

January 30th, 2019



Submitted via [www.regulations.gov](http://www.regulations.gov)

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

We are writing on behalf of Feminist Campus in firm opposition to proposed changes to Title IX outlined in the Department of Education's Notice of Proposed Rulemaking (NPRM), released November 28, 2018. We are deeply concerned that the measures proposed in the NPRM would harm survivors, weaken critical civil rights protections for all students, and actually increase levels of violence in schools.

**These new proposed rules ignore the pervasive violence experienced by students seeking a higher education.** To enforce them would be to ignore the [1 in 5 women, 1 in 16 men](#), and nearly [one in four Transgender, Genderqueer, non-conforming, or Questioning students](#) who are sexually assaulted while in college. Implementing the proposed changes to Title IX outlined in the NPRM would be to [ignore the violence faced by survivors of color](#), which is compounded by social barriers such as being [disbelieved](#) and invalidated, as well as [greater difficulties in reporting processes](#). **We urge the Department of Education to act in consideration of the safety of all students, survivors, and college campuses by reinstating the 2011 Dear Colleague Letter and accompanying guidelines (Questions and Answers on Title IX and Sexual Violence of 2014).**

Feminist Campus is the student organizing and advocacy arm of the Feminist Majority Foundation (FMF), a non-profit organization that aims to promote the social, political, and economic equality of women. In combination with our Girls Learn International Program (which reaches K-12 students), we work with student activists, student organizations, faculty, and staff on over 600 high school, community college, and 4-year college and university campuses across the United States. We educate and mobilize young feminists on issues of gender equality, including sexual violence response and prevention work, on the campus, community, and national level. We also amplify the strong voices of young people, working to make sure their concerns are represented in decision-making and policy processes.

Feminist Campus is comprised of organizers with first-hand experience working on Title IX issues as former student activists, as well as expertise from working one-on-one with current students every day. As such, the Feminist Campus team will provide this on-the-ground perspective to speak to the ways harmful policies could impact students, as a compliment to the Feminist Majority Foundation comment, which sought to address the amended Title IX regulations on a broader level. **Our comments focus on the tangible harms we foresee the proposed rules having on students and survivors, as well as the dangerous increase in violence that will occur on campuses across the country as a result of the NPRM. Overall,**

**we object to the many way the NPRM will make campuses and all institutions less safe and increase, rather than decrease sex discrimination - which is the mandate of Title IX.**

### ***Overall Objections to the NPRM***

Enforcement of the Title IX amendments in the NPRM will:

1. **Make campuses unsafe by ignoring nearly half of actual cases of violence inflicted upon students.**
  - The proposed rules would ignore violence that doesn't fall within a **dangerously limited definition**: The proposed regulation would define sexual harassment as “unwelcome conduct on the basis of sex that is **so severe, pervasive, and objectively offensive** that it **denies** a person access to the school's education program or activity.” That means that a survivor would be forced to endure repeated and escalating levels of abuse before a school would be legally required to act. It also means that a school would potentially not be responsible for intervening until it's too late: until the survivor is already denied equal access to an education by, for example, being forced to drop out of a class or drop out of school altogether.
    - **The proposed rules send the message that students should be forced to put up with sexual violence and that some level of sexual harassment is acceptable**: Currently, it is already too often that schools minimize or dismiss reports - the new definition would dismiss many more cases that were not deemed “serious enough” by the school, resulting in the denial of care, fair processes, or legal remedies for many who were harmed. 95% of sexual assault cases on college campuses in the United States go unreported. Since the job of the Department of Education is to protect the civil rights of students, including the right of survivors to access education, Secretary DeVos should be working to encourage survivors to come forward and seek justice, not taking away the ability of their university to protect them. Limiting the definition of sexual harassment so that many cases of harassment would never even be considered as such leaves students more vulnerable than ever.
    - **Under the new proposed definition, the level of protection for children and young people would fall below the standard of legal protection ensured to adults**. By narrowing the definition of “sexual harassment” with respect to Title IX, the NPRM would make it more difficult for students in schools, including K-12 schools, to be protected from sexual harassment than adults in the workplace.
  - **The proposed rules allowance for schools to ignore of off-campus cases will result in many perpetrators escaping accountability, with freedom to continue inflicting violence**: Under the NPRM, schools would only be required to investigate and respond to just a fraction of the thousands of off-campus sexual assaults that happen each year. The majority of all college and university students live off-campus; [70% of sexual assault cases occur in the home of the survivor, the perpetrator, or another individual](#); and **41% of ALL campus sexual assaults occur off-campus**. By ignoring cases of sexual harassment and assault that occur off-campus, schools will only be pursuing a *fraction* of all violence affecting students. Given this lack of school action, survivors would be forced to face their rapist in class or in common spaces without any

protection - all because the violence they experienced didn't occur within the school's technical bounds.

- **The NPRM's off-campus rule would allow perpetrators that have committed violence (for example, at an off-campus party, an extremely common part of college life) to walk free without consequence.** [63.3% of men at one university who self-reported acts qualifying as rape or attempted rape admitted to committing repeat rapes.](#) meaning that when schools are allowed to ignore acts of violence committed off campus by students, they are ensuring that perpetrators -including serial perpetrators- will walk on campus with a ballooned sense of entitlement, and nothing to stop them from committing violence again.

## 2. Fail to establish the critical role schools must play in protecting student civil rights via prevention efforts and actively combating a hostile climate.

- The proposed rules fail **to address schools obligations and roles in protecting students through prevention efforts:** while prevention efforts such as consent education at first-year student orientations, continued education throughout the year, work with fraternities and athletics, bystander intervention trainings, efforts to focus on the [Red Zone](#) (the most dangerous time of year regarding sexual violence) and more were extensively outlined in the 2011 and 2014 ED Title IX Guidances, **there is no mention of prevention efforts included in the 2018 NPRM.** Schools not only have the responsibility to hold perpetrators accountable and protect student survivors, but they have a further obligation to actively create a safe school environment. Due to pervasive inequities, any school not engaged in active prevention work is contributing to an unsafe - and often actively hostile - climate for its students.
- **The proposed Title IX regulation changes would ignore online threats that contribute to hostile learning environments:** With the off-campus measure outlined under Point 1, schools would be allowed to ignore many forms of online harassment and threats. This digital violence certainly contributes to hostile learning environments and educational inequities for those targeted by harassment and threats. Online harassment and threats may be so extreme that students may be too afraid to leave their homes or attend class, but under the NPRM such forms of violence would not be considered as an act on campus or "sanctioned by the school," allowing them to continue unchecked.
  - In the case of *Feminist Majority Foundation v. University of Mary Washington*, female members of an on-campus student organization, Feminists United, were inundated with harassing comments and rape and death threats via the anonymous social media app Yik Yak. Because of Yik Yak's geolocation feature, the threats and harassment were from individuals in a 1.5 mile radius of the school, making those posting the threats most likely fellow students. As a result, the women in Feminists United were scared to attend class, participate in extracurricular activities, and go to their on-campus jobs.
    - This is the definition of a hostile environment, yet, under the proposed NPRM, the University of Mary Washington would have had no obligation to respond to these threats. This portion of the NPRM is in [direct conflict with a ruling from the United States Court of Appeals for the 4th Circuit in December 2018](#) which concluded that the University of Mary Washington

could not “turn a blind eye to the sexual harassment that pervaded and disrupted its campus solely because the offending conduct took place through cyberspace.”

### **3. Exacerbate the financial, emotional, and social costs of violence that student survivors are forced to bear.**

Sexual violence is an pervasive, painful, and violating injustice that too many students are forced to face: many survivors of sexual violence face lasting physical and emotional trauma. [Survivors are three times more likely to suffer from depression, six times more likely to have PTSD, thirteen times more likely to abuse alcohol, twenty six times more likely to abuse drugs, and four times more likely to contemplate suicide.](#) **Rather than working to support survivors in whatever ways possible, the measures outlined in the NPRM would actually allow schools to *greatly increase* the burdens survivors face in several different ways.**

- **Outlined rules in the NPRM that will Increase Emotional Harm:**
  - **Traumatizing Cross-Examination Practices:** The NPRM’s requirement of schools to force survivors to submit to live cross-examination by an adversarial party aligned with the survivor’s named harasser or rapist is a cruel measure. If a survivor is too traumatized to be cross-examined, too bad: the proposed rules would prohibit the school from relying on any of the survivor’s statements to reach a conclusion regarding the names harasser or rapist’s responsibility.
    - Currently, student activists in Michigan are working to sound the alarm on the ways their school’s cross-examination policies have hurt their campus, sharing how the policies are will stop many from coming forward in the first place. We know this is true, not just for these student activists, but also across the country: after all, if a student knows they will be forced to answer to live questioning by a representative allied with their perpetrator -on top of long investigation time periods, time spent re-hashing the assault over and over, and every other excruciating part of the process- they may choose not to report at all.
    - Survivors and experts across the board agree that the best and least harmful solution is written and submitted questions, rather than live questioning. We encourage The Department of Education to consider such policies instead.
  - **The Emotional Impact of Delayed Investigations:** If a survivor reports an assault to both their school and the police, the proposed rule would allow the school to delay its investigation, perhaps indefinitely. Title IX, however, imposes an independent civil rights obligation on schools. [Already the average duration of a sexual violence investigation takes more than two years](#); proposed measures in the NPRM would prolong this process even further.
  - The criminal justice system operates under an entirely different set of laws and with different considerations. Survivors should not be forced out of school because the administration will not take action while a criminal complaint is pending, which can take years.
  - The long wait it also another painful aspect: while ongoing investigations stretch our over months -even years- survivors are still forced to go to class, walk around on campus, and live their lives without safety. Not only this, but as the process

continues, so does the time spent re-hashing the triggering experience over and over, as well as time spent in meetings or trying to seek justice, but being put on hold. Such a barrier can be another significant factor that stops survivors from coming forward.

- **Financial Costs to Survivors:** The Title IX proposed changes asserts that the measures introduced in the regulations will help save financial cost to schools, insultingly ignoring the financial burdens survivors shoulder. **Survivors seeking justice through investigative processes will often be slammed with the cost of expensive attorney fees**, especially in long, drawn-out, and ongoing investigations. For survivors who simply cannot afford this, the options are limited. **Not only is legal representation expensive, so too is medical care:** for some students, the expenses of traveling to the hospital, and/or the costs of counseling to work through Post-Traumatic Stress Disorder and the emotional trauma of such violence can also add up. Furthermore, the academic costs also add up: Students who have faced violence might see their grades suffer through no fault of their own, need to take an off-semester or leave of absence, or transfer schools in order to feel safe. [34.1% of students who have experienced sexual assault dropout of college](#). The reality is, some student survivors will also be denied opportunities, such as joining student groups, interning/working in certain fields, attending conferences, etc. if their rapist might be there, or if the emotional impact of sexual violence serves as a barrier. [Estimated costs of each rape is \\$151,423 - a huge sum for any student or average person](#). Given this, **it is insulting for the current NPRM to measure the cost to schools without considering the cost to student survivors.**

#### 4. Discriminate against student survivors and deny students a fair and equal investigative process.

- The NPRM's allowance of standards of evidence to differ between sexual assault and other equivalent crimes is discriminatory to student survivors. Essentially, schools would be allowed to use a standard of proof that tips the scales in favor of named harassers and rapists rather than one that is equal for both survivors and perpetrators. Shockingly, the proposed rule allows schools to single out sexual harassment and assault complaints for different treatment, not to protect survivors from being re-traumatized, but to protect alleged perpetrators from "stigma." False reporting, however, is extremely rare, and survivors deserve a fair process that does not give deference, a higher benefit of the doubt, or special rights to those who may have caused them long-lasting, traumatic harm. **In order to ensure fair and equal processes, schools should not have the option to use higher standards of evidence for assault than they adopt for any other campus crime, essentially discriminating against student survivors in their reporting process.** Instead schools should uniformly adopt the preponderance of the evidence standard, one which ensures fairness for the parties.
- **The proposed rules difference in standards of evidence relies on the dangerous myth of "false reporting":** This rule relies on and feeds into the often-cited narrative of "false reporting" of sexual violence, which is an unfounded claim used to discredit survivors. [Studies have shown that false reports of sexual violence account for 2-10%](#) of all sexual assault reporting, **whereas the majority of incidents of sexual violence are never even reported due to tremendous prohibitive barriers.** The proposed rule weakens support and protections for survivors; as a result, fewer survivors will be inclined to report incidences of violence against them and will face higher levels of

scrutiny when they do. All of this will continue to perpetuate the false reporting mythology and continue to harm survivors.

- **The Title IX proposed changes in the NPRM also harms survivors by limiting their ability to seek help:** Under the proposed rule, schools would only be required to respond to complaints made to a limited number of employees with the “authority to institute corrective measures.” Schools would have no obligation to act even when students report to a TA or an RA. The rule also hurts K-12 students; instead of being able to rely on a trusted teacher aide, cafeteria worker, or playground supervisor, a child would have to report harassment or assault to a principal or district superintendent before the school would be legally obligated to respond.
  - **A student activist from a Feminist Campus campus group in Georgia shared her concerns about this:** “On my campus, people who were sexually assaulted did not always feel safe reporting their assault to designated individuals or did not even know who these individuals were. It doesn't mean they did not need support. This regulation unfairly prioritizes the convenience and comfort of college administrators instead of victims and survivors and needs to be revised.”
- **The proposed rules reflect the reality of ED’s clear refusal to listen to the experiences of feminists, student survivors, and women, and the prioritization of men’s rights groups and the “falsely accused.”** In the years leading up the rescission of the 2011 Guidance and the year between the rescission and the 2018 NPRM, Secretary DeVos consistently ignored meeting-requests from women’s rights organizations, survivor-focused groups, and students instead embracing so-called men’s rights activists and university administrators, fraternities, and athletic clubs that have promoted misogyny, gender stereotypes, and rape mythology.
  - We ask the Department of Education to consider the dangers this lack of listening could have on the lives of students, as well as on campuses from coast to coast, and we ask ED to talk with survivors and women to promote educational equality in our schools.

In conclusion, the proposed changes to the implementation of Title IX outlined in the NPRM would ignore thousands of cases of violence inflicted upon students, fail to establish the role of schools in combating hostile climates, ignore the significant financial costs that student survivors bear, exacerbate the emotional and social cost of violence, and deny students fair investigative processes. **Overall, these proposed rules would harm students, strip survivors of crucial civil rights, and reduce school accountability to create safe and equitable learning environments for all.** We urge the Department of Education to withdraw these proposed rules and reinstate the 2011 Dear Colleague Guidance.

If you have questions feel free to contact the Feminist Campus Team at [campusteam@feminist.org](mailto:campusteam@feminist.org) or Shivani Desai, Senior National Organizer at Feminist Campus at [sdesai@feminist.org](mailto:sdesai@feminist.org).