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National Hispanic Leadership Agenda

Submitted via <http://www.regulations.gov>

January 30, 2019

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

Re: ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Ms. Bull:

We write today on behalf of the National Hispanic Leadership Agenda (NHLA), a coalition of 45 leading national Latino nonpartisan civil rights and advocacy organizations, and on behalf of the Hispanic Education Coalition (HEC), which unites 16 organizations dedicated to improving educational opportunities and outcomes for the more than 58.9 million Latinos living in the mainland United States and Puerto Rico, in response to the proposed rule published by the Department of Education, Office for Civil Rights in the Federal Register on November 29, 2018.

The Latinx community is disproportionately affected by issues of sexual assault and harassment within the United States. Immigrants often chose not to report sexual assault due to fears of deportation.¹ Language barriers often make it difficult to file complaints.² Stereotypes about Latinx sexuality often cause them to be believed less than white survivors.³ It is with this knowledge that HEC and NHLA comment on the Department's proposed rule on Title IX of the Education Amendments of 1972 (Title IX).

It is the mission of the Department to enforce Title IX, and NHLA and HEC are shocked that the Department would attempt to abdicate its role through the proposed rule. Title IX guarantees that:

“No person in the United States shall, on the basis of sex, be

- (1) excluded from participation in,
- (2) be denied the benefits of, or
- (3) be subjected to discrimination

under any education program or activity receiving Federal financial assistance.”⁴

In provision after provision of the proposed rule, the Department fails to enforce one or more of these rights, which are guaranteed by Title IX.

The proposed rule would redefine sexual harassment in such a way as to allow students to be subjected to discrimination.⁵ It attempts to require schools to ignore rape or sexual assault that occurs off-campus, even when survivors would be forced to interact with their assaulters on a daily basis on-campus, and would lead to survivors

¹ Chiara Sabina et al., *The likelihood of Latino women to seek help in response to interpersonal victimization: An examination of individual, interpersonal and sociocultural influences*, Psychosocial Intervention (2014), <https://www.sciencedirect.com/science/article/pii/S1132055914000076>.

² Mary Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, Georgetown Journal on Poverty Law & Policy, 252 (2000) <http://library.niwap.org/wp-content/uploads/2015/CULT-Jrnl-GeorgetownHelpseekingBehaviors-00.pdf>.

³ Vera Lopez & Meda Chesney-Lind, *Latina girls speak out: Stereotypes, gender and relationship dynamics*, Latino Studies (Dec. 2014).

⁴ 20 U.S.C. § 1681 (numbering added to emphasize the separate rights under Title IX). Title IX does allow for discrimination by religious institutions where it conflicts with “religious tenets,” see note 10 and accompanying text for additional discussion.

⁵ Proposed § 106.30. Defining sexual harassment as “[u]nwelcome 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.” (emphasis added).

being denied access to education.⁶ It attempts to require schools to dismiss complaints of sexual assault or harassment that do not meet its narrow definitions of sexual assault and harassment.⁷ It allows schools to ignore sexual assault or harassment when the survivor notifies the school but fails to notify one of the few people designated by the rule.⁸ It allows schools not to enforce Title IX if those few designated officials are negligent in their duties,⁹ and allows religious schools to discriminate against LGBTQ students or pregnant and parenting students without giving their students any notice.¹⁰

The proposed rule also stacks the deck against survivors and for the accused, by presuming reported harassment or assault did not occur,¹¹ requiring survivors to be subjected to live cross-examination by the accused's "advisor of choice" instead of a neutral arbiter,¹² and to use a higher standard of evidence than they would use to investigate other types of misconduct.¹³ It also would allow investigations to continue without end, effectively denying access to education,¹⁴ and it recommends mediation, a procedure completely inappropriate for resolving cases of sexual assault or harassment, because survivors do not share responsibility for sexual assault with their assailants.¹⁵

Each of these many provisions in the proposed rule violate either the plain text of Title IX, or its intent to ensure all students have access to education free from discrimination on the basis of sex. The Department must continue to enforce all provisions of Title IX, and to do so, the Department must withdraw this fundamentally flawed rule in its entirety.

If you have any questions, please contact Adam Fernandez of the Mexican American Legal Defense and Educational Fund at afernandez@maldef.org, or John Aguilar of the Hispanic Association of Colleges and Universities at john.aguilar@hacu.net.

Sincerely,



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Chair, NHLA
Co-Chair, NHLA Education Committee



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HEC Member Organizations (16): ASPIRA Association; Cuban American National Council; Hispanic Association of Colleges and Universities; Hispanic Federation; Intercultural Development Research Association; League of United

⁶ Proposed § 106.45(b)(3). "If the conduct alleged by the complainant would not constitute sexual harassment as defined in § 106.30 even if proved *or did not occur within the recipient's program or activity*, the recipient must dismiss the formal complaint with regard to that conduct." (emphasis added).

⁷ *Id.*

⁸ Proposed § 106.30. "Actual knowledge means 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 a teacher in the elementary and secondary context with regard to student-on-student harassment." This notably does not include professors in higher education, teachers in K-12 in regard to employee-on-student harassment or assault, and others that are covered under existing rules.

⁹ *Id.* See also Proposed § 106.44, prohibiting only "deliberate indifference."

¹⁰ Proposed § 106.12. While Title IX expressly allows religious schools to discriminate where Title IX contradicts religious tenets, longstanding practice requires schools inform the Department and their students so students can make informed decisions. By removing this notice requirement, students will no longer be able to make informed decisions and could lose access to education, contrary to the intent of Title IX.

¹¹ Proposed § 106.45(b)(1)(iv).

¹² Proposed § 106.45(b)(3)(vii).

¹³ Proposed § 106.45(b)(4)(i).

¹⁴ Proposed § 106.45(b)(1)(v).

¹⁵ Proposed § 106.45(b)(6).

Latin American Citizens; Mexican American Legal Defense and Educational Fund; Migrant Legal Action Program; Multicultural Education, Training & Advocacy; National Association for Bilingual Education; National Association for State Directors of Migrant Education; National Council for Community and Education Partnerships; National HEP CAMP Association; National Latino Children's Institute; National Migrant and Seasonal Head Start Association; and UnidosUS.

NHLA Member Organizations (45): Alianza Americas; American G.I. Forum; ASPIRA Association; AVANCE; Casa de Esperanza; Congressional Hispanic Caucus Institute; Farmworker Justice; Green Latinos; Hispanic Association of Colleges & Universities; Hispanic Federation; Hispanic National Bar Association; Hispanics in Philanthropy; Inter-University Program for Latino Research; Labor Council for Latin American Advancement; LatinoJustice PRLDEF; League of United Latin American Citizens; MANA, A National Latina Organization; Mexican American Legal Defense and Educational Fund; Mi Familia Vota; NALEO Education Fund; National Association of Hispanic Federal Executives; National Association of Hispanic Publications; National Association of Latino Arts and Culture; National Association of Latino Independent Producers; National Conference of Puerto Rican Women; National Day Laborer Organizing Network; National Hispana Leadership Institute; National Hispanic Caucus of State Legislators; National Hispanic Council on Aging; National Hispanic Environmental Council; National Hispanic Foundation for the Arts; National Hispanic Media Coalition; National Hispanic Medical Association; National Institute for Latino Policy; National Latina Institute for Reproductive Health; National Latina/o Psychological Association; Presente.org; SER Jobs for Progress; National Southwest Voter Registration Education Project; U.S.- Mexico Foundation; UnidosUS; United States Hispanic Chamber of Commerce; United States Hispanic Leadership Institute; United States-Mexico Chamber of Commerce; Voto Latino.