

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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<http://oversight.house.gov>

February 14, 2020

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

Dear Secretary DeVos:

The Committee on Oversight and Reform is requesting documents and information regarding a troubling proposal by your agency that would encourage schools to pursue fewer complaints of sexual assault and other forms of harassment, depriving survivors of equal access to education under the law.

When Congress passed Title IX of the Education Amendment Act in 1972, it prohibited discrimination on the basis of sex—including through sexual harassment—in educational institutions that receive federal funds.<sup>1</sup> Under your tenure, the Department of Education has proposed a new rule that would significantly narrow Title IX's definition of sexual harassment. Your proposal would limit the circumstances under which schools are required to investigate sexual misconduct and make it more difficult for student survivors to resolve their claims.<sup>2</sup>

The Committee is also concerned that the Department failed to meet required procedures for adopting new rules by conducting a flawed cost-benefit analysis and reducing transparency in order to push this rule through.

### Statements by Trump Administration Officials

The Trump Administration's proposal would be a drastic departure from the Department of Education's longstanding enforcement of Title IX. Statements by you and other Trump Administration officials raise serious concerns that bias against survivors of sexual assault may

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<sup>1</sup> Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61462 (Nov. 29, 2018) (proposed rule) (online at [www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal](http://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal)).

<sup>2</sup> Letter from National Women's Law Center to Kenneth L. Marcus, Assistant Secretary of Civil Rights, Department of Education (Jan. 30, 2019) (online at <https://nwlcciw49tixgw51bab.stackpathdns.com/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf>).

have led the Department to draft a rule that would curtail investigations of sexual misconduct at educational institutions. For example:

- In July 2017, the former Acting Assistant Secretary for Civil Rights, Candice Jackson, derided students who file Title IX claims, asserting that “90 percent of them ... fall into the category of ‘we were both drunk,’ ‘we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right’.”<sup>3</sup>
- In September 2017, just weeks before the Department rescinded two important Title IX guidance documents that protect survivors of sexual violence, you dismissed many victims of sexual harassment, claiming that “if everything is harassment, then nothing is.”<sup>4</sup>
- Judge Neomi Rao, who was the Administrator of the Office of Information and Regulatory Affairs at the time the Office approved the Department’s proposed Title IX rule, wrote in her college newspaper that if a woman “drinks to the point where she can no longer choose, well, getting to that point was part of her choice.”<sup>5</sup>

These statements are fundamentally at odds with Title IX’s central goal of preserving equal access to education and protecting all students from sexual harassment and assault.

### **Deficiencies in Rulemaking Process**

In addition to concerns about the negative impacts of this proposal, it appears that the Department failed to comply with basic rulemaking requirements. For example, Executive Order 12866 requires agencies to conduct a thorough cost-benefit analysis for proposed rules.<sup>6</sup> In this case, the Department discounted the proposal’s costs to survivors of sexual harassment and assault while overestimating potential savings to educational institutions.

The Department declined to deem this rule “economically significant,” meaning it does not expect the rule to have an annual economic impact of \$100 million or more.<sup>7</sup> Given the

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<sup>3</sup> *Campus Rape Policies Get a New Look as the Accused Get DeVos’s Ear*, New York Times (July 12, 2017) (online at [www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html](http://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html)).

<sup>4</sup> Department of Education, *Secretary DeVos Prepared Remarks on Title IX Enforcement* (Sept. 7, 2017) (online at [www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement](http://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement)).

<sup>5</sup> *Shades of Gray*, Yale Herald (Oct. 14, 1994) (online at [www.documentcloud.org/documents/5684266-01-Shades-of-Gray-Neomi-Rao.html](http://www.documentcloud.org/documents/5684266-01-Shades-of-Gray-Neomi-Rao.html)).

<sup>6</sup> Exec. Order No. 12866, 58 Fed. Reg. 190 (Oct. 4, 1993) (online at [www.reginfo.gov/public/jsp/Utilities/EO\\_12866.pdf](http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf)) (providing that cost-benefit analysis should include “qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider”).

<sup>7</sup> Exec. Order No. 12866, 58 Fed. Reg. 190 (Oct. 4, 1993) (online at [www.reginfo.gov/public/jsp/Utilities/EO\\_12866.pdf](http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf)); Office of Information and Regulatory Affairs, Office of

Department's one-sided cost-benefit analysis, however, the Committee is concerned that the Department reached this conclusion only by shifting costs from educational institutions onto student survivors.<sup>8</sup>

The Centers for Disease Control and Prevention estimates that each victim of sexual assault faces a lifetime cost of \$122,461, or \$3.1 trillion for the 25 million sexual assault victims in the United States. An estimated 32% of these lifetime costs—nearly \$1 trillion—is borne by government sources.<sup>9</sup>

For student survivors, the medical costs associated with sexual assault are compounded by lost educational and professional opportunities, relocation and housing costs, missed paid work, and foregone tuition. Of the students who experience sexual assault, 34% drop out of college.<sup>10</sup> The Department's cost-benefit analysis does not appear to have taken these costs into account.

The Department has argued that its proposal would save educational institutions between \$286.4 and \$367.7 million over ten years—because schools would be expected to investigate fewer complaints of sexual assault.<sup>11</sup>

However, the Department appears to have inflated the rule's potential savings by using a 2014 Senate report to overestimate the number of investigations schools currently undertake. In fact, the Senate report found that sexual assaults on campus are widely underreported and that reported sexual violence often goes uninvestigated.<sup>12</sup>

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Management and Budget, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance RIN: 1870-AA14 (online at [www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=1870-AA14](http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=1870-AA14)) (accessed February 6, 2020).

<sup>8</sup> *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, Verdict Magazine (Nov. 29, 2018) (online at <https://verdict.justia.com/2018/11/27/a-sharp-backward-turn-department-of-education-proposes-to-undermine-protections-for-students-against-sexual-harassment-and-assault>); Letter from National Women's Law Center to Kenneth L. Marcus, Assistant Secretary of Civil Rights, Department of Education (Jan. 30, 2019) (online at <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf>).

<sup>9</sup> Cora Peterson Ph.D. et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, American Journal of Preventative Medicine (June 2017) (online at [www.ncbi.nlm.nih.gov/pmc/articles/PMC5438753/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC5438753/)).

<sup>10</sup> Cecilia Mengo and Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, Journal of College Student Retention: Research, Theory & Practice (May 11, 2015) (online at <https://doi.org/10.1177/1521025115584750>).

<sup>11</sup> 83 Fed. Reg. at 61463, 61487.

<sup>12</sup> Majority Staff, Senate Subcommittee on Financial and Contracting Oversight, *Sexual Violence on Campus* (2014) (The Senate report asked 440 schools for the number of Title IX investigations performed in the previous five years, within a range—for example, between 2-5, or 10-50. The Department then took the highest end of the reported ranges into its calculations—assuming for instance that a school had conducted 50 investigations rather than 10).

The Department also appears to have underestimated how much it would cost educational institutions to comply with the proposed rule. In its public comments to the proposed rule, the Association of Title IX Administrators cautioned:

ED [the Department] dramatically underestimates the amount of time needed to appropriately train coordinators, investigators, and adjudicators. The estimated cost associated with appropriate training is inestimably higher, even if all training is performed in house.<sup>13</sup>

The Association also asked the Department to “revise and provide more accurate assessments of the institutional costs to implement the changes proposed by the new regulations.”<sup>14</sup>

The Department failed to consider other costs the rule would impose on schools, such as the cost of conducting the quasi-judicial proceedings created by the rule and higher litigation costs faced by schools that fail to pursue reports of misconduct.

Finally, the Department has made objective analysis of the costs and benefits of its proposed rule more difficult by failing to disclose the data used to develop the rule. Under the Administrative Procedure Act, an agency proposing a new rule must make available “for public evaluation” the “technical studies and data upon which the agency relies.”<sup>15</sup> Executive Order 12866 also requires an agency to disclose information underlying its Regulatory Impact Analysis and other cost benefit analyses in order to assess the accuracy of the agency’s conclusions.<sup>16</sup>

In this case, the Department failed to meet these transparency requirements. In the preamble to the proposed rule, the Department cited “public reports of Title IX reports and investigations at 55 IHEs [institutions of higher education] nationwide,” a “sample of public Title IX documents,” and a “review of Title IX documents from various institutions.”<sup>17</sup> The Department did not make these reports or documents available, nor did it identify which schools provided documents or which documents were analyzed. The Department’s failure to disclose this data deprives the public of a meaningful opportunity to assess whether the proposed Title IX rule is based on sound evidence.

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<sup>13</sup> Letter from Association of Title IX Administrators to Secretary Betsy DeVos, Department of Education (Jan. 28, 2019) (online at [www.regulations.gov/document?D=ED-2018-OCR-0064-104725](http://www.regulations.gov/document?D=ED-2018-OCR-0064-104725)).

<sup>14</sup> *Id.*

<sup>15</sup> *Chamber of Commerce v. SEC (Chamber of Commerce II)*, 443 F.3d 890, 899 (D.C.Cir.2006).

<sup>16</sup> See Exec. Order No. 13563, 76 Fed. Reg. 14 (Jan. 21, 2011) (online at [www.federalregister.gov/documents/2011/01/21/2011-1385/improving-regulation-and-regulatory-review](http://www.federalregister.gov/documents/2011/01/21/2011-1385/improving-regulation-and-regulatory-review)) (requiring agencies to provide to the public “timely online access to ... all relevant scientific and technical findings” that form the basis of a rulemaking).

<sup>17</sup> 83 Fed. Reg. at 61485; 83 Fed. Reg. at 61487; 83 Fed. Reg. at 61488.

### Request for Documents

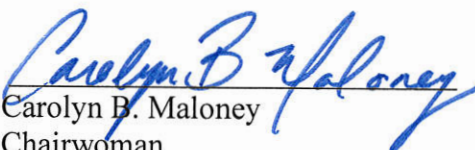
For all these reasons, the Committee requests that the Department produce by February 28, 2020, the following documents and information for the time period from September 22, 2017, to the present:

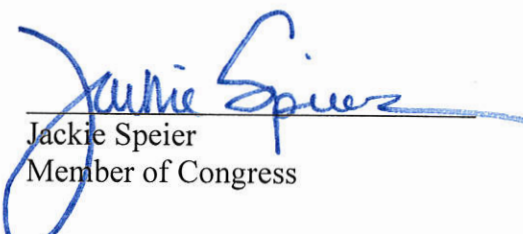
1. All documents—including studies, technical assessments, and underlying data—relied on by the Department in drafting the proposed or final rules, including to examine potential impacts and evaluate the significance of the rules;
2. All communications between and among Department officials in the Office for Civil Rights and the Office of the Secretary concerning the proposed or final rules;
3. All communications between Department officials and any officials within the Department of Justice or the Executive Office of the President concerning the proposed or final rules, including scheduling emails and calendar items;
4. All communications—excluding public comments—between Department officials and any external groups or individuals concerning the proposed or final rules, including scheduling emails and calendar items; and
5. All communications between Department officials and the Office of Information and Regulatory Affairs regarding the proposed rule, including any pass-back documents, proposed changes, or comments to the proposed or final rules.

The Committee on Oversight and Reform is the principal oversight committee of the House of Representatives and has broad authority to investigate “any matter” at “any time” under House Rule X. An attachment to this letter provides additional instructions for responding to the Committee’s request.

If you have any questions regarding this request, please contact Committee staff at (202) 225-5051.

Sincerely,

  
Carolyn B. Maloney  
Chairwoman

  
Jackie Speier  
Member of Congress



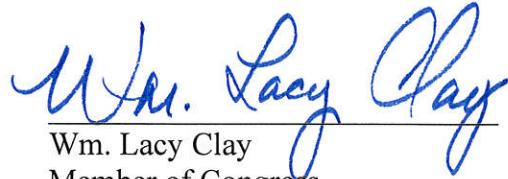
Brenda Lawrence  
Member of Congress



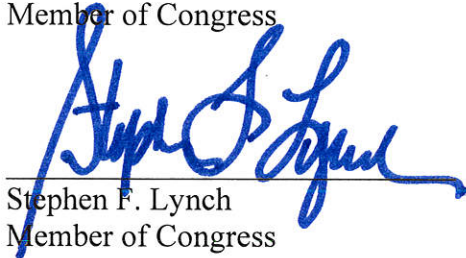
Ayanna Pressley  
Member of Congress



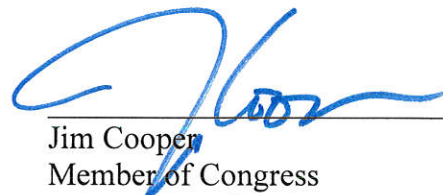
Eleanor Holmes Norton  
Member of Congress



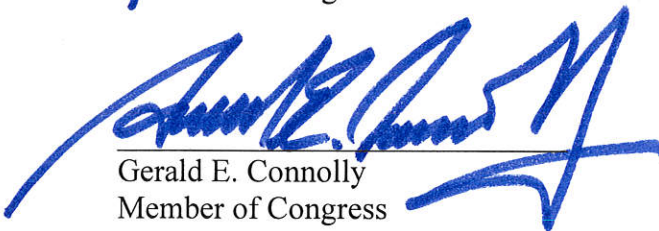
Wm. Lacy Clay  
Member of Congress



Stephen F. Lynch  
Member of Congress



Jim Cooper  
Member of Congress




Gerald E. Connolly  
Member of Congress



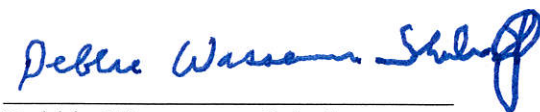
Raja Krishnamoorthi  
Member of Congress




Jamie Raskin  
Member of Congress



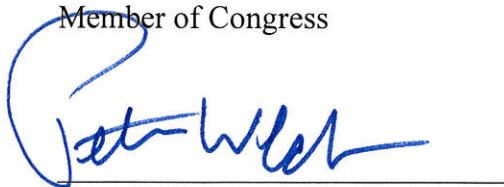
Harley Rouda  
Member of Congress



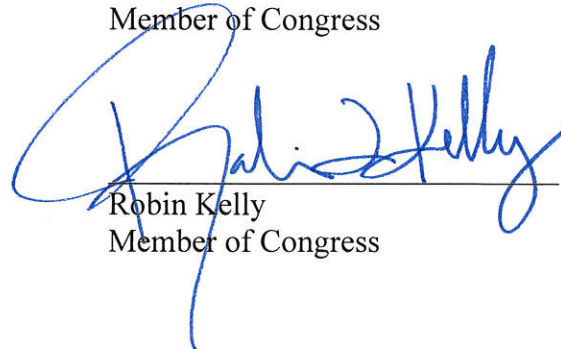
Debbie Wasserman Schultz  
Member of Congress



John Sarbanes  
Member of Congress



Peter Welch  
Member of Congress



Robin Kelly  
Member of Congress



Mark DeSaulnier  
Member of Congress



Stacey Plaskett  
Member of Congress



Ro Khanna  
Member of Congress



Jimmy Gomez  
Member of Congress



Alexandria Ocasio-Cortez  
Member of Congress



Rashida Tlaib  
Member of Congress



Debra Haaland  
Member of Congress



Katie Porter  
Member of Congress

cc: The Honorable Jim Jordan, Ranking Member  
Committee on Oversight and Reform