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July 21, 2020

The Honorable Betsy DeVos  
United States Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

The Honorable Kenneth L. Marcus  
Assistant Secretary for Civil Rights  
Office for Civil Rights  
U.S. Department of Education  
400 Maryland Avenue, S.W  
Washington, D.C. 20202

**Re: Nondiscrimination on the Basis of Sex in Education Programs or Activities  
Receiving Federal Financial Assistance Rule Issued May 19, 2020**

Dear Secretary DeVos and Assistant Secretary Marcus:

The National School Boards Association (NSBA) shares the goal of the Department of Education to protect students from all forms of sexual harassment so that students can participate fully in the programs our public schools offer. We also share your view that communication, knowledge, and training of all stakeholders is a critical aspect of such participation. To this end, NSBA is committed to helping school districts across the country develop and implement policies to address sexual harassment against all students,<sup>1</sup> and to create supportive school environments

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<sup>1</sup>Among many policy statements expressing its commitment to preventing sexual harassment against all students, NSBA's Delegate Assembly has adopted the following:

Beliefs & Policies, Art. IV, § 2.9: NSBA supports state and local school board efforts to become more proactive in the elimination of violence and disruptive behavior at school, school-sponsored events, during school bus travel and while traveling to and from school. Such behavior, includes, but is not limited to, physical violence, "bullying" by any means, disrespect of fellow students and school personnel, and other forms of harassment.

Beliefs & Policies, Art. IV, § 2.12: NSBA believes that all public school districts should adopt and enforce policies stating that harassment for any reason, including but not limited to harassment on the basis of race, ethnicity, gender, actual or perceived sexual orientation, gender identity, disability, age, and religion against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders. Such policies should include an effective complaint mechanism. Districts should institute in-service programs to train all school personnel,

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*The leading advocate for public education*

to “restore or preserve equal access to education, protect student and employee safety and deter sexual harassment.”<sup>2</sup>

On behalf of our member state associations, the 3,200 members of our Council of School Attorneys, and school boards across the country, NSBA first seeks clarification on one crucial issue: how schools can meet the implementation date of the “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rule,” commonly referred to as the Title IX “Rule” or “regulations.” In this spirit of cooperation and common purpose, we also write to express concern and request clarification of certain aspects of the Title IX Rule.

As outlined in greater detail below, NSBA is concerned that absent an extension of the effective date, the three-month implementation timeframe unduly burdens public school systems at an unprecedented time. Amid the coronavirus pandemic, school districts are grappling with novel operational challenges as they work to reopen schools safely in the fall.<sup>3</sup> Consistent with state and national expectations, the sole priority for most school districts is to reopen schools safely for direct instruction. By requiring full compliance with the drastically amended Title IX Rule by August 14, 2020, the Department is forcing schools to redirect significant time and attention from more imminent health and safety concerns.

NSBA urges the Department to address the issues identified below to develop a clear understanding of the Rule, and to extend the compliance date.

NSBA presents four areas of concern shared by our members:

- I. The Department’s Effective Date for the Title IX Rule is Unworkable for School Districts.
  - a. *The short implementation period impedes schools’ policy-revision processes.*
  - b. *Appropriate training is unfeasible given the short implementation period.*
- II. The New Actual Knowledge Standard, Encompassing All K-12 Employees, Creates Confusion.
- III. The Department Should Clarify Key Aspects of the New Process to Assist Schools in Properly Evaluating and Processing Sexual Harassment Complaints.

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including volunteers to recognize and prevent harassment against employees and students. Districts should investigate complaints, initiate education programs for students, and institute programs to eliminate harassment.

<sup>2</sup>U.S. Department of Education Title IX Final Rule Overview, <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf>.

<sup>3</sup>Districts must now address budget deficits for the next school year and beyond, determine what expenses are permissible under the federal stimulus grant packages, and tackle the inevitable problem of staff reductions. Since K-12 school districts rely on financial support from states, declining income and sales tax revenues have created massive budget holes resulting in drastic cuts and lay-offs.

- a. *Title IX Coordinators need further guidance on the circumstances necessary to justify a unilateral formal written complaint.*
- b. *School districts need further guidance on how to manage a parallel system.*

IV. The Mandate to Release Confidential Information and the Limitations on Early Disciplinary Intervention are Unduly Restrictive.

**I. The Department’s Implementation Date for the Title IX Rule is Unworkable for School Districts.**

The Title IX Rule makes sweeping changes to the way K-12 schools address sexual harassment, which necessitate substantial revision to local school policies and procedures, as well as staff training. The publication of the final Title IX Rule coincided with the closing of most school districts across the country due to the coronavirus pandemic, effectively halting immediate comprehensive review and discussion of the new Rule at the district level. Now, as schools reimagine instruction considering the current national health emergency, the timeframe makes compliance difficult at best, and likely improbable. School district staff and their attorney advisors must review current policies and practices for consistency with the extensive new procedural requirements, as well as state and local law. The staff time associated with this review and revision process and subsequent training undoubtedly will create additional fiscal difficulties for many school districts, whose budgets are already strained.<sup>4</sup>

- a. *The short implementation period impedes schools’ policy-revision processes.*

The coronavirus pandemic poses even greater hurdles for school districts as they race to make major policy revisions over the summer months in a manner that meets school district and state rule-making procedures. Before issuing official policy changes, most districts provide notice to the public and other stakeholders, workshop potential revisions, and hold public meetings for discussion and input. Where school districts can convene prior to the effective date, the process for policy revisions may be lengthy for some districts and preclude the mid-August implementation. For example, in Pennsylvania, it may take over two months to approve policy changes, as public notification of proposed revisions and a second-reading process is usually required.

The final Rule implicates numerous school district policies – not only those specifically addressing discrimination/harassment under Title IX. School districts will need to review policies and student codes of conduct addressing, e.g., bullying/cyberbullying, hazing, adult/student boundaries, and discipline procedures. Under the new rule, it appears that school districts must develop parallel procedures to address “non-Title IX” complaints that require scrutiny under state law or local policies. Schools must harmonize Title IX sexual harassment definitions and

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<sup>4</sup>Budget shortfalls associated with the economic fallout from the pandemic will also force cuts in school staff. Preliminary estimates predict astonishing state budget holes that some education funding experts warn could result in the loss of up to 300,000 education positions nationwide.

procedures with existing district and state anti-harassment policies, which prohibit conduct based on sex that does not rise to the level of sexual harassment under the new Rule. School districts need more than the allotted three months to discern how the Title IX Rule can be fully integrated into existing school district policies under federal and state law.

b. *Appropriate training is unfeasible given the short implementation period.*

In addition to overhauling district policies, school districts must train all employees on the new Title IX procedures at precisely the same time they are preparing other professional development, updating student handbooks, and addressing staffing needs to be ready for students to return to school in the middle of a global pandemic. During the summer break, administrators routinely collect, prepare, and reconcile data for state reporting, program development, and staffing/instructional modifications. All this regular activity now occurs under the cloud of coronavirus, which adds another significant set of timing challenges this year. At a minimum, now districts are required to redevelop and implement plans for student and staff schedules, alter or make building modifications, revise transportation scheduling, and consider additional staffing needs.

While extensive training for all personnel is critical to the successful implementation of the Rule, appropriate training takes time. Training of all staff on this scale not only requires time but requires additional funding resources. There is great concern that, without additional time to train staff, districts would be forced to choose between full and adequate implementation of the Rule and the reallocation of staff and resources to address coronavirus concerns. For school districts that lack financial resources or available providers for the training, and for large districts with 100 or more administrators who may need to be trained very quickly, the financial impact is significant.

An extension of time to implement the rule would enable districts to tackle pandemic-related needs and education staff cuts at the onset of the new school year, and to bring stability to the educational process. The August 14, 2020 deadline is simply impractical given the significant reopening task ahead. NSBA urges the Department to reconsider the effective date of the rule so that school districts will have an adequate opportunity to assess its policy, personnel, training, and funding needs.

## **II. The New Actual Knowledge Standard, Encompassing All K-12 Employees, Creates Confusion.**

Section 106.30 of the Rule defines “actual knowledge” more expansively in the elementary and secondary school context than courts have defined the term in suits for money damages under Title IX. The Rule states that a school district will be deemed to have “actual knowledge” of sexual harassment, thereby triggering the district’s response obligations under the Rule, whenever *any*

employee has notice of potential sexual harassment or assault.<sup>5</sup> For PSE institutions, notice to the Title IX Coordinator or any official with authority to act conveys actual knowledge to the recipient. The Department tied its differentiation between ESE and PSE schools and their employees, who “stand in a special relationship regarding their students.”<sup>6</sup> This appears to include not only teachers but also educational support staff, bus drivers, coaches, clerical, and cafeteria staff. School districts see two significant implications of this expanded standard: first, to mitigate potential legal exposure and potential loss of federal funding, districts will be obliged to train all employees to identify and to report allegations of sexual harassment as now defined; second, to accomplish the necessary training, districts will need to modify existing budgets and seek additional funding.

As school districts examine the new reporting requirements, questions are emerging. While the Rule expressly refers to “any” employee, is it the Department’s intent to include part-time, temporary or substitute employees, many of whom will have only a casual, infrequent connection to the schools? Making a substitute teacher an “employee” for the purposes of the Title IX regulation is impractical because substitutes should be not viewed in the same manner as classroom teachers, who have greater knowledge of their students and have the benefit of prior interaction and observation to assess student behaviors. A substitute teacher may only teach one class, one day per year, and rarely interact with the students. To equate a daily substitute teacher with a regular classroom teacher for purposes of “actual knowledge” of alleged sexual harassment places another financial and professional burden on school districts.

Similarly, adjuncts, interns, maintenance employees, independent third-party contractors such as an IT consultant, and others with no custody or control over students may arguably be considered an employee under the new regulations. NSBA asks the Department to clarify its intent.

### **III. The Department Should Clarify Key Aspects of the New Process to Assist Schools in Properly Evaluating and Processing Sexual Harassment Complaints.**

The new Rule requires schools to comply with numerous detailed procedural requirements to respond to a “formal complaint” of sexual harassment. Because it restricts the ways a formal complaint can be initiated, however, the Rule may have the unintended consequence of limiting the manner in which schools respond to allegations of sexual harassment and deterring reports.

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<sup>5</sup>In two key decisions, the US Supreme Court determined the standard to be used in assessing liability for schools receiving federal funds under Title IX and held that such schools can be liable for sexual harassment by either students or staff if there is proof of (1) “actual knowledge” of the alleged misconduct and (2) the recipient acted with “deliberate indifference” in its response. *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998) and *Davis v. Monroe County Bd. of Ed.* 526 U.S. 629 (1999). Despite this framework in money damages cases, the Department adapted the actual knowledge standard for K-12 schools so as to “charge a recipient with actual knowledge whenever any employee has notice.” The actual knowledge standard under the Rule to include notice to “any employee” in an elementary and secondary school is a condition not found in the *Gebser/Davis* framework. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rule, 34 CFR 106 at 58.

<sup>6</sup>Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rule, 34 CFR 106 at 1676.

NSBA asks the Department to clarify the expanded role of the Title IX Coordinator associated with the formal complaint process in the K-12 setting.

- a. *Title IX Coordinators need further guidance on the circumstances necessary to justify a unilateral formal written complaint.*

Under the new Rule, a Title IX Coordinator may sign a formal, written complaint, thereby initiating a complex investigation and adjudication process. Schools must ensure that their staff understand what factors a Title IX Coordinator should and should not consider when deciding whether to sign a formal complaint. The Rule provides little guidance on the circumstances and factors that would permit a Title IX Coordinator to sign a formal complaint, however. The Proposed Rule issued in November 2018 would have required a Title IX Coordinator to file a formal complaint upon receiving multiple reports against the same respondent. That provision was removed. NSBA is concerned that the removal of this provision and the absence of clear directives places the Title IX Coordinator in a difficult legal posture when there is evidence of a Title IX violation that requires redress.

The commentary refers to legitimate reasons why a complainant may not want a school to move forward with a formal investigation of allegations, and says it “endeavors through these final regulations to respect a complainant’s autonomy.”<sup>7</sup> The Rule requires the Title IX Coordinator to meet with a complainant to discuss the complainant’s wishes regarding an investigation before making any decision about whether to proceed. At the same time, the Rule explicitly warns Title IX Coordinators to exercise caution in unilaterally filing a complaint when the complainant is reluctant or does not desire to proceed. The rationale does not adequately address the appropriate response of school districts faced with legally sufficient complaints. It seems unlikely given the policy considerations underlying sexual harassment procedures in general that the Department would prevent districts from acting, but the Rule leaves that impression.

- b. *A parallel system poses significant management and financial hurdles for school districts.*

School districts nationwide have detailed student discipline policies reflecting federal and state legal standards, including the requirement that students have a basic due process right to notice and an opportunity to be heard before imposition of suspension or expulsion. The “dual track” system created by the Rule, with enhanced substantive and procedural “hoops” over and above the widely understood and workable *Goss v. Lopez*<sup>8</sup> standard, is not required by federal due process standards. The parallel system the Rule imposes for sexual harassment claims stands to

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<sup>7</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rule, 34 CFR 106, Footnote 177.

<sup>8</sup> *Goss v. Lopez*, 419 U.S. 565 (1975) holding that a public school must conduct a hearing, allowing the student notice and an opportunity to be heard, before subjecting a student to suspension. Suspension without a hearing violates the Due Process Clause of the Fourteenth Amendment of the US Constitution.

undermine school officials' discretion to deal with widely varying fact situations, compromises some school safety efforts, and creates arbitrariness vis-à-vis the treatment of sexual harassment violations versus other conduct violations (e.g., weapons, threats of violence, drug use). The prospect of coordinating these dual systems is daunting at best for many school districts and confusing for most. This is particularly onerous where school boards are the final decisionmakers.<sup>9</sup> Against the backdrop of financial disruptions caused by the pandemic, the “dual track” process would give rise to the need for significant (and expensive) “retooling” of policies, procedures and training, as well as enhanced liability and fiscal exposure.

Because the Title IX coordinator retains discretion to initiate a formal investigation over the objection of the complainant—recognizing, of course, the difficulty of pursuing the investigation without the cooperation of the alleged victim – the Department should provide more guidance for Title IX Coordinators on how to manage dual systems without running afoul of concerns raised by the Office for Civil Rights.

#### **IV. The Mandate to Release Confidential Information and the Limitations on Early Disciplinary Intervention are Unduly Restrictive.**

The final Rule requires schools to investigate and adjudicate formal complaints in a manner that ostensibly affords the full panoply of due process protections up to and including an optional “live” hearing for K-12 schools and cross examination of the parties, for both complainant and respondent.<sup>10</sup> While these procedural protections may be appropriate in the postsecondary context, they are not in the K-12 context. The extensive process now associated with every formal complaint of sexual harassment is likely to chill such reports in K-12 schools building, and effectively increase the potential for retaliation and further harm to complainants.

One way the Rule fails to acknowledge the unique circumstances presented in the K-12 school settings is by prohibiting schools from restricting the disclosure or discussion of allegations or the presentation of evidence at any time during the course of the investigation. It prohibits schools from instructing young students and their parents to defer public discussion of the allegations – information that could cause bullying of the complainant and castigation of the alleged perpetrator. Depending on the surrounding circumstances, including the ages of the parties, K-12 school officials should be able to determine whether confidentiality is needed to avoid creation of a more hostile environment for the complainant or respondent, or to avoid impairing the educational process by escalating acts of retaliation to more vulnerable students prior to final resolution on the facts of the complaint. NSBA believes that there are other strategies schools could use to protect the confidentiality of the students but allow for adequate and fair representation.

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<sup>9</sup>In Illinois, school boards serve as the final decisionmakers in the internal appeal process on sex equity complaints.

<sup>10</sup>U.S. Department of Education Title IX Final Rule Overview, <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf>.

Education leaders also have expressed concern that the Rule limits the discretion of school administrators to protect informants, while still affording due process comporting with governing case law that applies at the elementary and secondary level. For example, traditional forms of early intervention (parent conferences and behavioral agreements) and minor discipline such as detention or one day suspensions, would be prescribed under the new Rule. Based upon these concerns, NSBA urges the Department to clarify this provision to address the unique challenges to sexual harassment claims in the primary and secondary school setting. NSBA asks that educators be afforded the discretion to address allegations of sexual harassment in a less formal and more expedient manner through effective, time-tested practices.

## V. Conclusion

We appreciate the opportunity to seek clarification on the Title IX Rule and reiterate NSBA's strong support for our common purpose to keep schools free from sexual harassment against students. The new Title IX Rule presents many unintended legal, fiscal, and practical challenges to schools, many of which could be remedied through thoughtful and concerted discussion. NSBA Executive Director & CEO Anna Maria Chávez explained on July 9, "As local school boards plan for opening in the fall, their number one priority is to do everything within their means to provide students with a high-quality education in a safe and healthy learning atmosphere." To do this, public schools need to focus their staff time on *safely* reopening strategies that work for local communities. NSBA seeks an extension of the Title IX Final Rule implementation deadline beyond August 14, 2020, for this purpose, to enable schools to first attend to the task of safely reopening schools while dealing with the coronavirus crisis, and to allow time to revise school policies and to educate all necessary personnel.

We continue to be available to OCR and the Department of Education for consultation to provide the perspective of school boards and their counsel. NSBA stands ready to work in partnership with OCR on this and other issues of importance to our members, and to the nation's public school children.

Sincerely,

A handwritten signature in blue ink that reads "Anna M. Chavez". The signature is written in a cursive style with a large, stylized "C" at the end.

Anna Maria Chávez  
Executive Director & CEO  
National School Boards Association