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California State Legislature

SENATOR
HANNAH-BETH JACKSON
NINETEENTH SENATE DISTRICT



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CALIFORNIA'S WINE INDUSTRY

January 28, 2019

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

Re: Docket ID #: ED-2010-OCR-0064
Proposed Title IX Regulations

Dear Mr. Marcus:

Title IX of the Education Amendments of 1972 was the first comprehensive federal law to prohibit sex discrimination in education. It covers women and men, girls and boys, and staff and students in any educational institution or program that receives federal funds. This includes local school districts, colleges and universities, for-profit schools, career and technical education agencies, libraries, and museums. Music classes or choirs, sex education classes, and sports involving bodily contact are exempt from Title IX, as are religious institutions if the law would violate their religious tenets. Admissions policies at private undergraduate institutions are also exempt.

This issue is of critical importance to me and to the students of the State of California. I have been working for the equal treatment of young men and women in our schools for decades; in 2014, I carried legislation (SB 967, Jackson, 2014) to require institutes of higher education to educate students about affirmative consent and sexual assault; improve response and prevention efforts; provide services for victims; and to implement comprehensive prevention and outreach programs addressing sexual violence, domestic violence, dating violence, and stalking.

Under SB 967 all institutions of higher learning in California who receive public funding are required to adopt policies and procedures regarding sexual assault and related offenses when a student is involved as either the victim or the accused, and to adopt a detailed and victim-centered policy concerning sexual assault, domestic violence, dating violence, and stalking. California's higher learning institutions are also required, to the extent feasible, to enter into memoranda of understanding, agreements, or collaborative partnerships with existing on-campus

and community-based organizations to refer students for assistance or make services available to students, including counseling, health, mental health, victim advocacy, student advocacy, and legal assistance. I worked very hard to make this bill meaningful and impactful to the lives of young women on our college campuses.

Title IX requires recipients of federal education funding to evaluate their current policies and practices, adopt and publish a policy against sex discrimination, and implement grievance procedures providing for prompt and equitable resolution of student and employee discrimination complaints. All schools must publicly appoint at least one employee to coordinate Title IX compliance.

Title IX affects all areas of education, including:

- recruitment, admissions and housing;
- career and technical education;
- pregnant, parenting, and/or married students;
- science, technology, engineering, and math education;
- sexual harassment and assault;
- comparable facilities and access to course offerings;
- financial assistance;
- student health services and insurance benefits;
- harassment based on gender identity; and
- athletics.

Forty-seven years after its adoption, the work of Title IX sadly remains undone. Sexual harassment pervades the lives of students. Nearly half of students in grades 7-12 experienced harassment in the 2010–11 school year (56 percent of girls and 40 percent of boys). Of that number, 87 percent said it had a negative effect on them. Sex segregation persists in career and technical education, with women making up about 90 percent of the students enrolled in courses leading to traditionally female occupations such as cosmetology, childcare, and health services.

- Only 39 percent of all full-time professors at colleges and universities are women.
- Women's teams receive only 33 percent of recruiting dollars and 36 percent of athletic operating dollars.
- Women receive only 17 percent of computer science and 18 percent of engineering-related technology bachelor's degrees.
- Pregnant and parenting students are often steered toward separate and less rigorous schools.

There are at least four fundamental ways in which the proposed regulations would harm students and survivors.

First, they reduce school liability by narrowing the definition of sexual harassment and expanding religious exemptions. While the Obama administration more broadly defined sexual harassment as "unwelcome conduct of a sexual nature," Secretary DeVos plans to narrow the definition of sexual harassment to, in part, "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the

recipient's education program or activity." If DeVos' definition goes into effect, experts predict that those who experience sexual harassment, including survivors of sexual assault, will be less likely to report, as they may not know if their experiences are "severe" or "pervasive" enough to qualify as sexual harassment. I am reminded of the case of Ninth Circuit Judge Alex Kozinski, who, before leaving the bench himself after he was dogged by allegations of sexual harassment, ironically ruled in 2000 that a single incident of sexual harassment (in this case, the touching of a breast) was not sufficient to meet the standard of "severe and pervasive" to establish a hostile work environment. The proposed Title IX standards would take our students back to the days of "one free grope" and deny victims access to the courts, and ultimately justice.

DeVos' proposed rule may also allow schools to disregard certain Title IX protections by expanding their religious exemptions. Under current guidance, schools are permitted to claim religious exemptions from certain Title IX provisions, such as admissions of certain students or counseling services, but must submit a letter to the U.S. Department of Education requesting specific exemptions, a process DeVos claims is "confusing or burdensome." The new rule will no longer require schools seeking religious exemptions to submit such a letter, explaining that "even if an institution has not sought assurance of its exemption, the institution may still invoke its religious exemption during the course of any investigation pursued against the institution by the Department [of Education]."

Advocates argue that such religious exemptions can and have been used to discriminate against LGBTQ students and to deny women's reproductive rights on the basis of religious objections. Schools may also be exempted from responding to, preventing, or addressing the effects of sexual assault as required by Title IX if they seek religious exemptions from the manner and scope in which they are otherwise required to act. This means that students who attend religious institutions and experience sexual assault may have no recourse beyond the policies the school decides to implement and the resources—such as alternative schooling accommodations or counseling services—it offers them.

Second, the proposed regulations allow schools to choose the burden of proof required for sexual assault cases. The Obama administration's 2011 guidance directed schools to discipline accused students if evidence demonstrated that misconduct was more likely than not to have occurred, also known as the preponderance of evidence standard. The preponderance of evidence standard was deemed to be more aligned with past U.S. Supreme Court rulings related to discrimination claims, and other civil rights cases—under which violations of Title IX fall—consistently use this standard. Under DeVos' proposed rule, schools would have more latitude in choosing between the preponderance of evidence and clear and convincing evidence standards for Title IX cases. There is only confusion when schools can pick their own approach, and clarity leads to compliance – a goal I am sure we are all striving to achieve.

The clear and convincing standard stacks the process against the survivor and sets an unreasonably high bar for evidence that is difficult to obtain in many sexual assault cases. By allowing schools to adopt this standard, the Department of Education is signaling to survivors that they will need even more proof of the assault, discouraging many survivors from reporting.

Third, the proposed rules clearly dissuade survivors from reporting. Under the current guidance students can report their sexual assault to anyone, including faculty or advisers, and a school is required to investigate when it “knows or reasonably should know” about a possible sexual assault. DeVos’ proposed rule, however, states that in order for a school to be held liable for a Title IX violation, a student must report their assault to school officials “with authority to institute corrective measures”—forcing students to report to campus officials not of their choosing. The proposed rule will also require survivors and Title IX coordinators to produce and sign a formal document about the assault for the school to begin an investigation. Both of these changes will likely reduce the number of survivors who report, as many may not trust the campus officials in whom they will be forced to confide and may not want to pursue such a formal route after their assault.

DeVos has also proposed that survivors and accused students could have advisers who conduct a cross-examination to ask questions on behalf of the individual. Additionally, either party could request that “cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions.” Cross-examination is highly problematic and likely to jeopardize the rights and safety of student survivors. As the Obama administration’s guidance states, “Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.” Not too many assaulted people want to sit across from their perpetrators.

Last, these proposed regulations would bolster accused students’ rights over those of survivors. Beyond creating additional reporting and evidentiary burdens for survivors, DeVos’ proposed rule would bolster the rights of accused students. These changes tap into a sentiment — which President Donald Trump’s rhetoric against the #MeToo movement has stoked — that men have suddenly been put on trial without due process. For instance, the proposed rule underscores the importance of the presumption of innocence. The rule also requires schools to conduct individualized risk and safety assessments before removing an accused student from campus and allow the accused to immediately challenge their removal. It also suggests that to women make these allegations lightly. The evidence clearly demonstrates to the contrary.

In the draft regulations, the department frames these changes as a fairer approach to handling campus sexual assault. In reality, the proposal is anything but equitable, as it creates a false narrative that accused students are being denied Title IX protections as a pretext for disempowering survivors. The rule would also place survivors in traumatic and potentially dangerous positions while schools conduct their assessments, since accused students may continue attending classes or share social circles with survivors. This could not only cause great mental and emotional stress for survivors who choose to pursue justice but may also disincentivize others from coming forward for fear of exposing themselves to additional trauma.

Since the passage of this landmark civil rights law, some opponents have sought to weaken it. There has been talk of a so-called “boys’ crisis,” a narrative where expanded educational opportunities for girls have come at the expense of boys. AAUW’s 2008 report *Where the Girls Are* found no evidence of a boys’ crisis, but reaffirmed the existence of large disparities in

educational achievement by race/ethnicity and family income. A crisis exists, but it is a crisis for African-American, Spanish-speaking, and lower-income students – both girls and boys.

It is my strong belief and commitment, working in this area for 20 years, that when it comes to education, young women and men should feel secure in the certainty that laws like Title IX will protect their right to access education. The Department of Education under Secretary DeVos is taking major steps backward when it comes to Title IX protections. Regardless of what the Department of Education does, it is critical that educational institutions continue to protect survivors through policies that treat them with dignity and respect.

I respectfully submit these comments for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Hannah-Beth Jackson". The signature is written in black ink and is positioned above the printed name and title.

HANNAH-BETH JACKSON
Senator, 19th District