

**Comments on Department of Education Proposed Rule: Nondiscrimination on the Basis of Sex in
Education Programs or Activities Receiving Federal Financial Assistance
RIN: 1870-AA14**

March 23, 2020

The National Center for Transgender Equality (NCTE) supplements our comments on the proposed rule (Doc ID ED-2018-OCR-0064-11557) with these additional comments to address subsequent developments, including: the COVID-19 epidemic, public statements by the Secretary regarding the rule, enforcement actions by the Department, additional proposed changes to the Title IX regulations, and recently published research.

OMB should continue review of all significant regulatory actions during the current National Emergency and for 30 days thereafter to allow for meaningful public input and preparation for any rule changes.

During the current novel coronavirus (COVID-19) pandemic, schools, colleges, universities, student organizations, organizations serving survivors, and countless other stakeholder organizations and individuals are confronting a national and global emergency. School, child care, and workplace closures; urgent needs for public education, outreach, and direct services; and individuals becoming ill or taking care of loved ones who are ill are all diverting time and resources away from stakeholders' ability to participate in the public feedback process established by Executive Order 12866. These disruptions will also interfere with covered entities' and other stakeholders' ability to prepare for implementation of any final rule.

Accordingly, we urge that the Office of Management and Budget should continue review of this rule, and of all non-emergency rulemaking during the current National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, declared by the President on March 13, and for 30 days thereafter. While there may in rare cases be good cause to proceed with OMB review of a rule that is necessary for the public health, national security, or economic relief, the present rule is not one.

Both a "may dismiss" and a "must dismiss" approach to off-campus victimization are arbitrary, harmful, and contrary to the Title IX statute and case law.

NCTE noted in our comments on the proposed rule how the proposed "must dismiss" approach to off-campus discrimination would be harmful, arbitrary, and contrary to law. Since that time, Secretary DeVos has publicly suggested that the Department might shift its approach in the final rule to a "may dismiss rule"—that is, not requiring, but permitting, schools to categorically dismiss and not investigate any complaint based on off-campus victimization.ⁱ This approach, while perhaps less dramatic in the scope of its overreach, is nevertheless insupportable.

Regardless of whether it is couched as "may" or "must," absolving schools of any responsibility for off-campus victimization conflicts with Title IX's statutory language, which holds schools responsible for addressing sexual harassment if it affects a student's ability to enjoy "the benefits of ... any education program or activity," regardless of where it occurs.ⁱⁱ The Department itself recognized the devastating impacts of off-campus sexual assault, and the responsibility of schools to act on knowledge of such abuse, in its September 12, 2019 Letter of Findings that the Chicago Public Schools had violated Title IX "because the District failed to respond promptly and equitably to complaints alleging sexual harassment" that occurred off-campus.ⁱⁱⁱ These reports included a student who was sexually abused by a teacher in his car, and a student who was sexually assaulted in an abandoned building by thirteen boys, eight of whom whom she recognized from school. The administrative record is replete with evidence of the prevalence and harms of off-campus victimization of students by other students or staff, often in circumstances where the school had knowledge and failed to act.^{iv} The construction of

Title IX reflected in the Chicago Findings Letter reflects the statutory language, case law, and longstanding Department practice. Any categorical carve-out of off-campus abuse would be arbitrary and improper.

The Department's recent resolution of the University of Southern California/George Tyndall case illustrates the longstanding approach to notice and the harms of the proposed rule's approach.

NCTE noted in our comments on the proposed rule how a dramatic narrowing in the Department's notice standards for administrative enforcement would be harmful, arbitrary, and contrary to law. In particular, the Supreme Court has applied an "actual knowledge" standard under Title IX only to private suits for money damages, not to administrative enforcement by the Department.^v The proposed rule's narrow definition of "actual knowledge" is even narrower than the one applied by the Supreme Court in damages actions. The Department's recent Letter of Findings regarding the University of Southern California starkly illustrates the harms of this proposal.^{vi}

In that case, a staff gynecologist in the USC Student Health Center, George Tyndall, sexually harassed and abused numerous students over a period of over twenty years. This abuse occurred in the Student Health Center itself, in the course of the employee's duties as a health care provider for students. OCR's investigation found that "patients and SHC staff members complained to SHC supervisors about allegedly inappropriate sexual conduct by Employee 1 from the early 1990s to 2016."^{vii} While supervisors in the center had already been aware of complaints for years, the center's Executive Director did not receive a formal complaint until 2000. The Department's Letter of Findings applies the standards the Department has followed since 2001, stating:

A school has notice of sexual harassment if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment. A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.

In cases where an employee is engaged in sexual harassment of a student, a school may be held responsible under Title IX regardless of whether it knew or should have known about the harassment. Specifically, if an employee, in the context of carrying out his or her day-to-day job responsibilities for providing aid, benefits or services to students, engages in harassment that denies or limits a student's ability to participate in or benefit from the school's program, the school is responsible for discrimination, whether or not it knew or should have known about it.

Thus, under the long-established standards applied by the Department in this case, the fact that the abuse was perpetrated by a school employee in the course of carrying out his job made the school responsible without regard to actual or constructive notice. Moreover, staff chaperones' awareness of apparent inappropriate sexual conduct, and their complaints to mid-level supervisors, put the school on notice long before formal complaints reached the Student Health Center's top official. Thus, the Department would have been authorized to investigate and find discrimination and seek a resolution many years earlier had it received word of these complaints.

The USC Findings Letter stands in stark contrast to the proposed rule. Under this proposal, a school would for the first time be able to disclaim responsibility stopping for sexual harassment or violence by its own employee unless it was reported to a sufficiently senior official. Reporting to a teacher would constitute "actual knowledge" if the abuse was by a fellow student, but not if it was by another teacher or staff member, such as Dr. Tyndall.

Under this standard, it would not even matter if the employee committed this abuse in their workplace, during work hours, and used their official position to exploit students, nor that several other staff (such as the USC Health Center chaperones) were aware of it for months or years. Inexplicably, even reporting abuse to employees with a formal duty to report it up the chain of command would not make a school responsible for taking action. Nor would numerous reports of highly suspicious circumstances on the part of the “right” higher officials—such as the USC Health Center supervisors—trigger the school’s responsibility to act.

This arbitrary standard is a recipe for more serial abusers like Dr. Tyndall to victimize students for years while colleges put on blinders and fail to act. The longstanding approach applied by the Department in the USC case is the correct one, and the redefinition attempted by the proposed rule is arbitrary and dangerous.

OMB must fully address the legal, policy, and cost implications of this rule’s Title IX exemption changes in light of the Department’s other changes to the Title IX exemption as proposed in January 2020 (RIN 1840-AD45).

NCTE noted in our comments on the proposed rule described how would deprive the public, including prospective students and their families, of notice of schools’ intention to invoke potentially sweeping exemptions from this critical civil rights law. While the Department must apply the Title IX statutory exemption language and has not denied exemptions solely on the basis of a school’s failure to provide advance notice, such notice is an important indicator that an exemption request is bona fide, and directing institutions to provide notice helps ensure fundamental fairness for students. Encouraging schools to assert an exemption only after they face a complaint of discrimination risks subjecting students to fundamentally unfair surprises and betrayals. In comparison, educational institutions are well aware of their own religious tenets and requiring notification imposes no hardship on schools entitled to an exemption under current law.

Now, however, OMB and the Department must also consider the costs and benefits of eliminating the notice procedure in light of the Department’s separate proposal, published in January, to expand the scope of organizations who may claim the exemption.^{viii} Under this proposal, organizations with only a tenuous, if any, claim to be “controlled by a religious organization” will be encouraged to claim broad exemptions for the first time. The Department stated that its new criteria were “consistent with the Department’s past practice” and pointed to little-known guidance documents from 1977 and 1989.^{ix} While the proposed factors borrow phrases from those documents, they are recontextualized to be much broader in the January proposed rule, so that (for example) a statement of “moral belief” and disciplinary consequences attached to that belief could justify an exemption in the absence of any evidence of being “controlled by a religious organization.” In its January proposal, the Department nevertheless asserted that it “does not believe that it would substantially change the number or composition of entities asserting the exemption,” but that “[t]o the extent that it would, there would be an expansion of previously eligible entities beginning to assert the exemption due to an increased clarity regarding the regulatory standard for doing so.”^x The Department did not state any reasoning or evidence for this conclusion, nor for its conclusion that “[w]e do not anticipate this change to have any quantifiable cost.”^{xi}

The lack of any material benefit to repealing the notice provision is unchanged here, but the potential harms to students are magnified, because the number of institutions who may claim exemptions that prospective students are unaware of will expand by some unknown number. OMB and the Department must assess the potential harm of unfair surprise and deprivation of educational opportunities to students, and this analysis must now seek to assess and weigh the number of additional institutions who may now claim exemptions for discrimination without prior notice.

New research on the experiences of transgender students and survivors further illustrates the potential for the rule to exacerbate the harms of sexual violence and harassment.

NCTE noted in our comments on the proposed rule that transgender students are sexually victimized at extremely high rates, and face additional, bias-related barriers to filing and pursuing complaints. New research continues to confirm and elaborate these findings.

For example, a study of over 2,700 10th grade students at 27 Northeastern high schools found high rates of peer victimization of all kinds among transgender students. In the sample, cisgender girls and transgender youth of all genders were more likely than boys to be sexually harassed. Cisgender girls and transgender youth were more likely than boys to be sexually harassed by boys, while transgender youth were more likely than cisgender boys or girls to be sexually harassed by girls. With respect to sexual violence, transgender youth were more likely to be victimized than either cisgender boys or girls. The same was true for sexual abuse by a dating partner. Discriminatory harassment of other kinds was linked with sexual harassment and violence among LGBTQ youth. “Among transgender youth who endorsed [*i.e.*, reported] bias-based discrimination, all reported bullying as well, with 80% reporting some form of sexual harassment, 88% reporting dating conflict, and 50% reporting sexual victimization.” Overall, “[e]ighty-six percent of transgender youth reported some form of peer victimization in the past year and 14% endorsed all four forms of peer victimization (*i.e.*, bullying, sexual harassment, unwanted sexual intercourse, dating conflict).”^{xii} Because of these high rates of victimization, the experiences of transgender survivors are instructive.

The Department has acknowledged that the individual and societal costs of sexual harassment and violence are enormous. One new study of over 50,000 college students found that sexual assault in the past year was reported by 13% of cisgender women, 4% of cisgender men, and 18% of transgender students (of all genders). Across gender, “college students exposed to [sexual assault] have substantially higher risk of co-occurrence of depression, anxiety, NSSI [non-suicidal self-injury], and suicide ideation.”^{xiii} The Department has argued that data regarding the economic and social costs of sexual violence and harassment alone are not relevant to evaluating the costs of the rule. But it is not true that once a person suffers violence or harassment, the damage is done.

How schools respond matters, for several reasons. One is the potential to deter future harm *by the specific respondent*. Another is the potential to deter future harm by others. The Department and OMB must consider these effects. In addition to effects on potential future violence, the proposed rule has the potential to exacerbate the already grave effects of victimization on students’ long-term health and educational opportunity. There is a substantial body of literature showing that the responses of a survivor’s social and institutional environment have important mediating effects on the impacts of violence and harassment. Responsive and supportive institutions can mitigate these harms, while ineffective or hostile responses fail to do so and can even exacerbate harm.

For example, a new study of 155 transgender survivors found that the association between sexual violence and suicide risk was mediated by several factors, including internalized transgender stigma, expectation of mistreatment because of being transgender, and belief that it is necessary to conceal one’s gender identity. In other words, “the relationship between sexual violence and suicide risk is partially explained by [these] proximal stressors.”^{xiv} Again, this finding demonstrates that survivors’ fears and beliefs regarding how they will be treated when reporting have a substantial impact on the degree of harm they ultimately suffer. To the extent that survivors see Title IX rule changes, and new procedures adopted by schools in response, as discouraging reporting and investigations and tilting the process against them, it is likely to exacerbate these and other fears and increase the harm to survivors’ mental health and safety.

Another new study, analyzing data from sample of 1,648 college students, found that whether students have a favorable or unfavorable impression of their school's responsiveness to sexual assault reporting was significantly associated with their willingness to seek both formal and informal supports. The same study found that LGBTQ students were especially likely to have a negative view of their school's responsiveness.^{xv}

Similarly, a new study of the experiences of transgender people in the Central Savannah River Area of Georgia and South Carolina found that sense of future safety in one's own community is a powerful factor in predicting both suicidal ideation and suicide attempts. According to the researchers, "the current study highlights that perceptions of safety maybe even more strongly linked to suicidal thoughts and suicide attempts than being the victim of sexual or physical assault."^{xvi} To the extent that survivors feel that a school's lack of response to their complaint, or to other complaints in similar cases, puts them at greater risk of future abuse or violence while attending school, this could be as harmful to their health as the abuse itself. Because the rule as proposed would necessarily encourage schools to investigate and sustain fewer meritorious complaints, it will increase these costs.

These new studies are consistent with past research. One study published in 2018 examined the experiences of 404 LGBTQ students in six Midwest high schools, and found that a sense of belonging in the school community mediated the relationship between sexual harassment victimization and depressive symptoms.^{xvii} Thus, whether students who have experienced sexual harassment or violence feel they are accepted and supported in their school community mediates the harms of victimization. Earlier studies found that survivors whose reports are met with emotional support are associated with better coping, while responses that blame survivors or try to control or limit their decisions magnify the impact of victimization.^{xviii} In addition, a 2014 study of 1,000 randomly chosen University Of Oregon students found that when student survivors said their school had discouraged or punished reporting, made it unduly difficult, or dismissed meritorious claims, they were more likely to disengage from their studies and campus life.^{xix} Abundant evidence in the administrative record here demonstrates that students whose complaints are dismissed on technical grounds, or who face a complaint process tilted in favor of respondents, experience the exact opposite of school belonging and emotional support. These findings all point in on direction: the rule as proposed would magnify the harms of victimization to survivors and society.

Based on this and other research already in the administrative record, OMB and the Department must assess and weigh these likely costs against any potential benefits of the rule.

- i Lowe, T., Will Betsy DeVos remove schools' Title IX power to adjudicate off-campus sexual misconduct?, WASH. EXAMINER (Dec. 2, 2019), <https://www.washingtonexaminer.com/opinion/will-betsy-devos-remove-schools-title-ix-power-to-adjudicate-off-campus-sexual-misconduct>.
- ii 20 U.S.C. § 1681(a).
- iii Letter of Findings from Adele Rapport, Regional Director for the Office for Civil Rights, to Dr. Janice K. Jackson, CEO of Chicago Public Schools District #299 (Sept. 12, 2019), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05151178-a.pdf>.
- iv See, e.g., United Educators, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (2015), http://www.ncdsv.org/ERS_Confronting-Campus-SexualAssault_2015.pdf; Fleck, Jennifer, Sexual assault more prevalent in fraternities and sororities, study finds, UWIRE (Oct. 16, 2014) (reporting on results of University of Oregon Sexual Violence and Institutional Behavior Campus Survey), <https://www.uwire.com/2014/10/16/sexual-assault-more-prevalent-in-fraternities-and-sororities-study-finds/>.
- v See, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Cannon v. Univ. of Chicago*, 441 US 677 (1979).
- vi Letter of Findings from Anamarina Loya, Acting Regional Director for the Office for Civil Rights, to Dr. Carol Folt, President of the University of Southern California (Feb. 27, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09186908-a.pdf>.
- vii *Id.* at 12.
- viii Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, Proposed Rule, RIN 1840-AD45, 85 Fed. Reg. 3190 (Jan. 17, 2020).
- ix *Id.* at 3207.
- x *Id.* at 3219.
- xi *Id.*
- xii Norris, A. L., & Orchowski, L. M. (2020). Peer victimization of sexual minority and transgender youth: A cross-sectional study of high school students. *Psychology of Violence*, 10(2), 201–211. <https://doi.org/10.1037/vio0000260>.
- xiii Parr, Nicholas. (2020). Sexual Assault and Co-occurrence of Mental Health Outcomes among Female, Male, and Transgender–Gender Nonbinary U.S. College Students. 10.31235/osf.io/exhqh.
- xiv Chelsea, M. Cogan, James A. Scholl, Jenny Y. Lee, Hannah E. Cole & Joanne L. Davis (2020) Sexual violence and suicide risk in the transgender population: the mediating role of proximal stressors, *Psychology & Sexuality*, DOI: [10.1080/19419899.2020.1729847](https://doi.org/10.1080/19419899.2020.1729847).
- xv Dawnsha R. Mushonga, Lisa Fedina & Melissa L. Bessaha (2020) College student perceptions of institutional responses to sexual assault reporting and general help-seeking intentions, *Journal of American College Health*, DOI: [10.1080/07448481.2019.1705827](https://doi.org/10.1080/07448481.2019.1705827).
- xvi Christopher F. Drescher, James A. Griffin, Tracy Casanova, Francesca Kassing, Elizabeth Wood, Susan Brands & Lara M. Stepleman (2019) Associations of physical and sexual violence victimisation, homelessness, and perceptions of safety with suicidality in a community sample of transgender individuals, *Psychology & Sexuality*, DOI: [10.1080/19419899.2019.1690032](https://doi.org/10.1080/19419899.2019.1690032).
- xvii Hatchel, T., Espelage, D. L., & Huang, Y. (2018). Sexual harassment victimization, school belonging, and depressive symptoms among LGBTQ adolescents: Temporal insights. *American Journal of Orthopsychiatry*, 88(4), 422–430. <https://doi.org/10.1037/ort0000279>.
- xviii See, e.g., Orchowski, L. M., Untied, A. S., & Gidycz, C. A. (2013). Social Reactions to Disclosure of Sexual Victimization and Adjustment Among Survivors of Sexual Assault. *Journal of Interpersonal Violence*, 28(10), 2005–2023. <https://doi.org/10.1177/0886260512471085>.
- xix Smith, C. P., Rosenthal, M. N., & Freyd, J. J. (October, 2014). Assessing campus climates: The role of institutional betrayal in campus sexual assault research. Presented by Mary Koss at the GSU College Sexual Assault Forum: From Campus Climate to a Coordinated Response, Atlanta, GA, 22-24 October 2014.