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Kenneth L. Marcus
Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, DC 20202
Submitted via www.regulations.gov

January 30, 2019

Re: DOE 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:

The Association of the New York City Bar ("the Association"), on behalf of its Sex and Law Committee ("the Committee"), respectfully submits the following comments with respect to the above-referenced Proposed Regulations, which were published in the Federal Register on November 29, 2018. Founded in 1870 as a professional membership organization, the Association's mission is to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice. The Association has approximately 24,000 members, all of whom are law students or individual lawyers who may be admitted to practice law in New York as well as other jurisdictions.

The Sex and Law Committee of the New York City Bar Association addresses issues pertaining to gender and the law in a variety of areas that aim to reduce barriers to gender equality in health care, the workplace and civic life and to promote respect for the rule of law. The Committee's members work and practice in a wide range of areas, including, violence against women, reproductive rights, gender discrimination, poverty, matrimonial and family law, employment law, and same-sex marriage. In light of the Committee's longstanding commitment

to fighting for gender equity and its expertise in the field, we are well positioned to comment on these proposed regulations relating to sexual harassment and assault.

The Committee has set out to comment on two issues in particular. First, we address the proposed regulation's cross-examination requirement, which further conflicts with New York's Education Law Article 129- B ("NY Article 129-B"). Second, we address the proposed regulations as they relate to the standard of proof for the adjudication of school grievance processes involving sexual harassment/assault.

I. THE PROPOSED RULE DEPARTS FROM NEW YORK LAW ON CROSS EXAMINATION IN SCHOOL ADMINISTRATIVE HEARINGS

Sections 106.45 (b) (2), *Notice of Allegations*, and 106.45 (b) (3), *Investigations of a formal Complaint*, of the proposed Title IX regulations contain many provisions that are a significant departure from current federal policy and best practices and create irreconcilable differences with other aspects of the proposed regulations and NY Article 129-B, as well as longstanding law in New York.[1]

NY Article 129-B, or "Enough is Enough," took effect in 2016 and seeks to combat sexual assault on campuses and to ensure the safety of all students by, among other things, adopting standard and fair disciplinary procedures, including the right to "participate in a process that is fair, impartial, and provides adequate notice and a meaningful opportunity to be heard."[2] Notably absent from the law is the right to cross-examine, which is consistent not only with best practices in addressing sexual trauma, but also with longstanding New York case law on the rights of students in administrative hearings, as discussed more fully below.

New York State and its private and public universities have expended tremendous resources to implement NY Article 129-B. In 2017, Governor Cuomo assembled a multi-agency team, which included New York State Police, the Department of Health, Division of Criminal Justice Services, and ordered a statewide review of all New York institutions to ensure compliance with NY Article 129-B.[3] If the proposed regulations become law, New York institutions will be forced, once again, to create new policies that either conflict with New York State law or with federal law, opening the doors not only to extensive litigation, but unrest among students at New York institutions, who have come to rely on the law.

The most significant proposed provisions that depart from NY Article 129-B are the ones that call for the use of cross-examination in dealing with Title IX complaints. These proposed provisions (1) prohibit the consideration of a statement by either party if that party does not submit to cross-examination, (2) require an appointment of an advisor aligned with that party, and (3)

[1] §106.45 (b) (2) and §106.45 (b) (3) of the proposed Title IX regulations; New York Education Law Article 129-B.

[2] NY Education Law, § 6443.

[3] Governor Cuomo Orders Comprehensive Statewide Review of Compliance with "Enough Is Enough" Law to Protect Students from Sexual Assault on College Campuses, https://www.governor.ny.gov/news/governor-cuomo-orders-comprehensive-statewide-review-compliance-enough-enough-law-protect. (All websites cited in this letter were last visited on January 30, 2019.)

require the advisor to conduct cross-examination.[4] These requirements are in conflict with many of the procedures in place under NY Article 129- B, and create practical concerns for both parties and institutions alike.

The proposed regulations remove investigative discretion and power given to institutions by §6446 (1)(d) of NY Article 129-B by prohibiting an institution from considering a statement from either party if that party does not submit to cross-examination.[5] Under §6446(1)(d) of Article 129- B, an institution may decide to proceed with an investigation even if the complainant does not wish to cooperate as long as the institution believes that they have an obligation to do so in order to provide a safe, non- discriminatory environment for all members of its community.[6] In contrast, under the proposed regulations, an institution cannot conduct a meaningful investigation or hearing if the only evidence in the complaint is a statement from a student unwilling to cooperate in an investigation or to submit themselves to cross-examination.[7]

The requirement that parties submit themselves to cross-examination is also a departure from - and contradiction of - longstanding New York case law. In New York, although trial lawyers recognize the benefits of and freely utilize cross-examination during a judicial proceeding, "there is a limited right to cross-examine an adverse witness in an administrative proceeding (*see Matter of Weber v State Univ. of N.Y., Coll. at Cortland*, 150 AD3d at 1432), and '[t]he right to cross[-]examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings' (*Winnick v Manning*, 460 F2d 545, 549 [1972]."[8] Therefore, the proposed requirement that parties submit to cross-examination elevates the evidentiary standard of an administrative hearing, and does not comply with the relevant law in New York State.

Compulsory cross-examination also creates practical problems for both parties involved in a Title IX proceeding. Survivors of sexual harassment or sexual assault might be less likely to report an incident to their institution or go through the process of an investigation and hearing if they must submit to cross-examination. Cross-examination may re-traumatize an individual who has been subjected to sexual harassment or sexual assault. In a similar light, requiring the party accused of sexual harassment or sexual assault to submit to cross-examination might also discourage those individuals from defending themselves in the Title IX proceeding. Specifically, if a criminal case is pending about the same or related matters, the accused individual will likely refrain from submitting to cross-examination to avoid self-incrimination or creating inculpatory testimony that can be used in criminal court.

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[4] §106.45 (b) (2) and §106.45 (b) (3) of the proposed Title IX regulations.

[5] NY Education Law §6446 (1)(d).

[6] NY Education Law §6446(1)(d).

[7] The proposed regulations require a live hearing for formal complaints made in institutions of higher education. In elementary and middle schools, a live hearing is not required, and parties may submit written questions directed toward credibility, which may be asked by the recipient (the school) of the Title IX complaint. *See also Matter of Haug v. State University of New York Potsdam*, 32 N.Y.3d 1044 (2018) (noting that hearsay is an acceptable form of evidence on which the decision maker can rely, in the context of a Title IX administrative hearing).

[8] *Matter of Jacobson v. Blaise*, 157 AD3d 1072, 1076, (3d Dep't. 2018).

By requiring that cross-examination at a hearing be conducted by the "party's advisor of choice," the proposed regulations also shift the Title IX proceeding away from being an educational conduct process to one driven by attorneys and representatives.[9] Additionally, the proposed regulations require that, "if a party does not have an advisor present at the hearing, the recipient [of the complaint] must provide an advisor aligned with that party to conduct cross-examination."[10] This is a significant departure from what is required by NY Article 129-B, which only provides each party with the right to have an advisor present for the Title IX conduct process.[11] The additional requirements set forth in the proposed regulations create a process that requires the infrastructure, procedures, and resources akin to an official judicial process. The proposed regulations do not indicate how institutions should implement the requirement that an advisor conduct cross- examination, or how to fund this type of procedure. Furthermore, there is no guidance on how institutions can compel representation, or even what it means for an advisor to be "aligned with" a party.

The cross-examination requirement also conflicts with the formal complaint policy that would be adopted by the proposed regulations, which requires an institution to initiate Title IX grievance procedures where (1) an individual has signed a formal complaint against a respondent, *or (2) the institution has actual knowledge of multiple reports against the same individual*.[12] (Emphasis added.) Despite this, even in a circumstance where several people have made reports of sexual harassment or assault against the same individual, an institution is prohibited from considering any of those statements in the context of a Title IX proceeding unless at least one reporting individual submits herself or himself to cross-examination. In cases where reporting individuals do not want to submit to cross-examination because the person accused is a high profile or powerful individual, an institution will not be able to investigate or impose appropriate consequences.

New York has long recognized that students deserve a meaningful opportunity to be heard, and NY Article 129-B has made this the law of the state, while intentionally refusing to create an express right to cross-examine the accused. Mandating cross examination solely for sexual harassment and assault raises significant concerns for students and institutions alike. For this reason, the Sex & Law Committee cannot recommend the proposed rule on this issue.

II. THE PROPOSED RULE ON STANDARD OF PROOF DOES NOT IN FACT PROVIDE UNIVERSITIES A MEANINGFUL CHOICE AND WILL ULTIMATELY REQUIRE UNIVERSITIES TO ADOPT A HIGHER STANDARD OF PROOF

The proposed rule provides that a school may use the preponderance of the evidence standard only if it uses the preponderance standard in complaints against faculty, in addition to using it in all other student cases with the same maximum punishment. Otherwise, the school must

[9] §106.45(b)(3)(vii) of the proposed Title IX Regulations.

[10] §106.45(b)(3)(vii) of the proposed Title IX Regulations.

[11] NY Education Law §6444(5)(c)(i).

[12] §106.45(b)(2) of the proposed Title IX Regulations.

use the clear and convincing evidence standard. This purported "choice" to institutions is no choice at all. Notably, the rules governing faculty are often governed by collective bargaining agreements and do not give schools discretion to change how student complaints against faculty are heard and determined. In addition, the American Association of University Professors' widely adopted Recommended Institutional Regulations on Academic Freedom and Tenure provides that in dismissal cases, "[t]he burden of proof that adequate cause exists rests with the institution and will be satisfied only by clear and convincing evidence in the record considered as a whole." (Regulation 5c(8)). As a result, many faculty cases are decided based on a clear and convincing evidence standard. The effect of this rule is that in most circumstances schools will be mandated to use the clear and convincing standard – a standard that favors the accused and, as discussed above, is discriminatory towards the victim of sexual assault or harassment. There is no reason that student sexual harassment or sexual assault investigations, which are very similar to other types of student misconduct, should be subject to the same rules governing faculty. Instead, the standard should be consistent across all types of student misconduct.

The proposed rules would effectively force schools to use "clear and convincing evidence" for Title IX proceedings except in limited circumstances. This is the opposite of the flexibility that the new rules purport to encourage.

Section 106.45(b)(4)(i), *Standard of Proof,* proposes that, when hearing and determining a complaint of sexual harassment and assault a school may use the preponderance standard only if: (i) it uses preponderance for all other misconduct that carries the same maximum sanctions, and (ii) as discussed above, it uses preponderance in complaints against faculty. Otherwise, the school must use the clear and convincing evidence standard. In addition, the rules state "in contrast, because of the heightened stigma often associated with a complaint regarding sexual harassment, the proposed regulation gives recipients the discretion to impose a clear and convincing evidence standard with regard to sexual harassment complaints even if other types of complaints are subject to a preponderance of the evidence standard."

Civil rights laws prohibiting discrimination almost exclusively use preponderance of the evidence as the standard of proof. Most significantly, the Office of Civil Rights (OCR) investigations of schools for alleged violations of their obligations under civil rights laws (including Title IX), and litigation against educational institutions alleging violations of Title IX, use a preponderance of the evidence standard. Other educational civil rights statutes such as Title VI of the Civil Rights Act of 1964 (which prohibits race discrimination) use a preponderance of the evidence standard. In addition Title VII, which prohibits discrimination including sexual harassment, uses a preponderance standard.[13] This is also the standard applied to "erroneous outcome" cases brought by male plaintiffs suing their schools under Title IX for unjust disciplinary action after being held responsible for sexual assault. As properly noted by one expert, "To require complainants in University disciplinary processes to prove a sexual assault by clear and convincing evidence but permit disciplined male plaintiffs to succeed on a reverse discrimination claim under

[13] Title IX & the Preponderance of the Evidence: A White Paper (Aug. 7, 2016), https://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-8.7.16.pdf.

the preponderance standard, would create a powerful disincentive for a school to ever decide a close case in favor of a complainant."[14]

The preponderance standard generally applies to all civil actions, including civil enforcement actions. *See, e.g., SEC v. Posner*, 16 F.3d 520, 521 (2d Cir. 1994) (SEC must prove securities law violations by a preponderance of the evidence in civil enforcement actions); *EEOC v. Gaddis*, 733 F.2d 1373, 1379 (10th Cir. 1984) (EEOC must prove employment discrimination claim by a preponderance of the evidence in civil enforcement actions).

The preponderance standard is also broadly applicable in federal administrative proceedings, even in cases involving the imposition of serious sanctions. S*ee, e.g., Steadman v. SEC*, 450 U.S. 91 (1981) (holding that the preponderance standard of review applies to SEC proceeding involving the imposition of "severe sanctions" which permanently barred petitioner from practicing his profession and forced him to divest an investment at a substantial loss); *Valmonte v. Bane*, 18 F.3d 992, 1003–05 (2d Cir. 1994) (concluding that the preponderance standard applies to administrative proceeding concerning the publication of names of suspected child abusers on central registry).

When a school uses one standard for adjudicating accusations against students who commit violent acts of a non-sexual nature or who engage in non-sex-related discriminatory conduct, but adopts a higher standard for sexual harassment and assault, the school improperly differentiates between similarly serious campus misconduct and makes it more difficult to hold perpetrators of sexual assault or harassment accountable. We can fathom only one reason why such a differentiation would be permitted, *i.e.*, it is based on the false premise that sexual assault victims are more likely to be untruthful. If promulgated, the proposed regulation will continue, if not in fact then certainly in appearance, the long and misguided history of treating sexual harassment and assault complaints different from other misconduct. As noted by one scholar, "The law's traditional approach to sexualized violence treated women as inherently untrustworthy and men as not only presumptively innocent, but especially in need of protection from false allegations."[15]

The proposed regulations single out sexual harassment and sexual violence on campus as the only civil rights violations not able to be proven by preponderance of the evidence. Cases involving sexual harassment and assault require the same evidence gathering, testimony of witnesses, and credibility assessments required by any other misconduct investigation. To treat such cases distinctly serves only to reinforce false prejudices and to discriminate against women. This is inherently unfair and inequitable.

[14] *Id.*

[15] *E.g.* Lynn Henderson, *Rape and Responsibility*, 11 LAW & PHIL.127 (1992).

III. CONCLUSION

The Education Department's proposed rules raise significant legal concerns for institutions, and will result in costly and time-consuming litigation for New York institutions. For the above reasons, we oppose the implementation of these regulations and request that they be withdrawn.

Thank you for the opportunity to submit comments on the NPRM.

Respectfully,

Sex & Law Committee
Mirah E. Curzer, Co-Chair
Melissa S. Lee, Co-Chair