment is allowed to go unchecked is not a university where research or education can advance; the proposed regulations diminish the intended protections of Title IX and would make our universities less competitive and less innovative.

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

Sincerely,

Josh Nassar  
International Union, UAW

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<sup>3</sup> Rosenthal, M. N., Smidt, A. M., and Freyd, J.J., *Still second class: Sexual harassment of graduate students*, *Psychology of Women Quarterly* (2016), <http://dx.doi.org/10.1177/0361684316657822>.