The Council of Parent Attorneys and Advocates, Inc.
Protecting the Legal and Civil Rights of Students with Disabilities and Their Families

January 30, 2019

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

Re: Docket No. ED-2018-OCR-0064, RIN 1870–AA14

Dear Ms. Bull:

The Council of Parent Attorneys and Advocates (COPAA) is an independent, nonprofit organization of parents, attorneys, advocates, and related professionals. COPAA members nationwide work to protect the civil rights and secure excellence in education on behalf of the 6.5 million children with disabilities under the Individuals with Disabilities Education Act (IDEA) and over 700,000 children with 504 plans under Section 504 of the Rehabilitation Act of 1973 in our nation's schools. COPAA writes the U.S. Department of Education (the Department) today in response to the Notice of Proposed Rulemaking to amend regulations implementing Title IX of the Education Amendments of 1972 (Title IX).

COPAA first would like to underscore the documentation that exists showing that sexual harassment of children in schools is widespread.[i] Sexual violence (including sexual harassment, homophobic name-calling, and unwanted sexual touching) is also increasingly being recognized as a public health concern among adolescents and the outcomes for those who suffer from sexual violence perpetration can be severe including: lower grades and missing classes; increased rates of risky behavior; depression; anxiety; and suicidality. The negative academic and mental health effects of sexual violence are well documented.[ii] Additionally, people with disabilities are victimized by crime at higher rates than the rest of the population, according to the National Crime Victimization Survey.[iii] We also know that there are students with disabilities who are improperly accused and mistreated in K-16 settings, including college Title IX hearings. These students due process rights are too often ignored, and they are also not treated equitably during the Title IX process.

COPAA has long advocated that schools, including post-secondary settings, need more resources and support to ensure that faculty are trained to ensure that students with disabilities are provided the education, specialized services, and accommodations they require as well as guaranteed the protections afforded to them under the IDEA, the Americans with Disabilities Act (ADA), the Rehabilitation Act of 1973 and other federal laws. Consistent with our work on behalf of all students with disabilities, we offer the following recommendations and comments:

Recommendation: Do not promulgate new regulations.

Rationale: Regulations were first issued on Title IX in 1972. Subsequently, guidance has been issued by the Department that has helped school districts and families since at least 1994, 1997 and then 2001. The 2001 guidance (which has held consistent through previous administrations) has helped define a well-known standard. Most importantly, schools *are required to address student on student harassment*.[iv] The Supreme Court said that under Title IX, damages are available "where a funding recipient intentionally violates the statute."[v] Applying this principle to peer sexual harassment, the Court held that school districts may be liable for damages on the basis of a violation of Title IX if the district administrator or

administrators are deliberately indifferent to known conduct that is severe or pervasive enough to deprive the victim of equal access to an educational program or activity. While not dispositive on whether a particular set of facts gives rise to Title IX liability, guidance from the Office for Civil Rights (OCR) is highly relevant to a deliberate indifference analysis and has been relied on by courts, including the U.S. Supreme Court, in cases involving deliberate indifference. *Davis* itself relied on OCR policy guidelines in construing Title IX, citing to OCR policy guidance three (3) times in its majority opinion.[vi]

Recommendation: Do not promulgate regulations that minimize the impact of sexual harassment and victimization of students with disabilities.

Rationale: The NPRM does not acknowledge or attempt to address the scope of the impact of sexual harassment and sexual assault on K-16 students with disabilities. As stated in above, we know that students with disabilities are victims of sexual harassment – both as the accused and those who fall victim to the indecency of others.

People with different disabilities may face different challenges and have very different needs. Some disabilities may put people at higher risk for crimes like sexual assault or abuse. Someone who needs regular assistance may rely on a person who is abusing them for care. The perpetrator may use this power to threaten, coerce, or force someone into non-consensual sex or sexual activities. An abuser may take away access to the tools a person with a disability uses to communicate, such as a computer or phone. People with disabilities may be less likely to be taken seriously when they make a report of sexual assault or abuse. They may also face challenges in accessing services to make a report in the first place. For example, someone who is Deaf or Deaf-Blind may face challenges accessing communication tools, like a phone, to report the crime or get help. Many people with disabilities may not understand or lack information about healthy sexuality and the types of touching that are appropriate or inappropriate. This can be especially challenging if a person's disability requires other people to touch them to provide care.[vii]

Recommendations:

- Do not promulgate §106.30 – Definition of Sexual Harassment
- Do not promulgate §106.45(b)(3) – the requirement that a school dismiss a complaint of sexual harassment if the alleged conduct does not meet this new definition, even if the conduct is proven to have occurred.

Rationale: Under the proposed definition, even if a student reports sexual harassment to the "right person" who has "actual knowledge their school would still be required to ignore the student's Title IX complaint if the harassment has not yet advanced to a point that it is actively harming a student's education. A school would be required to dismiss such a complaint even if it involved harassment of a minor student by a teacher or other school employee.

Together, these proposed rules are unworkable and fail to consider the different experiences, challenges, and needs of students with disabilities, who already face additional barriers to education – for both those who are the accuser and/or for those who are accused. The proposed rules would force students with disabilities, including K-12 students with disabilities, to endure repeated and escalating levels of abuse without being able to ask their schools for help. By the time their school would be legally required to intervene, it might be too late.

The Supreme Court in *Davis* stated that "a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." Most courts which have addressed the issue have concluded that even a single incident of rape is sufficient to establish that a child was subjected to severe, pervasive, and

objectively offensive sexual harassment for purposes of Title IX.[viii] The leading case for this proposition addressed a situation in which a mentally impaired elementary school student alleged that two students fondled her breasts and vagina in the classroom and on the school bus, and that a third boy raped her. The court stated that "[w]ith respect to the first prong of the *Davis* test," evidence that plaintiff was raped "obviously qualifies as being severe, pervasive, and objectively offensive sexual harassment that could deprive [plaintiff] of access to the educational opportunities provided by her school."[ix] Tellingly, the court did so without compelling plaintiffs to demonstrate a causal link between the sexual harassment and a specific denial of access to educational opportunities.

For a student with disability who may be the accused, the rule provides no requirements to ensure recipients and their Title IX coordinators conduct age appropriate training on healthy relationships and all Title IX information (e.g. what constitutes sexual harassment, how to report a claim, etc.) communicated in a way that can be understood and learned by all, including those with intellectual disabilities and disabilities that limit their verbal and hearing abilities. If the Administration is in fact adhering to the flexibility described in the NPRM under *Davis,*[x] then schools must be required to do more to ensure both students and faculty be provided training and support.

Recommendation: Do not promulgate § 106.44(a) which would require schools to respond to sexual harassment only if an employee has "actual knowledge" of the harassment.

Rationale: As proposed in the NPRM, §106.30 would define "actual knowledge" to apply only to the small group of school employees "who ha[ve] the authority to institute corrective measures on behalf of the" school. This small group of employees would include (i) the Title IX coordinator; and (ii) if the student is a K-12 student reporting student-on-student harassment, a K-12 teacher.[xi] These proposed rules are unworkable for students with disabilities, especially K-12 students with disabilities, who should not be required to meet the burdensome standard of actual knowledge in order to get help. In addition, K-12 students with disabilities often have closer relationships with their teacher aides, school psychologists, members of their Section 504 team or IEP team, and other school employees who are not their teachers or the Title IX coordinator; they should not be foreclosed from reporting sexual harassment to these other school employees.

Recommendation: Do not promulgate regulations, specifically §106.44(c), that does not consider the needs of students and employees with disabilities" who are parties in a Title IX complaint.

Rationale: The language is vague and left to new interpretation(s) on provisions from all other civil rights and special education laws that may or may not apply, depending on the unique circumstances of a student with a disability throughout the Title IX process, including a[ny] removal determination. For example, the section referencing the removal of students could encourage schools to remove students with disabilities because of implicit bias against students with disabilities, particularly students with intellectual disabilities. The NPRM also does not address due process concerns of students with disabilities removed from classes during Title IX proceedings.

We strongly agree that segregation of K-12 students with disabilities from classroom settings should be rare and only when in compliance with IDEA. However, this needs additional clarification because the procedural rights to a Free, Appropriate, Public Education (FAPE) are not as comprehensive as the right to equal educational opportunities for all students under Title IX, the ADA, and the Rehabilitation Act of 1973, which are much broader than the IDEA. Not all K-12 students with disabilities are covered under IDEA, which has an enumerated list of disabilities a student must have in order to meet the FAPE requirement. Recipients must be made aware that a student with a disability does not have to be eligible for FAPE in order to be covered under this regulation. Additionally, although IDEA may have additional requirements to provide FAPE, recipients must not be misled into thinking there are different standards

for K-12 and post-secondary education environments when it comes to *equal access* to educational opportunities.

A recent Supreme Court decision made clear that a student's procedural rights to FAPE under IDEA does not supersede or infringe upon the student's right to restrict or limit the rights, procedures, and remedies available under the Constitution, the ADA, sections of the Rehabilitation Act of 9173 (including Section 504), or other federal laws protecting the rights of students with disabilities.[xii] This applies to students with disabilities regardless of whether they are the accuser or the accused. The NPRM fails to state that colleges and universities have an affirmative duty to communicate the nature of the allegation and inquire whether a person needs an accommodation in a way that people with any disability, including an intellectual disability, can understand and respond. Additionally, while respecting the student's privacy, they should work with the Office of Disability and obtain the student's consent if he or she would like to contact their parent, guardian, or other support, during the entire Title IX process. Finally, campus police enforcing Title IX must be trained on how to interact with students with disabilities in ways that are not harmful to them and to their learning environment.

In conclusion, we urge the Department to abandon this NPRM and work with the special education and civil rights communities to assure a regulation is developed that builds on the research and best practices that fully support the rights of students with disabilities.

Sincerely,

Selene Almazan, Esq.
Legal Director

COPAA is an independent, nonprofit organization of parents, attorneys, advocates, and related professionals. COPAA members nationwide work to protect the civil rights and secure excellence in education on behalf of the 6.5 million children with disabilities in America. COPAA's mission is to serve as a national voice for special education rights and is grounded in the belief that every child deserves the right to a quality education that prepares him or her for meaningful employment, higher education and lifelong learning, as well as full participation in his or her community.

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[i] Sarah Rinehart, Namrata Doshi, & Dorothy Espelage, *Sexual Harassment and Sexual Violence Experiences Among Middle School Youth*, University of Illinois at Urbana-Champaign 5 (April 6, 2014), at: http://www.aera.net/Newsroom/Recent-AERA-Research/Sexual-Harassment-and-Sexual-Violence-Experiences-Among-Middle-School-Youth

[ii] *Id*. at 2.

[iii] Erika Harell, *Crime Against Persons with Disabilities*, (2008-2010) at: https://www.bjs.gov/content/pub/pdf/capd10st.pdf

[iv] See: *Davis v. Monroe County Bd. of Ed., 526 U.S. 629* (1999)

[v] *Ibid.*

[vi] *Id*. at 526 and at 647-648 (citing United States Department of Education, Office of Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039-12040 (1997) and United States Department of Education, Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. 11448, 11449 (1994) ("1994 Racial Harassment Guidance")

[vii] *Sexual Abuse of People with Disabilities*, Rape, Abuse & Incest National Network at: https://www.rainn.org/articles/sexual-abuse-people-disabilities

[viii] *See, e.g., J.K. v. Arizona Bd. of Regents*, 2008 WL 4446712 (p.12) (D.Ariz.2008); *Kelly v. Yale Univ.*, 2003 WL 1563424 (p.3) (D.Conn.2003); *Doe v. Dallas Indep. Sch. Dist.*, 2002 WL 1592694 (pgs. 6–7) (N.D.Tex.2002); *but see, Ross v. Mercer Univ.*, 506 F.Supp.2d 1325, 1358 (M.D.Ga.2007)

[ix] *Soper v. Hoben*, 195 F.3d 845 (6th Cir.1999) (pgs. 854-855)

[x] See Section 106.44(a) General; Section 106.30 (p. 61466, final paragraph): …the Court reasoned in Davis that Title IX must be interpreted in a manner that leaves room for flexibility in schools' disciplinary decisions…

[xi] See Section 106.44(a) General; Section 106.30 (p. 61466, second column)

[xii] *See* Fry v. Napoleon Community Schools, 580 U.S. ___ (2017)