New Civil Liberties Alliance

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Betsy DeVos
Secretary of Education
Brittany Bull,
U.S. Department of Education,
400 Maryland Avenue SW
Room 6E310
Washington, DC 20202
ED-2018-OCR-0064

Re: *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, Docket Number ED-2018-OCR-0064

Secretary DeVos:

The New Civil Liberties Alliance (NCLA) submits the following commentary in response to the Department of Education's proposed rule, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61462 (Nov. 29, 2018) (*Proposed Rule*).

NCLA sincerely appreciates this opportunity to comment and express its concerns about the Proposed Rule. NCLA abhors unequal treatment on the basis of sex, particularly when it involves sexual harassment or assault. NCLA likewise laments the Department's history of regulating under Title IX via guidance and trampling the due process rights of accused individuals in the process. While NCLA appreciates the Department's effort to correct past abuses of departmental oversight, the Proposed Rule is an inappropriate response. The Department lacks the constitutional authority to promulgate the rule, and it may not lawfully require educational institutions to adopt the adjudicatory procedures outlined in the rule. And while Congress may legislate in this area in a way that respects the constitutional rights of the accused, it has not yet done so in a manner that would authorize the Proposed Rule. Thus, instead of adopting the Proposed Rule, the Department should

acknowledge the impropriety of its past actions and allow each institution to determine for itself the best process, consistent with the Constitution, for ameliorating sexual harassment and assault on campus.

I. STATEMENT OF INTEREST

The New Civil Liberties Alliance is a nonprofit civil rights organization founded to defend constitutional rights through original litigation, amicus curiae briefs, the filing of regulatory comments, and other means. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as the due process of law, the right to trial by jury, the right to live under laws made by the nation's elected lawmakers rather than by prosecutors or bureaucrats, and the right to be tried in front of an impartial and independent judge whenever the government brings cases against private parties.

NCLA defends civil liberties by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution's design sought to prevent. Not only does the administrative state evade constitutional limits through administrative rulemaking, adjudication, and enforcement, increasingly agencies coerce state and local actors to engage in otherwise unconstitutional behavior as a condition of receiving federal funds. This unconstitutional administrative state within the Constitution's United States violates more rights of more Americans than any other aspect of American law, and it is thus the focus of NCLA's efforts.

Even where NCLA has not yet brought a suit to challenge an agency's unconstitutional exercise of administrative power, it encourages agencies themselves to curb the unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads have a duty to follow the law, not least by avoiding unlawful modes of governance. NCLA therefore advises that all agencies and agency heads must examine whether their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act (APA) and with the Constitution. Agencies must also take care that they do not violate

constitutional rights indirectly by enlisting regulated entities, such as colleges and universities, to violate the rights of others in order to avoid having federal funds revoked.

II. THE DEPARTMENT'S PRIOR EFFORTS TO REGULATE THROUGH "GUIDANCE"

Title IX, which was enacted in 1972, says, "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.

The Department's predecessor promulgated implementing regulations under Title IX in 1975, but it did not pass any substantive regulations concerning "sexual harassment as a form of sex discrimination" at that time. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61462, 61464 (Nov. 29, 2018) (NPRM). Indeed, it could not have, as the legal concept of "sexual harassment" is widely understood to have been first formulated and recognized by the Courts in the 1980s. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (recognizing, for the first time, that "sexual harassment" constituted discrimination on the basis of sex); Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, *in Sexual Harassment Law*, 9, 20 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004) (describing how the term "sexual harassment" first arose as a legal argument in 1979, which was not recognized by the Court until *Vinson*). Instead, the implementing regulations said only that a recipient of funds "shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part." 34 C.F.R. § 106.8(b).

This regulatory language "initially gave rise to the requirement that schools set up grievance procedures to hear complaints that the school violated Title IX." Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Cal. L. Rev. 881, 900 (2016). But, once "sexual harassment was understood to be a form of Title IX sex discrimination, the idea that schools had a responsibility to correct a hostile environment recast the grievance procedures as a forum for schools to hear complaints about harassing conduct by students." *Id.*

The Department ran with this notion. First, the Department determined, informally, that the general statutory directive of preventing discrimination "on the basis of sex" by grant recipients also

required the Department to prevent covered institutions from allowing sexual harassment as a form of discrimination by either employees or even students. Then, since 1997 the Department has issued "a series of guidance documents" directing colleges and universities that receive federal funding to adopt specific grievance procedures when students or faculty have been accused of sexual harassment on pain of the full revocation of all federal funding to the institution. *Proposed Rule*, 83 Fed. Reg. at 61463.

The Department first issued a guidance document entitled, "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," 62 Fed. Reg. 12034, on March 13, 1997 (*1997 Guidance*). This document contained a lengthy section entitled, "Prompt and Equitable Grievance Procedures," which spelled out requirements schools must satisfy in investigations and adjudications of allegations of sexual misconduct by either students or faculty. *1997 Guidance*, 62 Fed. Reg. at 12044. To that end, the 1997 Guidance listed six "elements" OCR would use "in evaluating whether a school's grievance procedures are prompt and equitable." *Id.* The guidance ultimately left schools with the flexibility to shape their policies based on local needs: "Procedures 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 12045.

The 1997 Guidance also cautioned schools to protect the rights of the accused. The Department noted that "a public school's employees" and "students in public and State-supported schools" "may have certain due process rights under the United States Constitution," and the "rights established under Title IX must be interpreted consistently with any federally guaranteed rights involved in a complaint proceeding." *Id.* at 12045. The Department also cautioned that "procedures that ensure the Title IX rights of the complainant while at the same time according due process to both parties involved will lead to sound and supportable decisions." *Id.*

Following this directive, educational institutions, including both public and private colleges and universities across the country adopted formal procedures for adjudicating allegations of sexual harassment on campus. Many implemented procedures that afforded

the accused with important procedural protections such as the presumption of innocence, the right to confront his or her accuser, and the right to be disciplined only after having been found responsible by clear and convincing evidence.

On April 4, 2011, the Department, acting through the Office of Civil Rights, published a "Dear Colleague Letter" on sexual harassment (*2011 DCL*), which forbad educational institutions from adopting too many protections for the accused. Although the 2011 DCL styled itself a "significant guidance document" and claimed that it "does not add requirements to applicable law," it in fact added numerous new requirements. *See 2011* DCL, at 1 n. 1. Indeed, the 2011 DCL directed schools to "take immediate action to eliminate harassment, prevent its recurrence, and address its effects." *Id.* at 2.

For instance, the document expressly required, as part of schools' mandated efforts to publish and implement procedures for the "prompt and equitable resolution" of sexual misconduct claims, that schools adopt a preponderance of the evidence standard of proof in their investigations of allegations of sexual misconduct. The 2011 DCL gave schools no leeway in that regard (with emphases added):

> Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school *must* use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. *Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX.* Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

2011 DCL, at 11.

The 2011 DCL also ominously warned that "[w]hen OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, OCR will seek appropriate remedies for both the complainant and the broader student population." *Id.* at 16. The 2011 DCL said, "When conducting Title IX enforcement activities, OCR seeks to obtain voluntary compliance from recipients. When a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding." *Id.*

On April 29, 2014, OCR reinforced the 2011 DCL when it published a document entitled, "Questions and Answers on Title IX and Sexual Violence" (*2014 Q & A*). That document, like the 2011 DCL, styled itself as a "significant guidance document," but it too set out mandatory requirements for educational institutions. *See 2014 Q & A*, at 1 n. 1.

First, the 2014 Q & A confirmed that OCR understood schools' use of a preponderance of the evidence standard to be mandatory. In a section entitled "Title IX Procedural Requirements," it names preponderance of the evidence as "the evidentiary standard that *must* be used … in resolving a complaint[.]" *Id.* at 13 (emphasis added). The document also said that "any procedures used for sexual violence complaints, including disciplinary procedures, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution … *including applying the preponderance of the evidence standard of review*." *Id.* at 14 (emphases added).

Like the 2011 DCL, the 2014 Q & A warned that "even if a school was not on notice [of misconduct], the school is nonetheless responsible for remedying any effects of the sexual harassment on the student, as well as for ending the sexual harassment and preventing its recurrence, when the employee engaged in the sexual activity in the context of the employee's provision of aid, benefits, or services to students[.]" *Id.* at 4.

Just in case the mandatory language and threatened enforcement set out in the guidance documents were insufficient to coerce colleges and universities into abandoning due process protections for accused students and faculty, just days after issuing the 2014 Q & A, OCR publicly identified colleges and universities it was then investigating for potential violations of their obligation to comply with Title IX in the implementation of prompt and equitable sexual misconduct grievance procedures. When OCR first published a list, there were 55 colleges and universities on it. In a final list published by OCR on January 17, 2017, the list included 223 colleges and universities that were being investigated for being out of compliance with OCR guidelines.

Notably, at the time of the 2011 DCL, at least 24 major universities used a "clear and convincing evidence" standard of proof. Consistent with its dictate that only a preponderance of the evidence standard could allow for the "prompt and equitable

resolution" of sexual misconduct claims, OCR forced numerous schools that did not immediately comply with the 2011 DCL's mandate to replace more protective standards with the preponderance of the evidence standard. For instance, Harvard Law School, Princeton University, and the State University of New York (SUNY) system all entered resolution agreements with OCR agreeing to reduce the standard of proof in disciplinary proceedings to resolve OCR investigations.

OCR has also ordered two schools to adopt grievance procedures that expressly forbid parties from directly cross-examining each other in sexual misconduct disciplinary hearings. In a Resolution Agreement signed on April 24, 2015, OCR required Rockford University to present to OCR for review a draft Title IX policy that stated, among other things, that "the parties may not personally question or cross-examine each other during a hearing." Similarly, in a Resolution Agreement entered on or around December 23, 2014, OCR required Southern Virginia University to draft Title IX grievance procedures that say, "If cross-examination of parties is permitted … the parties will not be permitted to personally question or cross-examine each other."

Unsurprisingly, as the Department acknowledged in the Proposed Rule, given the wording of the documents and the enforcement actions, many colleges and universities considered this guidance to be "legally binding" and altered their campus adjudication procedures. *Proposed Rule*, 83 Fed. Reg. at 61463-64. Instead of insisting on basic due process protections like providing the accused with notice of the allegations and the right to cross-examine an accuser, the guidance "pressured schools and colleges to forgo robust due process protections." *Id.* at 61464.

The result was catastrophic for many students who were accused of misconduct. As the Department has recognized, "over 200 students have filed lawsuits against colleges and universities alleging their school disciplined them for sexual misconduct without providing due process protections." *Id.* at 61465. And these cases have demonstrated a systematic deprivation of even the most basic procedural protections. For example, the Sixth Circuit Court of Appeals recently re-instated a due process lawsuit because a student had been denied any opportunity to directly question either his accuser or a series of witnesses. The Court said, "Due process requires cross-examination in circumstances like these because it is the greatest legal engine ever invented for uncovering the truth." *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (internal citations and quotation marks omitted). In another case, a court in California concluded that a student was denied

"even a semblance of due process" when he was suspended from the University of California, Santa Barbara for two years, even though he "was denied access to critical evidence; denied the opportunity to adequately cross-examine witnesses; and denied the opportunity to present evidence in his defense." *Doe v. Regents of Univ. of California*, 283 Cal. Rptr. 3d 843, 844-45 (Cal. Ct. App. 2018).

On September 7, 2017, in a prepared speech, Secretary Betsy DeVos acknowledged the Department's past failings, saying, "One person denied due process is one too many," and that "the system established by the prior administration has failed too many students."

Secretary DeVos explained the "current reality" of Title IX adjudications were "kangaroo courts" where "a school administrator [] will act as the judge and jury." At such proceedings, "The accused may or may not be told of the allegations before a decision is rendered. If there is a hearing, both the survivor and the accused may or may not be allowed legal representation." Further, "[w]hatever evidence is presented may or may not be shown to all parties. Whatever witnesses—if allowed to be called—may or may not be cross-examined. And Washington dictated that schools must use the lowest standard of proof."

Secretary DeVos also explained that the OCR had "terrified" schools and "run amok" by "weaponiz[ing] the Office of Civil Rights to work against schools and against students." She continued, saying that the OCR had "exert[ed] improper pressure upon universities to adopt procedures that do not afford fundamental fairness." Secretary DeVos also said, "The failed system imposed policy by political letter, without even the most basic safeguards to test new ideas with those who know this issue all too well." Thus, Secretary DeVos declared, "The era of 'rule by letter' is over."

On September 22, 2017, Secretary DeVos withdrew the 2011 DCL and the 2014 Q & A. In a press release, the Department said, "The withdrawn documents ignored notice and comment requirements, created a system that lacked basic elements of due process and failed to ensure fundamental fairness."

That same day, OCR issued a new "Q & A on Campus Sexual Misconduct." (2017 Q & A). The 2017 Q & A provided a new definition for what constitutes an "equitable"

investigation and set out new mandatory procedures for adjudication. The 2017 Q & A did not, however, require that a school use an evidentiary standard more rigorous than a preponderance, nor did it require that schools grant the accused a hearing, nor did it require the school to separate the investigatory and decision-making functions. Finally, the 2017 Q & A informed schools that "existing resolution agreements between OCR and schools" related to the 2011 DCL and 2014 Q & A were "still binding," and would continue to be enforced, despite lacking basic elements of due process and failing to ensure fundamental fairness to students.

The Department now proposes to adopt complex substantive regulations, which would set out strict procedures that all educational programs or activities receiving federal financial assistance would be forced to adopt. These new procedures aim to strike a balance between the due process rights of the accused and those complaining of alleged harassment. However, the proposed regulations also formally impose substantive conditions to which any recipient of federal financial assistance must adhere.

III. THE PROBLEMS WITH THE PROPOSED RULE

While NCLA appreciates the Department's partial efforts to remedy some of its most egregious past actions, NCLA objects to the Proposed Rule because the Department has no authority to set forth such requirements on funded institutions.

A. The Department Has No Authority to Issue the Proposed Rule

At its most basic level, the Department lacks the power to issue the Proposed Rule and thus it must not attempt to do so. The U.S. Constitution does not allow the Department to impose these requirements on colleges and universities because the Department has no constitutional power to make laws, and Congress has never even attempted to give the Department the type of authority it has proposed to exercise here.

No agency has any inherent power to make law. "All legislative powers" are vested in the Congress by Article I, § 1 of the U.S. Constitution. Moreover, "the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). Further, "an agency literally has no power to act … unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

As the Department recognizes, "Title IX states generally 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), but does not specifically mention sexual harassment." *Proposed Rule*, 83 Fed. Reg. at 61466. Yet the Department insists that it has the power to specify detailed adjudication procedures for all funding recipients, based on the Secretary's authority to implement Title IX set out in 20 U.S.C. §§ 1221e-3, 1682 and 3474. *Id.* at 61480.

Title IX says nothing about sexual harassment, much less campus discipline, and the laws written by Congress do not attempt to empower the Department to promulgate this rule. Title IX of course, merely prohibits recipients of funding from discriminating "on the basis of sex." 20 U.S.C. § 1681. And § 1682 merely empowers each agency that extends funding "to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." Section 1221e-3 says simply that the Secretary may make regulations "in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, and subject to limitations as may be otherwise imposed by law." 20 U.S.C. § 1221e-3. Finally, § 3474 just allows the Secretary "to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department."

None of these statutes come close to empowering the Secretary to specify the processes that funding recipients must utilize in adjudicating allegations that a student has sexually harassed another student. Title IX speaks only of discrimination by the recipients of funding themselves, and even then, the concept of sexual harassment as a form of sex discrimination only comes about through interpretation. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Cal. L. Rev. 881, 900 (2016). Whether or not this view is valid, Title IX says nothing at all about a funding recipient's obligation to police third-party conduct—the actions of its own students. Title IX therefore has nothing at all to say about which procedures a recipient must adopt to address third-party sexual harassment.

Furthermore, the statutory provisions enabling the Secretary to make regulations only empower her to administer funding in a way that is necessary to prevent the recipient from discriminating "on the basis of sex." *See* 20 U.S.C. §§ 1221e-3, 1682, 3474. Each provision is meant to allow the implementation of Title IX, but they cannot be used by the Secretary to alter the law's substantive requirements. But the Proposed Rule does just that—it goes far beyond the statutory directive and micromanages precisely how colleges and universities may treat students who themselves have been accused of a form of discrimination.

Title IX did not contemplate such a reach, and the Proposed Rule is simply not authorized by law. Because there is no underlying statutory authority for the Proposed Rule, the attempted rulemaking activity is invalid, and threatens to evade Article I's strictures. The Department must not attempt such invalid activity.[1]

B. The Proposed Rule Is an Invalid Attempt to Invoke the Spending Clause

The Spending Clause says that Congress may "pay the Debts and provide for the ... general Welfare of the United States." U.S. Const., Art. I, § 8, cl. 1. Title IX was enacted pursuant to Congress' claimed authority under this clause. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998).[2]

The Spending Clause limits Congress' authority to condition payment of federal funds on state and local actors' engaging or refusing to engage in certain behavior. For example, Congress, and by extension an administrative surrogate, must speak "unambiguously" if it "intends to impose a condition on the grant of federal moneys." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Congress, and its administrative surrogates, may not condition the grant of federal funds on a state or local actor's, including a private university's, engaging in otherwise unconstitutional behavior. *South Dakota v. Dole*, 483 U.S. 203, 208 (1987). Congress is also forbidden from coercing states or local actors, including private universities, to adopt certain policies and practices on threat of having federal funds revoked. *Id.*, at 211. Such "economic dragooning" imperils "the political

[1] While the Proposed Rule is constitutionally invalid, it is also invalid under the Administrative Procedure Act, 5 U.S.C. § 706(2), because it is an attempt to promulgate a rule in excess of the Department's authority and is arbitrary and capricious in its effort to interpret Title IX.

[2] NCLA does not agree that Article I, Section 8, clause 1, grants Congress the power to spend funds for any purpose. The Spending Clause, properly understood, is a limitation on the taxing power, and it allows Congress to spend funds while exercising other enumerated powers.

accountability [that is] key to our federal system," because, when a local actor "has no choice, the Federal Government can achieve its objectives without accountability." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578, 581 (2012).

These limitations on the exercise of the Spending Clause are well known to the Department. Indeed, the Department recognized that Title IX was enacted pursuant to Congress' so-called "Spending Clause authority," and thus "the obligations it imposes on recipients are in the nature of a contract." 83 Fed. Reg. at 61466. And the Department has said, "[I]t follows from this that recipients must be on clear notice of what conduct is prohibited and that recipients must be held liable only for conduct over which they have control." *Id.*

Unfortunately, the Department has failed to also acknowledge that the Proposed Rule does not comport with the constitutional limits on its exercise of Spending Clause authority. First, the mandatory procedures set out in the Proposed Rule may well constitute unconstitutional conditions. One of the most nefarious aspects of the Department's former habit of rule by guidance was that the Department had forced funding recipients to violate the constitutional rights of students by eliminating their basic due process protections. As the Department now recognizes, this was unlawful because "the government may not compel private actors to restrict conduct that the government itself could not constitutionally restrict." 83 Fed. Reg. at 61481. But mandating different specific procedures will not necessarily resolve this issue, because what process is constitutionally due "in each particular case" may differ depending on the circumstances. *Baum*, 903 F.3d at 581. For instance, the Department proposes to allow funding recipients to continue to rely on a preponderance of the evidence standard, 83 Fed. Reg. at 61477, but this standard may well fall short of required due process in many—if not all—cases.

Next, to the extent that the conditions set by Title IX are contractual in nature, the Proposed Rule improperly alters the very essence of the bargain struck between the government and funding recipients long after the terms were finalized. The terms of the agreement between Congress and funding recipients only encompasses a prohibition on *the recipient* from engaging in discrimination "on the basis of sex." 20 U.S.C. § 1681. But the Proposed Rule seeks to radically alter the terms to impose strict rules on campus

adjudicatory procedures at a micro level. Such new conditions simply could not have been foreseen as part of the Congressional directive. The Department, in its role as mere executor of the agreement, may not now fundamentally alter the terms of the agreement in this fashion. *See Pennhurst State Sch. & Hosp.*, 451 U.S. at 17.

Finally, the Proposed Rule would also violate the Spending Clause because it is not a true mutual agreement. Spending Clause jurisprudence assumes, at minimum, that the parties have entered into a valid and mutual agreement without fear from improper compulsion. *See Dole*, 483 U.S. at 211. But the Proposed Rule violates that assumption. Colleges and universities across the nation depend on substantial federal funding for their continued existence, and very few educational institutions could survive without continued funding. *See* Pew Charitable Trust, *Federal and State Funding of Higher Education: A Changing Landscape*, Chartbook (June 2015) *available at* https://www.pewtrusts.org/~/media/assets/2015/06/federal_state_funding_higher_education_final.pdf. The entire structure of American higher education depends on the Department providing the funds it has promised, including federal guarantees for student loans. With this level of dependency, the overwhelming majority of colleges and universities cannot be said to have a meaningful choice between adopting the Proposed Rule and forgoing funding.

This point is clearly illustrated by the history of schools' systematic compliance with the Department's prior invalid guidance directives. Colleges almost uniformly adopted the procedures set by the Department, even though it resulted in these institutions facing more than 200 lawsuits for violating the constitutional rights of their students. 83 Fed. Reg. at 61465. Clearly these recipients determined it was preferable to violate the rights of their students and face civil liability for that than to face even the threat of withdrawn federal funding.

The Proposed Rule also is not a true agreement between the government and the parties whom the terms of the rule purport to bind—every student in a funded institution. The Proposed Rule recruits educational institutions to act as agents of the federal government and limits the rights of their students in very precise ways. The affected students, however, have no say in this agreement. And students have no real choice but to accept the agreement forced upon them, because, as mentioned, higher education in America depends, almost universally on the receipt of federal funding. Particularly for low-income students, the decision to receive an education means attending

a federally-funded institution. The Proposed Rule would govern nearly all college students, without affording these third parties any say in the terms of the so-called agreement.

C. The Proposed Rule Fails to Remedy the Harms Created by Prior Department Actions Adequately

Finally, apart from violating constitutional limits on the Department's authority, the Proposed Rule also fundamentally distorts the proper role between the federal government and educational institutions.

The ultimate decision concerning the best way to address sexual harassment at colleges and universities should be decided by the institutions themselves. While NCLA fully appreciates the need to address sexual harassment on campus, educational institutions have labored for years to strike the proper balance between establishing an appropriate educational environment and protecting the rights of the accused. To be sure, certain educational institutions have failed in this effort. But, completely separate from governmental oversight, educational institutions already face civil liability for either allowing misconduct or for violating the rights of their students. *See Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) ("Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex … . We believe the same rule should apply when a teacher sexually harasses and abuses a student."). These institutions are in the best position to determine what procedures are appropriate for their students.

Indeed, many of the problems arising on campus in the past decade have been of the Department's own making. Colleges and universities almost universally adopted formal disciplinary proceedings long before the 2011 DCL, and those institutions faced a well-established legal obligation to prevent sexual harassment. *See Franklin*, 503 U.S. at 75. And these institutions by and large appropriately protected the rights of accused students until the Department unlawfully forced changes to these proceedings. With this history, the Department should recognize that it is unwise for it to mandate specific policies, which may or may not strike the right balance. After all, as Judge James L. Buckley noted in a slightly different context, the "surest way to kill [local] initiatives" "is to impose federal regulatory straitjackets on them." James L. Buckley, *Saving Congress from Itself*, 39 (2014). Local "experimentation remains the best way to develop more effective ways of delivering public

services." *Id.* The Department should repudiate its dishonorable past practice of denying students due process, refrain from repeating the mistake of violating students' civil liberties via the Proposed Rule, and allow educational institutions to manage this issue on their own—as Congress has so far left them to do.

* * *

Thank you again for this opportunity to provide NCLA's views on this important issue. Should you have any questions, please contact Caleb Kruckenberg, Litigation Counsel, at caleb.kruckenberg@ncla.legal.

Sincerely,

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New Civil Liberties Alliance