UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, Plaintiff, v. UNITED STATES DEPARTMENT OF EDUCATION and ELISABETH DEVOS, *in her official capacity as the Secretary of Education*, Defendants.	Civil Action No. 1:20-cv-4260 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. For nearly fifty years, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"), has been a crucial tool for addressing and eradicating sex-based discrimination in federally funded education programs and activities. Under the landmark federal civil rights law, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX's expansive prohibitions have protected generations of students, employees, and others from the myriad forms of sex-based discrimination in elementary and secondary schools, colleges, universities, and other entities offering education programs and activities.[1]

2. On May 19, 2020, the U.S. Department of Education (the "Department") radically and unjustifiably amended the Department's longstanding Title IX implementing regulations through its Final Rule, *Nondiscrimination on the Basis of Sex in Education Programs or*

[1] For ease of reference, this Complaint collectively refers to covered entities as "schools" or "institutions," although Title IX also applies to other recipients offering education programs or activities (*e.g.*, libraries, museums).

Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (the "Final Rule"). The Final Rule guts decades of firmly established policy on schools' obligations to respond to sexual harassment and other forms of sex discrimination; strips existing protections for students and others targeted for and victimized by sexual harassment; invents new rights for individuals accused of sexual harassment that find no basis in the letter or spirit of Title IX; and imposes onerous new procedural requirements on educational institutions, in the midst of the COVID-19 global pandemic, with a mere 87 days to implement the extensive changes to their policies, practices, and procedures.

3. As the Supreme Court has consistently recognized, the scope of Title IX's anti-discrimination protections is far-reaching. The Court has held that Title IX must be construed expansively to "accord it a sweep as broad as its language." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982). Accordingly, Title IX "covers a wide range of intentional unequal treatment" based on sex. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005).

4. To fulfill Title IX's broad anti-discrimination mandate, the Department is charged with implementing and enforcing Title IX to ensure that schools provide all students, employees, and others safe, nondiscriminatory learning environments. Through its Office for Civil Rights ("OCR"), the Department enforces Title IX's implementing regulations, codified at 34 C.F.R. pt. 106, by, among other things, investigating sex discrimination complaints against schools, seeking voluntary measures to cure violations, and, in relatively rare cases, initiating administrative enforcement proceedings that may result in the termination of federal funds.

5. For decades, the Department has consistently interpreted Title IX to require schools to investigate all sexually harassing conduct of which they have actual or constructive notice, and to take steps reasonably calculated to prevent, address, and remedy any adverse

effects on individual students or the school environment. Until now, the Department has applied these same standards to all forms of harassment, including gender-based harassment under Title IX; harassment based on race, color, or national origin under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d7 ("Title VI"); and harassment based on disability under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 ("Title II").

6. In late 2018, the Department published a notice of proposed rulemaking, 83 Fed. Reg. 61,462 (Nov. 29, 2018) (the "Proposed Rule"), under the auspices of providing greater protections for individuals *accused* of sexual harassment. During the notice and comment period, the Department received nearly 125,000 comments, many of which vigorously opposed the Proposed Rule as an unwarranted departure from existing policies, a threat to the rights, safety, and well-being of victims of sexual harassment and other forms of gender-based discrimination, and a contravention of the Department's statutory mandate to combat sex discrimination in schools. A wide range of New York stakeholders—including the State's Attorney General, The State University of New York ("SUNY"), New York State Education Department ("NYSED"), public and private colleges and universities, public school districts, and victims' rights groups, among others—submitted comments in opposition to the Proposed Rule.

7. Nevertheless, on May 19, 2020, the Department published the Final Rule, retaining most of the objectionable provisions of the Proposed Rule. Upending decades of established Title IX policy, the Final Rule redefines sexual harassment narrowly to exclude many forms of harassment that deprive students and others from equal access to educational opportunities; drastically limits, and in many instances prohibits, institutions from investigating and addressing harassment; guts Title IX's longstanding protections for survivors of sexual

harassment and assault; and abdicates the Department's central role in enforcing schools' compliance with Title IX's prohibitions against sexual harassment.

8. In addition, the Final Rule prescribes, for the first time in Title IX's history, an unduly prescriptive and burdensome grievance and adjudicatory process that schools must follow when they receive complaints of sexual harassment. The Final Rule imposes—in conflict with Title IX's central purpose of protecting students from sex-based discrimination—arbitrary and burdensome procedural requirements that will likely frustrate schools' ability to protect students.

9. The Final Rule radically and unjustifiably departs from the Department's longstanding Title IX enforcement policies. The Department's drastic redefinition of sexual harassment and the severe narrowing of schools' obligations to investigate and respond to harassing conduct that impedes access to their education programs will permit schools to ignore conduct that harms students and others. The Final Rule turns Title IX on its head: it deprives individuals experiencing sexual harassment the longstanding right to go to school free from discriminatory and harassing conduct, while creating a slew of highly prescriptive, burdensome grievance procedures that will discourage victims from stepping forward and make it more difficult for schools to fulfill their obligation of eradicating sex-based discrimination in their programs and activities. These changes are an abrupt and stark departure from decades of Department policy, and greatly undermine the central purpose of Title IX to address and prevent sex-based discrimination in educational institutions.

10. The Final Rule's preemption clause—which was not included in the Proposed Rule and therefore not subject to public notice and comment—requires schools to comply with the Final Rule to the extent a conflict with state or local law exists. This provision will hinder the State and its educational institutions from enforcing their own policies that provide greater

substantive and procedural protections to victims of sexual harassment and assault than the amended Title IX regulations under the Final Rule. This includes New York Education Law Article 129-B, known as the "Enough is Enough" law, which was enacted to combat sexual assault on college and university campuses statewide. *See* N.Y. Educ. Law §§ 6439-6449 ("Enough is Enough"), which sets comprehensive and careful standards for colleges in addressing sexual assault and has served as a model for similar laws across the country. Until this point, Enough is Enough complemented and was coextensive with Title IX as it furthered the common purpose of addressing sexual harassment in higher educational institutions. Now, the Final Rule will bar New York and its educational institutions from enforcing more robust protections under Enough is Enough and their own codes of conduct. Perversely, a school's good-faith compliance with Enough is Enough's procedural protections may, under the Final Rule, violate the Title IX regulations.

11. Adding insult to injury, the Department published the Final Rule in the midst of the global COVID-19 pandemic that has shuttered nearly every school and college campus in the country for at least the remainder of the 2019-2020 school year and possibly beyond. Ignoring the extraordinary challenges that schools face during this public health crisis—including shifting to virtual teaching and learning, implementing measures to keep school campuses safe, and having to divert their limited financial resources to this response—the Department has nevertheless set the effective date of the Final Rule for August 14, 2020, less than 90 days after issuing a rule that will discard decades of established Title IX policy and practice.

12. The Final Rule will cause immediate, irreparable, and ongoing injury to Plaintiff the State of New York (the "State"), the State's educational institutions, and its residents. Implementation of the Final Rule will drain and divert educational resources from the State's

educational institutions, hinder the State's effective administration and enforcement of its own laws and institutional policies, harm the State's interest in ensuring all students can attend school in a safe, nondiscriminatory environment conducive to teaching and learning, and frustrate the State's interest in enforcing robust civil rights protections for all victims of sexual harassment.

13. Defendants' drastic departure from longstanding Title IX policy violates the Administrative Procedure Act ("APA"). *First*, the Department exceeds its statutory authority by imposing burdensome procedural requirements that frustrate, rather than effectuate, Title IX's robust anti-discrimination protections. *Second*, the Final Rule is contrary to law, because it unduly narrows the scope of protections afforded to students under Title IX, conflicts with other federal civil rights laws prohibiting harassment, violates students' federal privacy rights, and conflicts with federal protections for students with disabilities. *Third*, the Final Rule is arbitrary and capricious because it fails to (a) justify the Department's departure from decades of settled policy, (b) adequately consider the substantial harms to educational institutions, their students and employees, and the general public, or (3) justify the contravention of the Department's longstanding policy of applying the civil rights laws it enforces in a consistent manner, by creating weaker standards for sexual harassment than for harassment based on race, national origin, and disability. *Finally*, in publishing the Final Rule, Defendants failed to observe procedures required by law, as certain provisions, including the preemption provision, were not included in the Proposed Rule and were thus issued without adequate notice to the public.

14. Plaintiff the State of New York brings this action to vacate the Final Rule and enjoin its implementation because (a) the Final Rule exceeds the Department's statutory jurisdiction, authority, and limitations in violation of the APA, 5 U.S.C. § 706(2)(C); (b) the Final Rule is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with

law under the APA, 5 U.S.C. § 706(2)(A); and (c) the Department failed to observe procedure required by law in issuing aspects of the Final Rule in violation of 5 U.S.C. § 706(2)(D).

JURISDICTION AND VENUE

15. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 2201(a). Jurisdiction is also proper under the judicial review provisions of the APA, 5 U.S.C. § 702.

16. Declaratory and injunctive relief is sought consistent with 5 U.S.C. §§ 705 and 706, and as authorized in 28 U.S.C. §§ 2201 and 2202.

17. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b)(2) and (e)(1). Defendants are United States agencies or officers sued in their official capacities. Plaintiff is a resident of this judicial district, and a substantial part of the events or omissions giving rise to this Complaint occurred and are continuing to occur within the Southern District of New York.

PARTIES

18. Plaintiff the State of New York, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is New York State's chief law enforcement officer and is authorized to pursue this action pursuant to N.Y. Executive Law § 63. Plaintiff is aggrieved by Defendants' actions and has standing to bring this action because the Final Rule harms its sovereign, quasi-sovereign, economic, and proprietary interests and will continue to cause injury unless and until the Final Rule is vacated and enjoined.

19. Defendant United States Department of Education is a cabinet agency within the executive branch of the United States government, and is an agency within the meaning of 5 U.S.C. § 552(f). The Department promulgated the Final Rule and is responsible for its enforcement.

20. Defendant Elisabeth DeVos is the United States Secretary of Education and is sued in her official capacity.

ALLEGATIONS

I. Title IX and the Department's Implementing Regulations Broadly Prohibit Discrimination on the Basis of Sex, Including Sexual and Gender-Based Harassment, in Federally Funded Education Programs and Activities.

A. Overview of Title IX.

21. Title IX, a landmark federal civil rights law, was enacted by Congress in 1972 with the broad goal of ensuring that all students have access to educational opportunities free from discrimination on the basis of sex, and to further protect faculty, staff, and others from sex-based discrimination in educational institutions. Title IX, which provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," 20 U.S.C. § 1681(a), applies to all aspects of a school's education program, including academics, extracurricular activities, housing, admissions, recruiting, and employment.

22. Title IX, enacted under Congress's Spending Clause powers, was modeled after Title VI, which broadly prohibits all recipients of federal funds (including educational institutions) from discriminating against individuals on the basis of race, color, or national origin. *See* U.S. Dep't of Educ., Off. for Civ. Rts., *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,038 n.2 (Mar. 13, 1997) ("1997 Guidance"). Title IX's anti-discrimination protections are virtually identical to those under Title VI and Section 504 (which prohibits federal funding recipients from discriminating against individuals on the basis of disability). The Department has long recognized that Title IX's protections against sexual harassment are similar to those applicable to

racial harassment in Title VI, as well as to the harassment protections for employees under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 ("Title VII").

23. As with Title VI, Section 504, and other civil rights laws adopted under the Spending Clause, Title IX conditions federal education funding on covered institutions' compliance with the statute's broad anti-discrimination mandate. Title IX authorizes and directs federal agencies that extend federal education funding, including the Department, to administratively enforce its protections. *See* 20 U.S.C. § 1682. An institution's failure to comply with Title IX and refusal to adopt voluntary corrective measures to cure violations after being notified of a violation by an agency may result in the termination of or refusal to extend federal funds to that institution. *Id.*

24. Under the Civil Rights Restoration Act of 1987 ("CRRA"), Congress amended Title IX, Title VI, Section 504, and the Age Discrimination Act to clarify that the terms "program or activity" and "program" under those laws are defined as "all of the operations" of a covered entity, "any part of which is extended Federal financial assistance." Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687 (Title IX); 42 U.S.C. § 2000d-4a (Title VI); 29 U.S.C. § 794(b) (Section 504); 42 U.S.C. § 6108 (Age Discrimination Act)). In enacting the CRRA, Congress emphasized the expansive original purpose of these civil rights laws, finding that "certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application" of the laws and that "legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." *Id.*

25. Title IX contains a provision exempting an educational institution controlled by a religious organization from parts of the law that are inconsistent with the organization's religious tenets. 20 U.S.C. § 1681(a)(3).

B. The Department's Title IX Implementing Regulations.

26. Every federal agency that provides federal funds to educational institutions must issue regulations to effectuate Title IX. 20 U.S.C. § 1682.

27. As the Department provides funding to virtually all public schools, colleges, and universities, and the vast majority of private higher educational institutions, it plays a significant role in enforcing Title IX's broad anti-discrimination mandate and regulating schools' compliance with the law.

28. The Department's predecessor, the U.S. Department of Health, Education, and Welfare promulgated the agency's Title IX implementing regulations in 1975. 40 Fed. Reg. 24,128 (June 4, 1975) (codified at 45 C.F.R. pt. 86). The regulations were formally adopted and recodified without substantive changes by the Department when it began operations in 1980. 45 Fed. Reg. 30,802, 30,955-65 (May 9, 1980) (codified at 34 C.F.R. pt. 106). The Department has enforced those regulations ever since. These regulations have furthered Title IX's core purpose of addressing and eradicating sex discrimination in education, and have provided a framework for institutions' compliance with Title IX's broad anti-discrimination mandate.

29. The regulations, mirroring the statute, provide that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance." 34 C.F.R. § 106.31(a).

30. In addition, the regulations specifically prohibit institutions from engaging in enumerated conduct, on the basis of sex, in "providing any aid, benefit, or service to a student." 34 C.F.R. § 106.31(b). These specific prohibitions include, *inter alia*, "(1) [t]reat[ing] one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; (2) [p]rovid[ing] different aid, benefits, or services or provide aid, benefits, or services in a different manner; (3) [d]eny[ing] any person any such aid, benefit, or service; (4) [s]ubject[ing] any person to separate or different rules of behavior, sanctions, or other treatment; . . . (6) [a]id[ing] or perpetuat[ing] discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees; [and] (7) [o]therwise limit[ing] any person in the enjoyment of any right, privilege, advantage, or opportunity." *Id.*

31. To effectuate these protections, the Department's Title IX regulations have always provided that where the Assistant Secretary for Civil Rights ("Assistant Secretary") finds that a covered institution has discriminated on the basis of sex, that institution "shall take such remedial action as the Assistant Secretary deems necessary to *overcome the effects* of such discrimination," and, "[i]n the absence of a finding of discrimination on the basis of sex," that the institution "may take affirmative action to overcome the effects of conditions which resulted in limited participation . . . by persons of a particular sex." 34 C.F.R. § 106.3(a)-(b). The regulations further mandate that every applicant for and recipient of federal funding from the Department assure that the applicant or recipient's education program or activity will comply with the Title IX regulations, and that such assurance "shall not be satisfactory to the Assistant Secretary" if the applicant or recipient "fails to commit itself to take whatever remedial action is

necessary . . . to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance." 34 C.F.R. § 106.4(a).

32. The regulations contain other procedural requirements designed to protect students from discrimination and ensure schools' compliance with the statute's anti-discrimination protections. These include, *inter alia*, requiring that institutions (a) designate at least one employee to coordinate Title IX compliance and investigations, 34 C.F.R. § 106.8(a), (b) establish and publish a grievance procedure for the "prompt and equitable resolution of student and employee complaints" regarding prohibited discriminatory conduct, *id.* § 106.8(b), and (c) implement "specific and continuing steps" to widely disseminate their Title IX anti-discrimination policies to reach students, parents, applicants for admission, employees, recruiters, unions, and others, *id.* § 106.9.

33. With respect to the religious exemption contained in 20 U.S.C. § 1681(a)(3), the Department's Title IX regulations have, since 1975, permitted religious institutions to claim this exemption "by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization." 34 C.F.R. § 106.12(b). Following receipt of such a statement, OCR's longstanding practice has been to acknowledge the claimed exemptions in writing, reminding the institution that it remains bound by all other provisions of Title IX for which no exemption was claimed. The Department posts all religious exemption requests, and its responses to those requests, on its website.[2] Copies of all requests and responses from 1975 to the present are available online. The purpose of this longstanding practice is two-fold: it

[2] U.S. Dep't of Educ., Off. for Civ. Rts., *Other Correspondence*, https://www2.ed.gov/about/offices/list/ocr/correspondence/other.html (last updated May 5, 2020).

(a) follows the statutory mandate to respect religious institutions' beliefs in the enforcement of Title IX, and (b) provides notice to prospective and current students and employees of those institutions that certain Title IX protections may be unavailable to them.

II. The Department Has Consistently Enforced Title IX's Protections to Protect Victims of Sexual and Gender-Based Harassment from Harm for Decades.

34. For many years, the Department has recognized sexual harassment as a form of sex discrimination that, ignored or inadequately addressed, results in educational harms to victimized students. In turn, the Department has consistently enforced Title IX to protect students and others from sexual harassment that impedes or denies access to institutions' programs or activities. As required by law, the Department has always employed the same standards for addressing sexual harassment under Title IX as it does for other forms of discriminatory harassment under Title VI, Section 504, and Title II. Through the Final Rule, the Department has created an unlawful and unjustifiable schism between its enforcement standards for sexual harassment and all other forms of prohibited harassment in schools.

A. The Department Has Consistently Interpreted Title IX's Protections Against Sexual Harassment Since At Least 1997.

35. The Department articulated its well-settled sexual harassment policies in multiple guidance documents issued by OCR over the course of two decades.

36. In 1997, OCR issued the 1997 Guidance to advise institutions of their obligations under Title IX to respond to sexual harassment of students and OCR's standards for investigating and enforcing schools' compliance with those obligations. Four years later, in 2001, OCR issued substantially similar guidance to update and replace the 1997 Guidance. *Revised Sexual*

Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 19, 2001)[3] ("2001 Revised Guidance").

37. The 1997 Guidance and 2001 Revised Guidance were both issued by the Department following a public notice and comment process.

38. The 2001 Revised Guidance, which remains in effect but will be superseded on August 14, 2020 by the Final Rule, reiterates the definitions and standards set forth in the 1997 Guidance. The document clarified that OCR's policies for the administrative enforcement of Title IX were unaffected by two intervening Supreme Court decisions, *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), which only addressed the liability standards for private Title IX sexual harassment lawsuits seeking monetary damages. 2001 Revised Guidance at i-iv.

39. As the Department observed in the 1997 Guidance, OCR's enforcement of Title IX revealed "that a significant number of students, both male and female, have experienced sexual harassment, that sexual harassment can interfere with a student's academic performance and emotional and physical well-being, and that preventing and remedying sexual harassment in schools is essential to ensure nondiscriminatory, safe environments in which students can learn." 1997 Guidance at 12,034. The Department noted that OCR had "long recognized that sexual harassment of students engaged in by school employees, other students, or third parties is covered by Title IX" and that "OCR's policy and practice is consistent with the Congress' goal in enacting Title IX—the elimination of sex-based discrimination in federally assisted education programs." *Id.* The Department added that guidance specific to sexual harassment "is important because school personnel who understand their obligations under Title IX are in the best position

[3] *Available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

to *prevent* harassment and to lessen the harm to students if, despite their best efforts, harassment occurs." *Id.* (emphasis added).

40. In the 2001 Revised Guidance, the Department expressly distinguished the standards OCR applies to investigations and administrative enforcement of its Title IX regulations from the standards applicable to private suits seeking monetary damages, the latter of which were addressed in *Gebser* and *Davis*. 2001 Revised Guidance at i. The Department stated that the 2001 Revised Guidance is, "[i]n most other respects . . . identical to the 1997 Guidance" and was intended "to serve the same purpose" as the earlier document in providing a framework for educators to prevent and mitigate the harm of sexual harassment faced by their students. *Id.*

41. The 2001 Revised Guidance explains that the liability standards used in *Gebser* and *Davis* "are limited to private actions for monetary damages" and that those cases "did not change a school's obligations to take reasonable steps under Title IX and the regulations to prevent and eliminate sexual harassment as a condition of its receipt of Federal funding," a position, it noted, that was "uniformly agreed" upon by the institutions and individuals who submitted comments. *Id.* at ii, iv. In the 2001 Revised Guidance, the Department noted that the Supreme Court, in *Gebser*, specifically distinguished its authority to establish liability standards for private damages suits from the authority of federal agencies, including the Department, to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate," under circumstances that may not give rise to a claim for money damages. *Id.* at ii.

42. In 2006, OCR issued a guidance document, *Dear Colleague Letter: Sexual Harassment Issues* (Jan. 25, 2006)[4] ("2006 DCL"), "to increase awareness of an important issue affecting students—sexual harassment—and to remind [schools] of the principles that a school

[4] *Available at* https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006 html.

should use to recognize and effectively respond to the sexual harassment of students." 2006 DCL. The letter reiterated schools' "essential" obligation to prevent and remedy sexual harassment, reaffirming the 2001 Revised Guidance as the operative statement of OCR's enforcement policies for sexual harassment, and expressly distinguishing OCR's administrative enforcement standards from those applicable to private Title IX damages lawsuits. *Id.*

43. On October 26, 2010, amid growing national attention to bullying in schools, OCR issued a Dear Colleague Letter on Harassment and Bullying[5] ("2010 DCL"), to clarify when bullying amounted to discriminatory harassment in violation of Title IX and other civil rights laws. The letter reminded schools that they have substantially similar obligations to prevent, investigate, and respond to harassment, regardless of whether the harassment is based on sex, race, color, national origin, or disability. *Id.* at 1-4.

44. On April 4, 2011, the Department further supplemented its 2001 Revised Guidance with a Dear Colleague Letter on Sexual Violence[6] ("2011 DCL") to address rising concerns about pervasive sexual violence in schools. The letter clarified that sexual violence (including rape, sexual assault, sexual battery, and sexual coercion) is a form of sexual harassment covered by Title IX and provided schools guidance on responding to sexual violence faced by their students. 2011 DCL at 1. The letter also noted that about 1 in 5 women and 1 in 16 men were victims of attempted or completed sexual assault in college, and, in just one recent school year, there were "800 reported incidents of rape and attempted rape and 3,800 reported incidents of other sexual batteries at public high schools." *Id.* at 2.

45. The 2011 DCL explained that schools should adhere to the standards and procedures contained in the 2001 Revised Guidance when addressing incidents of sexual

[5] *Available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.
[6] *Available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

violence and other forms of sexual harassment, and provided further recommendations to educational institutions on the proper application of Title IX's various requirements (*e.g.*, publishing nondiscrimination notices, designating a Title IX coordinator, and adopting and publishing grievance procedures) to complaints of sexual violence. *Id.* at 2-3.

46. On April 29, 2014, OCR published a supplemental guidance document, *Questions and Answers on Title IX and Sexual Violence*[7] ("2014 Q&A"), to "further clarify the legal requirements and guidance articulated in the [2011] DCL and the *2001 Guidance* and include examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent is recurrence, and address its effects." 2014 Q&A at ii.

47. The Department withdrew the 2011 DCL and 2014 Q&A in September 2017.

B. These Guidance Documents Used the Same Definitions of Key Terms, Including Sexual Harassment, and Set Forth Compliance Standards Consistent with Title IX's Anti-Discrimination Mandate.

48. The Department's guidance documents issued between 1997 and 2014 consistently (1) defined key terms, including "program or activity" and "sexual harassment," (2) explained schools' obligations under Title IX to respond to and remedy sexual harassment, (3) articulated when the Department would find an institution to be in violation of those obligations, and (4) clarified the privacy protections that must be afforded to students during sexual harassment investigations.

1. Definitions of key terms.

a. Definition of "education program or activity."

49. Consistent with the statutory definition of "education program or activity" contained in Title IX, 20 U.S.C. § 1687, and the Department's Title IX regulations, 34 C.F.R.

[7] *Available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

§ 106.2(h), the Department has treated "all of [a] school's operations," including "all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere," to be subject to Title IX's requirements. 1997 Guidance at 12,038; 2001 Revised Guidance at 2-3.

b. Definition of "sexual harassment."

50. Under the Department's longstanding enforcement policies, sexual harassment is defined as "unwelcome conduct of a sexual nature" that "can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature." 2001 Revised Guidance at 2. Where the harassment rises to the level that it "den[ies] or limit[s] . . . the student's ability to participate in or to receive benefits, services, or opportunities in the school's program," it is a form of sex discrimination prohibited by Title IX. *Id*. Sexual harassment can take the form of either (1) *quid pro quo* harassment, where a teacher or other school employee conditions a student's participation in a program or activity on their submission to unwanted sexual conduct, or (2) hostile environment harassment, defined as unwelcome conduct of a sexual nature by employees, students, or others that "is sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program based on sex." *Id.* at 5; *see also* 1997 Guidance at 12,038.

51. OCR has long made clear that "[h]arassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents," 2010 DCL at 2, recognizing that harassment often includes conduct that creates a hostile environment for many students.

c. Definition of "hostile school environment."

52. For purposes of administrative enforcement of Title IX, the Department has found harassing conduct to be "sufficiently serious" to create a hostile school environment where it is sufficiently severe, pervasive, or persistent as to interfere with a student's educational opportunities. 1997 Guidance at 12,038; 2001 Revised Guidance at v-vi; 2010 DCL at 2; 2011 DCL at 3. Applying a sliding-scale approach, the Department's position has been that a single incident may be sufficiently severe to create a hostile environment without being repetitive or ongoing in nature, whereas less severe but ongoing or pervasive conduct may also create a hostile environment depending on the circumstances. 2010 DCL at 2; 2011 DCL at 3.

53. OCR has long emphasized that a school's inquiry into whether sexual harassment has created a hostile environment should consider the following factors: (a) "[t]he degree to which the conduct affected one or more students' education," (b) "[t]he type, frequency, and duration of the conduct," (c) "[t]he identity of and relationship between the alleged harasser and the subject or subjects of the harassment," (d) "[t]he number of individuals involved," (e) "[t]he age and sex of the alleged harasser and the subject or subjects of the harassment," (f) "[t]he size of the school, location of the incidents, and context in which they occurred," (g) "[o]ther incidents [of sexual harassment] at the school," and (h) other "[i]ncidents of gender-based, but nonsexual harassment" that may, when "combined with incidents of sexual harassment," be "sufficiently serious to create a sexually hostile environment." 2001 Revised Guidance at 5-7.

2. The Department has consistently required schools to prevent, investigate, address, and remedy the effects of sexual harassment.

54. Under the Department's longstanding Title IX enforcement policies, where a school has actual or constructive notice of conduct against a student that may constitute sexual harassment, the school is obligated to take "immediate and appropriate steps" to investigate the

conduct and, where the investigation reveals that harassment has occurred, to "take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again." *Id*. at 11-13, 15; *see also* 1997 Guidance at 12,042; 2010 DCL at 2-3; 2011 DCL at 4. Where OCR investigates a complaint against a school and finds that it has failed to respond to, remedy, and prevent sexual harassment, it will find the school to be in violation of Title IX and provide it the opportunity to voluntarily resolve that violation before the Department initiates further enforcement action.

a. Notice requirements.

55. For harassment against a student by a school employee occurring under the auspices of the employee's responsibilities toward students, the school is responsible for taking corrective action regardless of whether it has actual notice. 2001 Revised Guidance at 10.

56. For harassment against a student by another student or other third party, a school must respond where "a responsible employee 'knew, or in the exercise of reasonable care, should have known' about the harassing conduct." *Id*. at 13; 1997 Guidance at 12,042; 2010 DCL at 2 n.9; 2011 DCL at 4. A responsible employee is one 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." 2001 Revised Guidance at 13.

57. The Department has never before required a student to make a complaint to a specific employee to provide sufficient notice to the institution. *Id*.; 1997 Guidance at 12,036-37, 12,042. "A school can receive notice of harassment in many different ways," including, *inter alia*, a formal grievance filed with the school's Title IX coordinator, a complaint by a targeted

student made to a teacher or other responsible employee, an incident directly witnessed by a school employee, media reports, or other means. 2001 Revised Guidance at 13.

b. Investigation and grievance procedure requirements.

58. Under current policy, once an educational institution has actual or constructive notice of conduct constituting sexual harassment, it "should take immediate and appropriate steps to investigate or otherwise determine what occurred." *Id*. at 15; *see also* 1997 Guidance at 12,042; 2010 DCL at 2. The investigation must be "prompt, thorough, and impartial," but "[t]he specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors." 2001 Revised Guidance at 15; *see also* 1997 Guidance at 12,042; 2010 DCL at 2; 2011 DCL at 4-5.

59. Even if an individual incident would not, by itself, constitute actionable sexual harassment, schools' obligation to investigate *all* potentially harassing conduct has been grounded in the Department's recognition that investigations of individual incidents "could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment" to which the school is obligated to respond under Title IX. 2010 DCL at 2.

60. OCR has long required schools to investigate harassment that occurred or originated off-campus to determine whether the effects of that harassment are affecting a student's access to a school's program or activity. For example, an off-campus rape could impose continuing educational harm on a victim if the student's assaulter was a teacher or classmate, or lived in the same dorm. The Department has previously required schools to investigate such conduct to determine whether it has created a hostile environment within its education program. *See* 2011 DCL at 4; 2014 Q&A at 29.

61. The Department has authorized schools to take immediate measures to protect a student experiencing harassment during the pendency of an investigation, including separating the targeted student from the alleged harasser in classes or housing, providing counseling to the targeted student or alleged harasser, or disciplining the alleged harasser. 2001 Revised Guidance at 16; 1997 Guidance at 12,043; 2010 DCL at 3. OCR has warned that such measures "should not penalize the student who was harassed" and that "any separation of the target from an alleged harasser should be designed to minimize the burden on the target's educational program (*e.g.*, not requiring the target to change his or her class schedule)." 2010 DCL at 3.

62. Pursuant to the requirement in the Department's Title IX regulations that institutions "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [the regulations]," 34 C.F.R. § 106.8(b), the Department has traditionally afforded institutions a great degree of flexibility in developing effective grievance procedures based on the types of conduct at issue and school-specific considerations. In its various sexual harassment guidance documents, the Department has long cautioned against a one-size-fits-all approach to grievance procedures since factors including "differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience" should inform the "detail, specificity, and components" of grievance processes used by individual schools. 2001 Revised Guidance at 20; *see also* 2011 DCL at 9; 1997 Guidance at 12,045. For example, whether a complaint resolution process is completed in a timely manner depends "on the complexity of the investigation and the severity and extent of the harassment." 2001 Revised Guidance at 20.

63. Under longstanding policy, OCR considers six factors in determining whether a school's grievance process is prompt and equitable, including whether (a) notice of the school's

grievance procedures has been given to students, parents, and employees; (b) those procedures have been applied to complaints alleging harassment; (c) complaints have been investigated in an "[a]dequate, reliable, and impartial" manner, including providing the opportunity to present witnesses and other evidence; (d) the school has designated and followed "reasonably prompt timeframes for the major stages of the complaint process;" (e) the school provides notice to the parties of the outcome of the complaint; and (f) the school has provided "[a]n assurance that [it] will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate." *Id.*

64. The 2011 DCL and the 2014 Q&A provided greater detail to schools on how they should meet these requirements in the context of investigating alleged sexual harassment, including sexual violence. 2011 DCL at 8-14; 2014 Q&A at 9-14, 24-38. In the 2011 DCL, the Department emphasized that schools should provide comparable procedural rights to complainants and alleged harassers, and articulated the Department's position that schools "must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred)," the same standard of proof that OCR itself uses in resolving complaints of discrimination under all of the civil rights laws it enforces, including Title IX. 2011 DCL at 11. The Department noted that it would be inconsistent, and therefore inequitable, to use a higher standard such as a clear and convincing standard used in criminal complaints, for complaints of sexual harassment but not for other forms of harassment.

65. The 2011 DCL reminded institutions that the different standards of proof for a Title IX investigation as compared to a criminal investigation are warranted by the distinct aims of these investigations, noting that institutions are required by Title IX to investigate conduct that may constitute unlawful sexual harassment even where this conduct would not warrant criminal

charges. *Id.* Thus, the Department noted that a concurrent criminal inquiry does not relieve an institution of its responsibility to promptly investigate and address sexual harassment. *Id.*

66. In the 2014 Q&A, the Department also reminded institutions that equity requires them to make accommodations for students with disabilities to ensure those students' equal access to the grievance process. 2014 Q&A at 7. These accommodations may include "providing electronically-accessible versions of paper forms to individuals with print disabilities, or by providing a sign language interpreter to a deaf individual attending a training." *Id.*

c. Corrective measures.

67. Where a school's inquiry or investigation reveals that harassment occurred, the school must "take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again." 2001 Revised Guidance at 11-13, 15; *see also* 2010 DCL at 2-3; 2011 DCL at 4. The Department has required these remedial steps to be taken regardless of whether the student or students targeted for harassment made a formal complaint to the institution. 2001 Revised Guidance at 15-16; 1997 Guidance at 12,042.

68. Recognizing that school personnel knowledgeable of Title IX's requirements "are in the best position to prevent harassment and to lessen the harm to students" when harassment occurs, the Department has traditionally afforded schools flexibility in fashioning remedies to stop, prevent, and cure the effects of harassment on a student or the broader school community. 2001 Revised Guidance at ii; 1997 Guidance at 12,034.

69. Depending on the context, appropriate remedial measures may include, *inter alia*, actions specific to the individual students involved (which may, but need not, include discipline

of the harasser), trainings for students and staff, modifications of school policies and practices, and steps to prevent retaliation. 2010 DCL at 3.

d. Confidentiality and privacy protections.

70. The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), generally forbids disclosure of a student's education record without the consent of the student or, for minors, the student's parent.

71. Recognizing potential tensions between schools' FERPA obligations and their Title IX obligations to effectively investigate and respond to sexual harassment, the Department, since the 1997 Guidance, has provided guidance to schools on how to avoid unlawful disclosure of students' protected information. The 2001 Revised Guidance reaffirmed language from the 1997 Guidance, which advised schools that they are prohibited from releasing information to a complainant that is contained in another student's education record unless "(1) the information directly relates to the complainant (e.g., an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or a sex offense in a postsecondary institution." 2001 Revised Guidance at 20 n.102; *see also* 1997 Guidance at 12,038. The 2001 Revised Guidance explained how schools must balance the privacy interests of all students against the interest in disclosing sufficient information to conduct an investigation and notify a complainant of the result. 2001 Revised Guidance at 17-18.

72. The 2011 DCL and 2014 Q&A further addressed these issues. 2011 DCL at 5, 13-14; 2014 Q&A at 18-24, 36-37.

e. Consistency with other civil rights laws enforced by OCR.

73. The Department has always used the same definitions and imposed the same standards to address sexual harassment under Title IX as it has for race-based harassment under Title VI and disability-based harassment under Section 504 and Title II.

74. In 1994, the Department published a guidance document, *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance; Notice*, 59 Fed. Reg. 11,448 (Mar. 10, 1994) ("1994 Racial Harassment Guidance"), addressing schools' Title VI obligations to prevent, address, and remedy harassment based on race, color, or national origin. OCR will find a school to be in violation of Title VI where a school "has created or is responsible for a racially hostile environment—*i.e.*, harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient," including where a school "has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment of which it has actual or constructive notice," regardless of whether the harasser is a school employee or another party. 1994 Racial Harassment Guidance at 11,449. This is the same standard the Department has imposed for Title IX sexual and gender-based harassment cases for many years.

75. As with its sexual harassment guidance documents, the Department emphasized in the 1994 Racial Harassment Guidance that whether a hostile environment exists "must be determined from the totality of the circumstances," considering factors including the nature, scope, frequency, duration, and location of the harassing conduct, as well as the identity, number, and relationship of the persons involved. *Id*. The guidance, also mirroring the Department's longstanding approach to sexual harassment, stated that the overall severity, persistence, or

pervasiveness must be weighed, and that "[g]enerally, the severity of the incidents needed to establish a racially hostile environment under title VI varies inversely with their pervasiveness or persistence." *Id*. As with sexual harassment under the 2001 Revised Guidance, the 1994 Racial Harassment Guidance provides that where racial harassment exists, a school "has a legal duty to take reasonable steps to eliminate it" and that the "appropriate response . . . must be tailored to redress fully the specific problems experienced at the institution as a result of the harassment" and "be reasonably calculated to prevent its recurrence." *Id*. at 11,453, 11,450.

76. As conveyed in OCR's July 25, 2000 *Dear Colleague Letter on Prohibited Disability Harassment*[8] ("2000 DCL") which remains in force, OCR follows substantially similar standards for disability-based harassment that may violate Section 504 or Title II as it does for sexual harassment under Title IX and racial harassment under Title VI. *See* 2000 DCL.

77. The 2010 DCL clarified that the Department follows the same standards for discriminatory harassment under all the laws it enforces, and that these guidance documents are still operative for harassment violative of Title VI, Section 504, and Title II. 2010 DCL at 1-4.

78. As required by the CRRA, the Department's implementing regulations for Title IX, Title VI, and Section 504 use a common definition of covered "program or activity." *See* 20 U.S.C. § 1687 (Title IX); 34 C.F.R. § 100.13(g) (Title VI); 34 C.F.R. § 104.3(k) (Section 504); *see also* 1994 Racial Harassment Guidance at 11,448; 2000 DCL.

[8] *Available at* https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html.

III. The Final Rule Sharply Departs from the Department's Well-Established Policies, Undermining Protections for Harassed Students and Abdicating the Department's Essential Role in Eliminating Sexual Harassment in Schools.

A. The Department's Efforts to Downplay Sexual Harassment and Weaken Existing Title IX Protections.

79. Since 2017, Defendants have engaged in an ongoing campaign to roll back Title IX's protections against sexual assault, including sexual violence, particularly in the context of higher education. Turning away from decades of well-established enforcement policies, the Department has taken a number of steps to strip existing legal protections for survivors of campus sexual assault and to minimize the Department's role in enforcing Title IX on behalf of students who experience such harassment—up to and including its issuance of the Final Rule.

80. After Secretary DeVos was confirmed to her cabinet position on February 7, 2017, she swiftly oversaw the Department's dismantling of existing Title IX protections against sexual harassment. On April 12, 2017, Secretary DeVos named Candice Jackson, a vocal critic of the previous administration's Title IX policies, as the Deputy Assistant Secretary and Acting Assistant Secretary of Civil Rights, in which capacity she led OCR until July 2018.

81. After assuming their roles, both Secretary DeVos and Ms. Jackson publicly criticized the Department's Title IX policies and characterized most campus sexual assaults as a non-issue. Jackson publicly belittled student survivors of sexual assault, contending that "90 percent of [their complaints] — fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'"[9]

[9] Erica L. Green *et al*., *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. Times (July 12, 2017), https://www nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html.

82. Echoing this sentiment, Secretary DeVos, in September 2017, gave public remarks in which she criticized OCR's "incredibly broad definitions" of sexual harassment, opining that "if everything is harassment, then nothing is." U.S. Dep't of Educ., *Secretary DeVos Prepared Remarks on Title IX Enforcement* (Sept. 7, 2017).[10] In her remarks, the Secretary focused on the rights of students accused of sexual harassment, stating that "[t]he notion that a school must diminish due process rights [of alleged harassers] to better serve the 'victim' only creates more victims." *Id.* Taking a swipe at the settled principle that sexual harassment victims should not bear the brunt of interim remedies to protect their access to educational opportunities, the Secretary said measures like changing class schedules or housing assignments should not "punish the accused" during the investigation and grievance process. *Id*.

83. The Secretary further asserted that "the prior administration weaponized the Office for Civil Rights to work against schools and against students" and went so far as to describe the then-current sexual harassment guidance to schools as "un-American." *Id.* She contended that "any school that uses a system biased toward finding a student responsible for sexual misconduct also commits discrimination." *Id.* Remarking that "[s]tudents, families, and school administrators are generally not lawyers and they're not judges [and] [w]e shouldn't force them to be so for justice to be served," the Secretary criticized the "quasi-legal structures" schools used to fulfill their Title IX obligations to fairly resolve sexual harassment complaints, dismissively calling them "kangaroo courts." *Id*.

84. Against this backdrop, on September 22, 2017, OCR issued a Dear Colleague Letter on Campus Sexual Misconduct[11] ("2017 DCL") and an accompanying document, entitled

[10] *Available at* https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement.
[11] *Available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

Q&A on Campus Sexual Misconduct.[12] The 2017 DCL announced that the Department was rescinding both the 2011 DCL and 2014 Q&A. The letter asserted, without providing any evidentiary support, that the 2011 DCL and 2014 Q&A had "not succeeded in providing clarity for educational institutions or in leading institutions to guarantee educational opportunities on the equal basis that Title IX requires." 2017 DCL at 2. The 2017 DCL, signed by Acting Assistant Secretary Jackson, pertained specifically to "campus sexual misconduct" and did not mention or address other forms of sexual harassment or sex discrimination in schools. *Id.* at 1-2.

85. The 2017 DCL noted that the Department intended to continue to rely on the 2001 Revised Guidance and the "reaffirmation" of that guidance in the 2006 DCL. *Id*. at 2. The letter did not mention the 2010 DCL, nor has the Department withdrawn that document.

B. The Department Promulgated the Proposed Rule Shortly After Rescinding OCR's 2011 and 2014 Guidance Documents.

86. On November 29, 2018, the Department promulgated the Proposed Rule.

87. The Proposed Rule contained significant revisions and amendments to the Department's longstanding Title IX regulations, including proposing unjustified redefinitions of key terms; relaxing schools' obligations to investigate, address, and remedy sexual harassment; imposing onerous, prescriptive, quasi-judicial procedural requirements that schools must follow in investigating and handling complaints; and largely erasing schools' obligation to remedy the effects of sexual harassment both for targeted students and their broader school communities. The proposed procedural requirements curtailed schools' previous flexibility and discretion in tailoring grievance procedures for sexual harassment complaints to local circumstances.

88. The detailed new grievance procedures in the Proposed Rule, which focused on the subset of sexual harassment complaints by individual complainants against individual

[12] *Available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

respondents, afforded stronger rights to accused students than those to students targeted for discriminatory harassment, for the first time in the Department's history of enforcing Title IX. *Id.* at 61,471-80. These changes included—without legal support or justification—giving respondents the right to file *sex discrimination* complaints against their schools with OCR based on alleged violations of the mandatory grievance procedures, even where such violations were not based on sex. *Id*. at 61,497.

89. The Proposed Rule did not contain any language preempting schools' application of stronger state or local protections against sexual harassment. To the contrary, the Proposed Rule "emphasize[d] that when determining how to respond to sexual harassment, recipients have flexibility to employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved" and averred that the proposed grievance procedures were intended to provide "recognition that a recipient needs flexibility to employ grievance procedures that work best for the recipient's educational environment." Proposed Rule at 61,468, 61,472. The Proposed Rule did not suggest that schools would be constrained from applying stronger protections under state or local law, or their own codes of conduct.

90. In assessing the likely costs of the Proposed Rule, the Department failed to include or account for the substantial monetary and nonmonetary costs of the Proposed Rule, including the costs of an increase in sexual harassment and violence, and various legal and compliance costs education institutions would be forced to incur.

91. During the notice and comment period, the Department received more than 124,000 comments on the Proposed Rule, *see* Final Rule at 30,044, many of which vigorously opposed the core aspects of the proposed regulatory changes.

92. The State opposed the Proposed Rule, identifying many of the unreasonable, unworkable, and unlawful provisions that remain in the Final Rule and are the subject of this challenge.[13] SUNY, NYSED, other public and private higher educational institutions in the State, public school districts, and other stakeholders submitted comments in opposition to the Proposed Rule. Eighteen other states and the District of Columbia also opposed the Proposed Rule. Comments in opposition were also submitted by advocacy groups for women and girls, LGBTQ people, and sexual assault survivors, among others; mental health professionals; and associations representing school administrators and educational institutions across the country.

93. On March 27, 2020, in a letter to Secretary DeVos, 17 states and the District of Columbia urged the Department to suspend the rulemaking process for the Proposed Rule while the "nation's educational institutions respond to the national emergency caused by the novel coronavirus (COVID-19) and until both K-12 schools and institutions of higher education resume normal operations." The letter noted that over 93 percent of all K-12 institutions, and more than 1,140 colleges and universities had closed or were in the process of closing in response to this extraordinary national public health emergency. The letter explained that the burdens the Proposed Rule would place on schools, if finalized, "would be untenable and ultimately counterproductive to student safety" in light of this unprecedented pandemic. Specifically, "[d]uring this crisis, schools will need the flexibility to fashion and revise investigation, resolution, and grievance procedures on an ongoing basis, in order to carry out Title IX's mandate in the manner that best addresses the impact of the pandemic and the needs of their school populations and communities," and some of the new legal obligations in the Proposed Rule "would be both impossible and unsafe" for institutions to implement.

[13] Letter from Attorney General Letitia James to Hon. Betsy DeVos, *et al.* (Jan. 30, 2019), *available at* https://ag.ny.gov/sites/default/files/nyoag_title_ix_comment_letter_draft_final_for_filing.pdf.

C. The Final Rule.

94. The Department publicly released the text of the Final Rule on May 6, 2020, in a document exceeding 2,000 pages,[14] and published the 554-page Final Rule in the Federal Register on May 19, 2020. Final Rule at 30,026-579.

95. The Final Rule is scheduled to take effect on August 14, 2020. *Id.* at 30,026.

96. The Final Rule amends regulations implementing Title IX of the Education Amendments of 1972. Specifically, it (a) amends 34 C.F.R. § 106.3's remedial requirements; (b) amends 34 C.F.R. § 106.6 to, *inter alia*, add a preemption clause that was not part of the Proposed Rule; (c) significantly changes the provisions governing Title IX coordinators and schools' obligation to broadly disseminate their nondiscrimination policies under the former 34 C.F.R. §§ 106.8 and 106.9; (d) alters the procedure for religiously-controlled schools to seek exemptions under 34 C.F.R. § 106.12; (e) adds a host of new definitions applicable only to sexual harassment in the new 34 C.F.R. § 106.30; (f) drastically alters schools' obligations to respond to sexual harassment in the new 34 C.F.R. § 106.44; (g) adds a lengthy set of grievance procedures that schools must follow for sexual harassment complaints in the new 34 C.F.R. § 106.45; and (h) adds a retaliation provision in the new 34 C.F.R. § 106.71.

97. The Final Rule's stated purpose is to "better align the Department's Title IX regulations with the text and purpose of Title IX, the U.S. Constitution, Supreme Court precedent and other case law, and to address the practical challenges facing students, employees, and recipients with respect to sexual harassment allegations." *Id.* at 30,030.

98. The Final Rule purports to accomplish these goals by (1) redefining "sexual harassment" and other key terms, at odds with longstanding definitions used by the Department

[14] U.S. Dep't of Educ., Title IX Regulations Addressing Sexual Harassment (Unofficial Copy) (May 6, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf.

in enforcing Title IX and other civil rights laws; (2) narrowly limiting when and how a recipient must respond to sexual harassment, and preempting schools from following more expansive protections under conflicting codes of conduct or state or local law; (3) imposing extensive new procedural requirements and creating new rights for accused students that are not designed to prevent or address *sex* discrimination, exceeding the Department's authority under Title IX; (4) removing critical notice requirements for prospective and current students and employees; (5) ignoring compliance with contrary federal law; and (6) failing to acknowledge and quantify widespread harms and costs to covered institutions, their students, and the broader public.

99. The Final Rule does not refute or alter the Department's central factual findings undergirding its longstanding Title IX policies on sexual harassment, including that sexual harassment in schools is common, can interfere with students' ability to learn and their overall well-being, and that "preventing and remedying sexual harassment in schools is essential to ensure nondiscriminatory, safe environments in which students can learn." *See* 1997 Guidance at 12,034. To the contrary, the Department cited data illustrating the continued prevalence of sexual harassment in schools and the adverse impacts on students who experience harassment. Final Rule at 30,075-81. The Department fails to justify how the drastic changes to its Title IX policies are consistent with these findings.

100. Indeed, the Department concedes that the redefinition of "sexual harassment" was not required by *Gebser* or *Davis*. *Id.* at 30,033. It fails to adequately explain or justify how, in the administrative enforcement context, the "text and purpose" of Title IX in protecting students from sex discrimination would be furthered by these changes that effectively reduce protections for students experiencing sexual harassment and make it harder for their schools to respond to it. The Department also wholly ignores the fact that there is no evidence suggesting that any

burdens faced by accused students in defending against sexual harassment allegations is *based on sex*, such that the Department lacks the authority to create new enforceable rights for the accused as a form of sex discrimination under *Title IX*.

1. The Final Rule redefines key terms without adequate justification.

a. Redefinition of "education program or activity."

101. The Final Rule unlawfully and arbitrarily restricts a school's response to "sexual harassment *in* an education program or activity of the recipient against a person in the United States." Final Rule at 30,574-75 (§ 106.44(a)) (emphasis added).

102. The Final Rule defines "education program or activity," exclusively with respect to sexual harassment and not to other forms of conduct prohibited under Title IX, as those "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." *Id.* The Final Rule requires institutions to dismiss complaints with regard to conduct that "did not occur in the recipient's education program or activity, or did not occur against a person in the United States." *Id.* at 30,576 (§ 106.45(b)(3)).

103. The Final Rule's confusing redefinition effectively demands that students who experience sexual harassment, before seeking relief from their schools, ascertain the degree of their school control over campus events, student groups, and buildings to determine whether Title IX protections apply. It also wholly disregards schools' statutory obligation to address harassment, wherever it occurred, that has the effect of limiting or denying a student's access to education programs and activities. The Department has also failed to justify this geographic

limitation in light of its practice of applying civil rights statutes, including Title VI, outside of the United States in appropriate circumstances.[15]

104. The Final Rule's restrictions conflict with Title IX's statutory language, which does not depend on where the underlying conduct occurred, but instead prohibits discrimination based on its effects on a student's educational opportunities. 20 U.S.C § 1681(a). Moreover, the text of Title IX provides that the term "program or activity" and "program" mean "*all of the operations of*" a covered entity. *Id.* § 1687 (emphasis added). This definition was required by the CRRA, which adopted a uniform, expansive definition of "program or activity" for Title IX, Title VI, and Section 504. *See* 20 U.S.C. § 1687 (Title IX); 34 C.F.R. § 100.13(g) (Title VI); 34 C.F.R. § 104.3(k) (Section 504); *see also* 1994 Racial Harassment Guidance at 11,448; 2000 DCL.

105. The Final Rule's redefinition of "program or activity" applies only to conduct that constitutes sexual harassment under the Final Rule's new, narrow definition of that term. The existing definition will continue to apply to other forms of sex-based discrimination, including, perhaps, gender-based harassment that is not sexual in nature. The Final Rule's redefinition of "program or activity" thus creates arbitrary and unlawful limitations on the Department's enforcement powers and schools' obligations to respond to sexual harassment, as compared to all other forms of discrimination, including harassment.

106. The Final Rule's definition will lead to confusion for schools and students over whether students facing sexual harassment can seek relief from their schools. For example, the Final Rule likely bars American universities from offering Title IX protections to students in university-sponsored study abroad programs. Likewise, students undergoing remote learning

[15] *See, e.g.*, U.S. Dep't of Justice, Title VI Legal Manual (Updated), § V, at 4 (2016) (describing the circumstances in which Title VI applies to discriminatory conduct outside the United States).

due to the COVID-19 pandemic who experience sexual harassment by peers, teachers, or others online, or harassment at home that impedes their ability to attend classes, must guess whether this conduct falls under the Final Rule's definition of "program or activity." The Final Rule is, at best, ambiguous on these questions. The Department fails to sufficiently explain how these results comport with agency interpretation and the anti-discrimination purposes of Title IX.

107. Further, the Department's decision to limit the scope of proscribed conduct under Title IX based on location is arbitrary when Congress, under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1902(f) ("Clery Act"), requires reporting of information regarding crimes occurring on "[p]ublic property . . . immediately adjacent to and accessible from the campus" to current and prospective students, since it is relevant to understand how crimes impact the campus learning environment. 20 U.S.C. § 1902(f). It is illogical to require institutions to report off-campus conduct to current and prospective students if, as the Final Rule unreasonably assumes, that same conduct could never affect a student's access to the education program or activity.

b. Redefinition of "sexual harassment."

108. The Final Rule redefines sexual harassment as "conduct on the basis of sex that satisfies one or more of the following: (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or (3) 'Sexual assault' as defined in [the Clery Act,] 20 U.S.C. 1092(f)(6)(A)(v), 'dating violence' as defined in [the Violence Against Women Act ("VAWA"),] 34 U.S.C. 12291(a)(10), 'domestic violence' as defined in 34 U.S.C. 12291(a)(8),

or 'stalking' as defined in 34 U.S.C. 12291(a)(30)." Final Rule at 30,574 (§ 106.30(a)). Schools must dismiss complaints that do not meet this new definition. *Id.* at 30,576 (§ 106.45(b)(3)).

109. The Department's new definition of sexual harassment is a dramatic departure from longstanding Department practice, and will greatly limit the range of covered conduct.

110. First, this definition restricts schools' obligation under the Title IX regulations to prevent and respond to harassing conduct by requiring that sexual harassment be severe, pervasive, and "objectively offensive" before a school can respond. *Id.* at 30,574 (§ 106.30).

111. By contrast, the Department previously defined sexual harassment as unwelcome conduct of a sexual nature that "is sufficiently severe, persistent, *or* pervasive to limit a student's ability to participate in or benefit from an education program or activity." 1997 Guidance at 12,038 (emphasis added). Thus, even "a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment," and less severe, pervasive conduct that created a hostile environment was also considered to be harassment prohibited by Title IX. 2001 Revised Guidance at 5-9.

112. Under the Department's new definition, a single, severe, objectively offensive incident of sexual harassment may now be excluded from protection under the amended Title IX regulations (unless such conduct met the Clery Act or VAWA definitions incorporated into the definition), and persistent or pervasive conduct that limits a student's access to a school's education program or activity will almost certainly be unprotected.

113. Second, the requirement that the unwelcome sexual conduct "effectively denies a person equal access" to educational opportunities in order to be subject to Title IX coverage runs counter to the plain language of Title IX, which broadly protects all students from any conduct on the basis of sex that has the effect of excluding the student from participation in, being denied

the benefits of, or being subjected to discrimination under a school's education program or activity. Title IX is violated not just when an individual is "effectively denie[d] equal access" to an education program or activity, but also when conduct impairs or limits that individual's ability to enjoy the benefits and services of that program or activity.

114. Consistent with schools' affirmative obligation under Title IX and the longstanding regulations to affirmatively prevent discriminatory harassment and address hostile school environments resulting from such harassment, schools have always been obligated to investigate *all* potentially harassing conduct that may limit or deny educational opportunities to a student. Now, under the Final Rule, a school will have no obligation to respond to harassment until it has already affected one or more students' access to education. As such, students will now have to wait until the harassment they face severely and significantly affects their access to education before their schools are required—or even permitted—to act.

115. Third, although the Final Rule (like the Proposed Rule) purports only to apply to sexual harassment, including by adding new definitions and procedures applicable only to sexual harassment, Final Rule at 30,574-78 (§§ 106.30, 106.44, 106.45), the preamble to the Final Rule suggests that schools will also have to apply the Final Rule's new grievance procedures to other forms of "non-sexual harassment sex discrimination." *Id.* at 30,095; *see also* Proposed Rule at 61,462. Because the Final Rule itself does not say this—and, in fact, uses language specific to "sexual harassment"—schools will have to grapple with this ambiguity and whether and when to apply the new provisions to other forms of sex discrimination experienced by their students.

116. Fourth, the new definition of harassment is also inconsistent with the definitions of harassment used by the Department in enforcing like protections against harassment based on race, color, national origin, and disability under Title VI, Section 504, and Title II. As the

Department's enforcement policies for those laws remain unchanged, the Final Rule effectively establishes a separate, weaker enforcement standard for sexual harassment relative to all other forms of discriminatory harassment.

117. Fifth, the Final Rule's definition ignores the uniformity with which sexual harassment has long been defined under both Title IX and Title VII with respect to employees of educational institutions (including faculty, staff, and student employees). Under Title VII, sexual harassment is actionable when the harassment is sufficiently severe *or* pervasive to alter the conditions of the victim's employment.[16] The EEOC, in administratively enforcing Title VII, recognizes that hostile environment sexual harassment can result from "unusually severe" isolated incidents and gender-based harassment of a non-sexual nature that is sufficiently severe or pervasive.[17] Until the promulgation of the Final Rule, employees of covered institutions enjoyed consistent, parallel protections under both laws. Now, a student may be forced to endure worse sexual harassment than the student's teachers before the school is required to respond.

118. Finally, the Final Rule's redefinition of sexual harassment may prevent institutions from providing meaningful redress for a variety of unwelcome sexual conduct, in direct contravention to Title IX's mandate that requires institutions to prevent, address, and remedy the effects of such conduct on a student's educational access. The Final Rule fails to offer sufficient justification for the many harms that will result from this stark redefinition.

c. Elimination of references to hostile school environment.

119. The Final Rule strips all references in the Title IX regulations to schools' obligations to address hostile school environments resulting from sexual harassment, including

[16] *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (emphasis added); U.S. Equal Emp't Opportunity Comm'n, *Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990), https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment ("EEOC Guidance").
[17] *See* EEOC Guidance.

amending 34 C.F.R. § 106.3 to strike a requirement that institutions take remedial actions OCR deems necessary to "overcome the effects of [sex-based] discrimination." Indeed, in contrast to all of the Department's earlier guidance documents on sexual harassment and other forms of harassment, the terms "hostile environment" and "hostile climate" will be completely absent from the amended Title IX regulations after the Final Rule becomes effective.

120. The Final Rule's sole focus on responding to harassment against one individual by another individual ignores the cardinal principle that "[h]arassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents," 2010 DCL at 2, to create a hostile environment.

2. The Final Rule arbitrarily and unlawfully limits when a recipient must respond to conduct in violation of Title IX.

121. Contrary to the text and purpose of Title IX, the Final Rule drastically limits schools' obligations to respond to sexual harassment that impermissibly and arbitrarily restricts what conduct a recipient may respond to under Title IX. The Department fails to adequately explain the sea change from decades of longstanding and consistent enforcement policy, as reflected in OCR's various guidance documents on sexual harassment, and ignores how these new enforcement standards will frustrate, and effectively preclude, the ability of institutions to combat and eliminate sex discrimination in education.

a. The "actual knowledge" definition impermissibly allows institutions to avoid responding to known incidents of sexual harassment.

122. The Final Rule defines "actual knowledge" as "notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school." Final Rule at 30,574 (§ 106.30(a)). The

Final Rule states that "[i]mputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge," and that the "mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient." *Id.* The Final Rule limits a recipient's obligation to respond to sexual harassment to instances of which the recipient has "actual knowledge." *Id.* at 30,574-75 (§ 106.44(a)).

123. Previously, schools were required to respond to sexual harassment whenever an employee with authority to respond to the harassment, knew, or in the exercise of reasonable care, should have known about the harassing conduct. 1997 Guidance at 12,042; 2001 Revised Guidance at 13; 2010 DCL at 2 n.9; 2011 DCL at 4.

124. The Department's definition and circumscription of an institution's obligation to respond to allegations of which it has actual knowledge renounces this standard, which made clear that institutions had to respond to all sexually harassing conduct where the institution knew or reasonably should have known about it. *See* 1997 Guidance at 12,042; 2001 Revised Guidance at 13; 2011 DCL at 4.

125. The Final Rule fails to justify its new standard, particularly in light of the reality that students are most likely to disclose sexual assault and harassment to trusted sources, such as a residential advisor, guidance counselor, or professor. Instead, the Final Rule now authorizes institutions to do nothing—even where dozens of employees who can take action or report to appropriate officials have actual knowledge of harassment—so long as the Title IX Coordinator or high-ranking university official can disclaim actual knowledge. The Department offers no reasonable explanation for these added hurdles for complainants at the university level.

126. The Final Rule arbitrarily imposes different definitions of actual knowledge in K-12 institutions and post-secondary institutions, with no explanation for why university students should face added barriers in order to trigger an institutional response to sexual harassment.

127. The Final Rule's reliance on the Supreme Court's decisions in *Gebser* and *Davis* are misplaced, as these decisions only addressed the liability standard for private Title IX lawsuits seeking monetary damages, and specifically distinguished monetary liability standards from those federal agencies can apply in the administrative enforcement context. As the Supreme Court explicitly noted in *Gebser*, "[t]he Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate." 524 U.S. at 292. Indeed, the Department issued the 2001 Revised Guidance after those decisions, to affirm that these cases "did not change a school's obligations to take reasonable steps under Title IX and the regulations to prevent and eliminate sexual harassment as a condition of its receipt of Federal funding." 2001 Revised Guidance at ii.

128. The Final Rule offers no explanation for the Department's about-face from its position that *Gebser* and *Davis* had no bearing on OCR's administrative enforcement of Title IX.

b. The definitions of "complainant" and "formal complaint" impose undue restrictions on schools' ability to respond to sexual harassment.

129. The Final Rule defines "complainant," for purposes of sexual harassment claims only, as "an individual who is alleged to be the victim of conduct that could constitute sexual harassment." Final Rule at 30,574 (§ 106.30). The Department's Title IX regulations do not otherwise define a complainant for any other form of sex-based discrimination. Although the Final Rule permits *any* individual to notify a school that sexual harassment is occurring, and for the Title IX Coordinator to make a formal complaint in lieu of a student targeted for harassment,

the rule confusingly uses the term "complainant" to describe a targeted student even if that student did not make a formal complaint. *See id.* at 30,573-74 (§§ 106.8(a), 106.30).

130. The Final Rule defines "formal complaint" as "a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment." *Id.* at 30,574 (§ 106.30(a)).

131. The Final Rule newly limits individuals who can file a formal complaint, providing that "[a]t the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed." *Id.* By requiring that a formal complaint can only be filed by or on behalf of a student currently "participating in or attempting to participate in" an education program or activity at the time of the complaint (as opposed to when the harassment occurred), the Final Rule unjustifiably forecloses the ability of sexual harassment survivors who withdrew from school due to the damaging effects of that harassment from seeking justice from their schools through the administrative process.

132. These narrow, formalistic definitions are not supported by Title IX, which does not include any limitations on making or receiving complaints. *See* 20 U.S.C. § 1681. Nor are they supported by Title IX's mandate that schools take reasonable steps to prevent and remedy known sexual harassment and sex discrimination, regardless of how institutions learn about it.

133. The Final Rule also fails to consider the limiting effect of the definitions of "complainant" and "formal complaint," including that it may chill reporting, and does not offer sufficient accommodations for individuals with disabilities that may impede their ability to read, write, or sign a formal complaint, or to otherwise participate in the prescribed grievance process.

c. The "deliberate indifference" standard runs counter to Title IX's mandate and past practice.

134. The Final Rule provides that an educational institution with actual knowledge must respond "in a manner that is not deliberately indifferent." Final Rule at 30,574 (§ 106.44(a)). An institution is "only" deliberately indifferent "if its response to sexual harassment is clearly unreasonable in light of the known circumstances." *Id.*

135. Consistent with Title IX's mandate that no person "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" on the basis of sex, 20 U.S.C. § 1681(a), the Department has long required schools to act reasonably, promptly, and effectively in taking steps to end sexual harassment and prevent its recurrence. 34 CFR § 106.31; 1997 Guidance at 12,042; 2001 Revised Guidance at 10; 2010 DCL at 2-3; 2011 DCL at 4.

136. In contrast, the Final Rule permits schools to respond ineffectively to sexual harassment as long as the response is not "clearly unreasonable in light of the known circumstances," Final Rule at 30,574-75 (§ 106.44(a)), even if the response does not stop, prevent, or redress harassment.

137. In an attempt to justify its departure from previous standards, the Department cites only to decades-old Supreme Court precedent that explicitly limits the liability standards on which the Department relies to private Title IX lawsuits seeking monetary damages, and which subsequent Department guidance clarified did not apply to its enforcement of Title IX. The Final Rule does not point to any instances in which schools were burdened or unfairly penalized by the existing reasonableness standard, and otherwise fails to justify its departure from this well-established standard.

3. The Final Rule's mandatory and permissive dismissal provisions impermissibly allow for sexual harassment to go unaddressed.

138. The Final Rule mandates that "[i]f the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct." Final Rule at 30,576 (§ 106.45(b)(3)). Accordingly, a school must dismiss a complaint *before* an investigation if the allegations, on their face, are not severe, pervasive, and objectively offensive, *see id.*, even if a reasonable investigation might have revealed that the alleged conduct meets the stringent standard. Likewise, a school must dismiss a complaint that meets the Final Rule's definition of sexual harassment if the conduct occurred outside of the bounds of an educational program or activity, *see id.* at 30,574-75 (§ 106.44(a)), or outside the United States, even where the effects of such harassment harm a student's ability to participate in that program or activity and are redressable by the institution.

139. In forcing schools to dismiss complaints that do not meet the narrow, unlawful, and arbitrary definitions the Final Rule adopts, the Department exceeds its statutory authority by forcing schools to violate students' and employees' civil rights under Title IX. Title IX only authorizes the Department to issue rules "to effectuate the [anti-discrimination] provision of [Title IX]." 20 U.S.C. § 1682. Title IX delegates no authority to the Department to limit schools' protection of students against discrimination, hamper schools' ability to enforce their own procedures to best respond to a wide-variety of conduct subject to disciplinary action, or afford substantive Title IX rights to individuals (including those accused of misconduct) that are not themselves facing discrimination on the basis of sex.

140. The Final Rule fails to consider practical complications created by the mandatory dismissal provision. For example, where an institution investigates and dismisses a Title IX complaint, the institution will have lost critical time and resources before the institution can begin to investigate whether the conduct alleged also violates its own disciplinary code. The Final Rule provides little clarity on how institutions should conduct these successive investigations, or whether parallel investigations under different enforcement regimes can happen concurrently.

141. The Final Rule adds permissive dismissal language, allowing institutions to dismiss complaints where "a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein." Final Rule at 30,576 (§ 106.45(b)(3)(ii)).

142. This provision disregards Title IX's mandate, and calls into question whether victims of sexual harassment would be afforded Title IX protections in circumstances where their harassers are no longer on campus. For example, the Final Rule, read literally, would allow an institution to ignore harassment perpetrated by a graduating senior, where that student would graduate before the newly-prescribed grievance process could be completed. Similarly, a school would have no duty to investigate harassment against a student by an alumnus or other campus visitor who is not enrolled or employed by the school, regardless of the impact of the harassment on the targeted student or students' access to the school's education program or activity. This provision also fails to define what "specific circumstances" warrant permissive dismissal.

143. The Final Rule fails to justify why a vast range of unwelcome sexual conduct is no longer within the ambit of Title IX's protections, or to square these new limits with the broad scope of conduct that the Supreme Court recognizes as covered by Title IX. Nor does the Final Rule provide evidence that institutional resources were previously inappropriately directed at resolving claims of sexual harassment under Title IX.

4. The Final Rule imposes prescriptive new grievance procedures that are designed to protect accused students, not to address and remedy sex discrimination in schools.

144. After greatly narrowing the range of conduct subject to Title IX protection, the Final Rule adds dozens of new procedural requirements that institutions must follow when investigating complaints. These formalistic, prescriptive and burdensome requirements interfere with institutional expertise and responsibilities to respond to a wide range of conduct in schools. Further, the Final Rule fails to explain how these new requirements will reduce the prevalence of sexual assault and harassment, or otherwise promote the ends of Title IX.

a. The Final Rule arbitrarily changes evidentiary standards and departs from agency practice.

145. The Final Rule provides that a recipient must "[s]tate whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment." *Id.* at 30,575 (§ 106.45(b)(1)(vii)).

146. The Final Rule departs from decades of Department practice by requiring that institutions use the same standard of evidence for complaints against students as those against employees, and by making it harder for institutions to use the preponderance of the evidence

standard. This is at odds with the standards used by the Department and other federal agencies in administratively enforcing federal civil rights laws, and frustrates Title IX's anti-discrimination mandate. Use of a clear and convincing standard would effectively impose a higher burden of proof on complainants than respondents, in tension with the Final Rule's separate requirement that Title IX grievance procedures must treat complainants and respondents equitably, *id.* (§ 106.45(b)(1)(i)); *see also* 2011 DCL at 11 (explaining that "[g]rievance procedures that use [a clear and convincing] standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX.").

147. The Final Rule arbitrarily authorizes schools to impose a higher burden on proving sexual harassment allegations than any other disciplinary allegations even if other disciplinary proceedings carry an equal or greater sanction. The Department fails to justify this inconsistency, nor does it address that such a heightened and unequal standard perpetuates pervasive stereotypes that complainants of sexual harassment and assault are more likely to fabricate allegations than students who report other conduct violations.

148. Similarly, the Department failed to adequately explain why it has departed from the evidentiary norm for resolving discrimination claims. The preponderance of evidence standard is used in adjudicating administrative and civil claims of civil rights violations, including claims under Title VI and Title VII. *See* 2011 DCL at 11. In the same vein, the Department previously required that institutions use a preponderance of evidence standard in Title IX investigations. *Id.*

149. Additionally, the Department fails to adequately explain the Final Rule's requirement that schools use the same standard of evidence for resolving claims of student-on-student harassment as faculty-on-student harassment. In imposing this restriction, the Final Rule

arbitrarily fails to address how students are differently situated than employees, or why standards for adjudicating Title IX complaints should be dependent upon the bargaining power of particular employees or unions.

b. The Final Rule impermissibly requires institutions to adopt arbitrary and unreasonably onerous procedural rules that limit, rather than advance, Title IX's broad protections against sex discrimination.

150. The Final Rule mandates a variety of additional procedural requirements, *see* Final Rule at 30,575-78 (§ 106.45(b)), including that postsecondary institutions must provide for a live hearing and cross-examination by each party's "advisor of choice," and "not rely on any statement of [a] party or witness [that does not submit to cross-examination] in reaching a determination regarding responsibility," *id.* at 30,577 (§ 106.45(b)(6)(i)); that the decision-maker must "determine whether [a] question is relevant and explain any decision to exclude a question as not relevant" before allowing a party to answer a question posed during cross-examination; guarantee access to evidence to both parties, "including the evidence upon which the recipient does not intend to rely," *id.* at 30,576 (§ 106.45(b)(5)(vi)); and that institutions refrain from "restrict[ing] the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence," *id.* (§ 106.45(b)(5)(iii)).

151. Such specific, costly, and onerous one-size-fits-all procedures arbitrarily restrict a school's expertise and flexibility in responding to sexual harassment, impose heightened due process requirements in adjudicating sexual harassment claims that create inexplicable incongruity with other disciplinary procedures, and pose confusing and unworkable situations for schools, including with respect to fulfilling additional legal and professional obligations.

152. For example, in imposing live hearing and cross-examination requirements, the Final Rule fails to adequately explain why such legalized disciplinary hearings are necessary or

appropriate for all allegations of sexual harassment in the postsecondary education context. Schools routinely employ alternative practices that provide accurate and fair determinations in adjudicating sexual harassment allegations, as well as allegations with respect to violations of similar anti-discrimination laws and conduct that implicates equal or greater sanctions. Moreover, the Department acknowledges that live hearings and cross-examination are not necessary in resolving the same conduct at the K-12 level.

153. The Final Rule declines to mandate live hearings and cross-examination for K-12 institutions based on the Department's finding that "parties in elementary and secondary schools generally are not adults with the developmental ability and legal right to pursue their own interests on par with adults." *Id.* at 30,364. However, the Final Rule mandates live hearings and cross-examination for minors at pre-K-12 schools who are sexually harassed at post-secondary institutions, including, *e.g.*, young children attending pre-schools housed on college campuses, high school students at academic or athletic summer camps, or high school students taking college courses for high school credit at local colleges, without justification or sufficient explanation. *Id.* at 30,493. Conversely, a college student or other adult experiencing harassment on a K-12 campus, such as a student teacher or volunteer, would be subject to the Final Rule's procedural requirements but would not be required to participate in a live hearing or cross-examination. Relatedly, for education programs or activities that are not schools, such as museums and libraries, the Final Rule applies the K-12 requirements, regardless of whether the complainant or harasser are children or adults. Finally, the Final Rule makes no distinction between high school students who are 18 or older, or college students under the age of 18, in creating these drastically different procedural requirements based on the type of institution where

the harassment occurred. The Department has failed to justify or adequately explain these arbitrary distinctions.

154. The Final Rule's live hearing and cross-examination provisions fail to account for the reality that students may, but need not, be represented by counsel, and that these hearings will in many cases be managed by personnel who are non-attorneys, lack knowledge of evidentiary rules, and may have difficulty making correct on-the-spot relevancy determinations of questions posed during cross-examination, as they will now be required to do. *Id.* at 30,577 (§ 106.45(b)(6)(i)).

155. The Final Rule's "advisor of choice" provision allows for complainants to be cross-examined by a number of people whose very presence could re-traumatize them, including a respondent's twin brother, a respondent's friend who witnessed the sexual assault at issue, or the respondent's parent. The fact that an advisor need not undergo any specialized training before conducting this cross-examination, and that, unlike an attorney, need not be bound by any professional or ethical obligations further compounds this problem. The Final Rule fails to account for the chilling effect caused by the new live hearing and cross-examination mandates.

156. And because the Final Rule explicitly demands that "the decision-maker(s) must not rely on any statement of [a] party or witness in reaching a determination regarding responsibility" if such "a party or witness does not submit to cross-examination at the live hearing," *id.* at 30,577 (§ 106.45(b)(6)(i)), many complainants will be faced with the difficult choice of deciding between submitting to a traumatizing cross-examination, or withdrawing from the process knowing that a finding of responsibility will be less likely. Accordingly, the Final Rule would inexplicably bar schools from using a respondent's confession, statement against interest, or documentary evidence proving harassment occurred if the respondent refuses to

participate in cross-examination. This effectively requires schools to ignore evidence that would be plainly admissible in court proceedings under the Federal Rules of Evidence and gives respondents a get-out-of-jail-free card to avoid a finding of responsibility. The Department fails to justify how these procedures will further Title IX's anti-discrimination mandate of preventing, addressing, and remedying sexual harassment.

157. The Final Rule's requirement that the decision-maker at a Title IX hearing cannot be the same person as a Title IX Coordinator, *or* the person who investigated the underlying conduct, *id.* (§ 106.45(b)(7)(i)), arbitrarily invades on institutional flexibility, and will require institutions to either hire new staff or divert resources from other critical institutional functions.

158. Similarly, the Final Rule includes an ambiguous and overbroad conflict of interest rule, requiring "that any individual designated by a recipient as a Title IX Coordinator, investigator, decisionmaker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent." Final Rule at 30,575 (§ 106.45(b)(1)(iii)). Because the Final Rule newly confers on respondents the "right" under Title IX to contest findings of responsibility based on a school's alleged noncompliance with the prescriptive new grievance procedures, this provision may enable respondents to evade responsibility and prolong grievance proceedings based on the mere assertion that an individual involved in the grievance process was "biased" against that student or "respondents generally." This may very well give schools pause on whether to appoint individuals with a background in sexual violence prevention or a known interest in protecting survivors to these positions, even if the individual is committed to impartiality in this role.

159. Department guidance has made clear that in crafting responses to sexual harassment, the "critical issue under Title IX is whether responsive action that a school could reasonably be expected to take is effective in ending the sexual harassment and in preventing its recurrence." 1997 Guidance at 12,034. In accomplishing this obligation, school personnel should be offered "flexibility in how to respond to sexual harassment," and, accordingly, the Department has consistently acknowledged that "[p]rocedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes, and administrative structures, State or local legal requirements, and past experience." *Id.* at 12,045; *see also* 2001 Revised Guidance at 29; 2011 DCL at 9.

160. The Final Rule fails to justify this departure from Department practice and resulting intrusion into institutional autonomy.

5. The Final Rule hinders institutions' ability to apply stronger state or local protections against sexual harassment.

161. The Department asserts that the "dismissal of a formal complaint . . . does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient's own code of conduct," and that "nothing in these final regulations . . . inherently prevents recipients from complying with State and local laws or policies." Final Rule at 30037-38, 30454, 30576. However, these assertions are belied by the many provisions in the Final Rule that significantly constrain how schools may pursue investigations under other laws or policies.

162. The Final Rule's preemption provision provides that "[t]o the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law." *Id.* at 30,573 (§ 106.6 (h)). This provision—which was not included in the

Proposed Rule—may obstruct institutions' ability to enforce state and local laws that are more protective of students facing harassment than the Final Rule.

163. As a result, New York educational institutions may be precluded from providing certain protections required by the State's Enough is Enough law, including the right of reporting individuals to file complaints against individuals at different educational institutions, to obtain one-way no-contact orders or the requirement that investigators and adjudicators be trained under a "trauma-informed" approach, without potentially running afoul of the Final Rule's preemption provision. *See* N.Y. Educ. Law §§ 6440(2), 6444(4)(a), 6444 (5)(c)(ii).

164. The Final Rule fails to grapple with these and other potential conflicts, or their damaging effect on the ability of institutions to maintain New York's carefully considered standards for addressing sexual harassment, including sexual assault.

165. The Final Rule's retaliation provision provides that "[i]ntimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes [unlawful] retaliation." Final Rule at 30,578 (§ 106.71(a)).

166. Institutions may therefore be reluctant to address misconduct that does not meet the Final Rule's definitions under their own codes of conduct, if doing so could expose these institutions to Title IX liability.

167. The Department fails to grapple with the deterrent effects of this provision, or otherwise advise institutions how to maintain their own investigations initiated concurrently with or following the dismissal of a formal complaint.

168. Institutions face additional challenges should they attempt to investigate sexual harassment before, or concurrent with, a Title IX investigation. Institutional staff who question a respondent about sexual harassment allegations may not use any of the answers provided if a formal complaint is later filed against the respondent. *Id.* at 30,287. This exclusionary rule defies logic and appears to prevent an institution from using information about a respondent's actions—including conduct that plainly violates Title IX—simply because it was discovered before a formal complaint was filed. Consequently, a school could be prevented from responding to sexual harassment about which it has *actual knowledge*, at plain odds with its statutory obligations under Title IX, if such knowledge was acquired too early.

169. The Department fails to address the Final Rule's restraints on institutional autonomy and its conflict with schools' obligations to prevent, address, and remedy all sexual harassment that is impeding or denying access to its education program or activity.

6. The Final Rule arbitrarily removes important notice requirements for prospective and current students and employees, but adds burdensome new publication requirements.

170. The Final Rule, without sufficient justification, removes longstanding requirements that institutions broadly disseminate their Title IX nondiscrimination policies, including striking requirements in the existing 34 C.F.R. § 106.9 that schools publish their policies in local newspapers, alumni publications, and written communications distributed to all students and employees, newly limiting the publication requirement to a school's "website, if any, and in each handbook or catalog" made available to applicants, students, parents, and employees. Final Rule at 30,573 (§ 106.8(b)). The Final Rule removes the express requirements, now contained in 34 C.F.R. § 106.9, that a school's policies be disseminated to persons involved in admissions or recruiting of students or staff. *Id.* It also unjustifiably amends

the longstanding requirement that a school "shall not use or distribute a publication . . . which suggests, by text or illustration, that [it] treats applicants, students, or employees differently on the basis of sex," newly limiting it to publications "stating" a discriminatory policy. *Id.*

171. Since 1975, the Department has required that institutions claiming a religious exemption submit a letter to the Department stating which parts of the regulation conflict with a specific tenet of the religion. 34 C.F.R. § 106.12(b). Institutions have also been required to provide assurances to the Department of their Title IX compliance. 34 C.F.R. § 106.4(a). Without justification, the Final Rule provides that an "institution is not required to seek assurance from [the Department] in order to assert" a Title IX religious exemption. *Id.* at 30,573 (§ 106.12(b)). Moreover, in the event that the Department notifies an institution that it is under investigation for noncompliance with Title IX, it "may at that time raise its exemption." *Id.*

172. The Department fails to offer an adequate justification for its proposed changes in light of longstanding practice. Nor does the Department explain how these requirements confuse or burden recipients; nor does it point to any evidence of such confusion or burden.

173. The Final Rule arbitrarily fails to consider how these relaxed requirements conflict with other key obligations under Title IX, and their effect on students and prospective students. Since 1975, the Department has required institutions to provide students with notice of the institution's compliance with Title IX. 34 C.F.R. § 106.9(a). The Final Rule similarly requires institutions to notify prospective and current students and employees of their Title IX policies. 34 C.F.R. § 106.8(a).

174. By excusing an institution from submitting a religious exemption to the Department until it is under investigation, the Final Rule allows recipients to avoid notice provisions with impunity, and discriminate against students without warning. Such advanced

notice of an institution's exemption from Title IX is especially important to women, LGBTQ students, pregnant or parenting students, and students seeking birth control or other reproductive health care.

175. While easing these other requirements, the Final Rule newly imposes a mandate that schools publish all Title IX trainings on their websites, or otherwise make them publicly available, for a period of seven years. Final Rule at 30,578 (§ 106.45(b)(10)(i)(D)). This requirement was not included in the Proposed Rule and was not subject to notice and comment.

7. The Final Rule ignores compliance with contrary federal law.

176. The Final Rule either ignores or fails to address its interaction or conflict with other federal laws, including federal privacy laws, other civil rights laws protecting students and school employees, and protections for individuals with disabilities.

a. The Final Rule allows for the disclosure of sensitive education records in conflict with FERPA.

177. FERPA provides that no institutions receiving federal funds shall have a policy or practice of permitting the release of a student's educational records to private parties without the written consent of that student's parents. 20 U.S.C. § 1232g(b)(1). Education records are any "records, files, documents, and other materials" that contain information "directly related to a student," that are "maintained by an educational agency or institution." *Id.* § 1232g(a)(4)(A).

178. The Final Rule's blanket requirement that an institution provide parties an opportunity to "inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely," Final Rule at 30,576 (§ 106.45(b)(5)(vi)), conflicts with an institution's FERPA obligations, as much of the evidence obtained through Title IX

investigations is sensitive personally identifiable information, and may be included within education records.

179. Although the Final Rule provides that medical information cannot be disclosed without consent, the Final Rule still allows respondents and advisors to Title IX investigations to access other sensitive information, such as a complainant's academic transcript in direct contravention of FERPA's broad protections.

b. The Final Rule's new definition of "sexual harassment" conflicts with Title VI, Section 504, Title II, and Title VII.

180. The Final Rule's redefinition of sexual harassment departs from the definition used by the Department for discriminatory harassment under Title VI, Section 504, and Title II. It also conflicts with the definition of harassment used by the Equal Employment Opportunity Commission and courts for cases involving sexual harassment against employees of educational institutions. These inconsistent definitions conflict with the Department's longstanding policy of enforcing all civil rights laws similarly, and its obligation under Executive Order 12866 to "avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies." Moreover, this conflict exposes students and employees of educational institutions to inconsistent protections, permitting or requiring institutions to ignore harassment against students that it must address for employees. It also mandates that schools maintain separate, inconsistent regimes to resolve harassment complaints depending only on whether the underlying conduct is based on sex or some other protected classification.

181. The Final Rule's redefinition of "education program or activity" arbitrarily limits institutions' ability to respond to sexual harassment, while the Department's policies for other forms of discriminatory harassment are unchanged. The Final Rule's redefinition thus creates a weaker enforcement regime for sexual harassment relative to all other forms of harassment.

182. The Final Rule fails to address how schools should—or must—respond to harassment based on sex and one or more other bases, such as race, national origin, or disability. An African American student targeted for harassment because of the student's race and sex, for example, will now need to navigate multiple processes and conflicting standards in seeking help from the student's school, as will school officials charged with handling the complaint.

183. Similarly, the Final Rule fails to instruct institutions on how to investigate sexual harassment complaints by employees, including student employees, that implicate both Title IX and Title VII. The Final Rule mandates that a school must dismiss a complaint that does not rise to the level of sexual harassment as defined in the Final Rule, *id.* at 30,574 (§ 106.45(b)), even though this conduct may be actionable under Title VII's hostile work environment or sex-based harassment standards. Accordingly, a school faces a Catch-22: either dismiss a complaint made by an employee alleging conduct that does not rise to the level of sexual harassment as defined in Title IX and risk liability under Title VII, or pursue an investigation of allegations under Title VII and risk liability under Title IX.

184. Finally, the Final Rule fails to address likely conflicts between the onerous procedural requirements, including the cross-examination and live hearing requirements, and schools' Title VI obligations to serve students and parents with limited English proficiency.

c. The Final Rule undermines protections for individuals with disabilities.

185. The Final Rule fails to grapple with institutions' concurrent obligations to students and employees under federal disability rights laws, including Section 504, Title II, and the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 ("IDEA"), and the conflicts between the Final Rule's prescriptive procedural requirements and individuals' rights under these laws.

186. For example, the Final Rule's definition of "formal complaint" makes no exception for students with learning disabilities, students who are visually impaired, or students with other disabilities who would have extreme difficulty submitting a signed, written complaint. The Final Rule's definition of "complainant" also presumes that students are both aware of and have access to the Title IX coordinator and other responsible staff, without regard for the challenges this may pose for students with particular disabilities.

187. The Final Rule's live hearing requirement will similarly negatively impact students with disabilities, who may not, or cannot, participate fully in such hearings. The cross-examination requirement, and the other procedural requirements in the Final Rule, may also stigmatize and discriminate against students with disabilities.

8. The Final Rule fails to acknowledge and quantify widespread harms and costs to schools resulting from its onerous requirements.

188. The Final Rule includes a Regulatory Impact Analysis purporting to quantify the costs and benefits of the Final Rule. *See* Final Rule at 30,563-70.

189. The cost-benefit analysis in the Final Rule expressly refuses to quantify the impact of the Final Rule on sexual assault incidents and harassment, despite the fact that such incidents have concrete and obvious costs and are the very conduct the Final Rule governs. *Id.* at 30,539. Although the Department itself acknowledges that the Final Rule will result in a net decrease of investigation into sexual harassment, it fails to consider the costs of a reduction in reporting, and instead only considers the potential cost savings of such reductions. *Id.* at 30,547, 30,551. Despite expressly declining to assess the true costs of the Final Rule on sexual harassment outcomes, the Department concluded without evidence that "the mandatory offer of supportive measures in § 106.44(a)" will reduce negative outcomes. *Id.* at 30,545.

190. The Final Rule further ignores or underestimates increased compliance and legal costs that will result from implementation of the Final Rule. *Id.* at 30,549.

191. Moreover, the Final Rule's estimate of the annual rate of Title IX complaints based on sexual harassment or sexual violence is unreasonably low, and fails to account for current trends in sexual harassment complaints, including in the Department's own data.

INJURY TO PLAINTIFF

192. The Final Rule harms Plaintiff's economic, sovereign, and quasi-sovereign interests.

A. The Final Rule Harms New York's Economic Interests.

193. The State, through NYSED and the SUNY system, directly oversees over 5,000 public elementary and secondary schools, serving approximately 2.6 million students, and public colleges and universities, serving more than 700,000 students in two-year, four-year, and graduate programs.[18] SUNY and NYSED are governed by the Board of Regents, which is responsible for the general management and supervision of all educational activities within the State, including K-12 schools, postsecondary institutions, and cultural institutions. In addition, there are more than 100 private colleges and universities in the State that are subject to Title IX's requirements, serving over 500,000 students.[19] In total, New York educational institutions affected by the Final Rule serve over 3.8 million students.

194. New York's educational institutions will expend significant financial resources in order to implement the Final Rule. Although the Final Rule acknowledges some costs to institutions in implementing the Final Rule, it fails to adequately consider the full range of

[18] N.Y. State Educ. Dep't, NYSED Data Site, https://data nysed.gov/ (containing links to higher education and public K-12 school enrollment data for the 2018-2019 school year).
[19] *Id.*

administrative and financial burdens that institutions will experience or to weigh those costs against any benefits of these onerous requirements.

195. The Final Rule imposes a host of new, stringent limitations on the ability of Plaintiff's educational institutions to prevent, respond to, and investigate allegations of sexual harassment and assault, and other conduct, along with onerous, arbitrary procedural requirements to resolve complaints of sexual harassment. These provisions will impose new, unjustified financial and administrative burdens on New York's educational institutions. Plaintiff and its schools must implement these costly changes, or risk losing billions in critical federal funds that they rely on to provide education to New York students. SUNY, the largest system of public colleges and universities in New York and one of the largest public higher education systems in the country, receives over $1 billion annually in federal funds.

196. First, the Final Rule mandates dozens of new procedural requirements, *see* 106.45(b), including, that higher education institutions provide for a live hearing, including cross-examination "conducted directly, orally, and in real time by the party's advisor of choice." Final Rule at 30,577 (§ 106.45(b)(6)(i)). If a student does not have an advisor, the institution must provide one at no cost to the student. *Id.* An institution may "not rely on any statement of [a] party or witness [that does not submit to cross-examination] in reaching a determination regarding responsibility." *Id.* For virtual live hearings, or where a complainant does not wish to be in the same room as the respondent, institutions are required to provide "technology enabling participants simultaneously to see and hear each other." *Id.*

197. The Final Rule also prohibits the decision-maker at grievance hearings from being the person who investigated the underlying complaint, or the person who serves as Title IX coordinator, requiring schools to hire multiple people to perform functions previously performed

by one person. *See* Final Rule at 30,577 (§ 106.45(b)(7)(i)). Where schools lack resources to hire new employees to fulfill these roles, they will be compelled to divert existing staff away from other important educational functions to comply with the prescriptive Title IX requirements.

198. Plaintiff's educational institutions will incur significant expenses to understand and comply with the Final Rule and its lengthy, cumbersome, and often confusing new mandates, including by: familiarizing themselves with the extensive requirements of the Final Rule, considering and establishing new policies and procedures to comply with those requirements, training employees and students on their rights and obligations, hiring and training additional staff to fulfill each stage of the grievance process, purchasing new technologies to comply with the live hearing requirement, and complying with other aspects of the Final Rule.

199. Smaller institutions, such as community colleges, will be hardest hit by the economic and administrative burdens caused by compliance with the Final Rule's new grievance procedures. Not only will these institutions have to hire new staff, but, as these institutions typically do not have in-house counsel, they also will have to retain outside attorneys and assume the high cost of obtaining legal advice on how to comply with the Final Rule.

200. The complicated matrix created by the Final Rule's definitions and prescriptive grievance procedures will increase institutions' legal and compliance costs. The Final Rule's inconsistencies with federal, state, and local laws, and long-standing practices means that institutions will need to spend more time evaluating how to comply with various conflicting requirements, and will face new threats of liability if they comply with the Final Rule. For example, compliance with the Final Rule could expose institutions to liability under Title VII, given that Title VII's definition of actionable sexual harassment covers a much broader range of

conduct than the Final Rule's definition. Similarly, compliance with the Final Rule could expose institutions to liability under Section 504 or Title II, as the Final Rule's live hearing and formal complaint requirements do not currently provide accommodations for students whose disabilities would limit their ability to meet these requirements.

201. Institutions may also need to expend significant resources on conducting successive or parallel investigations where underlying conduct overlaps with other legal or code of conduct prohibitions, to the extent such proceedings are not barred by the Final Rule's preemption and retaliation provisions. Moreover, both complainants and respondents will have new grounds to challenge institutional compliance with the Final Rule, including respondents' newly-conferred ability to challenge alleged procedural noncompliance with the Title IX regulations, that will likely force schools to assume the burdens and costs associated with investigating and resolving those complaints, and in defending themselves in any investigation by the Department into alleged procedural violations of the detailed new rules.

202. Alone and in combination, these severe constraints on the operation of Plaintiff's institutions will dramatically undermine their effectiveness and efficiency, and lead to significantly increased costs.

B. The Unreasonably Short Implementation Deadline in the Midst of the Global COVID-19 Pandemic Will Harm Plaintiff.

203. In normal times, it would be difficult, if not impossible, for most schools in New York and elsewhere to comply with the Final Rule (including familiarizing themselves with the rule, revising policies, conducting trainings, and purchasing technology) within the 87-day period between the Final Rule's publication and effective dates, particularly as the Final Rule represents a radical alteration of the Department's decades-old policies. The global COVID-19 pandemic has severely disrupted school operations in New York and across the country, and will

likely to continue to do so in the coming months and beyond. The Department's refusal to provide a reasonable implementation period under these circumstances is patently unreasonable and indefensible. Institutions' implementation of the Final Rule will impose undue economic and administrative burdens on New York's educational institutions, exacerbated by the pandemic-related fiscal and administrative challenges they are facing.

204. At a time when institutions' focus is properly on maintaining operations and educating their students under unprecedented conditions, the need to devote significant resources this summer to implementation of the Final Rule will impinge on these efforts and harm schools and their students as a result.

205. Following the Governor of New York's declaration of a state of emergency on March 7, 2020 due to COVID-19, New York State has been in the throes of an unprecedented public health crisis. *See* N.Y. Exec. Order 202, *Declaring a Disaster Emergency in the State of New York* (Mar. 7, 2020).

206. New York is one of the epicenters of the pandemic and has suffered catastrophic losses due to COVID-19. As of June 3, 2020, nearly 375,000 people in the State have been diagnosed with COVID-19 and nearly 25,000 New Yorkers had died from it.[20] In New York City alone, 201,806 residents have been diagnosed with COVID-19, 52,456 have required hospitalization to treat it, and at least 16,933 have died from it.[21] Nationally, nearly 1.8 million people have been diagnosed with COVID-19 and over 100,000 people have died from the disease.[22]

[20] N.Y. Dep't of Health, COVID-19 Tracker, https://covid19tracker.health ny.gov (last accessed June 3, 2020).
[21] N.Y.C. Dep't of Health & Mental Hygiene, COVID-19: Data, https://www1 nyc.gov/site/doh/covid/covid-19-data.page (last accessed June 3, 2020).
[22] Centers for Disease Control & Prevention, CDC COVID Data Tracker, https://www.cdc.gov/covid-data-tracker/ (last accessed June 3, 2020).

207. In response to this extraordinary public health emergency, the Governor ordered all schools in New York to close temporarily on March 18, 2020. N.Y. Exec. Order No. 202.4. This executive order was extended several times and remains in effect.

208. As a result, most public and private K-12 schools, colleges, universities, and other educational institutions in the State are closed, with millions of students being forced to learn remotely. The same is true for most educational institutions in other states, which are attended by many of the State's residents.

209. This sudden transition to remote learning has transformed the educational landscape of New York State. With students, and institutional staff scattered among homes and offices across the country, educational institutions now face the daunting task of teaching, counseling and providing critical services to students remotely.

210. For most schools, moving virtually all of the services provided to students online requires an institution-wide overhaul. This process strains institutional resources and is immensely challenging for teachers, faculty, students and their caretakers.

211. In addition to educating over three million students, many public universities in New York have also been called upon to provide critical medical care and public health expertise as part of the State's efforts to combat COVID-19. Staff within the SUNY hospital system, in particular, are on the frontlines of fighting this pandemic.

212. The changes required by the lengthy Final Rule would be difficult for institutions to digest and implement under normal circumstances. But in the midst of a global pandemic, the burden placed on institutions is not only untenable, but risks undermining the health and safety of New York residents.

213. Certain changes mandated by the Final Rule, such as the live hearing requirement, are practically impossible to implement while schools are closed. The Final Rule's significant departure from Department practice will also sow confusion for ongoing Title IX investigations, many of which are already complicated by school closures.

214. Given the incredible challenges already facing New York's educational institutions, they should not be asked to divert critical resources in order to implement the Final Rule's arbitrary, unlawful, and unprecedented changes.

215. Ignoring requests by states and educational institutions to delay issuance of the Final Rule during the pandemic, the Department refused to delay publication of the rule and ordered institutions to implement it in a mere 87 days. After the Final Rule was released, Secretary DeVos dismissed concerns about the short implementation period, stating, "We've been working on this for more than two years so it's not a surprise to institutions that it was coming,"[23] disregarding the fact that the Final Rule differed in significant respects from the Proposed Rule and the virtual impossibility of digesting the lengthy, complex rule; developing and approving new policies to implement the significant changes from existing practice and onerous new procedural requirements; training faculty, staff, and students on their modified rights and obligations under the Final Rule; and simultaneously dealing with the unprecedented and evolving changes related to the COVID-19 pandemic, all during the summer months.

C. The Final Rule Interferes with Plaintiff's Effective Administration and Enforcement of Its State Laws and Institutional Policies.

216. New York has enacted laws that carefully balance the rights of students to attend schools without experiencing sex discrimination, with concerns regarding fairness to

[23] Mark Keierleber, *DeVos releases Title IX campus sexual assault rule, courting controversy amid coronavirus pandemic*, LA School Report (May 6, 2020), http://laschoolreport.com/devos-releases-title-ix-campus-sexual-assault-rule-courting-controversy-amid-coronavirus-pandemic/.

respondents, and the interests of educational institutions to respond in an appropriate manner for their specific campuses. New York schools have also developed policies, practices, and procedures for investigating sex discrimination and other conduct violations consistent with federal and state due process requirements and codes of conduct, which ensure that educational environments are appropriately protected from various conduct that prevents students from learning and thriving. The Final Rule upsets these carefully crafted balances, frustrates Plaintiff's ability to comply with New York law and its own institutional policies, and adds confusion regarding how Plaintiff must investigate and remedy sexual harassment.

217. First, the Final Rule's narrow definitions, restrictions on institutional responses, and dismissal provisions conflict with New York's Enough is Enough law, which was enacted to combat sexual assault on college and university campuses statewide. For example, that law applies to students "regardless of whether the violation occurs on campus, off campus, or while studying abroad." N.Y. Educ. Law § 6440(6). The Final Rule's geographic limitations on what constitutes an education program or activity, *see* 106.44(a), directly conflict with this provision. Enough is Enough explicitly includes confidentiality and privacy protections for students, including that institutions must comply with FERPA, *see id.* § 6440(2), and that reports to institutions "shall be investigated in accordance with institution policy and a reporting individual's identity shall remain private at all times if said reporting individual wishes to maintain privacy," *see id.* § 6444(1)(f); *see also id.* §§ 6444(1)(c)-(e), 6446. The Final Rule's mandatory disclosure requirement, Final Rule at 30,576 (§ 106.45(b)(5)(vi)), also conflicts with Enough is Enough's requirement that schools comply with FERPA.

218. Second, the Final Rule creates uncertainty with respect to how institutions should investigate claims of sexual harassment and sexual assault. The Final Rule's restrictions on

which university staff can receive "formal complaints" interferes with procedures that have been collectively bargained for, and through which employees covered under certain contracts agree to become "responsible employees." The Final Rule offers no guidance on how institutions can reconcile its unduly restrictive definition of "sexual harassment" with the definitions offered in competing federal laws or with existing duties under collective bargaining agreements.

219. Third, the Final Rule fails to sufficiently define key terms, including its failure to define "bias" and "conflict" in the requirement that decision-makers must be free of bias and conflict, and its failure to define "specific circumstances [that] prevent the recipient from gathering evidence sufficient to reach a determination" with respect to permissive dismissals. *See* Final Rule at 30,576 (§ 106.45(b)(3)(ii)).

220. Fourth, the Final Rule fails to account for the fact that institutions will have to notify students of numerous, significant changes to its Title IX framework at a time when all students are away from schools.

221. Finally, the Final Rule also conflicts with New York schools' policies and procedures governing a wide variety of conduct to ensure full participation and access to education, while balancing due process concerns as required by federal and state law.

D. The Final Rule Harms New York's Educational Institutions and the Provision of Education to All Students.

222. The Final Rule interferes with the right and statutory obligation of educational institutions in New York and throughout the country to provide a safe, nondiscriminatory learning environment for their students. Schools have a legal obligation and pedagogical interest in ensuring that all students—including survivors of sexual harassment—are able to learn in a safe environment. As the Department has long recognized, sex discrimination threatens the maintenance of a safe learning environment, and "can interfere with a student's academic

performance and emotional and physical well-being." 2001 Revised Guidance at ii. Accordingly, "[p]reventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn." *Id*.

223. By interfering with a school's ability to maintain a learning environment conducive to teaching and learning, restrictions on the school's ability to respond to and prevent harassment like those contained in the Final Rule frustrate that interest. The Final Rule directly interferes with schools' ability to take the many preventive and proactive actions previously required by Title IX. By arbitrarily narrowing the definition of sexual harassment and limiting schools' ability to respond, the Final Rule imposes barriers on schools' ability to effectively address the broad range of sex-based misconduct that impedes or denies students' educational opportunities, in conflict with Title IX's statutory mandate and schools' educational missions.

224. Not only will their educational access be limited, but many students may opt to miss classes or drop out of school altogether due to a lack of safety, and compounding frustration due to their school's lack of response. These students experiencing sexual harassment at school will no doubt face compounding physical, psychological, and emotional trauma as they watch the perpetrators go unpunished. As a result, many victims of harassment may reasonably choose not to report it to their schools, to avoid being subjected to the onerous and lengthy grievance procedures that may result in no relief or protection from future harassment. The hostile environment that many survivors will face—either during the prolonged period of the grievance procedures or from remaining silent—will harm them and their classmates.

E. The Final Rule Harms Plaintiff's Interests in Protecting Civil Rights.

225. Plaintiff has an interest in protecting the civil rights of its citizens, which the Final Rule dramatically undermines.

226. The Final Rule would impose disparate and harmful burdens on women, LGBTQ students, students of color, and students with disabilities. For example, women and LGBTQ students are more likely to experience sexual harassment and sexual assault in schools as compared to other populations.[24] The Final Rule's unlawfully narrow definitions and limitations on actionable behavior are likely to hinder institutions' ability to take preventive or remedial action, and will therefore cause even more women and LGBTQ students to experience sexual harassment and sexual assault while at school.

227. Many of the Final Rule's restrictive definitions and heightened grievance procedures will disproportionately impact students with disabilities by imposing onerous barriers to seeking and obtaining relief from sexual harassment imposed by the Final Rule.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Administrative Procedure Act – Exceeds Statutory Authority)

228. Plaintiff incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

229. Under the APA, courts must "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

230. Defendants may only exercise authority conferred by statute.

231. The Final Rule exceeds Defendants' authority under Title IX because the Final Rule legislates and implements narrow definitions and requirements that frustrate and limit the

[24] *See* Ass'n of Am. Univs., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* xii–xvi (2017), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf.

obligation of schools to ensure that no person "shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" any federally funded education program or activity "on the basis of sex." 20 U.S.C. § 1681(a).

232. In addition, the Final Rule establishes prescriptive grievance procedures that purport to regulate conduct outside of Title IX's prohibition of discrimination based on sex and undermine the autonomy of New York's education institutions. Title IX only authorizes the Department to issue rules "to effectuate the [anti-discrimination] provisions of [Title IX]." 20 U.S.C. § 1682. The Final Rule exceeds this authority by casting a school's actual or alleged noncompliance with the prescriptive grievance procedures as a form of sex discrimination, and using that label to permit students accused of sexual harassment to challenge the outcome of grievance procedures through the Title IX administrative enforcement process, absent *any* evidence that accused students have been systematically disadvantaged "on the basis of sex" or that the conferral of these new rights will advance Title IX's purpose.

233. The Final Rule is therefore "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," in violation of the APA. 5 U.S.C. § 706(2)(C).

234. Defendants' violation causes ongoing harm to Plaintiff and its residents.

SECOND CLAIM FOR RELIEF

(Administrative Procedure Act – Not in Accordance with Law)

235. Plaintiff incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

236. Under the APA, a court must set "aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2)(A).

237. The Final Rule conflicts with Title IX, including by, *inter alia*, narrowing the scope of protected activity in contravention of the statute's broad anti-discrimination mandate, and narrowly redefining the term "program or activity" only in the context of sexual harassment.

238. The Final Rule conflicts with FERPA, which prohibits the unauthorized disclosure of students' educational records. 20 U.S.C. § 1232g(b)(1).

239. The Final Rule conflicts with Section 504, which prohibits the federal government from discriminating against individuals with disabilities. 29 U.S.C. § 794(a).

240. The Final Rule conflicts with Executive Order 12866 which, *inter alia*, instructs that an agency "shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies." Exec. Order 12866 § 1(b)(10), 58 Fed. Reg. 51,735 (Sept. 30, 1993). The Final Rule conflicts with the unamended portions of the Department's Title IX regulations by, for example, (a) adding a new definition of "program or activity" applicable only to sexual harassment that is inconsistent with the existing, unchanged definition of the term in 34 C.F.R. § 106.2(h), and (b) restricting schools from responding to or remedying sexual harassment, in conflict with the longstanding and continuing requirement that schools affirmatively address all forms of discrimination on the basis of sex contained in 34 C.F.R. § 106.3(b). The Final Rule also conflicts with the Department's regulations governing its enforcement of discriminatory harassment based on other protected classifications under Title VI and Section 504; other Department regulations governing student privacy, language access, and disability rights; and Title IX regulations promulgated by other federal agencies.

241. The Final Rule further conflicts with Executive Order 12866, which mandates that an agency "tailor its regulations to impose the least burden on society, including individuals, businesses of different sizes, and other entities (including small communities and government

entities)," Exec. Order 12866 § 1(b)(11), by imposing uniform, onerous grievance procedures and procedural requirements on all educational institutions, in disregard of the significant burdens it will impose on institutions.

242. The Final Rule is therefore "not in accordance with law" as required by the APA. 5 U.S.C. § 706(2)(A).

243. Defendants' violation causes ongoing harm to Plaintiff and its residents.

THIRD CLAIM FOR RELIEF

(Administrative Procedure Act – Arbitrary and Capricious)

244. Plaintiff incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

245. The APA provides that courts must "hold unlawful and set aside" agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A).

246. The Final Rule is arbitrary and capricious because Defendants' justification for their decision runs counter to the evidence before the agency, relies on factors Congress did not intend the agency to consider, and disregards material facts and evidence.

247. The Final Rule is arbitrary and capricious because its definitions and requirements create unworkable situations for Plaintiff and its institutions that frustrate the goals of Title IX and impose costly and confusing requirements.

248. The Final Rule is arbitrary and capricious because it fails to adequately justify its departure from decades of consistent and well-settled policy.

249. The Final Rule is arbitrary and capricious because it fails to consider important aspects of the problem, including the Final Rule's consequences on the reporting of sexual

harassment, its discriminatory impact on certain populations, and its interference and conflict with the administration of FERPA, Title VI, Title VII, Section 504, Title II, and the IDEA.

250. The Final Rule is arbitrary and capricious because Defendants conducted and relied on a flawed cost-benefit analysis, citing benefits the Final Rule would confer without any evidentiary basis, and failing adequately to account for the true costs the Final Rule will impose, including the significant costs to Plaintiff and to the public health and safety of their residents.

251. The Final Rule is arbitrary and capricious because it fails to consider important aspects of the problem, including the Rule's interference and conflict with the administration of FERPA, Title VI, Title VII, Section 504, Title II, and the IDEA.

252. The Final Rule is arbitrary and capricious because Defendants predetermined its outcome.

253. The Final Rule is therefore "arbitrary, capricious, [or] an abuse of discretion" in violation of the APA. 5 U.S.C. § 706(2)(A).

254. Defendants' violation causes ongoing harm to Plaintiff and its residents.

FOURTH CLAIM FOR RELIEF

(Administrative Procedure Act—Without Observance of Procedure Required by Law)

255. Plaintiff incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

256. The APA provides that courts must "hold unlawful and set aside agency action" that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

257. The APA requires agencies to publish notice of all proposed rulemakings in a manner that "give[s] interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . ." 5 U.S.C. § 553(c); *see also id.* § 553(b).

258. The regulatory impact analysis in the Proposed Rule did not sufficiently identify and quantify the costs and benefits of the rulemaking, evading the APA's critical procedural protections that ensure agency regulations are tested through exposure to public comment, and denying Plaintiff and other affected parties an opportunity to present comment and evidence to support their positions, in violation of 5 U.S.C. § 706(2)(D).

259. Certain provisions of the Final Rule, including the preemption provision and requirement that schools publish all Title IX training materials, were not included in the Proposed Rule and were not otherwise subject to notice and comment, evading the APA's critical procedural protections that ensure agency regulations are tested through exposure to public comment, and denying Plaintiff and other affected parties an opportunity to present comment and evidence to support their positions, in violation of 5 U.S.C. § 706(2)(D).

260. Defendants' violations cause ongoing harm to Plaintiff and its residents.

REQUEST FOR RELIEF

Wherefore, Plaintiff respectfully requests that this Court:

1. Declare that the Final Rule is in excess of the Department's statutory jurisdiction, authority, or limitations, or short of statutory right within the meaning of 5 U.S.C. § 706(2)(C);

2. Declare that the Final Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A);

3. Declare that Defendants failed to observe procedure required by law in issuing the Final Rule, in violation of 5 U.S.C. § 706(2)(D);

4. Enjoin the Department and all its officers, employees, and agents, and anyone acting in concert with them, from implementing, applying, or taking any action whatsoever under the Final Rule;

5. Postpone the effective date of the Final Rule pending judicial review pursuant to 5 U.S.C. § 705;

6. Vacate and set aside the Final Rule in its entirety;

7. Award Plaintiff its reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and

8. Grant other such relief as this Court may deem proper.

DATED: June 4, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Plaintiffs,

v.

ELISABETH D. DEVOS, *in her official capacity as Secretary of the United States Department of Education*
400 Maryland Avenue, S.W.
Washington, D.C. 20202

UNITED STATES DEPARTMENT OF EDUCATION 400 Maryland Avenue, S.W. Washington, D.C. 20202 UNITED STATES OF AMERICA, Defendants.	

INTRODUCTION

1. Plaintiffs Commonwealth of Pennsylvania, State of New Jersey, State of California, State of Colorado, State of Delaware, District of Columbia, State of Illinois, Commonwealth of Massachusetts, State of Michigan, State of Minnesota, State of New Mexico, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, Commonwealth of Virginia, State of Washington, and State of Wisconsin (collectively, "the Plaintiff States" or "the States") bring this action against Defendants Secretary Elisabeth D. DeVos, the U.S. Department of Education (the "Department"), and the United States of America to prevent implementation of the unlawful rule recently promulgated by the Department titled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020) (the "Title IX Rule" or "Rule").

2. If the Rule is permitted to take effect, students across the country will return to school in the fall with less protection from sexual harassment.[1] The Rule will reverse decades of effort to end the corrosive effects of sexual harassment on equal access to education—a commitment that, until now, has been shared by Congress and the Executive Branch across multiple elections and administrations, as well as by state and local officials and school

[1] Unless otherwise stated, this Complaint uses the term "sexual harassment" to encompass all forms of sexual harassment, including sexual violence and sexual assault.

administrators. And because of the Rule's impracticable effective date, primary, secondary, and postsecondary schools across the country will be required to completely overhaul their systems for investigating and adjudicating complaints of sexual harassment in less than three months, in the midst of a global pandemic that has depleted school resources, and with faculty, staff, and student stakeholders absent from their campuses due to the pandemic and, in many cases, on leave due to the summer.

3. The Department claims that its Rule effectuates Title IX of the Education Amendments Act of 1972 ("Title IX"), but in reality the Rule undercuts Title IX's mandate to eradicate sex discrimination in federally funded education programs and activities.[2] The Rule creates substantive and procedural barriers to schools' investigation and adjudication of sexual harassment complaints, and discourages students and others from making sexual harassment complaints. As a result, fewer sexual harassment complaints will be filed, and schools will be less well equipped to protect their students' safety and rid their programs and activities of the pernicious effects of sex discrimination.

4. The Rule is unlawful. Without adequate justification or explanation, the Rule strips away longstanding protections against sexual harassment in violation of Title IX's mandate to prevent and remedy sex discrimination, and in ways that conflict with other federal and state statutes and Supreme Court precedent. For example, the Rule will not allow a school to investigate and remedy an egregious but isolated incident of sexual harassment, including some forms of unwanted touching, under Title IX because such harassment is no longer sufficiently

[2] With only limited exception, Title IX applies to all entities that receive federal funds from the Department, including primary, secondary, and postsecondary public and private schools, as well as museums, libraries, cultural centers and other entities that operate education programs or activities. Unless otherwise stated, this Complaint uses the word "schools" to refer generally to all recipients of federal funding subject to Title IX and the new Title IX Rule.

"pervasive" to fall within the Rule's narrowed definition of sexual harassment. Similarly, the Rule will eliminate a school's ability to open a Title IX investigation into sexual harassment of a former student because that student is no longer "participating" in an education program or activity—even where the former student left school *because of the sexual harassment* and even if the alleged perpetrator remains associated with the campus. In addition, the Rule will prevent a school from investigating a Title IX complaint by a student who is sexually harassed by another student at an off-campus apartment because the harassment did not take place "under the substantial control" of the school, even if the harassment limits the student's ability to benefit from or access the education program or activity. These and the Department's other newly created limitations on Title IX proceedings have no basis in Title IX.

5. The Rule also creates arbitrary and unlawful procedural requirements that will chill reporting of sexual harassment and make it harder for schools to reach fair outcomes as they investigate and adjudicate those sexual harassment complaints that the Department still deems cognizable under Title IX. For example, in postsecondary schools, the Rule will require third-party advisors to conduct live, direct, oral cross-examination of the other party—even where the advisor selected is a parent or the other party's teacher and even where less traumatizing methods exist to allow parties to ask questions of each other.

6. The Department's imposition of one-size-fits-all formal procedures—regardless of the nature of the complaint or the institutional setting—will prevent schools from formulating fair and equitable grievance procedures based on schools' individual circumstances and expertise in providing equitable educational opportunities to their students. In addition, the Rule's mandate that schools dismiss from Title IX proceedings sexual harassment complaints that fall outside the Rule's ambit will result in many schools feeling compelled—as a matter of state law, to ensure

the nondiscriminatory educational experience promised by Title IX, or both—to create separate grievance processes to investigate and adjudicate the same underlying allegations: one for sexual harassment that satisfies the Department's crabbed standards, which can be adjudicated in "Title IX proceedings," and another for sexual harassment as it has been widely understood, which must be relegated to "non-Title IX proceedings." The incentives that the Rule creates for schools are inequitable if not perverse: a school risks its federal funding if it does not strictly comply with even one of the Department's new procedural requirements, but a school that fails to respond to sexual harassment, even in a manner that is just short of clearly unreasonable, may not lose its funding.

7. The Rule's defects stem in part from a flawed rulemaking process. The Department included in the final Rule new substantive provisions that are not a logical outgrowth of the proposed rule, negating the States' (and the public's) opportunity to comment on the consequences of these provisions. Further, the Department has buried even more requirements and prohibitions in its hundreds of pages of preamble and nearly two thousand footnotes, including some that conflict with the text of the final Rule itself. Moreover, the Department failed to provide the public with the data and analysis underlying the Rule, contributing to a cost-benefit analysis that arbitrarily and intentionally disregarded key factors, including the substantial and quantifiable mental health, physical health, emotional, and economic costs to students who are harmed as a result of the Rule.

8. The Department acknowledges that sexual harassment is a form of sex discrimination that can create an unsafe and unwelcoming school environment, interfering with students' learning, impacting their mental and physical health well after the conduct itself has ceased, and potentially affecting survivors' family, friends, and other community members. It

also acknowledges that these harms are often exacerbated if the individual is forced to relive the incident of harassment in the context of investigatory, judicial, or other proceedings, such as the grievance procedures required by the Rule. Nevertheless, the Rule the Department has issued will exacerbate and inflict untold irreparable harm on students nationwide, including the more than 20 million school-age children enrolled in the Plaintiff States' public education systems and over 7 million students enrolled in the Plaintiff States' higher education institutions.

9. According to the federal government's own data, sexual harassment against students remains pervasive and mostly unreported. With the Department's final Rule, sexual harassment will not become less common—but it will, as the Department acknowledges in the Rule, become even less regularly reported and remedied.

10. Compounding the harms imposed by the Rule is its unduly short effective date of August 14, 2020, which is itself an affront to schools and students. Schools nationwide will be forced to undertake wholesale revisions of their sexual harassment policies and procedures in less than three months, in the midst of the ongoing global health crisis caused by the novel coronavirus (COVID-19) pandemic, and while most students and many administrators and faculty are away from school for the summer. This will leave schools unable to engage students, faculty, staff, parents, and other affected stakeholders in their educational communities as they ordinarily would when undertaking such an initiative, and thus unable to complete required internal review and approval processes. The resulting rushed policies will cause confusion and mistrust and will lack the buy-in necessary for effective implementation. Under normal circumstances, requiring schools to overhaul their policies and procedures, re-negotiate collective bargaining agreements, and implement the Rule's hiring, training, and other requirements in less than three months would impose an extraordinarily difficult burden. Given

the ongoing uncertainty caused by the COVID-19 pandemic and the strain it has placed on education institutions, Defendants' decision to require compliance with the Rule by August 14, 2020, is inexplicable.

11. Plaintiffs respectfully request that the Court stay the effective date of the Rule pending judicial review; grant them declaratory and injunctive relief from the Rule, on a preliminary and permanent basis; vacate and set aside the Rule; and award them such other relief as is requested herein.

JURISDICTION AND VENUE

12. This action arises under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 553, 701–06. This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

13. This Court has authority to issue declaratory relief, injunctive relief, and other relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, and the APA, 5 U.S.C. §§ 702, 705–706.

14. This is a civil action in which Defendants are agencies of the United States or officers of such an agency. Venue is proper in this Court because a defendant resides in this district, a substantial part of the events giving rise to this action occurred in this district, and a plaintiff resides in this district and no real property is involved. *See* 28 U.S.C. § 1391(e)(1)(A)–(C).

PLAINTIFF STATES

15. Plaintiff Commonwealth of Pennsylvania is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Josh

Shapiro, the "chief law officer of the Commonwealth." Pa. Const. art. IV, § 4.1. Attorney General Shapiro brings this action on behalf of the Commonwealth pursuant to his statutory authority. 71 Pa. Stat. § 732-204.

16. Plaintiff State of New Jersey is a sovereign state of the United States of America. This action is being brought on behalf of the State by Attorney General Gurbir S. Grewal, the State's chief legal officer. N.J. Stat. Ann. § 52:17A-4(e), (g).

17. Plaintiff State of California is a sovereign state of the United States of America. This action is being brought on behalf of the State by California Attorney General Xavier Becerra, the State's chief law officer, Cal. Const., art. V, § 13, who has the duty to see that the laws of the State are uniformly and adequately enforced, and Governor Gavin Newsom, the State's chief executive officer, who is responsible for overseeing the operations of the State and ensuring that its laws are faithfully executed, Cal. Const., art. V, § 1.

18. Plaintiff State of Colorado is a sovereign state of the United States of America. This action is brought on behalf of the State of Colorado by Attorney General Phillip J. Weiser, who is the chief legal counsel of the State of Colorado, empowered to prosecute and defend all actions in which the state is a party. Colo. Rev. Stat. § 24-31-101(1)(a).

19. Plaintiff State of Delaware is a sovereign state of the United States of America. This action is brought on behalf of the State of Delaware by Attorney General Kathleen Jennings, the "chief law officer of the State." *Darling Apartment Co. v. Springer*, 22 A.2d 397, 403 (Del. 1941). General Jennings also brings this action on behalf of the State of Delaware pursuant to her statutory authority. Del. Code Ann., tit. 29, § 2504.

20. Plaintiff District of Columbia is a sovereign municipal corporation organized under the Constitution of the United States. It is empowered to sue and be sued, and it is the local

government for the territory constituting the permanent seat of the federal government. The District is represented by and through its chief legal officer, the Attorney General for the District of Columbia, Karl A. Racine. The Attorney General has general charge and conduct of all legal business of the District and all suits initiated by and against the District and is responsible for upholding the public interest. D.C. Code § 1-301.81.

21. Plaintiff State of Illinois is a sovereign state of the United States of America. This action is being brought on behalf of the State by Attorney General Kwame Raoul, the State's chief legal adviser to the State of Illinois. His powers and duties include acting in court on behalf of the State on matters of public concern. *See* 15 ILCS 205/4.

22. Plaintiff Commonwealth of Massachusetts is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Maura Healey, who has both statutory and common-law authority and responsibility to represent the public interest for the people of Massachusetts in litigation, as well as to represent the Commonwealth, state agencies, and officials in litigation. *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266-67 (Mass. 1977); Mass. Gen. Laws ch. 12, § 3.

23. Plaintiff State of Michigan is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Dana Nessel, the State of Michigan's chief law enforcement officer, pursuant to her statutory authority. Mich. Comp. Laws § 14.28.

24. Plaintiff State of Minnesota is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Keith Ellison, the chief law officer of the State. Minn. Stat. § 8.01.

25. Plaintiff State of New Mexico is a sovereign state of the United States of America. New Mexico is represented by its Attorney General, Hector Balderas, who is authorized to assert the state's interests in state and federal courts.

26. Plaintiff State of North Carolina is a sovereign state of the United States of America. This action is brought on behalf of the State of North Carolina by Attorney General Joshua H. Stein, who is the chief legal counsel of the State of North Carolina and who has both statutory and constitutional authority and responsibility to represent the State, its agencies, its officials, and the public interest in litigation. N.C. Gen. Stat. § 114-2.

27. Plaintiff State of Oregon, acting by and through the Attorney General of Oregon, Ellen F. Rosenblum, is a sovereign state of the United States of America. The Attorney General is the chief law officer of Oregon and is empowered to bring this action on behalf of the State of Oregon, the Governor, and the affected state agencies under Or. Rev. Stat. §§ 180.060, 180.210, and 180.220.

28. Plaintiff State of Rhode Island is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Peter F. Neronha, the State's chief legal officer. R.I.G.L. § 42-9-5; R.I. Const., art. IX § 12.

29. Plaintiff State of Vermont is a sovereign state of the United States of America. This action is brought on behalf of the State by Attorney General Thomas J. Donovan, Jr., the State's chief legal officer. *See* Vt. Stat. Ann. tit. 3, §§ 152, 157.

30. Plaintiff the Commonwealth of Virginia is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Mark R. Herring. As chief executive officer of the Department of Law, General Herring performs all

legal services in civil matters for the Commonwealth. Va. Const. art. V, § 15; Va. Code Ann. §§ 2.2-500, 2.2-507.

31. Plaintiff State of Washington is a sovereign state of the United States of America. Washington is represented herein by its Attorney General, Bob Ferguson, who is the State's chief legal adviser. The powers and duties of the Attorney General include acting in federal court on matters of public concern to the State.

32. Plaintiff State of Wisconsin is a sovereign state of the United States of America. This action is brought on behalf of the State of Wisconsin by Attorney General Joshua L. Kaul pursuant to his authority under Wis. Stat. § 165.015(6). Attorney General Kaul brings this action at the request of Governor Tony S. Evers pursuant to Wis. Stat. § 165.25(1m).

33. In filing this action, Plaintiff States seek to protect themselves and the students and schools in their States from harm caused by Defendants' illegal conduct and prevent further harm. Those injuries include harm to Plaintiff States' proprietary, sovereign, and quasi-sovereign interests.

DEFENDANTS

34. Defendant Elisabeth D. DeVos is Secretary of the United States Department of Education and is sued in her official capacity. Her principal address is 400 Maryland Avenue, S.W., Washington, D.C. 20202.

35. Defendant United States Department of Education is an executive agency of the United States of America. Its principal address is 400 Maryland Avenue, S.W., Washington, D.C. 20202.

36. Secretary DeVos is responsible for carrying out the duties of the Department of Education under the Constitution of the United States of America and relevant statutes, including Title IX of the Education Amendments Act of 1972.

FACTUAL ALLEGATIONS

I. STATUTORY AND REGULATORY BACKGROUND

A. Title IX of the Education Amendments of 1972

37. Congress enacted Title IX in 1972 to remedy "one of the great failings of the American educational system" that had plagued America's education institutions for generations, namely, "the continuation of corrosive and unjustified discrimination against women" that "reaches into all facets of education." 118 Cong. Rec. 5803 (1972) (remarks of Senator Birch Bayh, original sponsor of Title IX).

38. Title IX's mandate is broad and unequivocal: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 1972 Education Amendments Act, Pub. L. No. 92-318, § 901(a), 86 Stat. at 373 (codified at 20 U.S.C. § 1681(a)).

39. Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, which provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, Pub. L. No. 88352, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d).

40. Both Title IX and Title VI "sought to accomplish two related, but nevertheless somewhat different, objectives": "to avoid the use of federal resources to support discriminatory

practices" and "to provide individual citizens effective protection against those practices." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

41. Fifteen years after enacting Title IX, Congress enacted legislation clarifying that, if any part of an institution receives federal funding, the whole institution must comply with Title IX. Civil Rights Restoration Act of 1987, Pub. L. 100–259, 102 Stat. 28 (codified in relevant part at 20 U.S.C. § 1687), *superseding Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

42. To enforce Title IX, Congress "authorized and directed" every federal agency providing financial assistance to education programs or activities to "effectuate the provisions of" Title IX "by issuing rules, regulations, or orders of general applicability[.]" Pub. L. No. 92-318, § 902, 86 Stat. at 374 (codified at 20 U.S.C. § 1682). The Department is one of many federal agencies that provide financial assistance to education programs and activities.

43. As a result, any regulations issued by the Department pursuant to Title IX must "effectuate" Title IX's antidiscrimination mandate.

44. Congress further mandated that no agency can issue a rule, regulation, or order effectuating Title IX "unless and until approved by the President." Pub. L. No. 92-318, § 902, 86 Stat. at 374 (codified at 20 U.S.C. § 1682). In Executive Order 12250, the President delegated this authority to the U.S. Attorney General. Exec. Order No. 12250, § 1-1, 45 Fed. Reg. 72,995 (Nov. 2, 1980).

45. Congress empowered federal agencies to enforce their Title IX rules and regulations through "the termination of or refusal to grant or to continue assistance" or "by any other means authorized by law." Pub. L. No. 92-318, § 902, 86 Stat. at 374 (codified at 20 U.S.C. § 1682).

46. Although Congress created a robust administrative enforcement scheme in Title IX, it also provided that any school that violates the statute should first receive notice of noncompliance and be allowed to come into voluntary compliance with Title IX. Pub. L. No. 92-318, § 902, 86 Stat. at 374 (codified at 20 U.S.C. § 1682).

47. Congress provided for judicial review of any agency rule, regulation, or administrative enforcement decision issued to effectuate Title IX, which "shall not be deemed committed to unreviewable agency discretion." Pub. L. No. 92-318, § 903, 86 Stat. at 374–75 (codified at 20 U.S.C. § 1683).

48. Separate from this administrative enforcement scheme, victims of discrimination can enforce Title IX through an implied private right of action, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979), including against States, Rehabilitation Act Amendments of 1986, 100 Stat. 1845 (codified at 42 U.S.C. § 2000d–7).

49. In 1992, the Supreme Court confirmed that schools can be held liable for violating Title IX based on incidents of sexual harassment. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992). And it further held that the students who have experienced sexual harassment can seek money damages from schools in private civil suits. *Id.* at 75-76.

50. Since enacting Title IX, Congress has passed several other statutes reflecting its intent to provide strong protections for individuals subjected to sexual violence and assault.

51. In 1990, Congress passed the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the "Clery Act"), Pub. L. No. 101–542, 104 Stat. 2384 (codified at 20 U.S.C. § 1092(f)), which imposes on postsecondary schools specific reporting requirements about crimes committed on campus.

52. In 1994, Congress passed the Violence Against Women Act ("VAWA"), Pub. L. No. 103–322, 108 Stat. 1902 (codified at 34 U.S.C. §§ 12291–12512), which provides for federal funding to stop violent crimes committed against women.

53. In 2013, Congress passed the Campus Sexual Violence Elimination Act as part of the VAWA Reauthorization Act. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat.54 (codified at 20 U.S.C. § 1092(f)(8)(B)(iv) & (C)). The Campus Sexual Violence Elimination Act amended the Clery Act to better align it with Title IX and provide for a survivor-centered approach to prevention and enforcement in schools. It encouraged greater transparency at higher education institutions and required such institutions to prevent sexual violence, protect victims, and investigate and resolve on or off campus complaints of sexual violence, including domestic violence, stalking, and dating violence.

B. The Department's 1975 Title IX Regulations

54. In 1975, the U.S. Department of Health, Education and Welfare, the Department of Education's predecessor for matters relating to education, promulgated regulations to effectuate the antidiscrimination mandate of Title IX. 34 C.F.R. pt. 106.

55. The regulations required schools to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [the regulations]." 34 C.F.R. § 106.8(b).

56. The regulations also prohibited schools from using or distributing publications that "suggest[], by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex." 34 C.F.R. § 106.9(b)(2).

57. Under the regulations, if the Department found that a school violated Title IX, the school "shall take such remedial action as the Assistant Secretary [for Civil Rights] deems necessary to overcome the effects of such discrimination." 34 C.F.R. § 106.3(a).

58. Title IX provides an exemption for schools controlled by religious organizations if its application would be inconsistent with the religious tenets of the organization. Pub. L. No. 92-318, § 901(a)(3), 86 Stat. at 373 (codified at 20 U.S.C. § 1681(a)(3)). The regulations provided that any school that wished to claim the exemption was required to "submit[] in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization." 34 C.F.R. § 106.12(a)–(b).

59. A congressional hearing to review these regulations reaffirmed Congress's intent to make the protections against sex discrimination in Title IX co-extensive with Title VI's protections against discrimination based on race, color, and national origin. For example, Senator Bayh noted that Title IX "sets forth prohibition and *enforcement* provisions which generally parallel the provisions of Title VI." *Sex Discrimination Regulations: Hearings before the Subcommittee on Postsecondary Education of the Committee on Education and Labor*, H.R. 94th Cong., First Session, at 170 (June 17, 20, 23, 24, 25, & 26, 1975) (statement of Senator Bayh of Indiana (quoting from his February 28, 1972, statement, 118 Cong. Rec. 5807 (emphasis in original))).

60. The 1975 regulations were codified not only in the Department of Education's regulatory code, but also in the regulatory codes of 25 other agencies that also funded education programs.[3] *E.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities

[3] *See* Agency for International Development, 22 C.F.R. pt. 229; Corporation for National and Community Service, 45 C.F.R. pt. 2555; Department of Agriculture, 7 C.F.R. pt. 15a; Department of Commerce, 15 C.F.R. pt. 8a; Department of Defense, 32 C.F.R. pt. 196; Department of Energy, 10 C.F.R. pt. 1042; Department of Health and Human Services, 45 C.F.R. pt. 86; Department of Homeland Security, 6 C.F.R. pt. 17; Department of Housing and Urban Development, 24 C.F.R. pt. 3; Department of Interior, 43 C.F.R. pt. 41; Department of

Receiving Federal Financial Assistance; Final Common Rule, 65 Fed. Reg. 52,858 (Aug. 30, 2000) (promulgating common rule to "promote consistent and adequate enforcement of Title IX" by the adopting agencies).

C. The Department's Policy on Unlawful Sexual Harassment

61. Since the 1980s, the Department has recognized that sexual harassment is a form of sex discrimination prohibited by Title IX.

62. Under the Reagan Administration, the Department's Office for Civil Rights ("OCR") recognized sexual harassment as a serious problem that was prohibited by Title IX and issued enforcement and policy guidance to all OCR regional directors accordingly. U.S. Dep't of Educ., Office for Civil Rights, Policy Mem., Antonio J. Califa, Director for Litigation Enforcement and Policy Services (Aug. 31, 1981) ("Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex . . . that denies, limits, provides different, or conditions the provision of aids, benefits, services, or treatment protected under Title IX."); *see also* Dep't of Educ., *Sexual Harassment: It's Not Academic Pamphlet* (1988)[4] (requiring education institutions, where sexual harassment is found, to "take immediate action to stop and prevent further harassment, as well as initiate appropriate remedial measures").

63. The Department's position has been consistent with interpretations of other anti-discrimination statutes.

Justice, 28 C.F.R. pt. 54; Department of Labor, 29 C.F.R. 36; Department of State, 22 C.F.R. pt. 146; Department of Transportation, 49 C.F.R. pt. 25; Department of Treasury, 31 C.F.R. pt. 28; Department of Veterans Affairs, 38 C.F.R. pt. 23; Environmental Protection Agency, 40 C.F.R. pt. 5; Federal Emergency Management Agency, 44 C.F.R. pt. 19; General Services Administration, 41 C.F.R. pt. 101-4; National Aeronautics and Space Administration, 14 C.F.R. pt. 1253; National Archives and Records Administration, 36 C.F.R. pt. 1211; National Science Foundation, 45 C.F.R. pt. 618; Nuclear Regulatory Commission, 10 C.F.R. 5; Small Business Administration, 13 C.F.R. pt. 113; Tennessee Valley Authority, 18 C.F.R. pt. 1317.

[4] https://files.eric.ed.gov/fulltext/ED330265.pdf.

64. Under Title VII of the Civil Rights Act of 1964, sexual harassment is actionable if, among other things, it creates a hostile environment because it is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986). Employees have a right to file a Title VII complaint after leaving employment for any reason.

65. The Department has likewise incorporated the disjunctive "severe, pervasive, or persistent" definition of hostile environment harassment into its enforcement of Title VI's prohibition of discrimination on the basis of race, color, and national origin. Department policy stated that "harassment need not result in tangible injury or detriment to the victims of the harassment" to create a hostile environment. *Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11,448, 11,450 (Mar. 10, 1994). The Department further recognized that Title VI and Title IX set similar legal standards. *Id.* at 11,451 n.2. Title VI does not limit who is able to file a complaint of harassment based on race, color, or national origin.

66. Beginning in 1997 and continuing until the promulgation of the Rule, OCR issued policy documents that established foundational requirements for how schools must respond to sexual harassment. The Department enforced these policies for more than two decades. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (Mar. 13, 1997) (the "1997 Policy"); *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed. Reg. 5512 (Jan. 19, 2001) (the "2001 Policy"); Stephanie Monroe, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Jan. 25, 2006) (the

"2006 Letter")[5]; Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Apr. 4, 2011, withdrawn Sept. 22, 2017) (the "2011 Letter")[6]; U.S. Dep't of Educ., *Questions and Answers on Title IX and Sexual Violence* (Apr. 24, 2014, withdrawn Sept. 22, 2017) (the "2014 Q&A")[7]; U.S. Dep't of Educ., *Q&A on Campus Sexual Misconduct* (Sept. 2017) (the "2017 Q&A").[8]

67. Both the 1997 Policy and the 2001 Policy went through a notice and comment process prior to final publication in the Federal Register. *Sexual Harassment Guidance: Peer Sexual Harassment,* 61 Fed. Reg. 42,728 (Aug. 16, 1996); *Sexual Harassment Guidance: Harassment of Students by School Employees*, 61 Fed. Reg. 52,172 (Oct. 4, 1996); *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 65 Fed. Reg. 66,092 (Nov. 2, 2000).

68. These policy documents set forth schools' obligation to provide students with an education experience free from sexual harassment. That obligation entails preventing sexual harassment, ending it when it occurs, preventing its recurrence, and remedying its effects.

69. In these policy documents, the Department consistently set forth and reaffirmed certain fundamental principles relating to administrative enforcement of Title IX with respect to sexual harassment: (1) schools are obligated to take affirmative steps to prevent sexual harassment, end harassment when it does occur, prevent its recurrence, and remedy its effects; (2) unlawful sexual harassment is defined as unwelcome conduct of a sexual nature that denies or limits a student's ability to participate in or benefit from the school's program based on sex;

[5] https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html.

[6] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[7] https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[8] https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

(3) unlawful sexual harassment can be caused by both quid pro quo harassment and a hostile environment; (4) a hostile environment is created by conduct that is severe, persistent, *or* pervasive—in other words, sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program; (5) schools are required to address harassing conduct occurring outside an education program or activity if the conduct creates a hostile environment in an education program or activity; (6) schools must adopt prompt and equitable grievance procedures that allow for, among other things, adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; and (7) schools may incorporate Title IX sexual harassment policies and procedures into their broader codes of conduct and grievance procedures.

70. In these prior policy documents, the Department did not require schools to dismiss complaints that fell outside the scope of Title IX as defined by regulation; it did not limit who could file a complaint alleging unlawful sexual harassment; it did not dictate prescriptive grievance procedures; and it did not mandate the creation of policies and procedures for sexual harassment separate and apart from the schools' other civil rights policies, student codes of conduct, or faculty and employee handbooks.

71. The Department's policy on administrative enforcement of Title IX remained consistent after the Supreme Court set heightened standards for liability in cases brought under Title IX's implied private right of action for money damages. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998); *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 632 (1999) (requiring school's actual knowledge of, and deliberate indifference to, harassing conduct for purposes of private claim for money damages).

72. In two letters issued following *Gebser*, the Department advised that even after this decision, schools' obligations under the Department's administrative enforcement of Title IX remained unchanged. Richard W. Riley, U.S. Sec'y of Educ., U.S. Dep't of Educ., Dear Colleague Letter regarding *Gebser v. Lago Vista* (Aug. 31, 1998)[9]; Richard W. Riley, U.S. Sec'y of Educ., U.S. Dep't of Educ., Dear Colleague Letter regarding *Gebser v. Lago Vista* (Jan. 28, 1999).[10] The Department observed that the Supreme Court's decision did not alter the fundamental obligations of schools to take prompt action to address sexual harassment because the Court had "expressly distinguished the limits on private recovery of money damages from the Department of Education's enforcement of Title IX."

73. Subsequent Department policy documents continued to reaffirm the principles embodied in the 1997 Policy and to distinguish the Department's administrative enforcement of Title IX from private claims for money damages against schools. *E.g.*, 2001 Policy ("reaffirm[ing] OCR's standards for administrative enforcement of Title IX" and "re-ground[ing] these standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages"); 2006 Letter (stating that the 2001 Policy "outlines standards applicable to OCR's enforcement of compliance in cases raising sexual harassment issues" and distinguishing these standards from those "applicable to private Title IX lawsuits for monetary damages"); 2011 Letter (reaffirming the 2001 Policy while also supplementing it); 2014 Q&A (reaffirming the 2001 Policy while seeking to "further clarify the legal requirements and guidance articulated in the [2011 Letter] and the 2001 Guidance and include examples of

[9] https://www2.ed.gov/offices/OCR/archives/pdf/AppC.pdf.

[10] https://www2.ed.gov/News/Letters/990128.html.

proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects").

74. In September 2017, the Department issued a letter withdrawing the 2011 Letter and the 2014 Q&A. Candice Jackson, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Sept. 22, 2017).[11] But the Department also issued a new interim Q&A that continued to explicitly reaffirm its 2001 Policy and many of the principles described above that had shaped Title IX enforcement for decades. 2017 Q&A.

II. THE DEPARTMENT'S NEW TITLE IX REGULATIONS

75. In 2018, Defendants published in the Federal Register a notice of proposed rulemaking to address sexual misconduct under Title IX. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462 (Nov. 29, 2018).

76. In a speech after the notice of proposed rulemaking was issued, Secretary DeVos suggested that students are over-reporting sexual harassment and making frivolous claims: "Too many cases involve students and faculty who have faced investigation and punishment simply for speaking their minds or teaching their classes. Any perceived offense can become a full-blown Title IX investigation. But if everything is harassment, then nothing is." Prepared Remarks by Secretary DeVos at the Independent Women's Forum Annual Awards Gala, U.S. Dep't of Educ. (Nov. 13, 2019).[12]

[11] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

[12] https://www.ed.gov/news/speeches/prepared-remarks-secretary-devos-independent-womens-forum-annual-awards-gala.

77. Secretary DeVos's remarks are contrary to the federal government's own data, which indicates that, despite Title IX's success in reducing many forms of sex discrimination, sexual harassment remains widespread at all levels of education.

78. Data reported by the U.S. Department of Education, the U.S. Department of Justice's Bureau of Justice Statistics, and the Centers for Disease Control and Prevention all demonstrate extraordinarily high rates of sexual harassment against students. For example, the Bureau of Justice Statistics found that 20 percent of college women had been sexually assaulted since entering college and one in three female rape victims had been assaulted for the first time between the ages of 11 and 17.

79. Many other studies confirm these results. For example, a 2019 study found that one in four undergraduate women (25.9 percent), one in fifteen undergraduate men (6.8 percent), and one in four (22.8 percent) transgender or gender-nonconforming undergraduates have been sexually assaulted during college.

80. In late February, the Department of Education lamented the troubling rise of sexual assault in K-12 public schools. In grades 7–12, 56 percent of girls and 40 percent of boys are sexually harassed every year, with nearly a third of the harassment occurring online. More than 20 percent of girls ages 14 to 18 have been touched or kissed without their consent.

81. The vast majority of incidents of sexual harassment go unreported. One national study found that only 12 percent of college students who have experienced sexual assault reported the incident to their school or the police. That same study found that only two percent of female students aged 14–18 who were sexually assaulted reported the incident.

82. On March 27, 2020, many Plaintiff States sent a letter to Defendants asking for the Rule to be delayed during the public health emergency caused by the COVID-19 pandemic. Plaintiff States received no response.

83. Almost eighteen months after issuing the notice of proposed rulemaking, the Department published the final Rule in the Federal Register. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,* 85 Fed. Reg. 30,026 (May 19, 2020). All schools must be in full compliance with the Rule by August 14, 2020.

84. The Rule establishes binding obligations that prescriptively dictate how schools must respond to allegations of sexual harassment, in many instances *limiting* the ability of schools to respond to conduct that Title IX seeks to prevent.

85. In promulgating the Rule, which sharply curtails investigation and enforcement, the Department has also upended decades of its own established policy. Much of this established policy went through two notice and comment processes in the late 1990s and early 2000s and has become well-established practice at schools in Plaintiff States.

86. In spite of conclusive evidence in the administrative record that sexual harassment incidents are on the rise and underreporting is a significant concern, Defendants improperly narrow Title IX by excluding all but the most egregious sexual harassment from its protections.

87. Defendants improperly eliminate protections for students who are denied equal access to education due to harassing conduct outside of a school's education program or activity, at, for example, an unauthorized fraternity party or in off-campus housing.

88. Defendants also improperly eliminate protections for students if sexual harassment occurs during a U.S. school-sponsored study abroad program, at a U.S. school's foreign campus, or during a U.S. school-sponsored foreign field trip.

89. Defendants improperly limit the circumstances under which a complainant or a school can file a formal complaint of sexual harassment.

90. Defendants unlawfully require schools to dismiss any complaint that falls outside of the Department's narrow interpretation of Title IX. As a result, schools will be compelled—as a matter of state law, to ensure the nondiscriminatory educational experience promised by Title IX, or both—to establish separate grievance procedures in order to pursue these complaints under their own codes of conduct. At the same time, Defendants make clear that they will withdraw federal funding from schools that inadvertently miscategorize complaints and adjudicate them using the "wrong" grievance procedure. *E.g.*, 85 Fed. Reg. at 30,221 & 30,283 n.1129.

91. The Rule turns Title IX on its head by placing schools at greater risk of losing federal funding if they fail to strictly implement each of the Rule's specified procedural requirements (by, for example, considering the statement of a complainant or witness who is unable or unwilling to testify at the live hearing) than if the response to sexual harassment itself is anything short of "clearly unreasonable."

92. Schools that fail to comply with all of the Rule's many complicated, novel, counterproductive, and burdensome requirements by August 14, 2020, face significant consequences as they could come under investigation by the Department, face enforcement actions, and lose billions of dollars of much-needed federal funding.

A. New Sexual Harassment Regulations

1. Limitations on the Scope of Unlawful Sexual Harassment

93. The Rule improperly narrows the definition of sexual harassment under Title IX to "conduct on the basis of sex that satisfies one or more of the following: (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or (3) 'Sexual assault' as defined in 20 U.S.C. 1092(f)(6)(A)(v),[13] 'dating violence' as defined in 34 U.S.C. 12291(a)(10), 'domestic violence' as defined in 34 U.S.C. 12291(a)(8), or 'stalking' as defined in 34 U.S.C. 12291(a)(30)." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.30(a) (*sexual harassment*)).

94. The first prong excludes "quid pro quo" harassment by students who may be in positions of authority with respect to other students regarding educational aid, benefits, or services but may not be considered "employees" under applicable state law. A teaching assistant, for example, may not be considered an employee by a school but may nevertheless exercise significant or sole control over another student's grades. In fact, a separate notice of proposed rulemaking issued by the National Labor Relations Board proposes to exclude student employees

[13] "Sexual assault" means "an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation." 20 U.S.C. 1092(f)(6)(A)(v). These offenses are limited to: forcible rape, forcible sodomy, sexual assault with an object, forcible fondling, incest, and statutory rape. FBI, *Uniform Crime Reporting Program: National Incident-Based Reporting System Offense Definitions* (2012), https://ucr.fbi.gov/nibrs/2012/resources/nibrs-offense-definitions.

from the definition of "employee" under the National Labor Relations Act. 84 Fed. Reg. 49,691 (Sept. 23, 2019). The Rule never acknowledges this proposal.

95. The second prong improperly elevates the definition of hostile environment sexual harassment in the context of Title IX's administrative enforcement scheme to the heightened standard used only for private civil actions that seek monetary damages. In requiring harassment to be "so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient's education program or activity" to qualify as hostile environment sexual harassment, Defendants impermissibly weaken the administrative enforcement scheme contemplated by Congress in enacting Title IX.

96. The Department's definition requires students to endure repeated and escalating levels of harassment to the point of risking school avoidance; detrimental mental health effects, such as increased risk of self-harm and depression; declines in attendance; withdrawal; and even dropout before the Rule permits schools to stop the discrimination under Title IX.

97. The Department's definition fails to address the unique circumstances for young children and children with disabilities who are unable to verbalize social-emotional and other safety concerns. The impact of such trauma on a student's ability to learn, and thus on access to education, may not be evident until much later, especially for students who may be nonverbal or have other difficulties expressing its impact. Such trauma impacts have far reaching consequences for a student's ability to stay in school, progress, and learn.

98. The Department's new definition of hostile environment sexual harassment conflicts with Title VII of the Civil Rights Act of 1964, which protects school employees, including student employees, from sexual harassment that is "sufficiently severe *or* pervasive to alter the conditions of the victim's employment[.]" *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67

(1986) (emphasis added). The anomalous result is that school employees are afforded more protection from sexual harassment under Title VII than students at those very same schools are afforded under the Department's interpretation of Title IX.

99. The Department also inexplicably deviates from the hostile environment harassment standard under Title VI of the Civil Rights Act of 1964, which protects individuals from harassment on the basis of race, color, or national origin if it is "severe, pervasive, or persistent"—even though the Department has consistently recognized the standard for harassment on the basis of sex and the standard for harassment on the basis of race, color, or national origin are coextensive. *Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11,448, 11,450 (Mar. 10, 1994).

100. These inconsistent standards are contrary to the purpose of Title IX, which is to eliminate sex discrimination in education, including sexual harassment. The Department fails to provide adequate justification for treating harassment on the basis of sex differently from harassment on the basis of race, color, national origin, and disability, such that schools must bear significantly higher administrative and financial burdens to remedy the unlawful conduct on the basis of sex.

101. Similarly, the Rule sets sexual harassment apart from all other conduct prohibited by Title IX, without adequate justification, thus providing less protection to survivors of sexual harassment than other victims under Title IX.

102. The Rule further narrows Title IX's sexual harassment prohibitions to protect students only if the harassing conduct occurs in a school's "education program or activity." The Rule defines "education program or activity" to "include[] locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in

which the sexual harassment occurs, and also include[] any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.44(a)).

103. This improperly excludes from Title IX's protection harassment that takes place *outside* an education program or activity but nonetheless causes a student to "be excluded from participation in" and "be denied the benefits of" an equal education *in* that education program or activity. For example, it would exclude sexual harassment in off-campus housing—where it often occurs.

104. This also effectively prevents schools from fulfilling their Clery Act/VAWA obligations to investigate all allegations of sexual assault, stalking, domestic violence, and dating violence both on and off campus.

105. The Rule further unlawfully limits Title IX so that it protects students from sex discrimination only when the discriminatory conduct occurs "against a person in the United States." 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.8(d)).

106. This limitation misinterprets Title IX. Sex discrimination may flow from discriminatory decisions by a federally funded school relating to sexual harassment that took place outside the United States. Additionally Title IX applies to "all of the operations" of that school's education programs and activities, including those that operate abroad. Defendants' invocation of the presumption against extraterritoriality does not apply.

107. Finally, the Rule requires schools, after receiving a formal complaint of sexual harassment, to "follow[] a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in

§ 106.30,[14] against a respondent." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.44(a)). A school that does not strictly implement the Department's specific procedures will violate the Rule and risk coming under investigation and ultimately losing federal funding.

108. At the same time, the Rule requires that schools, after receiving notice of sexual harassment, respond to that harassment only in a manner that is not deliberately indifferent, i.e., "clearly unreasonable in light of the known circumstances," 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.44(a)).

109. These inconsistent standards mean schools are at risk of losing federal funding if they fail to strictly implement the Department's uniform procedures for handling formal complaints, but face no risk to their funding if they respond to sexual harassment in a manner that is just short of clearly unreasonable.

2. Limitations on Filing and Responding to Complaints

110. The Rule mandates that "[a]t the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.30(a) (*formal complaint*)).

111. This limitation applies regardless of whether the formal complaint is signed by the victim of the harassment or by the Title IX Coordinator.

[14] The Rule defines "supportive measures" as individualized "non-disciplinary, non-punitive services" offered to a complainant or a respondent to "restore or preserve equal access" to the education program or activity without "unreasonably burdening the other party." They can be offered before, after or without the filing of a formal complaint. Examples include counseling, increased security and monitoring, changes of housing or changes in class schedules. 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. 106.30(a) (*supportive measures*)).

112. Because all conduct meeting the Rule's elevated definition of sexual harassment must go through the Rule's grievance process, the Rule prevents schools from sanctioning or removing a student or employee who has sexually harassed victims not participating or attempting to participate in the school's education program or activity at the time the formal complaint is made.

113. This limitation improperly denies Title IX protection to former students who have left the school or transferred, even if *because of sexual harassment*, as well as to campus visitors or students from other schools who are harassed by school students or employees while participating in the school's education programs or activities on an intermittent basis. This limitation also fails to recognize that perpetrators of sexual harassment may go on to harass others if their conduct goes unaddressed, regardless of whether the perpetrator's original conduct was directed at a complainant participating in or attempting to participate in a school's education program or activity at the time that the formal complaint is made.

114. The Rule also mandates that schools *must* dismiss any complaint that "would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(3)(i)).

115. Although schools "must dismiss" these complaints, the Rule "does not preclude action under another provision of the recipient's code of conduct." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(3)(i)).

116. Defendants lack authority to require schools to dismiss complaints that do not meet Defendants' narrow interpretation of Title IX.

117. Requiring schools to develop separate "Title IX sexual harassment" and "non-Title IX sexual harassment" policies and grievance procedures will cause confusion among students, faculty, and staff; will pose complex administrative and financial burdens; will undermine timely Clery Act/VAWA compliance; and will discourage students, faculty, and staff from reporting sexual harassment. All of these consequences undermine the purpose of Title IX.

118. The Rule further eliminates the requirement in the existing 1975 regulation that remedies shall be designed to "overcome the effects" of discrimination and limits schools from issuing remedies that go beyond "restor[ing] or preserv[ing] access" for the individual complainant. 85 Fed. Reg. at 30,391 & 30,577 (to be codified at 34 C.F.R. §§ 106.3(a) & 106.45(7)(ii)(E)).

119. These limitations on schools' ability to fully redress a sexually hostile environment on campus are inconsistent with Title IX's nondiscrimination mandate and long-standing Department policy requiring schools to take steps "to eliminate any hostile environment that has been created," which may include interventions for an entire class "to repair the educational environment" or for an "entire school or campus." 2001 Policy at 16.

3. Prescriptive Grievance Process

120. The Rule mandates adopting certain arbitrary and unlawful procedural requirements that will chill reporting of sexual harassment and make it harder for schools to provide a fair process to all of their students.

121. The Rule requires that postsecondary schools "must provide for a live hearing," during which "the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)). This cross-

examination "must be conducted directly, orally, and in real time by the party's advisor of choice." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)).

122. As articulated in the preamble but not the Rule itself, the live-hearing requirement applies even if the complainant or respondent is a preschooler cared for at a university daycare center or a minor attending a university's college summer program, summer sports camp, or university-sponsored event for high school students.

123. The live-hearing requirement also applies to faculty and employees of postsecondary institutions accused of sexual harassment. This mandate conflicts with some State employment laws and investigation procedures for expeditiously investigating discrimination claims.

124. Direct, oral cross-examination risks traumatizing both complainants and respondents. Because the Rule prevents schools from placing reasonable limits on who may serve as a party's selected advisor, parties and witnesses may be cross-examined by anyone, even a parent or one's own teacher, which risks chilling reporting and deterring survivors from filing complaints.

125. The mandate for direct, oral cross-examination will impose litigation-like requirements on an investigation and decision-making process intended for an educational setting, without regard to schools' and students' unique needs or to existing state or local requirements. Schools may feel compelled to hire lawyers or arbitrators to serve as decision-makers to ensure that hearings remain fair and to enforce any school-created rules of decorum. These unaccounted-for costs will impose additional burdens on schools, chill reporting and complaint filing, and undermine schools' ability to fulfill their Title IX obligations.

126. Defendants arbitrarily reject less burdensome and less traumatizing methods of cross-examination, such as submitted questions via a neutral third party, which would still allow both parties to ask each other questions and fulfill the truth-seeking function while mitigating the likelihood of traumatization.

127. The Rule further mandates that if either party "does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)).

128. The Rule creates unaddressed inequities, such as when one party's advisor may be an attorney and the other party's advisor may be a volunteer untrained in effective cross-examination. These inequities are inconsistent with the nondiscrimination mandate of Title IX and contrary to the 1975 regulatory requirement that school processes be "prompt and equitable." To avoid inequitable hearings and to reduce the risk of litigation, schools may feel compelled to hire attorneys or specially trained advocates to serve as advisors. These unaccounted-for costs will impose additional burdens on schools and undermine schools' ability to fulfill their Title IX obligations.

129. The Rule further provides that during these hearings, "[b]efore a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)); *see also* 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)) (listing types of irrelevant questions).

130. In the preamble, the Rule arbitrarily and impermissibly forbids schools from adopting additional rules of evidence to ensure an equitable hearing. 85 Fed. Reg. 30,336–37. But the regulations themselves allow schools to adopt "provisions, rules, or practices other than those required by" 34 C.F.R. § 106.45 as long as they "apply equally to both parties." 85 Fed. Reg. at 30,575 (to be codified at 34 C.F.R. § 106.45(b)).

131. Classrooms are not courtrooms, and school decision-makers are typically not attorneys or judges. Instead, school decision-makers are normally administrators and faculty members. Requiring them to rule on the relevancy of every question and "explain any decision to exclude a question as not relevant"—an obligation not required of Article III judges, Fed. R. Evid. 103(c)—will impose significant burdens on schools as they will either need to try to train non-lawyer decision-makers in the rules of evidence or hire lawyers or arbitrators to fill the role.

132. The Rule further mandates that if a complainant, respondent, or witness "does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions." 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)). The Rule's preamble states that if a party does not appear at the hearing or refuses to submit to cross-examination, all of the party's statements are excluded, including the allegations that form the basis for the formal complaint itself and statements made in police and hospital reports. 85 Fed. Reg. at 30,347.

133. Because most schools lack subpoena power and are not permitted to compel parties or witnesses to attend hearings, this provision will undermine the ability of schools to

fully address known sexual harassment in their education programs and activities whenever witnesses or parties refuse, or are unable, to submit to direct, oral cross-examination.

134. The Rule does not impose the live hearing requirement on "other recipients that are not postsecondary institutions," even though these recipients may be museums, libraries, or cultural centers. 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(ii)). The Department fails to explain why only postsecondary institutions are required to hold live hearings with direct, oral cross-examination by a third-party advisor.

135. The Rule further states that schools must not "restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(5)(iii)).

136. This provision fails to take into account the particularly challenging situation presented in primary and secondary schools, where young students are in a close environment. These schools now will be unable to restrict young minor complainants and respondents from sharing sensitive information with other minors. This provision increases the risk of retaliation, harassment, and the disclosure of sensitive, confidential, and other legally protected information to third parties.

137. The Rule further requires schools to "[p]rovide both parties [and their third-party advisors] an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(5)(vi)). Schools must provide the evidence "in an electronic format or a hard copy."

138. The Rule's preamble suggests that schools "may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process)." 85 Fed. Reg. at 30,304. However, this clarification is set forth only in the preamble and not found in the text of the Rule.

139. As a result, schools—including and primary and secondary schools—will be required to provide *all* evidence collected during the investigation to both parties and their third-party advisors, without regard to relevancy, confidentiality, the need to protect witnesses (who may be young minors), or the implications of sharing sensitive information with and about young children. The suggestion of a non-disclosure agreement fails to account for the unique circumstances of primary and secondary education: While only a minor party's parent or guardian can sign the nondisclosure agreement, the school must still disclose the evidence to the minor complainant or respondent.

140. The Rule further prohibits schools from imposing "disciplinary sanctions or other actions that are not supportive measures"—i.e., actions that "unreasonably burden[]" one party, 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.30(a) (*supportive measures*))—unless the school follows "a grievance process that complies with § 106.45." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.44(a)).

141. This requirement ignores the unique circumstances of K-12 schools, which will be unable to address the safety of their students and campuses through well-established and constitutionally sound forms of discipline—such as detention or a one- or two-day suspension—without going through a process that requires a minimum of 20 days and a formal appeal process. 85 Fed. Reg. at 30,576–78 (to be codified at 34 C.F.R. §§ 106.45(b)(5)(vi) (requiring

schools to give parties at least 10 days to submit a written response to all evidence directly related to the allegations), (b)(5)(vii) (requiring schools to provide an investigative report fairly summarizing the relevant evidence at least 10 days prior to a hearing or other time of determination), (b)(8) (establishing appeal process)).

142. This prescriptive grievance process establishes procedural requirements for addressing allegations of sexual harassment that differ from the procedural requirements for addressing other types of discrimination. Not only will this create disparities in the treatment of members of different protected classes, contrary to Title IX's purpose, but it could also significantly complicate proceedings in which a single individual is accused of perpetrating multiple different types of discrimination.

143. Title IX does not give Defendants authority to establish rules for primary and secondary education institutions that upend and override local school discipline policies and practices which meet Supreme Court standards and which allow for the flexibility needed by school officials to maintain safety. Title IX authorizes the Department to issue regulations that prevent and remedy sex discrimination, but does not authorize regulations that dictate the particular process that must be used by schools when such process is unrelated to preventing and remedying sex discrimination and when other K-12 processes already ensure fundamental fairness.

144. Finally, the preamble to the Rule admonishes that the "choice to initiate the grievance process must remain within the control of the complainant unless the Title IX Coordinator has specific reasons justifying the filing of a formal complaint over the wishes of a complainant." 85 Fed. Reg. at 30,304. The preamble's requirement that the Title IX Coordinator

in a K-12 school set forth "specific reasons" before acting to protect a child is inconsistent with the *in loco parentis* status of school officials.

4. Family Educational Rights and Privacy Act

145. The Rule conflicts with the Family Educational Rights and Privacy Act of 1974 ("FERPA") and the Department's own FERPA regulations. Pub. L. No. 93-380, § 513, 88 Stat. 484, 571–74 (codified as amended at 20 U.S.C. § 1232g).

146. Defendants are charged with enforcing both FERPA and Title IX.

147. The Rule imposes new obligations on schools that conflict with FERPA, despite the Department's statement in the preamble that a recipient "may comply with both these regulations and FERPA." 85 Fed. Reg. at 30,422.

148. For example, the Rule requires that a school must provide both parties and their third-party advisors "an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint," including evidence the recipient does not intend to rely upon in reaching a determination regarding responsibility. 85 Fed. Reg. at 50,576 (to be codified at 34 C.F.R. §§ 106.45(b)(2)(i)(B) & (5)(vi)). However, FERPA prohibits the "release" of student "education records," which would include any such evidence containing information directly related to a student that is maintained by a school, without the written consent of the student (or parent, where applicable). 20 U.S.C. § 1232g(a)(4)(A), (b).

149. In addition, the Rule permits consolidating "formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(4)). However, FERPA limits any right to review and inspect education

records that include information on more than one student to "only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material." 20 U.S.C. § 1232g(a)(1)(A); *see Family Educational Rights and Privacy*, 73 Fed. Reg. 74,806, 74,832–33 (Dec. 9, 2008).

150. The Rule prohibits schools from taking reasonable steps—already widely used consistent with FERPA—that both provide a fair process and comply with Congress's directive to protect student privacy.

151. The Rule states that the "obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99." 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.6(e)).

152. Defendants lack authority to implement these non-conflicting statutes in a way that creates a conflict and to resolve that conflict by superseding FERPA via regulation.

B. Changes to Other Title IX Regulations

153. Defendants make unlawful changes to the Department's other Title IX regulations, specifically, to the prohibition on discriminatory publications and the procedure required to claim a religious exemption.

154. Before the Rule, schools were prohibited from "us[ing] or distribut[ing] a publication of the type described in this paragraph which *suggests, by text or illustration*, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part." 34 C.F.R. § 106.9(b)(2) (emphasis added).

155. The Rule amends this provision to prohibit a school only from "us[ing] or distribut[ing] a publication *stating* that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part." 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.8(b)(2)(ii) (emphasis added)).

156. Defendants fail to provide a reasoned explanation for eliminating this prohibition on publications that suggest discrimination—a prohibition that is intended to combat sex stereotyping—or any evidence that the standard used for over 40 years has somehow failed to accomplish the purpose of Title IX's antidiscrimination mandate. The arbitrary nature of this change is exemplified by adding a requirement in the Rule that "materials used to train Title IX Coordinators, investigators, decision-makers" and others "must not rely on sex stereotypes." 85 Fed. Reg. at 30,575 (to be codified at §106.45(b)(1)(iii)).

157. The Rule also upends the prior long-standing application of Title IX's religious exemption. The Rule no longer requires an institution controlled by a religious organization claiming an exemption from all or part of Title IX to provide written notice to the Department with a declaration identifying which part of Title IX or the regulations conflicts with a tenet of the religion. Instead, schools now may declare an exemption for the first time after receiving a Title IX complaint. 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.12(b)).

158. Defendants fail to provide a reasoned explanation for this change, which will now leave prospective students, parents, and others in the dark about whether non-exempt schools will comply with Title IX's anti-discrimination requirements. Defendants also failed to identify support for the purported burden on education institutions that request the exemption and any cost-savings resulting from the change.

C. Effective Date

159. The Rule's August 14, 2020, effective date fails to provide schools with adequate time to review and implement the new legal requirements in a way that fulfills Title IX's antidiscrimination mandate.

160. For example, by August 14, 2020, every school in Plaintiff States must:

a. Carefully review 547 Federal Register pages of preamble (and 1,971 footnotes), which improperly specify additional mandates and restrictions on schools and provide critical information found nowhere in the eight pages of regulations themselves as to how schools must implement the Rule, *e.g.*, 85 Fed. Reg. at 30,296 n.1162 (a Title IX coordinator can sign a formal complaint against the wishes of a complainant only if doing so "is not clearly unreasonable in light of the known circumstances," contrary to the plain language of the regulation); 85 Fed. Reg. at 30,287 n.1142 (suggesting that school can be found in noncompliance for using a respondent's informal statements, in response to a report of sexual assault, in a subsequently-filed formal complaint process, because the school did not give the respondent advance notice of the (informal) interview); 85 Fed. Reg. at 30,428 (stating that if recipient obtains evidence about a party's sexual predispositions directly related to allegations, the recipient should allow both parties and their advisors an opportunity to review, contrary to the plain language of the regulation); 85 Fed. Reg. at 30,273 (even though supportive measures for the respondent are not required, failure to provide a respondent with supportive measures could result in a deliberate indifference violation finding by the Department);

b. Determine if any state or local laws conflict with the regulations and are therefore preempted, 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.6(h));

c. Revise all relevant policies, codes, handbooks, and grievance procedures for "Title IX sexual harassment," which may require multiple stages of review and approval under state or local law or school policy, 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.8(c));

d. Determine how to address "non-Title IX sexual harassment," which the school must dismiss under Title IX but can (and in some cases, must) address separately under codes of conduct or state law, 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(3)(i));

e. For postsecondary schools, determine which faculty and staff members must, may, or must only with a complainant's consent, report sexual harassment, 85 Fed. Reg. at 30,041;

f. Disseminate information about the new policies and procedures to the entire school community;

g. Revise all training materials and recordkeeping procedures, and post all revised training materials on schools' websites, 85 Fed. Reg. 30,575 (to be codified at 34 C.F.R. § 106.45(b)(1)(iii)), 85 Fed. Reg. 30,578 (to be codified at 34 C.F.R. § 106.45(b)(10));

h. Retrain all students, faculty, and staff on the new policies and procedures, including training the Title IX Coordinator, investigators, and decision-makers on the new grievance procedures; training decision-makers on how to make evidentiary decisions during a hearing and how to control cross-examination; and for primary and secondary schools, training all employees on the new

scope of sexual harassment under Title IX and how to report it; 85 Fed. Reg. at 30,574–75 (to be codified at 34 C.F.R. §§ 106.30, 106.45(b)(1)(iii));

i. If the school previously had not provided for live hearings by a board or hearing officer (separate from the investigator) and had not provided appeal rights, it must hire and train separate investigators, decision makers, and/or appeal officers, 85 Fed. Reg. at 30,577–78 (to be codified at 34 C.F.R. §§ 106.45(b)(7), (b)(8));

j. If the postsecondary school had not previously held live hearings, it must establish procedures and hire or appoint and train staff to serve as decision-makers, 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i));

k. For postsecondary schools, appoint or hire a pool of advisors who are willing to conduct cross-examinations for parties who do not have an advisor, 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(i)); and

l. Renegotiate bargaining agreements and revise procedures for employees, including those who were at-will employees, prior to the preemptive effect provision added in the Rule, 85 Fed. Reg. at 30,439.

161. Our schools must make many additional decisions—explicitly contemplated by Defendants in the preamble—about how to implement the Rule in a way that best provides for a safe and equitable education experience for all students. For example, Defendants note that postsecondary schools may consider adopting rules of decorum for live hearings to "forbid badgering a witness" or to "prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner." 85 Fed. Reg. at 30,248, 30,319. Defendants also state that schools may develop non-disclosure or confidentiality agreements

(and concomitant enforcement mechanisms) to protect confidentiality when "a complainant reports sexual harassment but no formal complaint is filed," 85 Fed. Reg. at 30,296, or when providing the parties and advisors with all evidence directly related to the allegations, 85 Fed. Reg. at 30,304.

162. And our schools must make all of these important, difficult, and resource-intensive decisions in a thoughtful and deliberate way during the ongoing COVID-19 pandemic that has resulted in the closure, recommended closure, or remote operation of virtually all primary, secondary, and postsecondary schools in Plaintiff States.

163. Defendants' complicated changes to the Title IX regulations impose extraordinary and untenable administrative burdens and financial costs on education systems already facing unprecedented challenges due to a global health crisis of unknown duration. The crisis has required schools to provide new types of essential educational and support services while maintaining the health and safety of their staff and students.

164. At this time, school administrators are already busy completing the spring semester, implementing modified summer programs, and preparing for the upcoming academic year—which will almost certainly commence in the midst of the ongoing pandemic. In addition, many of the administrative bodies necessary to review and approve changes to a student code of conduct, faculty handbook, or sexual misconduct policy—such as a faculty senate, faculty council, or local school board—do not meet during the summer.

165. Defendants' unreasonable timeframe for compliance will also impose additional costs on schools at a time when many of them are facing severe budgetary constraints as a result of the COVID-19 public health crisis. By requiring schools to implement the Rule in less than three months, schools within Plaintiff States will likely have to re-direct staff and resources

dedicated to carrying out education-related operations during the pandemic to instead address the Rule's significant administrative requirements. Indeed, some already have.

166. Defendants' timeframe is impossible for our schools to comply with in a way that does not create confusion; impose greater burdens and costs on students, faculty, and staff; and ultimately undermine Title IX's mandate.

D. Regulatory Impact Analyses

167. Both the notice of proposed rulemaking and the Rule include a regulatory impact analysis ("RIA") prepared pursuant to Executive Orders 12866 and 13563.

168. Both RIAs are fatally flawed.

1. RIA in the Notice of Proposed Rulemaking

169. In the proposed rule, the Department estimated a net cost *savings* of between $286.4 million to $367.7 million over ten years based solely on an anticipated decrease in Title IX investigations and complaint filings caused by the proposed regulations.

170. But the Department failed to disclose the methodology upon which it relied in reaching is conclusions and provided only generalized estimates not grounded in evidence. The Department also failed to provide all of the underlying sources, studies, and reports on which it purportedly relied for the many assumptions critical to its cost-benefit analysis. As a result, the public was deprived of an opportunity to review and comment on these sources, in contravention of the APA.

171. The Department's failure to provide this information in the notice of proposed rulemaking deprived the public of an opportunity to meaningfully comment on the Department's estimates and assumptions.

172. In the Rule, the Department does not adequately explain its failure to provide the technical studies and data upon which it relied to prepare the RIA in the notice of proposed rulemaking. 85 Fed. Reg. 30,502–03.

2. RIA in the Rule

173. In the final Rule, the Department drastically changed its cost-benefit analysis from that in the notice of proposed rulemaking, ultimately concluding that the Rule's net *costs* will be between $48.6 million and $62.2 million over ten years. 85 Fed. Reg. at 30,569. The Department's explanation of this revised estimate is flawed and inadequate.

174. Incidents of sexual violence and harassment have health, monetary, and other costs to the survivors, to school campuses, and to States that will bear the costs when students who are subjected to sexual harassment receive no relief from their schools. These costs include drop-out rates, class withdrawals, absenteeism, mistrust of education institutions, and harm to mental and physical health, all of which are independently harmful and can contribute to poor academic performance. 85 Fed. Reg. at 30,544–45.

175. Although the Department acknowledged these harms and identified relevant studies that provide cost estimates in the proposed rule, it intentionally declined to include them in the cost-benefit analysis. 83 Fed. Reg. at 61,485; 85 Fed. Reg. at 30,538–46.

176. The Rule will have the likely consequence of subjecting more students to harassment because it narrows the scope of Title IX's protections. *See* Part II.A, *supra*. The narrowed scope both diminishes Title IX's deterrent effect and limits schools' ability to respond to harassment. Thus, the costs attendant to increased incidents of harassment that will follow from the Rule are a necessary piece of the cost-benefit analysis.

177. The Department anticipates a significant decrease in investigations of complaints as a result of the changes in the Rule. 85 Fed. Reg. at 30,550, 30,553–54, 30,548–49, 30,568

(stating that Title IX investigations will decrease by about 33 percent per year in colleges and universities and 50 percent per year in elementary and secondary schools as a result of the Rule). When investigations decrease, so do the number of responsibility findings and the number of sanctions issued to perpetrators of sexual harassment. These decreases have an appreciable impact on a school's ability to deter future and repeat sexually harassing conduct. Because fewer incidents of sexual harassment will be investigated under the Rule, the likelihood of this harassment being detected and punished will also be reduced, which in turn will reduce the system's general deterrent effect.

178. Rather than recognizing the costs associated with increased sexual harassment, the Department unreasonably determined that the Rule's new, narrow scope would result in a cost *savings*—almost $200 million from fewer investigations into formal complaints. 85 Fed. Reg. at 30,568. Even if the Department is correct about the projected cost savings, it arbitrarily disregards that the costs are saved precisely because the narrow scope of the Rule is contrary to Title IX's anti-discrimination mandate.

179. The Department also failed to analyze how the Rule will affect the national economy, despite at least one study cited by the Department in the notice of proposed rulemaking showing that the national economic burden of sexual violence is $263 billion a year—costs largely borne by States, state schools, and state public health care systems. 83 Fed. Reg. at 61,485 n.5.

180. The Department also failed to properly consider the substantial administrative, staffing, and training costs the Rule imposes. The Department's estimates of what will be required for recipients to implement the Rule do not fully account for all related costs States' education institutions will bear.

181. For example, the Department did not factor in all of the costs of hiring, training, and retraining staff to comply with Rule's new requirements.

182. When the Department did consider administrative costs, it made unrealistic assumptions, such as the amount of time school administrators and employees would need to review and implement the Rule. 85 Fed. Reg. at 30,567. And, as the Department admitted, the States' education institutions will shoulder those and any other unaccounted-for financial and administrative expenses. 85 Fed. Reg. at 30,549.

183. To the extent the Department's estimates assume that Title IX Coordinators and school attorneys need only read the eight pages of actual federal regulations, 85 Fed. Reg. at 30,567, this is irrational. The preamble, which itself is over 500 Federal Register pages, includes additional (improperly issued) requirements that appear nowhere in the regulations themselves and that the Department intends to enforce. *See* ¶ 160.a *supra*.

184. The cost of meeting these administrative burdens is compounded by the Department's imposed effective date that requires schools to redirect resources away from managing their responses to the COVID-19 pandemic.

185. Separately, the Rule provided inadequate estimates of the time recipients will need to expend responding to formal complaints of Title IX sexual harassment under the Rule's new procedures. 85 Fed. Reg. at 30,568–69.

186. The Department's RIA fails to account for the many costs associated with the Rule and is therefore arbitrary and capricious. And in changing its analysis so drastically, the Department failed to provide an adequate reasoned explanation justifying these new significant costs.

E. Procedural Flaws

187. The Rule failed to comply with the APA's procedural requirements.

188. The Rule contains new provisions that were not a logical outgrowth of, and could not have been anticipated based on, the notice of proposed rulemaking.

189. The Rule expressly preempts state laws if there is any "conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45." 85 Fed. Reg. at 30,573 (to be codified at 34 C.F.R. § 106.6(h)). This regulatory provision was not disclosed to the public during the rulemaking process; to the contrary, the Department stated in the notice of proposed rulemaking that the proposed regulations will *not* have preemptive effect. *See* 83 Fed. Reg. at 61,468, 61,475. As a result, the States and the public were deprived of the opportunity to comment.

190. The Rule also allows for the consolidation of "formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances." 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R. § 106.45(b)(4)). But the notice of proposed rulemaking makes no mention of consolidation. As a result, the States and the public were deprived of the opportunity to caution the Department that any consolidation must be done with the consent of the parties and account for confidentiality, including the requirements of FERPA, state privacy laws, and any harms to students.

191. The Rule allows for dismissal of complaints if a "respondent is no longer enrolled or employed by the recipient," including if the respondent leaves a school during the investigation. 85 Fed. Reg. at 30,576 (to be codified at 34 C.F.R § 106.45(b)(3)(ii)). But, the notice of proposed rulemaking did not mention dismissal in this context at all and did not provide the States and the public with the opportunity to comment on the effect of such a dismissal.

192. The Rule contains a new confidentiality provision that is internally inconsistent with the existing confidentiality regulation already incorporated by reference from Title VI. The existing confidentiality provision states that the "identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder." 85 Fed. Reg. at 30,579 (to be re-codified at 34 C.F.R. § 106.81 (incorporating by reference 34 C.F.R. § 100.7(e))). The new confidentiality provision in the Rule only requires "the recipient," not the parties, to "keep confidential the identity of any individual who has made a report or complaint of sex discrimination." 85 Fed. Reg. at 30,578 (to be codified at 34 C.F.R. § 106.71). The notice of proposed rulemaking did not include this new confidentiality provision, depriving the States and the public of the opportunity to alert the Department to the inconsistency.

193. The Rule limits a victim's ability to benefit from Title IX protections by requiring that they be currently "participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed." 85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R § 106.30 (*formal complaint*)). This requirement is not a logical outgrowth of, and could not have been anticipated based on, the notice of proposed rulemaking, which only referenced precluding Title IX's grievance process for an individual who has never been enrolled as a student of the school at which they are filing a complaint. 83 Fed. Reg. at 61,468.

194. The Rule inserts various severability provisions that allow the balance of the Rule to remain applicable even if provisions of the Rule are held invalid. 85 Fed. Reg. at 30,576–79 (to be codified at 34 C.F.R. §§ 106.9, 106.18, 106.24, 106.46, 106.62, 106.72). The notice of proposed rulemaking did not mention the severability provisions and, therefore, did not provide the States or the public with the opportunity to comment on the effect of such provisions.

195. The Rule's preamble also includes a number of additional mandates and prohibitions that the Department indicates it will enforce as if they have the force of law. Some of these provisions conflict with the Rule. *E.g.*, ¶¶ 130, 160.a, *supra*. None of these mandates and prohibitions are included in the Rule and, therefore, are unlawfully issued.

196. Finally, the Rule does not include the approval of United States Attorney General William P. Barr or his designate, as required by 20 U.S.C. § 1682 and Executive Order 12250.

III. THE RULE WILL CAUSE IMMEDIATE AND IRREPARABLE HARM TO PLAINTIFF STATES, SCHOOLS, AND STUDENTS.

197. The Rule will cause immediate, irreparable harm to the proprietary, sovereign, and quasi-sovereign interests of the States.

A. The Rule Will Harm Plaintiff States' Proprietary Interests

198. The States, both themselves and through their publicly administered education institutions, are directly regulated by the Rule. As a result, they will suffer direct proprietary harm because of the Rule.

199. Each of the States administers a system of primary and secondary public education that is funded by both state and federal money:

a. *Pennsylvania*: The Pennsylvania Constitution charges the Pennsylvania General Assembly with "provid[ing] for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const. Art. III § 14. The Commonwealth provides more than $12 billion each year to its 500 public school districts, which educate more than 1.72 million students each year in 2,865 schools. Pennsylvania also has approximately 3,000 nonpublic and private schools that range from pre-K to high school. Pennsylvania received more than $1.36 billion from the

Department in 2019 to support its primary and secondary education programs. Pennsylvania is scheduled to receive more than $1.4 billion from the Department in 2020.

b. *New Jersey*: The Constitution and legislature charge the State of New Jersey with maintaining a "thorough and efficient system of free public schools" for residents ages five through 18. N.J. Const. Art. VIII, Sec. IV, Para 2; N.J. Stat. Ann. § 18A:7F-44(b). New Jersey has approximately 1.4 million students enrolled in public schools in grades K-12. The State allocates funding to local school districts in accordance with the School Funding Reform Act of 2008, N.J. Stat. Ann. § 18A:7F-43 to -70. The State provides over $8.4 billion in funding to its 584 local public school districts. In 2018–2019, New Jersey received $923,564,548 in federal education funding from the Department, and $1,604,148 from other federal agencies related to K-12 education.

c. *California*: The State is the legal and political entity with plenary responsibility for educating all California public school students. The State has the constitutional responsibility to establish and maintain the system of common schools and a free education, Cal. Const. art. IX, § 5, and to ensure that all California public school students receive their fundamental right to equal educational opportunity, regardless of sex and other protected factors, *id.* art. I, § 7(a) & art. IV, § 16(a). The State funds and oversees the operation of the largest common system of public schools in the nation, which serves nearly 6.2 million children in more than 10,500 schools. In 2018–2019, the State provided $54.7 billion in General Funds to its 1,037 local public school

districts. California also received more than $8.6 billion from the U.S. Department of Education in 2018–2019, and is scheduled to receive more than $8.8 billion from the Department in 2019–2020.

d. *Colorado*: Colorado's constitution pledges that the State will establish and maintain a thorough and uniform system of free public schools where all residents between the ages of six and 21 may be educated. Colo. Const. art. IX, § 2. Colorado's children are entrusted to that system through the State's compulsory attendance laws. Colo. Const. art. IX § 11; Colo. Rev. Stat. § 22-33-104. In the 2018–2019 academic year, Colorado was home to 178 operating school districts, 1,888 schools, and over 900,000 students. For school year 2019–2020, Colorado provided approximately $7.6 billion in state funding to districts and charter schools. Colorado also received more than $450 million from the Department for school year 2019–2020.

e. *Delaware*: The Delaware Constitution charges the Delaware General Assembly with "provid[ing] for the establishment and maintenance of a general and efficient system of free public schools." Del. Const. Art. X, § 1. For the 2019–2020 school year, Delaware was home to 19 operating school districts, with 194 traditional public schools, 23 charter schools, with more than 140 thousand students enrolled, and approximately 88 private schools that range from kindergarten through high school, with more than 15 thousand students enrolled. Delaware provides more than $1.4 billion each year to its public schools, and receives approximately $130 million from the Department for its primary and secondary education programs.

f. *District of Columbia*: The District has 116 traditional public schools and 123 public charter schools with approximately 93,000 enrolled students, according to Fiscal Year 2019 data. The District received more than $103 million from the Department in 2019 to support its primary and secondary education programs. It is scheduled to receive more than $107 million in 2020.

g. *Illinois*: The Illinois Constitution charges the State to "provide for an efficient system of high quality public educational institutions and services." Ill. Const. Art. X. Illinois provides over $8.89 billion to its approximately 852 school districts. These school districts educate approximately 1.98 million students each year in 3,872 public schools. Illinois also has approximately 198,643 students enrolled in non-public institutions. In the 2018–2019 school year, Illinois received approximately $3.66 billion in federal funds for its elementary and secondary education programs.

h. *Massachusetts*: The Massachusetts Constitution requires that the Commonwealth provide adequate funding to educate all Massachusetts children. *McDuffy v. Secretary of Executive Office of Education*, 615 N.E.2d 516 (Mass. 1993). Massachusetts is home to 406 public preK-12 school districts, comprised of more than 1,800 schools and more than 950,000 students. Each year Massachusetts allocates more than $6 billion to these public school districts. To support its elementary and secondary programs, Massachusetts received approximately $689 million from the Department in Fiscal Year 2019 and is scheduled to receive almost $693 million from the Department in Fiscal Year 2020.

i. *Michigan*: The Michigan Constitution charges the Michigan Legislature with "maintain[ing] and support[ing] a system of free public elementary and secondary schools as defined by law." Mich. Const. art. VIII, § 2. Michigan provides more than $13 billion each year to its 836 public school districts and 56 intermediate school districts. The 3,400 school buildings in these districts educate more than 1.5 million students each year. Michigan received approximately $1.14 billion from the Department in 2019 to support its K-12 schools. Michigan is expected to receive over $1.18 billion from the Department for the 2020–2021 school year.

j. *Minnesota*: The Minnesota Constitution requires the legislature to establish a general and uniform system of public schools. Minn. Const. Art. XIII § 1. Minnesota has over 330 public school districts and 169 charter schools, which educate over 865,000 students. In Fiscal Year 2019, Minnesota spent approximately $9.588 billion on E-12 education, the largest single expenditure in its budget. In that year, Minnesota received approximately an additional $508 million in elementary and secondary funding from the Department.

k. *New Mexico*: The New Mexico constitution promises to establish and maintain a uniform, free public school system "sufficient for the education of, and open to, all the children of school age." N.M. Const. Art. 12, Sec. 1. In 2020, legislators appropriated $3.468 billion in state funds for public education from prekindergarten through secondary schools, or 45.5 percent of total recurring appropriations. In 2019, the definition of "school-age" was revised to include students through age 22. The Fiscal Year 2021 budget

increased recurring appropriations by $216 million, or 6.6 percent, with significant additional funding to increase educator compensation, provide additional services to at-risk students, and provide professional development and mentorship support for early career teachers. Total federal support for New Mexico's elementary and secondary schools was $406,133,433.

l. *North Carolina*: North Carolina's constitution guarantees the "right to the privilege of education" and charges the state with the "duty" to "guard and maintain that right." N.C. Const. art. I, § 15. North Carolina's constitution also requires that the State provide all of its students a "sound basic education." *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997). For the 2014–2015 school year, North Carolina was home to 115 operating school districts, 2,592 schools, and more than 1.53 million students. For the 2014–2015 academic year, North Carolina contributed more than $8.08 billion in state funding for operating expenses and received more than $1.44 billion in federal funding for operating expenses.

m. *Oregon*: The Oregon Constitution charges the Oregon Legislature with appropriating funds "sufficient to ensure that the state's system of public education meets quality goals established by law." Or. Const., Art. VIII, § 8. As of fall 2019 there were 582,661 K-12 students in Oregon. Of those, 179,985 are in grades 9-12. Those students attend more than 1,200 public schools organized into 197 school districts in the State of Oregon. The 2019–2021 Legislatively Adopted Budget includes $1.254 million in pass-through federal funds for K-12 programs.

n. *Rhode Island*: The Rhode Island Constitution charges the Rhode Island General Assembly to "promote public schools . . . and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education[.]" R.I. Const., Art. XII, § 1. The Rhode Island public elementary and secondary education system provides education to approximately 143,000 students each year. Additionally, the system has a cumulative annual budget of $2.2 billion and employs approximately 21,000 teachers, administrators and staff.

o. *Vermont*: The "right to public education is integral to Vermont's constitutional form of government and its guarantees of political and civil rights." Vt. Stat. Ann. tit. 16, § 1. The Vermont Agency of Education and the State's public educators are deeply committed to ensuring that all children in the State enjoy equal educational opportunity. Vermont has approximately 250 public schools that serve over 80,000 children. In 2019, the State provided over $1.37 billion in funding to its school districts. The Agency of Education is responsible for supervising the expenditure and distribution of all money appropriated by the State to support these schools. The Agency is also responsible for executing and monitoring federal education grants to Vermont schools on behalf of the federal government. Vermont received more than $103 million from the Department of Education in 2019 to support its primary and secondary education programs, and estimates receiving over $107 million in 2020.

p. *Virginia*: Under the Constitution of Virginia, the General Assembly is required to "provide for a system of free public elementary and secondary

schools for all children" in the Commonwealth. Va. Const. art. VIII, § 1. The General Assembly must also "ensure that an educational program of high quality is established and continually maintained." *Id.* These directives have been adopted in the Code of Virginia, *see* Va. Code Ann. § 22.1-2, and the Supreme Court of Virginia has confirmed that "education is a fundamental right" under the state Constitution. *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994). For the 2019–2020 school year, there were 2,106 public schools in Virginia, including 1,860 schools, 155 local centers, and 91 regional centers. These schools educated nearly 1.3 million students in grades K-12 in 2019. The Commonwealth provides approximately $7.3 billion each year in state funding to its school. In Fiscal Year 2019, Virginia received more than $710 million in federal funding to support the Commonwealth's primary and secondary education programs. Virginia has also already received nearly $634 million in federal funding for Fiscal Year 2020

q. *Washington*: The Washington Constitution provides that it is the "paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." Wash. Const. art. IX sec. 1; *see McCleary v. State*, 269 P.3d 227 (Wash. 2012). Under its current biennial budget for 2019–2021, Washington provides more than $27 billion to its public schools, which serve over 1.1 million K-12 students annually. Washington received approximately $728 million from the Department in 2019 to support its primary and

secondary public education programs, and is scheduled to receive approximately $745 million in 2020.

r. *Wisconsin*: The Wisconsin Constitution charges the legislature with providing the establishment of public schools, "which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years." Art. X §3, Wis. Constitution. Wisconsin provides more than $5 billion each year to its public schools, which educate more than 850,000 students each year in 2,216 schools. Wisconsin also has approximately 790 nonpublic and private schools that range from pre-K to high school. Wisconsin received more than $560 million from the Department in 2019 to support its primary and secondary education programs. Wisconsin is scheduled to receive more than $575 million from the Department in 2020.

200. Collectively, the States' systems of public primary and secondary education have an enrollment of more than 20 million students and receive more than $31 billion from the Department annually.

201. Because each State receives federal funding from the Department for primary and secondary education, each State and its public primary and secondary education systems are subject to the Rule.

202. In addition, each State funds, supports, and/or administers systems of postsecondary education:

a. *Pennsylvania:* The Pennsylvania State System of Higher Education ("PASSHE") is a state-owned, funded, and administered network of 14

postsecondary schools across the Commonwealth with a combined enrollment of over 90,000 students each year. 24 P.S. §§ 20-2001-A to 20-2020-A. Pennsylvania provides PASSHE with more than $450 million each year. In addition, the Commonwealth System of Higher Education ("CSHE") consists of four "state-related" universities in Pennsylvania—Lincoln University, Pennsylvania State University, the University of Pittsburgh, and Temple University—that together educate more than 170,000 students. These universities are considered public institutions, and Commonwealth officials appoint a designated number of trustees to the governing board of each institution. CSHE universities receive an annual, non-preferred financial appropriation from the state and offer discounted tuition to Commonwealth residents. Pennsylvania provides nearly $600 million to the CSHE universities each year. Pennsylvania also has 14 community colleges that educate more than 120,000 students each year with nearly $300 million in annual public funding. Finally, eight institutions in Pennsylvania are private but receive state funding: Drexel University, Johnson College, Lake Erie College of Osteopathic Medicine, Philadelphia College of Osteopathic Medicine, Salus University, Thomas Jefferson University, University of Pennsylvania, and The University of the Arts. Pennsylvania institutions of postsecondary education received more than $930 million from the Department in 2019 and are scheduled to receive more than $970 million in 2020.

b. *New Jersey*: New Jersey is home to four public research universities, seven State colleges and universities, 18 community colleges, and 15 independent

non-profit four-year colleges. Over 531,000 students are enrolled in higher education institutions across the State with over 300,000 enrolled in public colleges. New Jersey's public colleges and universities are state-funded institutions that are governed by state law. In Fiscal Year 2019, the State provided a total of $1.74 billion to public colleges and universities in direct operating aid, including fringe benefits. The State also appropriated $522 million in student financial aid assistance that is awarded directly to students attending both public and private institutions in New Jersey. In Fiscal Year 2018, the federal government provided public colleges and universities in the state of New Jersey a total of $1.59 billion in federal funding—this includes appropriations, operating, non-operating, and financial aid. Similarly, independent not-for-profit institutions in New Jersey received over $318 million in federal grants and contracts as well as student financial aid in Fiscal Year 2018.

c. *California*: California operates and funds a system of colleges and universities, which include the University of California, California State University, and Community College systems. Collectively, these colleges and universities serve more than 2.8 million students. As of the Budget Act of 2019, for the 2018–2019 Fiscal Year, the State provided $19.5 billion in General Fund and Property Tax to its colleges and universities. California also received an estimated $5.7 billion from the Department in the 2018–2019 Fiscal Year, and is scheduled to receive more than $7.1 billion from the Department in the 2019–2020 Fiscal Year for its colleges and universities.

d. *Colorado*: Colorado is home to 31 public universities and colleges, which collectively enroll more than 250,000 students. In Fiscal Year 2019–2020, Colorado provided $858 million from the general fund and $220.3 million in student aid. Colorado higher education institutions collectively received over $464.6 million from the Department in 2019 and are scheduled to receive more than $482.9 million in 2020.

e. *Delaware*: Delaware is home to eight universities and colleges, which collectively enroll more than 60,000 students. In Fiscal Year 2020, Delaware provided $247 million in funding to higher education institutions. Delaware higher education institutions collectively received $68 million from the Department in 2019 and are scheduled to receive more than $71 million in 2020.

f. *District of Columbia*: The University of the District of Columbia ("UDC") is the District of Columbia's public higher education institution. Over 4,000 students are enrolled at UDC, including the flagship university and the community college. For Fiscal Year 2020, UDC has a projected operating budget of $166.3 million, of which $33.5 million comes from federal grants and $8.3 million comes from District of Columbia agency grants.

g. *Illinois*: Illinois has approximately 208 higher education institutions, including public, private, and technical schools, and community colleges, with approximately 720,000 students. Illinois has 12 public universities with roughly 182,000 students. The largest of the public universities is the University of Illinois Urbana-Champaign, which enrolls over 52,000 students

each year. Illinois also has over 271,000 students enrolled in public community colleges. Illinois provides approximately $4 billion to its higher education institutions, including $1.167 billion to universities and $410 million to community colleges. Illinois received at least $1 billion from the Department in 2019 to support its postsecondary education programs and is scheduled to receive more than $1 billion in 2020.

h. *Massachusetts*: Massachusetts has 29 public colleges and universities, including 15 community colleges, nine state universities, and five separate campuses of the University of Massachusetts system. More than 260,000 students attend Massachusetts institutions of public higher education. Massachusetts provides $1.3 billion in annual support to its public colleges and universities. Massachusetts is also home to 92 private higher education institutions. Next to health care and finance, higher education is one of Massachusetts's largest industries, employing over 135,000 faculty, staff, and administrators. To support its postsecondary programs, Massachusetts received approximately $562 million from the Department in Fiscal Year 2019 and is scheduled to receive nearly $584 million from the Department in Fiscal Year 2020.

i. *Michigan*: The Michigan Constitution charges the Michigan Legislature with "appropriating moneys to maintain" ten public universities in the state. Mich. Const. art. VIII, § 4. These ten universities are governed independently through constitutionally created boards. *See id.* §§ 5–6. Five other universities in the state also receive state funding. In sum, over 280,000 students are

enrolled in these fifteen state-funded universities across the state. These universities received over $1.5 billion in state funding during the 2019–2020 Fiscal Year. Michigan is also home to 28 public community colleges. The Michigan Constitution requires the Michigan Legislature provide "financial support" for these colleges. *Id.* § 7. The community colleges received $414 million through state appropriations during the most recent fiscal year. Michigan institutions received more than $763 million from the Department in 2019 and are scheduled to receive more than $800 million in 2020.

j. *Minnesota*: Minnesota is home to the University of Minnesota, which includes five campuses, and the Minnesota State Colleges and Universities system, which includes seven universities and thirty community and technical colleges. Together, these public colleges and universities educate more than 415,000 students. In Fiscal Year 2020, the State is scheduled to provide $1.428 billion in funding to these colleges and universities. In the same year, postsecondary institutions in Minnesota are scheduled to receive an additional $479 million from the Department.

k. *New Mexico*: New Mexico has 24 public colleges and universities that deliver workforce training, adult education, and undergraduate and graduate degrees. New Mexico dedicated $905 million in state appropriations for its higher education system in the most recent fiscal year for some 75,000 full-time or full-time equivalent students. The Department provided approximately $400 million in student financial aid for higher education students in New Mexico for purposes of tuition at New Mexico higher education institutions.

l. *North Carolina:* North Carolina is home to 74 public universities and colleges, which collectively enroll more than 1.05 million students. In 2019, North Carolina higher education institutions collectively received more than $896 million from the Department and are scheduled to receive more than $937 million in 2020. For Fiscal Year 2019–2020, the UNC System received more than $3.0 billion in state funding. For Fiscal Year 2019–2020, the Community College System received more than $1.1 billion in state funding.

m. *Oregon:* Oregon has seven public universities, which had over 100,000 students enrolled in 2019, and seventeen community colleges, serving over 250,000 students in 2018–2019. In the 2017–2019 biennium state funding per full-time-equivalent student was over $7,900 per student in Oregon's public universities. For students in Oregon's community colleges, state funding in 2017–2019 was over $3,200 per full-time equivalent.

n. *Rhode Island:* Rhode Island is home to the University of Rhode Island, Rhode Island College, and the Community College of Rhode Island. Collectively, the Rhode Island higher education system provides instruction to approximately 43,000 undergraduate and graduate students each year**.** This system employs approximately 4,500 faculty and support staff and has a combined operating budget of approximately $1 billion per year**.**

o. *Vermont*: Vermont is home to the University of Vermont, the Vermont State Colleges, and a number of private colleges. In 2019, Vermont State Colleges enrolled over 11,060 students. The University of Vermont enrolled over 12,800. For Fiscal Year 2020, the State appropriated about $32 million to

fund the Vermont State Colleges and about $42 million to the University of Vermont. Vermont institutions received more than $50 million from the Department in 2019, and estimate receiving over $52 million in 2020.

p. *Virginia*: There are over 375 institutions of higher education operating in Virginia, including 39 public institutions, 30 private non-profit colleges and universities, five regional higher education centers, one public/private medical school, and over 300 for-profit, out-of-state, or vocational institutions. In 2019, there were over 525,000 students enrolled in Virginia's institutions of higher education. The current state budget in Virginia appropriated approximately $1.9 billion to higher education funding. Virginia's higher education institutions received more than $2.2 billion in federal funding in Fiscal Year 2019. Virginia also is home to 23 community colleges, in which 158,000 students were enrolled in 2019. Those community colleges received approximately $384 million in state funding in Fiscal Year 2019 and approximately $398 million in Fiscal Year 2020.

q. *Washington*: Washington has a "vital interest" in ensuring that accessible higher education opportunities are available to its residents. Wash. Rev. Code § 28B.07.010. Washington has six public baccalaureate colleges and universities: the University of Washington, Washington State University, Central Washington University, Eastern Washington University, Western Washington University, and the Evergreen State College. Washington also has a system of 30 public community and technical college districts comprised of 34 separate colleges, whose funding is coordinated by the Washington State

Board for Community and Technical Colleges. In addition, Washington is home to a number of independent, private colleges and a variety of other higher education institutions. Washington postsecondary institutions received approximately $444 million from the Department in 2019, and are scheduled to receive approximately $462 million in 2020. Washington's six public baccalaureate colleges and universities have a combined enrollment of over 116,000 students each year. Washington's community and technical colleges educate over 148,000 students each year. Altogether, Washington's operating budget for 2019–2021 provides over $4 billion to support the State's higher education system.

r. *Wisconsin*: Wisconsin is home to more than 70 universities and colleges that confer an Associate's degree or higher. All public universities in the State of Wisconsin are part of the University of Wisconsin System. The University of Wisconsin System is one of the largest systems of public higher education in the country, serving approximately 170,000 students each year through 13 universities across 26 campuses and a statewide extension network. Wisconsin higher education institutions collectively received $390 million from the Department in 2019 and are scheduled to receive more than $400 million in 2020.

203. Collectively, the States' systems of publicly supported higher education have an enrollment of more than 7 million students and receive more than $15 billion from the Department annually.

204. Each of the institutions in the States' systems of higher education receives federal funding and, as a result, is subject to the Rule.

205. To comply with the Rule by the August 14, 2020, deadline, primary, secondary, and postsecondary schools face a number of obstacles that will impose substantial direct costs on these State-sponsored institutions. *See* Part II.C, *supra*.

206. In addition, the ongoing national health emergency caused by the COVID-19 pandemic makes it nearly impossible for schools to review the Rule and revise their policies by August 14, 2020. As of filing, every primary and secondary school in all but one Plaintiff State has been ordered to physically close and to operate remotely. Primary and secondary schools in California have also been closed and conducting all operations remotely under mandatory public health orders since March 2020. Likewise, virtually all postsecondary schools in Plaintiff States are physically closed and operating remotely. All of Plaintiff States have imposed stay-at-home or safer-at-home orders that to some extent require students, faculty, and staff to work or engage in schooling from home. Schools in Plaintiff States do not know yet whether they will return in the fall for in-person classes.

207. The Rule will require state-sponsored institutions to adopt new, costly, unnecessary, and unduly burdensome grievance procedures, forcing them to bear additional costs. *See* Part II.A.3, *supra*.

208. Where a Plaintiff State's law and other federal laws, such as the Clery Act and VAWA, provide greater protections than the Rule, schools subject to these laws will need to create parallel code of conduct provisions and enforcement mechanisms—one addressing "Title IX sexual harassment" and one addressing "non-Title IX sexual harassment." So too will schools that wish to continue providing protections for students beyond the Rule out of concern for

campus safety and student well-being, to ensure the nondiscriminatory educational experience promised by Title IX, or both.

209. Having two code of conduct provisions and two enforcement mechanisms for sexual harassment claims will burden students and schools alike and lead to significant confusion. Schools must determine how to clearly and effectively communicate the existence of different policies and the differences between them, without indicating that one policy's protections and procedures take precedence over the other. Schools that receive notice of sexual harassment will first have to gather enough information to determine which policy to use so they can accurately advise the complainant on the process for pursuing a formal complaint. 85 Fed. Reg. at 30,574–75 (to be codified at 34 C.F.R. § 106.44(a) ("The Title IX Coordinator must promptly contact the complainant to . . . explain to the complainant the process for filing a formal complaint.")). Where the facts are unclear, relevant school administrators must take time to consult with general counsel and others, causing further delays. Where a school's Title IX office does not handle non-Title IX sexual harassment investigations, but the investigation reveals information indicating that harassment thought to fall outside of Title IX actually falls within it (or vice versa), school administrators must determine how to hand off evidence between different offices while clearly explaining to both parties what will happen next. And should a party disagree with the school's determination that the harassing conduct falls under the school's non-Title IX policy, the party can appeal and seek OCR review, adding further delays. 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(8)(i)).

210. The Rule's August 14 effective date will force schools to take temporary and emergency measures to implement the Rule's minimum requirements, limiting schools' ability to consult with students and others affected by the Rule in the process. Many schools and state or

local policies require this consultation before implementing such significant changes. The lack of engagement with and input from school communities will undermine the legitimacy of the resulting measures and potentially lead to lower compliance with the Rule's requirements.

211. The effective date of August 14, 2020, will also make it difficult for schools to take certain additional steps they consider important to protecting their students, employees, and others. For example, many schools may wish to craft non-disclosure agreements to protect the privacy of complainants and respondents during the pendency of an investigation or after resolution—but will not be able to do so before August 14.

212. The Rule will impede schools' efforts to prevent and respond to incidents of sexual harassment, including sexual assault. As a result, schools will be forced to devote additional resources to addressing the physical, emotional, psychological, and other consequences of sexual harassment.

213. Because they will face greater difficulties in combatting sexual harassment against students, schools will also be at risk of reputational harm as a result of the Rule.

214. All of these financial and other harms will be felt by state-sponsored education institutions—primary, secondary, and postsecondary—in the Plaintiff States. The States will suffer direct harm to their proprietary interests as a result of the Rule.

B. The Rule Will Harm Plaintiff States' Sovereign Interests

215. The Rule will directly harm the States' sovereign interests by interfering with their primary authority to enact and enforce their own laws governing education institutions within their borders, as well as interfere with the important parallel role States have traditionally played in eliminating discrimination within their borders.

216. The Rule will directly harm the States' sovereign interests by inhibiting their ability to protect students from sexual harassment, provide campuses free from sex

discrimination, and fulfill their educational missions to provide equal opportunity, benefit, and access to students without regard to sex—all while retaining necessary federal funds.

217. Traditionally, States have acted as the primary regulators of primary, secondary, and postsecondary education. Although the federal government has expanded its role in education, state and local officials continue to have primary responsibility for decisions relating to the oversight of education institutions.

218. State and local officials have primary responsibility for overseeing K-12 schools and for setting policies relating to elementary and secondary education:

a. *Pennsylvania*: The Pennsylvania Department of Education oversees the 500 public school districts, more than 170 public charter schools, public cyber charter schools, public Intermediate Units, the education of youth in State Juvenile Correctional Institutions, and Head Starts and publicly funded preschools. The Pennsylvania State Board of Education reviews and adopts regulations that govern educational policies and principles and establish standards governing the educational programs of the Commonwealth. The Board of Education also approves the creation of new school districts or changes in the boundaries of existing districts, manages the State School Fund and adopts master plans for basic education. Local school boards exercise primary responsibility over budgetary and other decisions for each school district.

b. *New Jersey*: The Constitution and legislature charge the State of New Jersey with maintaining a "thorough and efficient system of free public schools" for residents ages five through 18. N.J. Const. Art. VIII, Sec. IV, Para 2; N.J. Stat.

Ann. § 18A:7F-44(b). The State Board of Education has general supervision and control of public education in the state, with exception of higher education. N.J. Stat. Ann. § 18A:4-10. The Commissioner of Education has supervision of all schools in the state that receive support or aid from state appropriations, other than institutions of higher education. N.J. Stat. Ann. § 18A:4-23.

c. *California*: The State is the legal and political entity with plenary responsibility for educating all California public school students. The State funds and oversees the operation of the largest common system of public schools in the nation, which serves nearly 6.2 million children in more than 10,500 schools. The State has the constitutional responsibility to establish and maintain the system of common schools and a free education, Cal. Const., art. IX, § 5, and to assure that all California public school students receive their fundamental right to an equal educational opportunity, regardless of sex and other protected factors, *id.* art. I, § 7(a) & art. IV, § 16(a). The California State Superintendent of Public Instruction oversees the schools within the state. Cal. Const., Art. IX, § 2; Cal. Educ. Code § 33112. The California State Board of Education is responsible for adopting rules and regulations for elementary and secondary schools in California. Cal. Educ. Code § 33031.

d. *Colorado*: The Colorado State Board of Education oversees the Colorado Department of Education and has general supervision authority of public schools in Colorado. Colo. Const. art. IX § 1; Colo. Rev. Stat § 22-2-107.

e. *Delaware*: The Delaware Department of Education exercises "general control and supervision over" Delaware's 19 operating public school districts, and has the ultimate responsibility for developing education policy, setting educational standards, and ensuring that school districts meet those standards. Del. Code Ann., tit. 14, § 121. The Delaware State Board of Education, by law, provides advice and guidance to the Delaware Secretary of Education on education policy, new initiatives, and budget requests, and approves regulations governing a wide variety of educational topics, including content standards, assessments, graduation requirements, educator evaluation, athletic regulations, and licensure and certification.

f. *District of Columbia*: The District of Columbia Office of the State Superintendent is the District of Columbia's state education agency tasked with overseeing K-12 education in the District. The District of Columbia Public Schools ("DCPS") is the traditional public school system in the District of Columbia. DCPS develops policies and codes of conduct for the traditional public schools in the District. DCPS engaged in a year-long resource-intensive process to update and ensure that its sexual harassment policies fully comport with prior guidance. That process is nearing completion; were this Rule to go into effect, DCPS would need to completely revamp its procedures at great cost of resource and time.

g. *Illinois*: The Illinois State Board of Education ("ISBE"), established under the Illinois School Code, administers elementary and secondary public education in the State of Illinois. ISBE oversees 852 public school districts, 141 public

charter schools, a state-operated educational facility, and numerous cooperatives and regional programs. ISBE reviews and adopts regulations that govern educational policies and principles and establishes standards governing K-12 education programs. *See* 105 ILCS 5/1A-4.

h. *Massachusetts*: The Massachusetts Department of Elementary & Secondary Education ("MA-DESE") serves as the chief regulator and administrator for the public preK-12 school system in Massachusetts. Among other responsibilities, MA-DESE distributes state and federal education money, licenses educators, helps districts implement learning standards, monitors schools and districts, and convenes districts to share best practices. The Massachusetts Board of Elementary and Secondary Education ("MA-BESE") is statutorily created and is comprised of 11 members, nine of whom are appointed by the Governor. MA-BESE's responsibilities include promulgating regulations governing schools and school districts, approving learning standards, deciding when to intervene in a low-performing school district, and hiring the MA-DESE commissioner. Local school committees oversee budget and other decisions for each district and establish educational goals and policies consistent with state law and statewide goals and standards instituted by MA-BESE.

i. *Michigan*: The Michigan Constitution vests the State Board of Education with "[l]eadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees," and the State

Board of Education "serve[s] as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith." Mich. Const. art. VIII, § 3. In the 2019–2020 school year, Michigan was home to 836 public school districts and 56 intermediate school districts with over 1.5 million students. While the school districts exercise primary responsibility over budgetary and other decisions for each district, the Michigan Department of Education implements federal and state legislative mandates in education and carries out the policies of the State Board of Education, and the State Board of Education has "leadership and general supervision over all public education." Mich. Const. art. VIII, § 3; Mich. Comp. Laws § 388.1009. The State Board of Education "serve[s] as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith." Mich. Const. art. VIII, § 3.

j. *Minnesota*: In Minnesota, local school boards "have the general charge of the business of the district, the school houses, and of the interests of the schools thereof." Minn. Stat. § 123B.02, subd. 1. The Commissioner of the Minnesota Department of Education "adopt[s] goals for and exercise[s] general supervision over public schools and public educational agencies in the state." Minn. Stat. § 127A.05, subd. 3.

k. *New Mexico*: The State regulates its 155 traditional secondary school districts and charter schools serving 330,029 students through the Public Education

Department, the State educational agency. The public school code applies to children from age five to 22. NMSA 1978, Sec. 22-1-2 (O).

l. *North Carolina:* The North Carolina State Board of Education and the North Carolina Department of Public Instruction have general supervisory authority of public schools in North Carolina. N.C. Gen. Stat. § 115C-10 to -22.

m. *Oregon*: Oregon law provides that the Oregon State Board of Education shall set standards for and adopt rules for governance of public kindergarten, elementary, and secondary schools. The State Board of Education is also required by statute to adopt rules providing that no public elementary or secondary school shall discriminate in determining participation in scholastic activities. ORS 326.051. "Discrimination" has the same meaning as set forth in Section 659.850 of the Oregon Revised Statutes, including discrimination on the basis of sex and sexual orientation. Section 326.111 of the Oregon Revised Statutes establishes the Oregon Department of Education to administer the functions exercised by the State Board of Education.

n. *Rhode Island*: The Rhode Island Department of Education oversees 36 school districts with 300 schools and over 143,000 students. The 17-member Rhode Island Board of Education was created by the Rhode Island General Assembly and is responsible for the governance of all public education in Rhode Island. The Commissioner of Elementary and Secondary Education is responsible for carrying out "the policies and programs formulated by the council on elementary and secondary education" and "distribution of state school funds in accordance with law and the regulations of the board" R.I.G.L. § 16-1-5.

o. *Virginia*: The Constitution of Virginia vests general supervision of the Commonwealth's public school system in the Board of Education. Va. Const. Art. VIII, § 4; *see also* Va. Code Ann. § 22.1-8. Standards of quality for the Commonwealth's school system are set by the Board of Education, subject to revision by the General Assembly. *See* Va. Const. Art. VIII, § 2. The Board of Education develops guidance and promulgates regulations for the administration of state programs. The Constitution further provides that, "[s]ubject to the ultimate authority of the General Assembly," the Board of Education has "primary responsibility and authority for effectuating the educational policy" of the Commonwealth. Va. Const. Art. VIII, § 5. The supervision of schools in each school division is vested in a local school board. *Id.* § 7; *see also* Va. Code Ann. § 22.1-28.

p. *Vermont*: Vermont's State Board of Education has the authority to establish and advance education policy for the State. Vt. Stat. Ann. tit. 16, § 164. Vermont's Secretary of Education has the authority to execute the policies adopted by the State Board; evaluate the program of instruction in Vermont's public schools; advise the Legislature concerning proposed laws affecting the public schools; supervise and direct the execution of laws relating to the public schools and ensure compliance; and supervise the expenditure and distribution of money appropriated by the State for public schools. Vt. Stat. Ann. tit. 16, § 212. The Secretary is also charged with annually determining whether students in each Vermont public school are provided educational

opportunities substantially equal to those provided in other public schools. Vt. Stat. Ann. tit. 16, § 165.

q. *Washington*: The Washington Office of the Superintendent of Public Instruction ("OSPI") oversees the State's K-12 education system, which includes 295 public school districts (approximately 2,000 schools) and six state-tribal education compact schools. The Superintendent of Public Instruction supervises all matters pertaining to public schools, including but not limited to certifying educators, administering a statewide student assessment system, maintaining a manual of the Washington state common school code, and establishing a coordinated program for the prevention of sexual abuse of K-12 students. *See* Wash. Rev. Code §§ 28A.300.040, 041, 160. While OSPI oversees the public school system statewide, the primary governing body of each K-12 school is its locally elected school board.

r. *Wisconsin*: The Wisconsin State Superintendent provides "general supervision" of all public K-12 schools and has the responsibility to "[a]scertain the condition of the public schools, stimulate interest in education and spread as widely as possible a knowledge of the means and methods which may be employed to improve the schools." Wis. Stat § 115.28(1).

219. Most States also exercise primary responsibility for regulating public postsecondary education in their borders:

a. *Pennsylvania*: The Pennsylvania Department of Education oversees the Commonwealth's Career and Technology Centers/Vocational Technical Schools and community colleges. The Pennsylvania State Board of Education

has the authority to review and adopt regulations that govern educational policies and principles and establish standards governing the educational programs of the Commonwealth, including the authority to adopt policies with regard to postsecondary schools, to regulate the community colleges, and to adopt master plans for higher education. The Pennsylvania State System of Higher Education is governed by a Board of Governors made up or appointed by Commonwealth officials. The Commonwealth System of Higher Education universities are governed by boards of trustees with a minority of representatives appointed by Commonwealth officials.

b. *New Jersey*: The Secretary of Higher Education is empowered to enforce the observance of State laws among institutions of higher education. N.J. Stat. Ann. § 18A:3B-34. The Secretary makes final administrative decisions over institutional licensure and university status as well as over a change in the programmatic mission of an institution under her purview. N.J. Stat. Ann. § 18A:3B-14. And the Secretary makes recommendations to the Governor and Legislature on higher education initiatives and programs of Statewide significance and implements Statewide planning on higher education. *Id.* The governing boards of each of New Jersey's public institutions of higher education "have authority over all matters concerning the supervision and operations of the institution including fiscal affairs, the employment and compensation of staff." N.J. Stat. Ann. § 18A:3B-6. They are required to compile and make public annual reports regarding their fiscal and governance condition. N.J. Stat. Ann. § 18:3B-35; N.J. Stat. Ann. § 18A:65-14.5. The

President's Council, consisting of the presidents of all higher education institutions that receive State funding, provide advice and policy recommendations to the Secretary of Higher Education. N.J. Stat. Ann. § 18A:3B-7, -8.

c. *California*: The University of California is a public trust formed under the California Constitution and funded by the State. Cal. Const., art. IX, § 9; Cal. Educ. Code § 92100 et seq. The nation's largest four-year public university system, the California State University system, is also part of the State of California's public higher education system and includes twenty-three campuses across the State. Cal. Educ. Code §§ 89001, 84001. The California Community Colleges are also part of the State of California's public higher education system. Cal. Const., art. XVI, § 8; Cal. Educ. Code §§ 66700, 70900. The California Constitution mandates and funds a system of free public schools, Cal. Const. art. IX, §§ 5, 6, and sets a minimum funding level for "the moneys to be applied by the State for the support of school districts and community college districts." Cal. Const., art. XVI, § 8(b). State law directs the Board of Governors of the California Community Colleges to prepare the system's budget, identify total revenue needs in order to properly serve the education system, and identify expenditures for the state general apportionment and for categorical programs, new programs, and budget improvements. Cal. Educ. Code § 70901(b)(5)(A)(I).

d. *Colorado*: The Colorado Commission on Higher Education, which is located in the Colorado Department of Higher Education, is the central policy and

coordinating board for higher education in the State of Colorado. Colo. Rev. Stat. §§ 23-1-102 and 24-1-114. The governing board of each institution of higher education is responsible for promulgating its institution's policies governing student conduct and discipline. Each institution is also responsible for establishing policies and procedures governing its faculty, administrative, and classified employees. Each of Colorado's institutions of higher education is governed by a board of regents, board of governors, or board of trustees (collectively, the "governing boards") either elected by the citizens of the state or appointed by the governor with the consent of the senate. Colo. Rev. Stat. §§ 23-20-102 (University of Colorado System), 23-30-102 (Colorado State University System), 23-40-104 (University of Northern Colorado), 23-41-101 (Colorado School of Mines), 23-51-102 (Adams State University), 23-52-102 (Fort Lewis College), 23-53-102 (Colorado Mesa University), 23-54-102 (Metropolitan State University of Denver), 23-56-102 (Western Colorado University), 23-60-104 (Colorado Community College System). Colorado statute also authorizes the creation of local district colleges. Colo. Rev. Stat. § 23-71-103. Colorado's two local district colleges are governed by governing boards elected by citizens of their districts.

e. *Delaware*: The Delaware Department of Education, through its Higher Education Office, works with Delaware's public and private higher education institutions to ensure students have access to high quality education, and is the lead communication agency on higher education with the Federal government. The Higher Education Office is also responsible for providing for the

licensure of any institution of higher education that offer courses, programs, or degrees within Delaware but are not incorporated or located in Delaware.

f. *District of Columbia*: The University of the District of Columbia is an independent agency governed by a Board of Trustees, which has the power to adopt policy regulations for the university, including those relating to gender discrimination and sexual harassment. *See* D.C. Code § 38-1202.01(a).

g. *Illinois*: The Illinois Board of Higher Education ("IBHE") is the coordinating body for the state's systems of colleges and universities. IBHE adopts regulations that govern educational policies and standards governing postsecondary education. IBHE recommends to the State the budgetary needs for operations, grants, and capital improvements for higher education institutions and agencies. It approves proposals by public university governing boards and the Illinois Community College Board for new units of instruction, research, or public service. It also reviews existing instruction, research, and public service programs to determine their continued educational and economic justification.

h. *Massachusetts:* The Massachusetts Department of Higher Education, along with the Massachusetts Board of Higher Education ("MA-BHE"), serves as coordinator of Massachusetts's system of public higher education and as the employer of record. MA-BHE promulgates regulations to govern the state's public higher education system, establishes overall goals for the system, reviews and approves admission and program standards and five-year plans for higher education institutions, and receives and disburses federal funds.

MA-BHE is a statutorily created agency comprised of 13 members, including nine members appointed by the Governor.

i. *Minnesota*: The Board of Trustees for the Minnesota State Colleges and Universities system has the authority to govern the seven universities and 30 colleges within its system. Minn. Stat. § 136F.06, subd. 1. The Office of Higher Education, which is headed by a Commissioner who is appointed by the Governor, oversees private colleges and universities in the State. Minn. Stat. § 136A.01, subd. 2.

j. *New Mexico*: The New Mexico Constitution establishes seven four-year public postsecondary institutions and ten two-year branch community colleges that are regulated by boards of regents. In addition, the State operates seven two-year independent community colleges regulated by community college boards. The New Mexico Higher Education Department oversees all of these postsecondary institutions.

k. *North Carolina*: The Board of Governors of the University of North Carolina has the responsibility for the planning, development, and overall governance of the UNC System, which is comprised of 17 constituent institutions. N.C. Gen. Stat. § 116, *et seq.* The Board of Governors has 24 voting members, elected by the North Carolina General Assembly to staggered four-year terms. Additionally, the president of the UNC Association of Student Governments serves as a nonvoting, ex officio member of the Board. The Board elects the President of the UNC System. The Board of Governors maintains The Code and the UNC Policy Manual. The Code incorporates the requirements of the

North Carolina constitution and General Statutes, as well as Board bylaws and other high-level policies. The UNC Policy Manual provides more specific direction and policies on university matters, including a system-wide policy to establish legally supportable, fair, effective, and efficient procedures for student disciplinary proceedings related to sexual harassment and Title IX violations (Chapter 700.4—Student Conduct and Discipline). The State Board of Community Colleges (CC State Board) is the governing authority for the 58 community colleges in the State. The CC State Board consists of 20 members—10 appointed by the governor, 8 elected by the General Assembly, and the lieutenant governor and the state treasurer, who serve as ex-officio members. The CC State Board establishes policies, regulations, and standards for the administrative offices and the institutions that comprise the Community College System.

l. *Oregon*: It is the law and policy of the State of Oregon to promote and support post-secondary education of its citizens, which benefits the economy of the State and the welfare of Oregonians. ORS §§ 350.001 et seq. The State regulates seven public universities in the State (ORS Chapter 352), as well as community colleges (ORS Chapter 341), and career and trade training (ORS Chapter 344). Section 350.050 *et seq.* of the Oregon Revised Statutes establishes the Higher Education Coordinating Commission, which sets standards for institutions of higher education. In addition to other policies and funding requirements, Oregon law requires all institutions of higher education to have written policies regarding sexual assault, harassment, stalking, and

dating violence that occur both on and off campus. ORS §§350.253, ORS 350.255

m. *Rhode Island*: The Council on Postsecondary Education provides oversight of the public higher education system in Rhode Island. The Council adopts standards, requires enforcement, and exercises general supervision over all public higher education in the state. R.I.G.L. § 16-59-4. Duties also include formulating broad policies to implement the goals and objectives of the Board of Education along with preparing and maintaining a 5-year budget for higher education that implements the financial recommendations of the Board of Education. The Rhode Island Office of the Postsecondary Commissioner supports the Board of Education and Council on Postsecondary Education as the State's higher education executive officer.

n. *Vermont*: The Vermont State Board of Education has the authority to issue certificates of approval and of degree-granting authority to post-secondary institutions in the state whose goals, objectives, programs, and resources meet State Board standards. Vt. Stat. Ann. tit. 16, § 176. Vermont's Higher Education Council reviews post-secondary institutions' eligibility for certain federal funding. Vt. Stat. Ann. tit. 16, § 2881. State officials make up a majority of the governing Board of Trustees for the Vermont State Colleges system, Vt. Stat. Ann. tit. 16, §§ 2172-74, and roughly half of the governing Board of Trustees for the University of Vermont, Vt. Stat. Ann. tit. 16, app. ch. 1 § 1-2.

o. *Virginia*: The State Council of Higher Education for Virginia ("SCHEV") is the Commonwealth's coordinating body for higher education. Pursuant to state statute, SCHEV "advocate[s] for and promote[s] the development and operation of an educationally and economically sound, vigorous, progressive, and coordinated system of higher education in the Commonwealth." Va. Code Ann. § 23.1-200. The coordination and governance of higher education in Virginia are shared responsibilities among the General Assembly, the Governor, the institutions of higher education, and SCHEV. The Governor appoints members to public institutions' Boards of Visitors, the State Board for Community Colleges, and SCHEV, and prepares and submits a biennial budget. The General Assembly confirms the Governor's nominations, adopts a biennial budget, and enacts legislation pertaining to higher education. SCHEV develops a statewide strategic plan and provides policy and funding recommendations. The governing boards at institutions of higher education set institutional policy goals and priorities, approve budget requests to the Governor and General Assembly, and ensure that institutions effectively and efficiently use state funds.

p. *Washington*: Each of Washington's six public baccalaureate colleges and universities and each of its 30 community and technical college districts is governed by a board of regents or board of trustees (collectively, the "governing boards") appointed by the governor with the consent of the senate. Wash. Rev. Code §§ 28B.20.100 (University of Washington), 28B.30.100 (Washington State University), 28B.35.100 (Regional

Universities), 28B.40.100 (The Evergreen State College), 28B.50.100 (Community & Technical Colleges). Each governing board is responsible for promulgating its institution's policies governing student conduct and discipline pursuant to Washington's Administrative Procedure Act, Wash. Rev. Code Chapter 34.05. *See* Wash. Rev. Code §§ 28B.20.130 (University of Washington), 28B.30.150 (Washington State University), 28B.35.120 (Regional Universities), 28B.40.120 (The Evergreen State College), 28B.50.140 (Community & Technical Colleges). Each institution is also responsible for establishing policies and procedures governing its faculty, administrative, and classified employees. This process includes negotiating collective bargaining agreements with those employees who are represented by unions.

q. *Wisconsin*: The Board of Regents of the University of Wisconsin System is granted the primary responsibility for governance of the University of Wisconsin System through enacting policies and promulgating rules for governing the system, planning for the future needs of the State for university education, ensuring the diversity of quality undergraduate programs while preserving the strength of the State's graduate training and research centers, and promoting the widest degree of institutional autonomy within the controlling limits of system-wide policies and priorities established by the board. Wis. Admin. Code § UWS 36.09. The State's Department of Safety and Professional Services' Educational Approval Program is charged with protecting the public by inspecting and approving private trade,

correspondence, business, and technical schools doing business within the state. Wis. Stat. § 440.52.

220. The States have primary responsibility for protecting the safety of their residents, including children in K-12 institutions and children and adults attending postsecondary schools.

221. Consistent with these responsibilities, the States have enacted laws and regulations to prevent discrimination on the basis of sex in education institutions and to protect the safety of students and others in K-12 and postsecondary schools. The States continue to vigorously enforce these laws and regulations:

a. *Pennsylvania*: Under Act 16 of 2019, postsecondary institutions in Pennsylvania must adopt a clear, understandable written policy on sexual harassment and sexual violence that informs victims of their rights under federal and state law, including the crime victims' bill of rights. The Pennsylvania Department of Education subsequently created a model sexual harassment and sexual violence policy for postsecondary schools. Pa. Dep't of Educ., *Sexual Violence and Sexual Harassment Model Sexual Misconduct Policy*. Pennsylvania institutions have until June 30, 2020, to comply.

b. *New Jersey*: Every public institution of higher education, elementary school and secondary school in New Jersey is required to adopt a policy included in its student code of conduct prohibiting harassment, intimidation, or bullying. N.J. Stat. Ann. § 18A:3B-68; N.J. Stat. Ann. § 18A:37-15. New Jersey law sets out particular standards for conduct that must be prohibited under this policy. *Id.* The New Jersey Law Against Discrimination ("LAD"), N.J. Stat. Ann. § 10:5-1 to-49, prohibits all primary, secondary and postsecondary

schools, except any school operated by a religious institution, from discriminating against students based on sex. This includes prohibiting sexual harassment "that a reasonable student of the same age, maturity level, and [sex] would consider sufficiently severe or pervasive enough to create an intimidating, hostile or offensive school environment[.]"N.J. Stat. Ann. § 10:5-5(f); 10:5-12(l); *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Education*, 189 N.J. 381, 402–03 (N.J. 2007). Schools are required to take action to prevent sexual harassment and must promptly address it if they knew or should have known about it. *Id.* at 407. The LAD provides for administrative or court enforcement by the State's Division on Civil Rights, as well as a private right of action. N.J. Stat. Ann. § 10:5-13. In May 2019, New Jersey enacted the Sexual Assault Victim's Bill of Rights, to ensure the dignity and safety of victims and their access to necessary services and investigative procedures. N.J. Pub. L. 2019-103.

c. *California*: The California Equity in Higher Education Act establishes the policy of the State of California to afford all persons equal rights and opportunities in postsecondary education institutions of the State. Cal. Educ. Code §§ 66251, 66252. As such, it is the policy of the State of California that all persons, regardless of sex, are free from discrimination of any kind in the postsecondary education institutions of the State. Cal. Educ. Code §§ 66270; 66281.5. State law authorizes the Board of Governors of the California Community Colleges, the Trustees of the California State University, and the Regents of the University of California to adopt regulations as required by law

to implement the nondiscrimination requirements set forth in state law. Cal. Educ. Code § 66271.1. Under state law, for K-12 students, the definition of sexual harassment includes unwelcome conduct of a sexual nature that has the purpose or effect of having a negative impact upon the individual's academic performance or of creating an intimidating, hostile, or offensive education environment. Students are protected from sexually harassing conduct, including cyber sexual bullying, that is related to a school activity or school attendance, including but not limited to acts that occur while a student is going to or coming from school, during lunch whether on or off campus, and while going to or coming from a school-sponsored activity. Cal. Educ. Code §§ 200 & 48900, et seq. Separate and apart from state law school discipline procedures, state law also establishes a detailed grievance process for promptly and equitably investigating and resolving complaints of sexual harassment and assault in K-12 schools under the state's Uniform Complaint Procedures. These procedures include collecting evidence from both parties, interviewing the parties and witnesses, issuing a letter of findings, and a right to appeal to the California Department of Education. Cal. Educ. Code, § 33315; Cal. Code Regs., tit. 5, §§ 4610, et seq. State law does not prohibit schools from acting outside the Uniform Complaint Procedures to more quickly address reports and complaints.

d. *Colorado*: Colorado law requires Colorado public universities and colleges to adopt sexual misconduct policies for enrolled students. Colo. Rev. Stat. § 23-5-146(2). These policies must contain fair, impartial, and prompt procedures

for the investigation of sexual misconduct, and require the college or university to complete an investigation or adjudicative process within an average of sixty to ninety days. *Id.* § 23-5-146(3)(d)(I). Although parties may have advisors during the process, those advisors are not permitted to speak and all questions for witnesses must go through the official individual or individuals conducting or participating in the investigation and adjudication process. *Id.* § 23-5-146(3)(d)(III)-(IV).

e. *Delaware*: Under Delaware law, each public school district and charter school is required to establish and disseminate a policy for responding to teen dating violence and sexual assault that includes guidelines on mandatory reporting and confidentiality, and protocols for responding to incidents of teen dating violence and sexual assault. Del. Code Ann. tit. 14, § 4166. Higher education institutions in Delaware with more than 1,000 students are required to offer to sexual assault victims to report incidents perpetrated by or against a student to law enforcement authorities servicing the institution, to inform victims of their rights under the Delaware Victims' Bill of Rights, to inform victims of available confidential medical and counseling services, and to report data to the State of Delaware to ensure compliance with the law. Higher education institutions are also required to provide training to responsible employees regarding the prevalence and nature of sexual assaults on college campuses, and the requirements of state and federal law. Del. Code Ann. tit. 14, ch. 90A.

f. *District of Columbia*: The District of Columbia City Council passed the D.C. School Safety Omnibus Act of 2018 ("DCSSOA") to promote and protect

District students' safety by preventing sexual harassment and dating violence against students by faculty, staff, and other students in District schools. The DCSSOA defines "sexual harassment" as "any unwelcome or uninvited sexual advances, requests for sexual favors, sexually motivated physical conduct, stalking, or other verbal or physical conduct of a sexual nature that can be reasonably predicted to: (A) Place the victim in reasonable fear of physical harm to his or her person; (B) Cause a substantial detrimental effect to the victim's physical or mental health; (C) Substantially interfere with the victim's academic performance or attendance at school; or (D) Substantially interfere with the victim's ability to participate in, or benefit from, the services, activities, or privileges provided by a school." D.C. Code § 38-952.01(5). The DCSSOA's broad definition of "sexual harassment" differs from the Rule's definition which restricts schools from investigating sexual harassment until it becomes "severe, pervasive, and objectively offensive." The D.C. Human Rights Act of 1977 ("DCHRA"), the country's most expansive state human rights law, protects District residents from sex discrimination in education institutions, which includes "deny[ing], restrict[ing], or . . . abridge[ing] or condition[ing] the use of, or access to, any of its facilities, services, programs, or benefits of any program or activity to any person otherwise qualified." D.C. Code § 2–1402.41.

g. *Illinois*: The Illinois School Code requires schools to create, maintain, and implement an age-appropriate policy on sexual harassment. 105 ILCS 5/10-20.69 (P.A. 101-418). The School Code also requires that all public school

classes that teach sex education in grades 6 through 12 must include course material and instruction about unwanted physical and verbal sexual advances and what may be considered sexual harassment or sexual assault. 105 ILCS 5/27-9.1(c)(8). In 2015, Illinois enacted the Preventing Sexual Violence in Higher Education Act ("PSVHEA") establishing requirements for all higher education institutions aimed at raising awareness about and addressing campus sexual violence, domestic violence, dating violence and stalking. The PSVHEA mandates that all universities "shall adopt a comprehensive policy concerning sexual violence, domestic violence, dating violence, and stalking consistent with governing federal and State law." 110 ILCS 155/10. It outlines detailed requirements schools must follow to address and prevent sexual violence.

h. *Massachusetts*: Massachusetts has several state laws which protect against sex discrimination and sexual harassment in education institutions. Mass. Gen. Laws ch. 151C, § 2(g) (fair educational practices); Mass. Gen. Laws ch. 76, § 5 (discrimination on the basis of sex); Mass. Gen. Laws ch. 12, § 11H (Massachusetts Civil Rights Act). Under Massachusetts law, prohibited sexual harassment by an education institution includes "any sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when: (i) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of the provision of the benefits, privileges or placement services or as a basis for the evaluation of academic achievement; or (ii) such advances, requests or

conduct have the purpose or effect of unreasonably interfering with an individual's education by creating an intimidating, hostile, humiliating or sexually offensive educational environment." Mass. Gen. Laws ch. 151C, § 1(e). The Massachusetts Commission Against Discrimination, a Massachusetts agency that investigates and adjudicates violations of anti-discrimination laws, enforces this prohibition for students seeking admission to any education institution or who are enrolled in vocational training institutions. Mass. Gen. Laws ch. 151C, § 3(a). The Massachusetts Board of Elementary and Secondary Education has promulgated regulations providing that: "All public schools shall strive to prevent harassment or discrimination based upon a student's race, color, sex, gender identity, religion, national origin or sexual orientation and all public schools shall respond promptly to such discrimination or harassment when they have knowledge of its occurrence." 603 Code Mass. Regs. 26.07(2). Massachusetts regulations contain requirements for schools' notification and complaint procedures for discrimination and harassment. 603 Code Mass. Regs. 26.08.

i. *Michigan*: Under Michigan state law, each local school district's board "shall adopt and implement a written sexual harassment policy." Mich. Comp. Laws § 380.1300a. State law further provides that the sexual harassment policies "shall prohibit sexual harassment by school district employees, board members and pupils directed toward other employees or pupils and shall specify penalties for violation of the policy." *Id.*

j. *Minnesota*: Under Minnesota law, in addition to the State's Human Rights Act that prohibits any educational institution from engaging in sex discrimination, Minn. Stat. § 363A.13, subd. 1, postsecondary institutions must have a written policy on sexual harassment and sexual violence, Minn. Stat. § 135A.15, subd. 1(b). The Minnesota State Colleges and Universities system has a policy that prohibits sexual harassment that is "directed at verbal or physical conduct that constitutes discrimination/harassment under state and federal law and is not directed at the content of speech." Its sexual violence policy states that it "is committed to eliminating sexual violence in all its forms." Minnesota law requires local school boards to adopt written sexual harassment policies and the Commissioner of the Minnesota Department of Education "maintain[s] and make[s] available to school boards a model sexual, religious, and racial harassment and violence policy." Minn. Stat. § 121A.03, subds. 1 & 2.

k. *Oregon*: Oregon has numerous policies against the sorts of conduct implicated in the Rule. Oregon law prohibits discrimination on the basis of sex. ORS 659A.030. Harassment (ORS 166.065) and offensive sexual contact (ORS 163.415) are crimes under Oregon law, as is offensive contact with a minor (ORS 163.479). Oregon Revised Code Section 342.700 et seq. requires all public school districts, education service districts and public charter schools to adopt a sexual harassment policy applicable to all students and staff. The law sets forth the requirements for the policies, including definitions and consequences for assault, unwanted physical and verbal contact, and demands for sexual favors. ORS 342.704.

l. *Rhode Island*: Under Rhode Island law, discrimination on the basis of sex is prohibited in all public elementary and secondary schools in the state. R.I.G.L. § 16-38-1.1. In 2007, the Lindsay Ann Burke Act was passed, requiring all schools to adopt a policy responding to allegations of teen dating and sexual violence. R.I.G.L. § 16-85-2. The Council on Postsecondary Education issued a Sexual Harassment and Sexual Violence policy in 2015 to prohibit all forms of sexual harassment and sexual violence that all faculty, staff and students at all higher education entities in Rhode Island must comply with.

m. *Virginia*: Virginia's General Assembly has enacted several statutes that protect victims of sexual assault. For example, Virginia Code § 23.1-808 requires review of sexual violence policies annually. Virginia Code § 23.1-806 requires that a review committee convene within 72 hours of a report of an alleged act of sexual violence and determine whether the matter should be referred to local law enforcement, and where the conduct may constitute a felony, contact the local Commonwealth's Attorney (subject to certain privacy protections). And Virginia Code § 23.1-807 requires that universities provide access to or enter into memoranda of understanding with sexual assault crisis centers or other victim support service.

n. *Vermont*: Under Vermont state law, "[i]t is the policy of the State of Vermont that all Vermont educational institutions provide safe, orderly, civil, and positive learning environments. Harassment, hazing, and bullying have no place and will not be tolerated in Vermont schools. No Vermont student should feel threatened or be discriminated against while enrolled in a Vermont

school." Vt. Stat. Ann. tit. 16, § 570(a). Therefore, Vermont law instructs that "[e]ach school board shall develop, adopt, ensure the enforcement of . . . harassment, hazing, and bullying prevention policies that shall be at least as stringent as model policies developed by the Secretary." *Id*. § 570(b). The Secretary of Education has developed model policies and procedures for the prevention of hazing, harassment, and bullying. Vermont statute also requires that the board of trustees or other governing body of each postsecondary school operating in Vermont adopt and ensure enforcement of a policy establishing that harassment, as defined by Vt. Stat. Ann. tit. 16, § 11(a)(26), is a form of unlawful discrimination and therefore prohibited. The board is also required to establish procedures to address complaints of discriminatory harassment and to initiate educational programs designed to prevent such conduct. Vt. Stat. Ann. tit. 16, § 178.

o. *Washington*: Washington law prohibits discrimination on the basis of sex in K-12 schools. Chapter 28A.640 Wash. Rev. Code. Regulations implementing this statute define sexual harassment for antidiscrimination purposes and establish required criteria for each school district's sexual harassment policy. Wash. Admin. Code §§ 392-190-056, 057. School districts are required to adopt sexual harassment policies and procedures that meet both state and federal antidiscrimination law requirements. The Washington State School Directors' Association has published model policies and procedures concerning issues such as harassment, gender inclusivity, and student discipline. Washington's Gender Equality in Higher Education Act, Chapter

28B.110 Wash. Rev. Code, prohibits discrimination on the basis of gender at Washington's higher education institutions. It requires each institution to develop and distribute policies and procedures for handling complaints of sexual harassment and sexual violence, as well as other rules and guidelines to eliminate sexual harassment and other forms of gender discrimination in higher education. Wash. Rev. Code § 28B.110.030(8). In 2014, the state legislature created a Campus Sexual Violence Prevention Task Force, which submitted its final report at the end of 2016. Among other things, the report contains summaries of initiatives launched by public and private institutions to combat sexual violence on campus, as well as positions and recommendations on many issues related to sexual violence prevention.

p. *Wisconsin*: Under Wisconsin law, each school board in charge of the K-12 public schools of the district bears the responsibility for developing policies prohibiting discrimination against pupils, including policies prohibiting discrimination on the basis of sex. Wis. Admin. Code §§ PI 9.01(1); 9.02(2). The Wisconsin Administrative Code provides that students, faculty, and staff within the University of Wisconsin System are subject to discipline, up to and including dismissal for engaging in acts of sex discrimination, including sexual assault, sexual harassment, dating violence, and stalking. Wis. Admin. Code §§ UWS 4, UWS 7, UWS 17. Additionally, University of Wisconsin System Board of Regents Policy 14-2 requires each school within the system to implement institutional procedures consistent with the policy, including providing education and training, defining prohibited conduct on the basis of

sex, identifying the institution's Title IX coordinator, designating responsible employees, and describing available counseling, medical, legal, and other resources for complainants, victims, and accused persons.

222. Where a Plaintiff State's law provide greater protections than the Rule, schools subject to these laws will need to create parallel code of conduct provisions and enforcement mechanisms—one addressing "Title IX sexual harassment" and one addressing "non-Title IX sexual harassment." *See* ¶¶ 208–209, *supra*.

223. The Rule will undermine the goals of State laws and regulations by discouraging reporting of sexual harassment, where, for example, victims do not wish to submit to cross-examination or disclosure of sensitive information required by the Rule, and by exacerbating the re-traumatization that could result from multiple rounds of interviews or adversarial cross-examination by an interested party.

224. Certain States require that policies governing K-12 and/or postsecondary schools be subject to a rigorous regulatory process to include, in some cases, notice and comment rulemaking. As a result, certain States will face difficulty in updating their regulations or policies in time to comply with the effective date of the Rule. For example,

a. *California*: Rulemaking by the California Department of Education, the California State Board of Education, and the State Superintendent of Public Instruction must comply with the requirements of California's Administrative Procedure Act. Cal. Gov't Code § 11340 et seq. These entities will need to engage in rulemaking to amend state policies relating to non-discrimination and complaint procedures for alleged violations of federal program statutes and regulations in California's schools. Compliance with California's

Administrative Procedure Act requires public notice of the express terms of the proposed regulation and an opportunity for public discussions of proposed regulations before regulations can be adopted. Cal. Gov't Code §§ 11346.2, 11346.4, 11346.45, 11346.5, 11346.6, 11346.8 .

b. *New Mexico*: To comply with the Rule's new requirements, postsecondary schools will have to change their regents, faculty, staff, and student policies, as well as the entire discrimination claims process. These changes must be made subject to New Mexico's regulatory requirements, which include a period of 30 days at a minimum between publication of a notice of proposed rule and a hearing on the rule. NMSA 1978, § 14-4-5.2.

c. *Wisconsin*: In Wisconsin, K-12 institutions must provide for a public hearing and opportunity for public commentary at a board meeting before the board for public schools in a particular district may adopt new non-discrimination policies or procedures. Wis. Admin. Code § PI 9.03(3). Similarly, administrative rules and procedures affecting the University of Wisconsin System of public higher education must go through Wisconsin's administrative rulemaking process, complete with a period of notice of the proposed rule and public comment. Prior to allowing a proposed rule to proceed to a period of public comment, the Wisconsin Legislative Council staff serves as the Administrative Rules Clearinghouse. An agency must submit a proposed rule to the Clearinghouse for review and comment, prior to holding a public hearing on the rule. The Clearinghouse then assigns a Clearinghouse Rule number to the proposed rule and reviews the statutory

authority under which the agency intends to promulgate the rule as well as the form, style and clarity of the rule. The Clearinghouse then submits a Clearinghouse Report to the agency with its comments about the rule.

225. The Rule will also harm the States' sovereign interests by requiring States with policies and laws that are consistent with Title IX's anti-discriminatory aims but conflict with the Rule's prescriptive grievance process to revise their codes, such as state employment laws, student privacy laws, and student discipline codes, in order to avoid having their laws preempted by the Rule, without even providing sufficient time for States to conduct such a review.

226. The States also have an interest in participating in the administrative process governing the Rule's adoption. The Department promulgated the Rule in a manner that deprived the States of a meaningful opportunity to participate in this process.

C. The Rule Will Harm Plaintiff States' Quasi-Sovereign Interests

227. Sexual harassment can lead to serious physical, emotional, psychological, and other harms. These harms can continue long after an incident or incidents of sexual harassment and can affect not just the individual subject to harassment, but friends, family members, and community members.

228. These harms are often exacerbated if the individual is forced to relive the incident of harassment in the context of investigatory, judicial, or other proceedings.

229. The Rule will undermine schools' efforts to combat sexual harassment, discourage reporting of sexual harassment, and cause increased harm to students and others who suffer sexual harassment in connection with educational programs.

230. In addition to causing harm to individuals who suffer sexual harassment, the Rule will undermine the educational mission of schools in the Plaintiff States, causing additional harm to students, faculty, staff, and other residents of the Plaintiff States.

231. The Rule will undermine State efforts to combat sexual harassment and ensure safe and equal educational experiences for all students. For example,

a. *New Jersey*: The New Jersey Attorney General issued revised statewide standards in 2018 on Supporting Victims of Sexual Assault. (AG Directive 2018-5). The dissemination and implementation of this Directive included stakeholder meetings with a wide variety of actors in all of New Jersey's 21 counties, including school administrators, victim advocates, and attorneys. In addition, the Office of the Secretary of Higher Education works with the State's public and private higher education institutions to ensure students have access to high quality education and serves as the lead communication agency on higher education with the Federal government. In 2019, the Governor signed Executive Order 61 (Murphy 2019), establishing a Safe and Inclusive Learning Environment working group (among 4 other groups) that was charged with developing an implementation guide for colleges and universities based on the 2017 NJ Task Force on Campus Sexual Assault report recommendations. The Secretary coordinated this wide variety of stakeholders from the State's higher education institutions to create an implementation plan including guidelines and best practices for schools carrying out sexual harassment investigations and grievance procedures.

b. *Virginia*: In 2014, then Governor Terry McAuliffe issued Executive Order 25, which established the Governor's Task Force on Combating Campus Sexual Violence. Attorney General Herring chaired the Task Force, which provided a final report and 21 recommendations to the Governor in May 2015. The work

> of the Task Force was a collaborative effort that included top state leaders and experts including Virginia's Secretaries of Education, Health and Human Services, and Public Safety and Homeland Security, representatives from higher education, student leaders, law enforcement, community advocates, and health professionals. The recommendations were designed to provide a safe and equitable learning and teaching environment for students, faculty members, and staff by enhancing institutional response to campus sexual violence with a sensitive and supportive approach to all parties involved.

232. The States have a quasi-sovereign interest in protecting the safety and well-being of their residents.

233. Protecting public health is one of the police powers reserved to the States. The States can reduce future health care costs when they effectively prevent their residents from being subjected to sexual harassment in their education institutions. The States have an interest in ensuring that funds are not diverted from other vital State priorities and programs towards treating increased numbers of sexual harassment victims due to the Rule's failure to provide sufficient protections to stop, prevent, and remedy sexual harassment and violence in State schools.

234. The States' interest is particularly strong in matters relating to the physical safety of their residents and in those relating to the protection of children. The Rule harms these interests by leaving many student victims and survivors of sexual harassment without adequate relief, exacerbating the effects of harassment and resulting in school communities that are less safe and unable to provide a nondiscriminatory environment, as required by Title IX.

CAUSES OF ACTION

COUNT I
Agency Action Not in Accordance With Law
(5 U.S.C. § 706(2)(A), (C)) – Title IX

235. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

236. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." 5 U.S.C. § 706(2)(A).

237. Title IX provides that no person in the United States shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" on "the basis of sex." 20 U.S.C. § 1681.

238. The purpose of Title IX is "to provide individual citizens effective protection against" discriminatory practices. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979). Title IX ensures that no student is excluded from participation in or denied the benefits of an education because of sexual harassment.

239. Congress created a robust administrative enforcement scheme for enforcing Title IX's prohibition on discrimination on the basis of sex.

240. The Rule violates Title IX in numerous ways, including by:

a. Narrowing the definition of sexual harassment;

b. Narrowing Title IX to apply only when sexual harassment occurs in a school's education program or activity and inside the United States;

c. Requiring a complainant to be "participating in or attempting to participate in the education program or activity" of the school at the time a formal complaint is filed; and

d. Placing schools at greater risk of losing federal funding if they fail to strictly satisfy every element of the Rule's prescriptive grievance process than if they respond to sexual harassment in a manner that is just short of clearly unreasonable.

241. Defendants have acted in violation of Title IX and the APA. The Rule is therefore unlawful and must be set aside.

COUNT II
Agency Action in Excess of Statutory Authority
(5 U.S.C. § 706(2)(C)) – Title IX

242. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

243. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

244. In Title IX, Congress authorized the Department only to issue rules and regulations that "effectuate the [substantive] provisions of" Title IX. 20 U.S.C. § 1682.

245. Although the Department relied on this authority in issuing the Rule, the Rule does not "effectuate" Title IX. The following provisions, among others, do not effectuate Title IX's prohibition of discrimination on the basis of sex:

a. Mandating that schools dismiss formal complaints if "the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States"; and

b. Mandating prescriptive grievance procedures for primary and secondary education that override local school discipline policies and practices that meet Supreme Court standards and allow for the flexibility needed to maintain safety.

246. Defendants have exceeded their statutory authority in violation of Title IX and the APA. The Rule is therefore unlawful and must be set aside.

COUNT III
Agency Action Not in Accordance With Law & in Excess of Statutory Authority
(5 U.S.C. § 706(2)(A), (C)) – FERPA

247. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

248. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

249. Defendants are charged with enforcing both Title IX and FERPA.

250. FERPA prohibits the "release" of student "education records" without the written consent of the student (or parent, where applicable). 20 U.S.C. § 1232g(b).

251. Schools must comply with FERPA when handling a Title IX matter. Subject to a limited exception, FERPA applies to Title IX disciplinary investigations, protecting the education records of all students involved.

252. The Rule violates FERPA by requiring schools to provide student education records beyond what is allowed by FERPA.

253. Defendants lack authority to implement these non-conflicting statutes in a way that creates a conflict and to resolve that conflict by superseding FERPA via a Title IX regulation.

254. Defendants have exceeded their statutory authority and acted in violation of FERPA and the APA. The Rule is therefore unlawful and must be set aside.

COUNT IV
Agency Action That Is Arbitrary, Capricious, and an Abuse of Discretion
(5 U.S.C. § 706(2)(A))

255. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

256. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, [and] an abuse of discretion." 5 U.S.C. § 706(2)(A).

257. A rule is arbitrary and capricious if, for example, the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

258. The following aspects of the Rule, among others, are arbitrary and capricious:

a. Requiring all schools to comply with the Rule by August 14, 2020;

b. Creating inconsistent requirements between the Rule's preamble and the Rule itself;

c. Proscribing standards for Title IX that are inconsistent with other civil rights laws applicable in schools;

d. Imposing requirements inconsistent with the Clery Act/VAWA by preventing schools from timely and effectively fulfilling their obligations under these statutes to investigate allegations of sexual assault both on and off campus;

e. Narrowing the definition of sexual harassment;

f. Limiting Title IX's protections to sexual harassment that occurs in a school's education program or activity or inside the United States;

g. Requiring a complainant to be participating in or attempting to participate in a school's education program or activity for a formal complaint to be filed;

h. Establishing other complaint filing barriers without regard to the unique needs of K-12 students;

i. Mandating that schools dismiss formal complaints if "the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States," but allowing schools to take action under other provisions of their code of conduct;

j. Limiting the remedies that a school can issue to only those directly applicable to the complainant and for the limited purpose of "restoring or preserving access" to the school;

k. Requiring postsecondary schools to provide live hearings with direct, oral cross-examination by a party's advisor, even if the complainant or respondent is a minor;

l. Requiring postsecondary schools to provide parties with advisors to conduct direct, oral cross-examination;

m. Requiring postsecondary schools to make immediate evidentiary decisions on the record during live hearings;

n. Preventing postsecondary schools from considering any statement unless the party or witness submits to live, direct, oral cross-examination;

o. Preventing K-12 schools from placing reasonable limitations on the parties' ability to discuss the allegations under investigation;

p. Requiring all schools to provide parties with all evidence directly related to the allegations, without regard for relevance, confidentiality, the protection of witnesses (who may be young minors), or the implications of sharing sensitive information with and about young children;

q. Prohibiting only school publications that "state" a discriminatory purpose or intent;

r. Eliminating the notice requirement for institutions controlled by a religious organization; and

s. Intentionally disregarding critical costs, providing inadequate and flawed assessments of the costs necessary to comply with the Rule, and providing inadequate justification for costs that the Rule imposes on schools.

259. In promulgating the Rule, Defendants have acted in a manner that is arbitrary, capricious, and an abuse of discretion in violation of the APA. The Rule is therefore unlawful and must be set aside.

COUNT V
Without Observance of Procedure Required by Law
(5 U.S.C. § 706(2)(D))

260. Plaintiff States incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

261. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

262. In issuing substantive rules, federal agencies are required to follow the notice and comment process set forth in the APA.

263. The agency must publish a "[g]eneral notice of proposed rule making" in the Federal Register. 5 U.S.C. § 553(b). That notice must describe "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3).

264. The agency must further provide "interested persons" an "opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c).

265. To comply with the APA's notice-and-comment requirements, the agency's final rule must be "a 'logical outgrowth' of the agency's proposed regulations." *Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 442 (D.C. Cir. 2012). The agency "must *itself* provide notice of a regulatory proposal." *Id.* at 462 (internal quotation marks omitted). A final rule is not a logical outgrowth if "interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." *Id.* at 461 (internal quotation marks omitted).

266. The Rule is not a logical outgrowth of the notice of proposed rulemaking. Specifically, the notice of proposed rulemaking failed to provide notice of provisions:

a. Explicitly preempting state and local laws that conflict with certain sections of the Rule;

b. Allowing for schools to consolidate complaints;

c. Allowing for dismissal if a respondent is no longer enrolled or employed by the recipient;

d. Creating a new confidentiality provision that is internally inconsistent with the existing confidentiality regulation already incorporated by reference from Title VI;

e. Prohibiting students from filing complaints if they are not participating in or attempting to participate in an education program or activity at the time of complaint filing; and

f. Purporting to make portions or sections of the Rule severable.

267. In addition, "[u]nder APA notice and comment requirements, among the information that must be revealed for public evaluation are the technical studies and data upon which the agency relies in its rulemaking." *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 236 (D.C. Cir. 2008) (internal quotation marks and brackets omitted). Agencies must provide these studies during the rulemaking "in order to afford interested persons meaningful notice and an opportunity for comment." *Id.* at 237. "[A]n agency [also] commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991).

268. Defendants failed to provide interested parties with methodology for its cost-benefit analysis and the technical reports and data on which the agency relied in preparing the

notice of proposed rulemaking. This prevented Plaintiff States and others from meaningfully commenting on the Department's estimates.

269. In promulgating a final rule, the agency must provide a statement of the "basis and purpose." 5 U.S.C. § 553(c). In this statement, the agency must "respond in a reasoned manner" to all public comments "that raise significant problems." *Am. Coll. of Emergency Physicians v. Price*, 264 F. Supp. 3d 89, 94 (D.D.C. 2017) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003)). "[F]ailure to address these comments, or at best its attempt to address them in a conclusory manner, is fatal to its defense." *Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 449 (D.C. Cir. 2012) (cleaned up).

270. Among others, the Department failed to provide an adequate explanation for:

a. Prohibiting only school publications that "state" a discriminatory purpose or intent;

b. Eliminating the notice requirement for institutions controlled by a religious organization; and

c. Not providing interested parties with technical reports and data on which the agency relied in preparing the notice of proposed rulemaking.

271. Any rule issued under Title IX must be approved by the President of the United States, who has delegated this authority to the Attorney General of the United States. 20 U.S.C. § 1682; Exec. Order No. 12,250, § 1-1, 45 Fed. Reg. 72,995 (Nov. 2, 1980).

272. The Rule does not state that it was approved by the Attorney General of the United States or his designate.

273. In promulgating the Rule, Defendants have failed to follow the procedural requirements of the APA and Title IX. The Rule is therefore unlawful and must be set aside.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff States request that this Court enter judgment in their favor and grant the following relief:

a. Postpone the effective date of the Rule pending judicial review under 5 U.S.C. § 705;

b. Declare the Rule unlawful pursuant to 5 U.S.C. § 706(2)(A), (C), & (D);

c. Preliminarily and permanently enjoin the Department and its officers, employees, and agents from applying and enforcing the Rule;

d. Vacate and set aside the Rule;

e. Award Plaintiff States reasonable costs and expenses, including attorneys' fees; and

f. Grant such other and further relief as the Court deems just and proper.

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