

United States Senate

WASHINGTON, DC 20510

October 12, 2018

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

Dear Secretary DeVos:

We are deeply alarmed by the news reports about, and the leaked draft of, the U.S. Department of Education's ("Department") potential proposed regulations governing Title IX of the Education Amendments of 1972 ("Title IX"), a law that is critical in ensuring equal opportunity in education regardless of sex. The draft regulations suggest a blatant disregard of the law's intentions by redefining a school's legal obligation under Title IX in a way that would weaken the law, undermine fundamental protections for survivors of sexual assault, harassment, rape, or other forms of sex discrimination, and empower schools to ignore discriminatory, unlawful behavior against students. We are concerned that the rule does not reflect input from students and survivors whose voices deserve to be heard, and we ask that the Department refrain from publishing the Notice of Proposed Rulemaking (NPRM) until it is clear that survivors' voices have been fully considered and addressed in any proposed regulations.

We are especially concerned about this process in light of a recent analysis indicating that the Department seemingly ignored the 95 percent of 12,035 public comments supporting the campus sexual assault and harassment guidance issued by the Obama Administration in 2011 and 2014.¹ During the deregulation comment period last fall, hundreds of thousands of students, parents, and school personnel urged the Department to uphold the policies from the previous Title IX guidance. Yet, the Department continued down its path of rescinding those guidance documents in 2017, raising concerns that it is poised to defy public consensus and ignore public feedback again in pursuing the proposed regulations. Title IX protections are at the forefront of our national conversation involving the #MeToo movement and the draft regulations appear far out of step with public sentiments and the underlying statutory goal of ending sex discrimination.

The draft regulations would limit the scope of students protected under Title IX by adopting a dangerous and burdensome definition of "sexual harassment," as opposed to guidance previously issued by the Department. The draft regulations also would narrow the definition from "unwelcome conduct of a sexual nature" including "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature" to "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it denies a person access to the school's education program or activity." Narrowing this definition shows the Department intends to limit the scope of reports it will investigate, and would mean that students may be forced to drop out of a class, or even school all together before

¹ <https://www.campusafety magazine.com/clery/departement-of-education-ignored-widespread-support-obama-title-ix-sexual-violence-guidance/>

their school would be required to respond to their report. Moreover, this definition would undercut the very purpose of Title IX's nondiscrimination protections and would invite retaliation against survivors. The regulation explicitly permits schools to discipline students for "bad faith" reports of sexual harassment or assault, despite the lack of evidence demonstrating a problem of "bad faith" reporting, which risks running counter to federal civil rights law prohibiting retaliation against survivors. The Department should be leading the way in doing more to tackle the scourge of sexual harassment, not taking steps to make it less likely that students report.

Additionally, the draft regulations would further limit the scope of responsibility for schools, as they would only be responsible for investigating incidents that occurred on campus.² Schools would therefore not be responsible for investigating incidents that took place in off-campus student housing, despite the fact that 87 percent of college students live off-campus, and an estimated 70 percent of campus sexual assault occurs at a student's home.³ The impact the sexual violence will have on the survivors' education does not change whether they are assaulted in an on-campus dormitory, or across the street in an off-campus apartment. Student survivors should not be forced to share a classroom with their abuser, no matter where the violence occurs.

Furthermore, under the draft regulations, the Department would permit religious schools and universities to discriminate on the basis of sex by allowing such an institution to exempt itself from Title IX, even when under investigation by the Department. The draft regulation would no longer require even the most cursory notification to the Department by an institution invoking the religious exemption. Since the George H.W. Bush Administration, religious schools have had to submit a brief letter explaining the need for such an exemption, and the Obama Administration made this information public.⁴ The draft regulation lacks this commitment to transparency. In practice, the draft regulation envisions a system of unaccountable and secret institutions where civil rights protections can be disregarded—where an unmarried mother may be denied admission, where a young woman could be thrown out for using birth control, and where a gay, lesbian, bisexual, or transgender student could be subjected to cruel punishment at the school. Without question, this scheme will lead to unnecessary discrimination against students based on sex, sexual orientation, gender identity, pregnancy, and marital status.

October marks the one-year anniversary of the #MeToo movement, where brave survivors have come forward to fight back against sexual assault, harassment, rape, and other forms of gender violence and discrimination. At a time of heightened awareness surrounding issues of sexual harassment and assault, the last action the Department should undertake is to roll back protections for newly empowered survivors. It is especially important that the perspectives of students and survivors be incorporated into any new regulations around Title IX as this Administration has repeatedly shown insensitivity and lack of compassion towards survivors of sexual violence, with the President even recently mocking Dr. Christine Blasey Ford at a public rally for speaking out about her assault.

² <https://www.nytimes.com/2018/08/29/us/politics/devos-campus-sexual-assault.html>

³ <https://www.rollingstone.com/culture/culture-news/campus-sexual-assault-how-will-devos-proposed-policies-impact-victims-717643/>; <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>;

⁴ 20 U.S.C. 1681(a)(3).

We ask that you postpone the NPRM until after the Department conducts significant stakeholder engagement and, specifically, incorporates the concerns of student survivors into the regulations. We also request a written response clarifying a number of procedural and substantive issues related to the new regulations. Please respond to the following questions and requests for information in advance of publishing the NPRM:

1. The draft regulation says, “The Department conducted listening sessions and discussions with stakeholders expressing a variety of positions for and against the status quo, including advocates for survivors of sexual violence.”
 - a. Who were “the advocates for survivors of sexual violence” the Department consulted with?
 - b. When did the Department meet with these survivors? And how often did these meetings occur?
 - c. What specific concerns raised by survivor advocates does the current draft of regulations address, and how? And, what concerns does the draft not address, and why?
2. Please provide a list of all organizations, advocates, and experts that have been consulted in the process of developing an NPRM thus far, along with the dates and times of the meetings and any materials provided to the Department in relation to this topic. Please identify which of these organizations, advocates, and experts raised the issue of religious exemptions under Title IX.
3. Please provide the analysis behind the Department’s determination that the former Title IX guidance was “widely criticized”⁵ and a “failed system,”⁶ which runs contrary to the new independent analysis of public comments.⁷
4. Please provide the data and analysis used to calculate the reported projection that the new regulations would decrease sexual harassment investigations at colleges and universities by 39 percent.⁸
5. Please provide the data and analysis used to calculate the reported projection that the new regulations would decrease sexual harassment investigations at elementary and secondary schools by 50 percent.⁹
6. Please provide the current list of colleges and universities with religious exemptions from Title IX obligations granted by the Department, the date each exemption was granted, and any correspondence between the Department and each such school in relation to Title IX.¹⁰

⁵ <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>

⁶ <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>

⁷ *Supra*: see note 1.

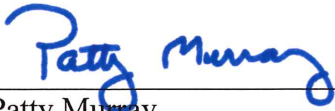
⁸ <https://www.nytimes.com/2018/09/10/us/politics/campus-sexual-misconduct-rules.html>

⁹ <https://www.nytimes.com/2018/09/10/us/politics/campus-sexual-misconduct-rules.html>

¹⁰ <https://www.buzzfeednews.com/article/tylerkingkade/betsy-devos-religious-exemption-title-ix-discrimination>

Thank you for your attention to this matter. Should you have any questions with this request, please contact Laurel Sakai with Senator Murray's HELP Committee Staff at (202) 224-0767.

Sincerely,



Patty Murray
United States Senator



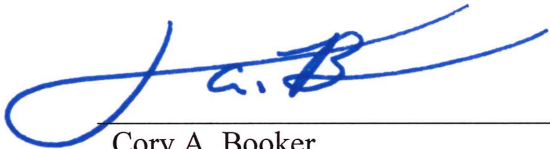
Richard Blumenthal
United States Senator



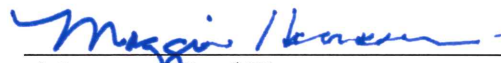
Kirsten Gillibrand
United States Senator



Elizabeth Warren
United States Senator



Cory A. Booker
United States Senator



Maggie Hassan
Margaret Wood Hassan
United States Senator

cc: The Honorable Mick Mulvaney, Director
The Office of Management and Budget
725 17th Street, NW
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