



January 27, 2018

Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Ref: 2018-25314

Dear Secretary Devos,

Through this letter, Students Active for Ending Rape (SAFER), strongly opposes the proposed changes to Title IX of the Education Amendments of 1972 (Title IX) as proposed by the Department of Education (DOE). We fundamentally disagree with the rules as written, as they were enacted based on false narratives and directly contradict the plethora of literature in the field of campus sexual violence. We believe that the rules, if implemented, would decrease reporting, make it easier for colleges and universities to cover up assaults that occur on and around campus, decrease the safety of students by allowing sexual predators to get away with their crimes, and would lead to an increase in students dropping out of college due to their victimization.

SAFER started as a student group at Columbia University in 1999 and became one of the first non-profit groups (officially incorporated in 2001) whose mission focused specifically on campus sexual violence. SAFER's mission is to empower student movements to combat sexual violence on college campuses. We generate knowledge that equips student activists with the evidence and resources they need to reform campus sexual assault policies and strengthen actions to reduce campus assaults. We envision a world where survivors receive support, schools are held accountable, and students hold the power to effect change.

In order to determine whether the Department of Education's ("DOE") new focus on the due process rights of students accused of sexual misconduct is an appropriate response to the reality of campus sexual violence, SAFER analyzed data from 50 U.S. universities and colleges to better understand how often sexual misconduct occurs, is reported, investigated, and adjudicated on campuses.

SAFER obtained documentation of the comments submitted to the DOE in response to proposed changes to the Title IX guidance through a FOIA request. The comments we received were overwhelmingly concerned with students experiencing sexual misconduct and violence, so SAFER finds it particularly troubling that the DOE would dramatically shift its focus towards individuals accused of sexual misconduct and violence and away from the concerns of the people.

SAFER also rejects the false dichotomy the DOE has pushed between the rights of the accuser and the rights of the accused. There is no such dichotomy. Fairness, transparency, and accountability are principles that equally benefit all. To attain truly fair adjudication processes, the DOE must respect the rights and autonomy of all students, instead of restricting the services and opportunities available to survivors under the guise of civil liberties.

We thank the DOE for giving us the opportunity to comment on the proposed changes to Title IX of the Education Amendments of 1972 (Title IX). For almost 20 years SAFER has proudly supported students in their efforts to improve the policies on their campuses. As advocates for students, we find several pieces of the proposed guidance problematic. We hope you will take our comments and suggestions into consideration.

1. Deliberate Indifference standard for responding to sexual harassment

(Proposed section 106.44) SAFER believes that the proposed changes, which would reduce the standard for responding to sexual harassment from "reasonable" to "deliberately indifferent", will further encourage universities to not investigate claims of sexual assault and harassment. According to an analysis done by the DOE as a part of this proposed guidance, universities currently conduct an average of 1.18 sexual harassment investigations per university per year. Under the new rule, the DOE suggests that number would be reduced by 39%. Based on several research studies, including SAFER's own research, between 18-22% of students indicate that they have been a victim of sexual assault in college¹. These statistics clearly indicate that the average number of

¹Cullen, F., Fisher, B., & Turner, M., The sexual victimization of college women (NCJ 182369). (2000). Retrieved from the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice: <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>

investigations for sexual assault and harassment is extremely low on average. We believe that the DOE should make it a priority to increase reporting and investigations of sexual assault and harassment instead of proposing a rule that would decrease an already severely underreported crime.

Universities have an inherent conflict of interest when it comes to handling claims of sexual assault. If they acknowledge that claims of an assault are true, they risk the college being seen as an unsafe place for students, thus reducing the number of admissions, which is how universities make money. This conflict of interest is further exacerbated when universities are charged with investigating coaches, trainers, and players of major revenue generating sports programs. For example, in 2018, Larry Nassar, former Michigan State University employee and physician for the United States gymnastics team, was sentenced to up to 175 years in prison for sex crimes he committed while at Michigan State University. Reports of sexual abuse by Nassar to Michigan State University started in the 1990's. Michigan State University covered up these allegations for decades².

We believe that universities will be further incentivized to cover up the claims of sexual assault and harassment by their students if the DOE holds them to a lower standard of reporting. We suggest the Department keep the "reasonable" standard in order to provide checks and balances for universities. We also suggest that the DOE consider a neutral third party for both reporting and investigating sexual assault and harassment for universities.

- 2. Narrowing the definition of sexual harassment (*Proposed section 106.44*)** - SAFER disagrees with changing the definition of sexual harassment to only include the most severe and pervasive cases. Any form of sexual harassment, no matter how severe or pervasive, should not be tolerated by the DOE. Students should not be turned away because their victimization does not rise to a certain level of severity or have to wait until they have experienced repeated harassment. In reality, students are less likely to engage with their education when dealing with the emotional implications of trauma. As a result, schools ultimately suffer when they ignore the experiences of students that don't fit the narrower definition of sexual harassment. Additionally, what is being lost in the current proposed guidance is that victims typically do not come forward. They are often fearful of retaliation, ashamed, facing mental health problems as a result of their victimization, or think that they won't be taken seriously if they report.

² Hauser, C., & Astor, M. (2018, January 25). The Larry Nassar Case: What Happened and How the Fallout Is Spreading. The New York Times. Retrieved January 2019, 2019, from <https://www.nytimes.com/2018/01/25/sports/larry-nassar-gymnastics-abuse.html>

SAFER believes the DOE should be promoting an environment where victims feel comfortable coming forward with allegations of sexual assault and harassment and are taken seriously when they do so.

3. **Safe Harbor (106.44)**- The new Safe Harbor provision is dangerous. It can be interpreted as preventing the complainant from claiming sex discrimination after a determination has been made through the grievance process, even if that determination is erroneous or unfair. SAFER believes this rule eliminates key checks and balances put in place to ensure colleges are acting in their students best interest and not in their own best interest. In the past, there have been several instances of colleges covering up sexual assaults in order to protect their reputation as well as their finances. One such instance occurred at Florida State University where Erica Kinsman was raped by then FSU quarterback, Jameis Winston. She took all the appropriate steps to report her assault, she went to the campus police the morning after her assault and had a rape kit done at the local hospital. Despite the rape kit matching Jameis Winston, the incident being filmed, and Winston admitting that he did not obtain verbal consent from Kinsman to have sex, Florida State University decided to place the importance of their star quarterback above a student who was raped. Even when a second victim came forward, the university closed the case finding Winston “not responsible”³.

As the case above plays out, it is important that there are checks and balances on universities as there is a great deal of incentive to not investigate claims of sexual assault (i.e. money, bad publicity, loss of a star quarterback, etc.) In addition, we find it troubling that the guidance uses the term “safe harbor” to refer to a rule that would protect schools. It would seem that the role of the DOE would should be to deliberately protect those who experience sexual assault and harassment. We would recommend that the DOE create a provision that protects victims of sexual harassment rather than create a provision that protects universities from any responsibility when they do not adequately respond to complaints of sexual violence.

4. **Option to Use Mediation(106.45(b)(6))**- SAFER disagrees with the DOE allowing for the use of mediation in college sexual assault and harassment cases involving students because the rule, as written, lacks consideration for the extremely sensitive nature of using mediation in a deeply personal and

³ Payne, M. (2015, February 19). Erica Kinsman, who accused Jameis Winston of rape, tells her story in new documentary ‘The Hunting Ground’. The Washington Post. Retrieved from https://www.washingtonpost.com/news/early-lead/wp/2015/02/19/erica-kinsman-who-accused-jameis-winston-of-rape-tells-her-story-in-new-documentary-the-hunting-ground/?noredirect=on&utm_term=.ab9826f2903

traumatizing crime. Proposed section 106.45(b)(1)(iv) would require that a recipient's grievance procedures presume that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance. According to best practices in the field of gender-based violence, mediation-based interventions like restorative justice (in its multiple forms) is only to be considered as an option when those accused of causing harm have admitted to that action. Failure to adhere to this standard increases the potential for ongoing harm including revictimization, re-traumatization, and financial hardship to the university if the survivor drops out among other negative consequences.

SAFER believes restorative justice approaches can be a formative option for survivors, but these types of interventions require intensive training and knowledge that is not currently available on college campuses. In addition, the process as proposed in this guidance is not trauma-informed. If mediation is going to be an option, the survivor should be in charge of determining the format of the event (i.e. someone sits in on their behalf; whether or not the person accused is in the same space; if the session requires an answer/response; if there can be a support person or multiple representatives to support them, etc.). Without these considerations, mediation may prove to be a harmful and irresponsible option that will produce few productive outcomes for the survivor.

- 5. Formal Complaint (*Section 106.30, 106.45(b)(3)*)-** the proposed guidance states schools “must dismiss” a formal complaint if the alleged conduct “did not occur within the [school’s] program or activity.” We believe this proposed rule is problematic as it directly contradicts the Clery Act precedent currently in place that allows for inclusion of off-campus assaults. The proposed guidance emphasizes the importance of reconciling Title IX precedent with the Clery Act, but in this instance, it directly contradicts itself. In addition to the legal issues this raises, it is also not practical. We know that a majority of students who experience sexual assault are assaulted off-campus.⁴ By limiting the scope of investigations, the DOE is casting too narrow of a net that will lead to fewer reports, investigations, and disciplinary proceedings. Further, it is also not practical for any “nontraditional” college to abide by this rule. For example, in New York City, students reside in housing that is often not owned by a university due to the lack of campus-owned housing in New York City. If a student is assaulted by another student at an off-campus apartment, the complaint would be dismissed per the proposed guidance, which would unfairly disadvantage

⁴ McWhorter et al., 2009

students on urban campuses. By reducing universities responsibility to investigate crimes that occur off-campus, we believe that fewer students will report their assaults.

- 6. Accused Right to Cross Examination (106.45(b)(3))**- The proposed guidance states: “Because most parties and many witnesses are minors in the elementary and secondary school context, sensitivities associated with age and developmental ability may outweigh the benefits of cross-examination at a live hearing. Proposed section 106.45(b)(3)(vi) allows – but does not require - elementary and secondary schools to hold a live hearing as part of their grievance procedures.
- a. Research shows that more than 90% of sexual assault victims do not report their assault. Reasons for this include fear of retaliation, fear of not being taken seriously, and not wanting to go through a trial. We believe that forcing victims to endure cross examination will decrease the likelihood that they will come forward and decrease safety on campus by not holding sex offenders accountable for their crimes⁵.
 - b. We believe that the same logic applied above to elementary schools could be used when it comes to those who are sexually victimized in college. What we know is that sexual assault and harassment are deeply personal and psychologically damaging crimes that can have lasting effects on those who experience it. We believe that sensitivities associated with this type of victimization undermine any potential benefit of cross-examination at a live hearing.
 - c. It is unclear from the proposed guidance if there are exceptions for those who are under the age of 18 in college. In 2009 9% of students were under the age of 18. In 2016 the college population was 16 million. This would mean over 1.4 million students would be unprotected by this guidance as written.
- 7. Raising the Standard of Proof (106.45(b)(4)(i))**- the proposed guidance states that school must use the clear and convincing evidence standard unless. There is still the opportunity to use the preponderance of evidence standard but only if it is used for both harassment cases and in cases against employees. Unfortunately, many employee contracts require the clear and convincing evidence standard which forces universities to use the clear and convincing evidence standard in sexual harassment cases. SAFER supports the National Women’s Law Center in their assessment that the preponderance of evidence

⁵ Fisher, B., Cullen, F., & Turner, M. (2000). The sexual victimization of college women (NCJ 182369). Retrieved from the National Criminal Justice Reference Service: <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>

standard is the only standard of proof that treats both sides equally, a standard required by Title IX. We encourage the DOE to keep the preponderance of evidence standard in cases of sexual assault and harassment.

For the reasons detailed above, we believe the DOE should immediately withdraw its current proposal and refocus its efforts on supporting those who experience sexual assault and harassment. The current guidance made significant strides in creating a safer environment for students but we believe more needs to be done. SAFER encourages the DOE to take a deeper look at victimization on campus. We believe that a nationwide campus climate survey would greatly benefit not only the Department but anyone who is impacted by sexual assault and harassment in college.

We thank the DOE again for the opportunity to comment on the proposed guidance. SAFER, as always, would like to extend our expertise in the area of campus sexual assault to the DOE should they ever require it.

Thank you for your time,

Students Active for Ending Rape (SAFER)