



**CONSORTIUM FOR CITIZENS  
WITH DISABILITIES**

January 30, 2019

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

Re: Docket No. ED-2018-OCR-0064, RIN 1870-AA14

The Consortium for Citizens with Disabilities (CCD) Education Task Force is writing in response to the U.S. Department of Education (the Department) Notice of Proposed Rulemaking (NPRM) regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

The Department asked for public comment on how this proposed rule affects students with disabilities. Title IX protects all students from sexual harassment, including sexual assault, and provides due process in administrative proceedings. Title IX applies to institutions that receive federal financial assistance from the Department, including state and local educational agencies (hereinafter referred to as “recipients”). These agencies include approximately 16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums. Also included are vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and territories and possessions of the United States.

Students with disabilities involved in sexual harassment, including sexual assault, face additional challenges and risks. This proposed rule makes schools and institutions of higher education drastically less safe for all students and fails to address known risk factors for students with disabilities who are survivors and alleged perpetrators of sexual violence.

For the reasons below, we ask that the Department immediately withdraw this NPRM and instead focus its energies on vigorously enforcing the Title IX requirements that the Department has relied on for decades, to ensure that schools promptly and effectively respond to sexual harassment.

**I. The proposed rule fails to take into account the reality of sexual harassment, including assault, and the different experiences, challenges, and needs of students with disabilities in elementary and secondary schools and in post-secondary institutions.**

As the Department notes in the preamble, students with disabilities have “different experiences, challenges, and needs.”<sup>1</sup> Students with disabilities are more likely to be victims of sexual assault and may be particularly vulnerable due to a range of factors, including physical challenges that can prevent them from protecting themselves, stereotypes about people with disabilities, and lack of opportunities for comprehensive sexual education.

Children with disabilities are at great risk of sexual abuse and violence. In general, children with disabilities (of both genders) are 2.9 times more likely than children without disabilities to experience abuse and violence.<sup>2</sup> Students with disabilities face sexual harassment, including assault, that threatens their equal opportunity to access education. College students with disabilities are also more likely than their peers without disabilities to experience sexual assault. A recent study by the Association of American Universities revealed that 31.6 percent of undergraduate females with disabilities reported nonconsensual sexual contact involving physical force or incapacitation, compared to 18.4 percent of undergraduate females without a disability.<sup>3</sup> This means that one of every three female undergraduates with a disability had been sexually assaulted during their time at college. In addition, students may experience mental health disabilities after an incident of sexual assault. The National Council on Disability has addressed the difficulties colleges face when effectively supporting students with mental health disabilities in a recent report.<sup>4</sup> Students with disabilities are less likely to be believed when they report and often have greater difficulty describing the harassment they experience.<sup>5</sup>

Also, sexual violence has been employed as a means by which anti-disability animus is expressed, including within the context of higher education. The FBI Hate Crimes Report found college campuses were the most common location in which hate crimes against persons with disabilities occurred and rape is the third most common type of hate crime committed against persons with disabilities.<sup>6</sup> Students with disabilities who face multiple forms of discrimination

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<sup>1</sup> 83 Fed. Reg. 61483.

<sup>2</sup> National Women’s Law Center. *Let Her Learn: Stopping School Pushout for Girls with Disabilities* (2017) at [https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Final\\_nwlc\\_Gates\\_GirlsWithDisabilities.pdf](https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Final_nwlc_Gates_GirlsWithDisabilities.pdf)

<sup>3</sup> National Council on Disability. *Not on the Radar: Sexual Assault of College Students with Disabilities* (2018) at <https://ncd.gov/publications/2018/not-radar-sexual-assault-college-students-disabilities>.

<sup>4</sup> National Council on Disability. *Not on the Radar: Sexual Assault of College Students with Disabilities*. *Supra* at 3 and *Mental Health on College Campuses: Investments, Accommodations Needed to Address Student Needs* at [https://www.ncd.gov/sites/default/files/NCD\\_Mental\\_Health\\_Report\\_508.pdf](https://www.ncd.gov/sites/default/files/NCD_Mental_Health_Report_508.pdf).

<sup>5</sup> E.g., Angela Browne, et al., *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14-15 (2016), available at <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx>.

<sup>6</sup> Brian T. McMahon, et. al, *Hate Crimes and Disability in America*, 47 *Rehabilitation Counseling Bulletin* 66, 71-72 (2004).

are more likely to have negative outcomes because recipients handle Title IX and disability policy in isolation of the other. Incidents that trigger concurrent Title IX and other civil rights (race, sexual orientation, religion, and ethnicity) responsibilities on part of recipient institutions may not be comprehensively remedied. For example, students with disabilities who also identify as members of other historically marginalized and underrepresented groups, such as LGBTQ or students of color are more likely to be ignored, blamed, and punished when they report sexual harassment due to harmful stereotypes that label them as “promiscuous.”<sup>7</sup>

Schools frequently struggle to balance establishing a positive school culture while disciplining students whose behaviors are disruptive to the learning environment. Unfortunately, several studies show that students with disabilities are at greater risk of removal from classes because of disproportionate discipline. Suspension and expulsion rates for K-12 students with disabilities are about two times higher than for their typically developing classmates.<sup>8</sup> While disproportionate discipline in Title IX is an important topic for further study, students with disabilities are far more likely to be victims of violence than instigators of it, and they are more likely to suffer physical and mental illnesses because of violence. Furthermore, we believe current law provides due process protections, yet schools are failing to provide accommodations necessary under current law.<sup>9</sup>

Tragically, many people still hold negative stereotypes that people with disabilities are not sexual and remain a child or child-like for their life. Just as harmful are negative stereotypes that people with disabilities who express sexual desires are sexual deviants and a menace.<sup>10</sup> Both stereotypes have a tragic impact on the student’s access to sexual health rights and justice in cases of sexual harassment or assault if the schools fail to counteract those stereotypes with comprehensive training.

In addition, students with disabilities that limit their ability to communicate may find it even more difficult to discuss incidents of a sexual nature. People with significant intellectual disability may not understand what is happening or have a way to communicate the sexual assault to a trusted person. Others with a less significant disability may realize they are being assaulted, but do not know they have a right to say no. In addition, they are rarely educated about sexuality issues (including consent) or provided assertiveness training. Even when a report is attempted, they face barriers when making statements to police because they may not

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<sup>7</sup> E.g., Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*. 42 HARVARD J.L. & GENDER 1, 16, 24-29 (forthcoming), available at <https://ssrn.com/abstract=3168909>; National Women’s Law Center, *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color.* (2016) at <https://nwl.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color>.

<sup>8</sup> National Center for Special Education in Charter Schools. *Key Trends in Special Education in Charter Schools: A Secondary Analysis of the Civil Rights Data Collection 2013-2014*. (2018) at <http://www.ncsecs.org/crdc-analysis-13-14/>.

<sup>9</sup> National Council on Disability. *Not on the Radar: Sexual Assault of College Students with Disabilities*. *Supra* at 3.

<sup>10</sup> Advocates for Youth. *Sexual Health Education for Young People with Disabilities – Research and Resources for Educators* (undated) at <https://advocatesforyouth.org/resources/fact-sheets/sexual-health-education-for-young-people-with-disabilities/>.

be viewed as credible due to having a disability.<sup>11</sup> Some people with intellectual disability do have trouble speaking or describing things in detail, or in proper time sequence. For that reason, prosecutors are often reluctant to take these cases because they are difficult to win in court.<sup>12</sup> For that reason, Title IX is the only option for survivors and all students who want to learn in a safe environment that is free of sexual harassment.

By narrowing the definition of “sexual harassment” with respect to Title IX, ED would be making it more difficult for students in schools to be protected from sexual harassment and shirk the responsibility of schools from acting until it is too late. The job of the Department is to protect the civil rights of students, including the right of survivors to access education, not to help shield schools from accountability. The proposed rules, however, are likely to lead to an increase in schools and postsecondary institutions ignoring sexual violence and harassment. The proposed rule also fails to address incidents where a student with a disability was targeted for sexual harassment because of their disability in addition to their sex.

## **II. The proposed rules would encourage or require schools to ignore students with disabilities who report sexual harassment.**

The proposed rule defines sexual harassment as “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school’s] education program or activity” and mandates dismissal of complaints of harassment that do not meet this standard.<sup>13</sup> Under this definition, even if a student reports sexual harassment to the “right person” who has “actual knowledge,” their school would still be required to ignore the student’s Title IX complaint if the harassment has not yet advanced to a point that it is actively harming a student’s education.<sup>14</sup> A school would be required to dismiss such a complaint even if it involved harassment of a minor student by a teacher or other school employee.

This NPRM “actual knowledge” provision proposes something unworkable for students with disabilities, especially young students, those with intellectual and developmental disabilities, and those with communication impairment. Reporting sexual harassment is always hard, and the proposed rules would further discourage students from coming forward to ask their schools for help. In the K-12 setting, schools fail to have age appropriate training on healthy relationships and all Title IX information (e.g. what constitutes sexual harassment, how to report a claim, etc.) communicated in a way that can be understood and learned by all, including those with intellectual disability and disabilities that limit their verbal and hearing abilities.

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<sup>11</sup> Davis, Leigh Ann, M.S.S.W., M.P.A. *People with Intellectual disability and Sexual Violence* (March 2011) at <https://www.thearc.org/document.doc?id=3657>.

<sup>12</sup> Shapiro, Joseph. “The Sexual Assault Epidemic No One Talks About.” NPR, 8 Jan. 2018, [www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about](http://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about).

<sup>13</sup> NPRM at § 106.44(a) and § 106.30.

<sup>14</sup> NPRM at § 106.44(a) and § 106.30.

Example:<sup>15</sup> A public school provides age-appropriate “Healthy Relationship” training for all students that teaches the concept of “consent” and how sexual harassment is harmful to the school community. However, students with intellectual disability are excluded from this requirement because the administrators feel they do not have a sexual harassment problem with those students. The NPRM creates confusion by narrowing the definition of sexual harassment and not requiring that schools communicate this definition in a way that all students can understand. In this case, segregation is not supported by data and puts more students at risk.

When K-12 students with disabilities report sexual harassment they are much more likely to report to those they have a close relationship with, such as teacher aides, school psychologists, members of their Section 504 team or Individualized Education Program (IEP) team, and other school employees who are not their teachers or the Title IX coordinator. Such students should not be foreclosed from reporting sexual harassment to these other school employees. Similarly, students with disabilities in higher education should not be foreclosed from reporting sexual harassment to Residential Advisors, Office of Disability Services, Teaching Assistants, professors, and other school employees who are not their Title IX coordinator. Non-verbal students and students with communication impairments are also harmed by this NPRM. These students rely on different modes of communication, whether it is sign language, interpreters, or technology assisted devices. There is an absence of procedures to communicate with survivors who are Deaf or hard of hearing and inaccessible support services for students with mobility disabilities.<sup>16</sup>

Example: A student with a significant disability that makes it difficult for him to communicate is not provided information about how to report a sexual assault in a way that he is able to understand. During the school year, he tells his school-provided support staff that another student inappropriately touched him. The support staff communicates with the parents, but not the Title IX coordinator. The parents are unaware of the school’s responsibility to investigate and remediate the situation. The school does nothing to protect the student. The student continues to ride the bus and attend school with the alleged perpetrator, which causes increasing anxiety in the boy and leads to increased absenteeism, poor academic performance, and decline in health. The NPRM makes this inappropriate response by the school much more likely to occur by shielding them from liability when students communicate a sexual assault to a trusted school employee.

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<sup>15</sup> Examples herein are based on stories collected from parents of students with disabilities under condition of anonymity.

<sup>16</sup> National Council on Disability. *Not on the Radar: Sexual Assault of College Students with Disabilities*. *Supra* at 3.

The NPRM exclusion of misconduct outside of school puts students with disabilities at greater risk of sexual harassment. Many K-12 students with disabilities, especially students with intellectual and multiple disabilities are educated in separate, segregated classes, and even separate schools and “off-site” educational and day services.<sup>17</sup> Sexual harassment, including assault, is more likely to occur in segregated and isolated settings.

The proposed regulations also change the definition of sexual harassment to define it as “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school’s] education program or activity” and mandates dismissal of complaints of harassment that do not meet this standard.<sup>18</sup> The NPRM definition of sexual harassment is again unworkable for students with disabilities. Young people with disabilities need accurate information and skills, and have the same rights to environments free from sexual harassment as those without disabilities. The current definition rightly charges schools with responding to harassment before it escalates to a point that students suffer severe harm. However, under the Department’s proposed, narrower definition of harassment, students with disabilities would be forced to endure repeated and escalating levels of abuse, from a student or teacher, before their schools would be required to investigate and stop the harassment. If a student is turned away by their school after reporting sexual harassment, the student is extremely unlikely to report a second time when the harassment escalates.

The Department’s proposed definition is out of line with Title IX purposes and precedent, discourages reporting, and excludes many forms of sexual harassment that interfere with access to educational opportunities. Sexual harassment is not protected speech if it creates a “hostile environment,” i.e., if the harassment limits a student’s ability to participate in or benefit from a school program or activity. In addition, schools have the authority to regulate harassing speech. The Supreme Court held in *Tinker v. Des Moines* that school officials can regulate student speech if they reasonably forecast “substantial disruption of or material interference with school activities” or if the speech involves “invasion of the rights of others.”<sup>19</sup> There is no conflict between Title IX’s regulation of sexually harassing speech in schools and the First Amendment.

Example: A 7th grade boy with a physical disability who requires the use of a wheelchair is targeted by other students who ask inappropriate questions about whether the boy can still have sex. The boy is embarrassed and ashamed by the questioning and asks that they stop. They do not stop. The boy reports the behavior to his teacher who believes this is just students being curious about his disability or at worst juvenile teasing and encourages him to “ignore them.” The inappropriate comments continue to the point where the boy develops anxiety

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<sup>17</sup> National Council on Disability. *The Segregation of Students with Disabilities*. (February 2018) at [https://ncd.gov/sites/default/files/NCD\\_Segregation-SWD\\_508.pdf](https://ncd.gov/sites/default/files/NCD_Segregation-SWD_508.pdf).

<sup>18</sup> NPRM at § 106.44(a) and § 106.30.

<sup>19</sup> *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

and his parents decide to remove him from school. Under the Department’s current interpretation, the teacher should have investigated and put in place remedial measures to protect the student. This NPRM could cause confusion and allow this type of harassment to go unchecked.

The “deliberate indifference” standard adopted by the proposed rules is a much lower standard than that required of schools under current guidance, which requires schools to act “reasonably” and “take immediate and effective corrective action” to resolve harassment complaints.<sup>20</sup> Under the proposed rules, by contrast, schools would simply have to not be deliberately indifferent—which means that their response to harassment would be deemed to comply with Title IX as long as it was not *clearly* unreasonable. As long as a school follows various procedural requirements set out in the proposed rules, the school’s response to harassment complaints could not be challenged. The practical effects of this proposed rule would shield schools from any accountability under Title IX, even if a school mishandles a complaint, fails to provide effective supports for survivors, and wrongly determines against the weight of the evidence that an accused harasser was not responsible for sexual assault.

Example: After being encouraged by fellow students to lift her shirt so they “can be friends,” a 6th grade girl with an intellectual disability is observed exposing herself to a group of boys. The parents of the girl are called in and told that they do not have to worry about any discipline because the school “knows she is a “good” girl and didn’t mean anything.” Under current law, this response is inadequate because the school failed to address and correct the hostile climate in which this incident occurred that 1) failed to provide adequate training of all students about healthy relationships and what constitutes sexual harassment; 2) failed to investigate disability and sex-based animus by the students who pressured the girl into lifting her shirt; and 3) failed to implement prompt and effective remedial measures which should include discipline of students who goaded the girl into lifting her shirt. The NPRM makes this situation much worse by providing an excuse and creating confusion in the law and leading school personnel to ignore this harmful situation.

**III. The proposed rules fail to take into account issues related to the needs of students and employees with disabilities when they participate in a Title IX proceeding.**

The grievance procedures required by the proposed rules would impermissibly tilt the process in favor of named harassers, re-traumatize complainants, and conflict with Title IX’s nondiscrimination mandate. Under proposed rule § 106.45(b)(1)(iv), schools would be required to presume that the reported harassment did not occur, which would ensure partiality to the

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<sup>20</sup> U.S. Department of Education, Office for Civil Rights. “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties” (2001) at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

respondent. This presumption would also exacerbate rape myths upon which many of the proposed rules are based—namely, the myth that women and girls often lie about sexual assault. The presumption of innocence is a criminal law principle, incorrectly imported into this context. Criminal defendants are presumed innocent until proven guilty because their very liberty is at stake—criminal defendants go to prison if they are found guilty. There is no such principle in civil proceedings or civil rights proceedings, and Title IX is a civil rights law that ensures that sexual harassment is never the end to anyone’s education.

NPRM’s section 106.45(b)(1)(iv) would only encourage schools to ignore or punish historically marginalized and underrepresented groups that report sexual harassment for “lying” about it. As described above, students with disabilities are less likely to be believed due to stereotypes about people with disabilities and often have greater difficulty describing the harassment they experience.

Students with disabilities, particularly intellectual disability, are particularly vulnerable in adversarial proceedings and would be harmed by NPRM’s section 106.45(b)(3)(vii), which would require colleges and graduate schools to conduct a “live hearing,” and requires parties and witnesses to submit to cross-examination by the other party’s “advisor of choice,” often an attorney. Neither the Constitution nor any other federal law requires live cross-examination in school conduct proceedings. Yet this proposed rule would require survivors and witnesses in college and graduate school to submit to live cross-examination by their named harasser’s advisor of choice, causing further trauma. Being asked detailed, personal, and humiliating questions often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced would understandably discourage many students—parties and witnesses— from participating in a Title IX grievance process, chilling those who have experienced or witnessed harassment from coming forward. It is well documented that some people with intellectual disability have trouble speaking or describing things in detail, or in proper time sequence, making adversarial proceedings tremendously unhelpful in allegations of sexual harassment, including assault.<sup>21</sup>

Furthermore, survivors with disabilities (including many who develop mental illness such as post-traumatic stress disorder because of the assault) should not be required to submit to live cross-examination by their assailant’s advisor. They should instead have the right to accommodations under Section 504 of the Rehabilitation Act and the ADA (e.g., written questions or live questioning by a neutral official, as the proposed rules would allow in K-12 schools).

For similar reasons, we are opposed to the proposed § 106.45(b)(6), which would allow schools to use “any informal resolution process, such as mediation” to resolve a complaint of sexual harassment, as long as the school obtains the students’ “voluntary, written consent.” Once consent is obtained and the informal process begins, schools may “preclude [] the parties from

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<sup>21</sup> NPR. “The Sexual Assault Epidemic No One Talks About.” January 2018. <https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about>.



resuming a formal complaint.” Mediation is a strategy often used in schools to resolve peer conflict, where both sides must take responsibility for their actions and come to a compromise. Mediation is never appropriate for resolving sexual assault or harassment, even on a voluntary basis. Survivors should not be pressured to “work things out” with their assailant (as though they share responsibility for the assault) or exposed to the risk of being re-traumatized, coerced, or bullied during the mediation process. Furthermore, students with disabilities should not be manipulated or pressured into agreeing to remove themselves from campus or go to alternative school as an outcome of mediation.

The Department’s longstanding practice requires that schools use a “preponderance of the evidence” standard—which means “more likely than not”—in Title IX cases to decide whether sexual harassment occurred.<sup>22</sup> We oppose proposed rule § 106.45(b)(4)(i) because it departs from that practice, and establishes a system where schools could elect to use the more demanding “clear and convincing evidence” standard in sexual harassment cases, while allowing all other student misconduct cases to be governed by the preponderance of the evidence standard, even if they carry the same maximum penalties.<sup>23</sup> The Department’s decision to allow schools to impose a more burdensome standard in sexual assault cases than in any other student misconduct case appears to rely on the unspoken stereotype and assumption that survivors are more likely to lie about sexual assault than students who report physical assault, plagiarism, or other school disciplinary violations. There is no basis for that sexist belief and in fact, men and boys are far more likely to be *victims* of sexual assault than to be *falsely accused* of sexual assault.<sup>24</sup>

The proposed rules also require schools to have “reasonably prompt timeframes,” but allows them to create a “temporary delay” or “limited extension” of timeframes for “good cause,” which includes “concurrent law enforcement activity” and “need for language assistance or

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<sup>22</sup> The Department has required schools to use the preponderance standard in Title IX investigations since as early as 1995 and throughout both Republican and Democratic administrations. For example, its April 1995 letter to Evergreen State College concluded that its use of the clear and convincing standard “adhere[d] to a heavier burden of proof than that which is required under Title IX” and that the College was “not in compliance with Title IX.” U.S. Dep’t of Educ., Office for Civil Rights, *Letter from Gary Jackson, Regional Civil Rights Director, Region X, to Jane Jervis, President, The Evergreen State College* (Apr. 4, 1995), at 8, available at [http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed\\_ehd\\_1995.pdf](http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf). Similarly, the Department’s October 2003 letter to Georgetown University reiterated that “in order for a recipient’s sexual harassment grievance procedures to be consistent with Title IX standards, the recipient must ... us[e] a preponderance of the evidence standard.” U.S. Dep’t of Educ., Office for Civil Rights, *Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University* (Oct. 16, 2003), at 1, available at <http://www.nchem.org/documents/202-GeorgetownUniversity--110302017Genster.pdf>.

<sup>23</sup> Proposed rule § 106.45(b)(4)(i) permits schools to use the preponderance standard *only if* it uses that standard for all other student misconduct cases that carry the same maximum sanction *and* for all cases against employees. This is a one-way ratchet: a school would be permitted to use the higher clear and convincing evidence standard in sexual assault cases, while using a lower standard in all other cases.

<sup>24</sup> *E.g.*, Tyler Kingkade, *Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It*, Huffington Post (Dec. 8, 2014) [last updated Oct. 16, 2015], [https://www.huffingtonpost.com/2014/12/08/false-rape-accusations\\_n\\_6290380.html](https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html).

accommodation of disabilities.”<sup>25</sup> In contrast, the 2011 rules recommended that schools finish investigations within 60 days, and prohibited schools from delaying a Title IX investigation just because there was an ongoing criminal investigation.<sup>26</sup> While criminal investigations seek to punish an abuser for their conduct, Title IX investigations should seek to ensure that complainants are able to access educational opportunities that become inaccessible due to harassment. Title IX guidance should not be about criminal liability, rather it should be about protecting students from discrimination and creating educational supports for survivors.

Of particular concern is allowing schools to delay proceedings because they fail to comply with federal accessibility laws that require accommodations including sign language interpreters and other accommodations. The NPRM says that there is “good cause” for a delay in proceedings if there is “the need for language assistance or accommodation of disabilities.”<sup>27</sup> Students with disabilities should not have their proceedings delayed because their school is failing to follow existing laws requiring that these accommodations are available.<sup>28</sup> Students should never be encouraged to pursue criminal proceedings before or instead of Title IX proceedings.

Example: A female college student with an intellectual disability is sexually assaulted. The Title IX coordinator advises her to report the incident to the police concurrently with her Title IX complaint. The police report triggers a report to adult protective services and an investigation into the student’s capacity and guardianship. After consulting with prosecutors, adult protective services begins the process of petitioning for the female student who has been raped under the theory that if the student cannot consent to sex, the perpetrator will be criminally liable. The school suspends the Title IX proceedings pending the guardianship determination. The NPRM makes it easier for colleges to delay indefinitely proceedings involving people with certain disabilities.

**IV. The proposed regulation does not address the need to create learning environments that prevent sexual harassment and assault of students with disabilities nor does it require the training and accommodations necessary to meet the needs of students with disabilities involved in Title IX proceedings.**

We appreciate that the proposed rule mentions students with disabilities in the context of emergency removals.<sup>29</sup> However, the proposed rule fails to recognize the difference between the procedural requirements K-12 students have under the Individuals with Disabilities

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<sup>25</sup> Proposed rule § 106.45(b)(1)(v).

<sup>26</sup> U.S. Department of Education Office of Civil Rights. “Title IX Enforcement Highlights.” June 2012. <https://www2.ed.gov/documents/press-releases/title-ix-enforcement.pdf> .

<sup>27</sup> Proposed rule § 106.45(b)(1).

<sup>28</sup> National Council on Disability. *Not on the Radar: Sexual Assault of College Students with Disabilities*. *Supra* at 3.

<sup>29</sup> Proposed rule § 106.45(b)(1)(v).

Education Act (IDEA)<sup>30</sup> and how the Title IX, Americans with Disabilities Act (ADA),<sup>31</sup> and Rehabilitation Act<sup>32</sup> statutes each distinctively require equal educational opportunity for *all* students with disabilities at all levels (elementary, secondary, and post-secondary institutions that receive federal funds). Additionally, the proposed regulation fails to address responsibility of schools to consider students with disabilities in creating a safe school climate that ensures equal educational opportunities throughout the entire Title IX process.

While we appreciate that the proposed rule mentions the need for recipients to be aware of and not “modify” students’ rights required in IDEA, ADA, and the Rehabilitation Act, in the context of emergency removals (proposed § 106.44(c)), this disclaimer does not go far enough. The proposed rule fails to put recipients on notice that they must consider the unique needs of students with disabilities throughout the entire Title IX process, not just during the removal determination.

We strongly agree that segregation of K-12 students with disabilities from classroom settings should be rare and only when in compliance with IDEA. However, this needs additional clarification because the procedural rights to free and appropriate public education (FAPE) are not as comprehensive as the right to equal educational opportunities for all students under Title IX, ADA, and the Rehabilitation Act, which are much broader. Not all K-12 students with disabilities are covered under IDEA, which has an enumerated list of disabilities a student must have in order to meet the FAPE requirement. Recipients must be made aware that a student with a disability does not have to be eligible for FAPE in order to be covered under this regulation. Additionally, although IDEA may have additional requirements to provide FAPE, recipients must not be misled into thinking there are different standards for K-12 and post-secondary education environments when it comes to *equal access* to educational opportunities.

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<sup>30</sup> The Individuals with Disabilities Education Act (IDEA) provides opportunity for free appropriate public education for qualifying K-12 students and procedural rights for students and parents (e.g. participate in the evaluation and IEP process). See National Center for Learning Disabilities. *IDEA Parent Guide: A comprehensive guide to your rights and responsibilities under the Individuals with Disabilities Education Act (IDEA 2004) (2006)* at <https://www.nclld.org/wp-content/uploads/2014/11/IDEA-Parent-Guide1.pdf>.

<sup>31</sup> The Americans with Disabilities Act (ADA) gives civil rights protections to individuals with disabilities that are like those provided to individuals on the basis of race, sex, national origin, and religion. It guarantees equal opportunity for individuals with disabilities in employment, public accommodations, transportation, State and local government services, and telecommunications. See Department of Education, Office of Civil Rights. *Americans with Disabilities Act* at <https://www2.ed.gov/about/offices/list/ocr/docs/hq9805.html>.

<sup>32</sup> Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive Federal financial assistance from the U.S. Department of Education (ED). Section 504 provides: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." Section 504 covers programs and activities by recipients of federal financial assistance including public school districts, institutions of higher education, and other state and local education agencies. The regulations implementing Section 504 in the context of educational institutions appear at 34 C.F.R. Part 104.

A recent Supreme Court decision made clear that a student’s procedural rights to FAPE under IDEA does not supersede or infringe upon the student’s right to restrict or limit the rights, procedures, and remedies available under the Constitution, the ADA, sections of the Rehabilitation Act (including §504), or other federal laws protecting the rights of students with disabilities.<sup>33</sup> The NPRM fails to state that colleges and universities have an affirmative duty to communicate the nature of the allegation and inquire whether a person needs an accommodation in a way that people with an intellectual disability can understand and respond. Additionally, while respecting the student’s privacy, they should work with the Office of Disability and obtain the student’s consent if he or she would like to contact their parent, guardian, or other support, during the entire Title IX process. Finally, campus police enforcing Title IX must be trained on how to interact with students with disabilities in ways that are not harmful to the learning environment.

Example: A male student with autism graduated from high school with the assistance of appropriate supports and an IEP that required prior written notice to the parents from the school each time that the school proposed to take certain actions with respect to the student - including removal from any educational setting. The student began a post-secondary program at college but has not yet received “appropriate educational supports” required under the ADA and Rehabilitation Act (a process that can take months to set up in a post-secondary setting). During class, he tried to make friends and meet girls. He was pacing trying to get up his nerve to speak to a couple of girls (not unusual for someone with autism) and the girls on the quad reported him for “stalking” and said he made them feel uncomfortable. He received a letter from the Title IX office but ignored it because he felt he did not do anything wrong. The campus police were sent to his class and asked him to go outside to speak and he was scared and refused. The police handcuffed him and physically took him out of the class. The students called his parents who were shocked at the college’s apparent ignorance, indifference and failure to understand the student’s need for accommodations.

The proposed regulation fails to address the need for the educational community, including Title IX Coordinators, students, teachers, staff, and administrators to acknowledge the different experiences and needs of students with disabilities in the educational ecosystem. Schools should be required to have age appropriate training on healthy relationships and all Title IX information (e.g. what constitutes sexual harassment, how to report a claim, etc.) communicated in a way that can be understood and learned by all, including those with intellectual disability and disabilities that limit their verbal and hearing abilities. Without such training, schools may continue to rely on negative stereotypes and implicit bias that will put students with disabilities at risk.

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<sup>33</sup> See *Fry v. Napoleon Community Schools*, 580 U.S. \_\_\_\_ (2017).

Sexuality is a normal part of growth and development. Students with disabilities have the same feelings, sexual desires, and a need for intimacy and closeness as students without disabilities. Young people with disabilities need accurate information and skills, and have the same rights to environments free from sexual harassment as those without disabilities. Tragically, many people still hold negative stereotypes that people with disabilities are not sexual and remain a child or child-like for their life. Just as harmful are negative stereotypes that people with disabilities who express sexual desires are sexual deviants and a menace.<sup>34</sup> Both stereotypes have a tragic impact on the student's access to sexual health rights and justice in cases of sexual harassment or assault if the schools fail to counteract those stereotypes with comprehensive training.

Title IX coordinators must take an active role in creating safe environments for students with disabilities. Each school could have a different approach based on the cultural and historical experiences with sexual harassment and assault. Some ways this could be accomplished include integrating students with disabilities into existing healthy relationship classes with their peers without disabilities and providing specific examples of the needs and challenges faced by students with disabilities in trainings on sexual harassment and assault in schools. Additionally, all Title IX information materials must be accessible and understood by students with disabilities. Ideally, post-secondary institutions would coordinate with the Office on Disability to identify students with disabilities who are involved in Title IX proceedings (while respecting student privacy rights), and disseminate Title IX information in ways that are accessible to all students (including website accessibility, and provided in plain language for students with intellectual disability).

The proposed regulation fails to take into account that many K-12 schools and post-secondary education institutions do not have a Title IX coordinator in place,<sup>35</sup> yet it relies on students, especially students with disabilities, to report to Title IX coordinators. Even where Title IX coordinators are appointed, they often lack the training, autonomy, or authority to do their jobs effectively.<sup>36</sup> These lapses can lead to Title IX violations that harm students and open the door for investigations and legal action.

The proposed regulation fails to require affirmative training and resources for Title IX coordinators to implement legally required accommodations for students with disabilities in the Title IX proceedings. Recipients and Title IX coordinators do not provide accommodations required by law including appropriate services and supports in the Title IX process and using the least restrictive remedies available for students with disabilities.<sup>37</sup> The NCD found that students with physical disabilities are not “on the radar” of colleges in their sexual assault prevention

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<sup>34</sup> Advocates for Youth. “Sexual Health Education for Young People with Disabilities – Research and Resources for Educators” (undated) at <https://advocatesforyouth.org/resources/fact-sheets/sexual-health-education-for-young-people-with-disabilities/>

<sup>35</sup> National Coalition of Women and Girls in Education. “Title IX at 45: Advancing Opportunity Through Equity in Education” (2018) At <https://www.ncwge.org/TitleIX45/Title-IX-Coordinators.pdf>.

<sup>36</sup> Ibid.

<sup>37</sup> National Council on Disability. *Not on the Radar: Sexual Assault of College Students with Disabilities.* *Supra* at 3.

efforts, policies, or procedures for response and support after an assault. This includes the absence of procedures to communicate with victims who are Deaf or hard of hearing and inaccessible support services for students with mobility disabilities. Similarly, NCD's study found that students with disabilities are invisible in federal research and grant programs on campus sexual assault.<sup>38</sup> Also, although IDEA stipulates that school children be educated in the least restrictive environment with their non-disabled peers, schools continue to apply Title IX remedies in ways contrary to IDEA.

Example: A 12 year-old student with autism has recently transitioned from a more restrictive classroom with only children with disabilities to an integrated school with children of all abilities. He is not used to men's bathroom etiquette. Another student makes a complaint that the boy with autism made him uncomfortable and was sexually inappropriate because he observed the other boy urinating and, because he had never received appropriate sex education in a way he understands, made comments about the other student's genitalia. After an informal meeting with the Title IX coordinator, the school's remedy was to require the student with autism to have a support person with him at all times in the bathroom. This response may not be the least restrictive means to solve the problem – instead the school should have worked with the IEP team, which includes the parents, to determine the appropriate way to explain bathroom etiquette to the student.

Finally, the NPRM fails to support and strengthen data collection on the prevalence of Title IX complaints by students with disabilities. Recipients should be expected to carefully analyze their data on claimants and respondents with disabilities, and consider it with respect to disproportionate outcomes and discipline for students by disability, race, sexual identity, sexual orientation, age and other important demographics.

We call on the Department of Education to immediately withdraw this NPRM and instead focus its energies on vigorously enforcing the Title IX requirements that the Department has relied on for decades, to ensure that schools promptly and effectively respond to sexual harassment.

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

Sincerely,  
American Association on Intellectual and Developmental Disabilities (AAIDD)  
American Network of Community Options & Resources (ANCOR)  
American Physical Therapy Association  
American Therapeutic Recreation Association  
Autism Society of America  
Autistic Self Advocacy Network  
Center for Public Representation

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<sup>38</sup> *Ibid.*

Council of Administrators of Special Education  
Council of Parent Attorneys and Advocates  
Disability Rights Education & Defense Fund (DREDF)  
Epilepsy Foundation of America  
National Association of Councils on Developmental Disabilities  
National Center for Learning Disabilities  
National Center for Parent Leadership, Advocacy and Community Empowerment (National PLACE)  
National Center for Special Education in Charter Schools  
National Disability Rights Center  
National Down Syndrome Congress  
RespectAbility  
School Social Work Association of America  
TASH  
The Advocacy Institute

CCD, headquartered in Washington DC, is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. Since 1973, CCD has advocated on behalf of people of all ages with physical and mental disabilities and their families. CCD has worked to achieve federal legislation and regulations that assure that the 54 million children and adults with disabilities are fully integrated into society.