Director of the Information Collection Clearance Division
U.S. Department of Education
400 Maryland Avenue, SW, LBJ 216-36
Washington, D.C. 20202-4537

January 30, 2019

Re: ED-2018-OCR-0064

To Whom it May Concern,

Thank you for the opportunity to comment on the Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

We the undersigned are ETR, a nonprofit education, training, and research organization dedicated to advancing health equity by designing science-based solutions to problems across four content areas, including School-Based Health & Wellness (SBHW). Our SBHW division houses ETR's K12T9 Initiative, which provides a range of services and supports to kindergarten through twelfth-grade (K-12) districts and schools seeking to improve or enhance their Title IX programs.

The comments herein are based generally on our 30-year history of working effectively in the K-12 milieu as researchers, independent evaluators, policy and program consultants, and health educators across many health and wellness issues. Our comments are specifically informed by our experiences over the past five years with K-12 districts and schools that are or have been under investigation by the United States Department of Education's Office for Civil Rights (OCR), under resolution agreement with OCR, or otherwise assessing and/or strengthening their K-12 Title IX Programs.

On the following pages, we comment on a number of sections of the proposed regulations with singular focus on their implications for K-12 educational institutions (hereinafter referred to using the Department's "recipients" moniker). These comments are our own, and do not necessarily reflect the views of our clients or funders.

Section 1: Comment on §106.8 – Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

In §106.8, paragraph (a) of the proposed regulations (i.e., *designation of coordinator*), the Department mandates the designation of "at least one" employee to serve as the recipient's Title IX Coordinator. We recommend the Department add language that sets a minimum standard of "at least one *full-time*, *dedicated*" employee for recipients with student populations under 10,000, and additional staffing for recipients with student populations over 10,000.

We have found that many recipients assign Title IX Coordinator responsibilities to an existing administrator – often the Human Resources Director – who has limited capacity to fully investigate and remediate Title IX cases given all their other responsibilities. We recommend that recipients with student populations over 10,000 employ one full-time coordinator, at least one full-time investigator, and a full-time administrative assistant to ensure minimum capacity. In larger recipients, additional investigators and administrative support staff should be added to ensure timely, fair, and exhaustive investigations and that appropriate supports are provided to complainants and respondents.

In §106.8, paragraph (2)(i) of the proposed regulations (i.e., *publications*), the Department states that "each recipient must prominently display a statement of the policy described in paragraph §106.8 (b)(1) on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under §106.8 (b)(1)." While we agree wholeheartedly that notification of entitled persons of the recipient's Title IX policies is needed, we suggest that the proposed regulation does not provide adequate definition of the characteristics of display that would qualify as "prominent." In our experience conducting assessments of recipient's websites, we have found significant differences in the accessibility of policies. In some cases, the use of search terms such as "Title IX" or "sexual harassment" will provide access to relevant policies rather easily, but other recipients' websites can be much more challenging.

With our K-12 clients, for example, we recommend that all these materials (i.e., policy, administrative regulation [grievance procedures], and complaint form) be accessible within two mouse clicks on their website. Unfortunately, across many websites we have searched, Title IX policies are not readily accessible to students or parents. We strongly recommend the Department clarifies and operationalizes the definition of "prominent display" to improve accessibility to essential information needed by complainants and respondents. We also recommend the Department reiterate federally-required standards around the translation of these materials into languages other than English.

We also recommend that the proposed regulations expand the list of materials required to be displayed to include the K-12 recipient's complaint form itself. In §106.8, paragraph (2)(c) of the proposed regulations (i.e., *adoption of grievance procedures*), the Department states that "a recipient must provide notice of the recipient's grievance procedures, including how to report sex discrimination and how to file or respond to a complaint of sex discrimination, to students and employees." From our perspective, the proposed language should be strengthened to specify that the recipient's complaint form must be included in the materials that are required to be published. Each of the K-12 recipients' school and program sites should also have paper copies readily available at their front desk. In our experience, K-12 recipients regularly fail to provide easily accessible copies of their complaint form on their website and at school sites. Recipients may refer to the form in their grievance procedures, but they don't always include the form itself, forcing potential complainants to locate the form within a complex website. We recommend that recipients be required to prominently display the administrative regulation that describes their grievance procedures *and* the complaint form in equal measure to the requirements for prominent display of their sex discrimination policy.

Finally, we recommend the regulations explicitly mandate that all relevant online and printed Title IX documents and forms be provided in languages other than English, that translators be made available when necessary, and that all information is accessible to persons with disabilities.

Section 2: Comment on §106.44 – Recipient's response to sexual harassment.

In §106.44, paragraph (a) of the proposed regulations (i.e., *general*), the Department points to "actual knowledge of sexual harassment" as the trigger for a Title IX investigation. In the proposed regulations, "actual knowledge" is present only when a formal, signed complaint is brought to the attention of the Title IX Coordinator, an official empowered to implement corrective measures, or a K-12 teacher.

First, tying the mandate to investigate and remediate a sexual and/or gender-based harassment allegation to the submission of a "formal, signed complaint" puts an unnecessarily high burden on students and their families and diminishes the responsibility of adults in the school environment to actively maintain a safe and positive learning environment.

In K-12 environments, Title IX programs address "reports" of sexual and/or gender-based harassment as well as formal "complaints." "Reports" are initiated when school personnel witness alleged sexual and/or gender-based harassment. "Complaints" are initiated when a student, their parent/guardian/caregiver, or their legal counsel files a formal, written complaint.

To maintain a safe and positive educational environment that ensures all students full access to educational program and activities, it is essential that K-12 recipients are not only empowered to but mandated to investigate both "reports" and "complaints." The investigation and remediation of "reports" allows recipients to provide supportive services (e.g., education, counseling and other school-based health and wellness services) to respondents that can disrupt the progression of escalating behavior, avert significant harm to others in the school environment, and prevent one or more Title IX complaints.

The insistence on a threshold for the initiation of responsibility under Title IX based only on a formal, signed complaint is clearly inappropriate in the K-12 environment. It is not developmentally appropriate to presume that children, especially young children, have the knowledge and experience to recognize sexual and/or gender-based harassment when it occurs, to recognize the potential effects of the harassment, to generally understand that the conduct is inappropriate, or to know how to talk about it. It is also inappropriate to place the burden on students – who in the K-12 environment represent every step on the developmental continuum relative to age, physical, cognitive, and sexual development – to file formal, signed complaints before expecting a response from their school and/or district. The investigation and remediation of "reports" empowers K-12 recipients to set and enforce standards of appropriate student conduct and positive school climate. To limit a recipient's responsibility to only formal complaints will have a negative effect on the capacity of K-12 recipients to appropriately and effectively regulate student conduct, ensure students' safety and wellbeing, and maintain a positive school climate.

Furthermore, requiring a formal, signed complaint effectively limits a complainant's access to the investigative and remedial functions of their school and district. In our practice, clients have disclosed instances where a recipient noted the lack of a signature on a complaint form as the reason they did not take up an investigation. The proposed provision provides an arbitrary bureaucratic loophole that excuses recipients for their willful indifference when paperwork is not completed perfectly.

In our experience, some complainants also choose not to initially sign a complaint, or indeed initially file anonymous complaints for fear of retaliation by the respondent or the recipient. In the case of an unsigned complaint, responsible recipients attempt to create rapport and trust with the complainant that often leads to a signed complaint. If absolved of their responsibility to act on unsigned complaints, the proposed regulation would decrease accessibility to the investigative and remedial responsibilities of a recipient for those students who are reluctant to come forward. This concept also applies to anonymous complaints commonly reported by alleged witnesses – in our view, K-12 recipients should be mandated to investigate all reports and complaints of sexual and/or gender-based harassment.

Second, the proposed confinement of the definition of a responsible party to the "Title IX Coordinator, an official empowered to implement corrective measures, or a K-12 teacher" is counterproductive to the goals of protecting student safety and ensuring access to K-12 educational programs and activities. Most schools employ school nurses, social workers, behavioral health service providers, health educators, and others who fall outside the narrow list provided in the proposed regulations. In the K-12 context, it is critical that students are empowered to report allegations of sexual and/or gender-based harassment to *any* adult in the school environment with whom they have a trusting and caring relationship. Depending on developmental and other factors, students may only feel comfortable reporting an allegation to their school's security personnel, a custodian, the school nurse, or the social worker, for example. Once in receipt of an allegation, we propose that all recipients' employees, volunteers, and contractors should also be mandated to report any allegation of sexual and/or gender-based harassment to appropriate personnel at their school site, who in turn should be required to report the allegation to their Title IX Coordinator.

The Department's proposed regulations, in §106.44 paragraph (e)(6) (i.e., *actual knowledge*), also state that "imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge." The proposed standard limits liability of recipients when their responsible employees are deliberately indifferent to a Title IX allegation. To create and sustain a safe school environment and positive school climate, we suggest that all K-12 recipients' employees, contractors, and volunteers should be held to a high standard of responsibility when it comes to reporting allegations of sexual and/or gender-based harassment. We recommend the proposed regulations require any of a K-12 recipient's employees, contractors, or volunteers who receives a complaint, otherwise becomes aware of a complaint, or personally observes possible sexual or gender-based harassment to immediately report it to their district's Title IX Coordinator or the principal or vice principal of the relevant school site.

In short, students should be able to approach *any* adult in the school community to initiate a Title IX response. To do otherwise, as the proposed regulations suggest, would have an immediate chilling effect on the likelihood that alleged sexual and/or gender-based harassment would be reported, and a smaller chance that resulting Title IX cases would be taken up by investigators. In turn, this would have a significant negative effect on overall school climate.

In §106.44, paragraph (c) (i.e., *emergency removal*), the Department sets conditions for removing a respondent from the recipient's education program or activity and states that interim measures cannot "burden" the respondent. While prompt, thorough and equitable investigation and remediation processes are absolutely essential to the integrity of Title IX compliance efforts and fundamental tenets of fairness and objectivity, K-12 recipients must have latitude to institute interim actions that preserve the safety of the school environment. The proposed regulations limit interim actions to emergency removal only, and do not allow for the commonplace modifications of class schedule, for example, that help school personnel maintain the safety of all students. K-12 recipients require significant latitude to implement well-founded interim actions short of emergency removal.

In §106.44, paragraph (e)(1)(ii) of the proposed regulations (i.e., *definitions > sexual harassment*), the Department defines "sexual harassment" as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." The proposed regulation changes language from "unwelcome conduct of a sexual nature" that "limit(s)" equal access to "unwelcome conduct on the basis of sex" that "effectively denies" equal access, thereby failing to recognize the full range of behaviors regularly observed in the K-12 environment.

First, the proposed change from "unwelcome conduct of a sexual nature" to "unwelcome conduct on the basis of sex" is unnecessary and confusing. The proposed change also appears to set up future legal arguments that would limit the definition of "sex" in a way that excludes claims of harassment based on sexual orientation, gender identity, and gender expression. From our perspective, it is essential to be inclusive of all students, regardless of their sex, sexual orientation, gender identity, or gender expression.

Second, the proposed changes from "limit(s) access" to "effectively denies access" is also inappropriate in the K-12 context. It is essential that K-12 recipients are guided to address the full continuum of unwelcome conduct of a sexual nature that interferes with a student's access to the educational environment. For example, a student who endures repeated verbal slurs based on sexual orientation would likely experience a deterioration of their sense of safety in and connection with the school environment and a decrease in their capacity to engage in meaningful learning, thus limiting their access to educational program and activities. The definition implications of "effectively denying" a student's access to the K-12 recipient, where attendance is mandated by law, sets an insurmountable barrier for those charged with ensuring a safe and positive learning environment for all students.

These two changes to the language of the regulations raise the bar on what behavior is considered sexual harassment and its actionable effects to the most severe end of the

continuum, causing students to endure ongoing unwelcome conduct of a sexual nature, and absolving recipients from their investigation and remediation mandates. Under these changes, only the most severe examples of sexual harassment and only the most severe effects of said harassment would trigger recipients' responsibility to investigate and remediate – an untenable situation for the K-12 environment that is antithetical to the goals of protecting student safety and wellbeing.

Finally, the proposed regulations confine a recipient's responsibility to address Title IX complaints to when the alleged behavior occurs on campus or in school-related activities. In K-12 environments, there are many behaviors that can occur off campus and outside of school-related activities that can have deleterious effects on students and their access to the educational environment. Social-media posts that include nude photographs of a complainant, for example, have dramatic consequences on students' full access to educational programs and activities. Under the proposed regulations, the presented example would not be actionable. It is however essential that schools are explicitly empowered, and indeed mandated, to fully address the effects of all unwelcome behavior of a sexual nature in their student population regardless of the geographical location of the alleged behavior (be it off campus or online).

Section 3: Comment on §106.45 – Grievance procedures for formal complaints of sexual harassment.

In §106.45, paragraph (b)(1)(v) (i.e., *timeframes*), the proposed regulation removes essential standards of responsiveness on the part of the recipient. Under the current regulations and subsequent OCR guidance, recipients are required to interview all parties within 10 days of the receipt of a complaint and are required to fully complete investigations, findings of fact, and the determination of remedial actions within 60 days. Under the proposed regulations, recipients are required to adhere to "reasonably prompt timeframes," which is unnecessarily vague and removes a major incentive for prompt action on the part of recipients. We recommend returning to the previously-operationalized timelines, which provide clear, measurable, and prompt timeframe requirements.

In §106.45, paragraph (b)(1)(vii) (i.e., *standard of evidence*), the proposed regulations would require recipients to set one of two standards of evidence, which could be either the "clear and convincing evidence" standard or the "preponderance of the evidence" standard. The reasoning behind providing this choice to recipients is unclear and sets up the likelihood that different recipients would establish different standards, creating confusion and inconsistency across recipients and their complainants.

In §106.45, paragraph (b)(2)(i)(b) (i.e., *notice of allegations*), the Department requires formal written notice to known parties that includes "sufficient details known at the time" pertaining to the time, location, and other details of an allegation and the identification of the identity of parties if known. First, the proposed requirement fails to recognize the developing nature of allegations based on the investigations process - allegations and parties often change during an investigation as more information is discovered. While notice is clearly needed and should be mandated, the proposed regulations place recipients in an untenable situation –

being forced to specify in detail the results of an investigation before an investigation has been completed. At the onset of an investigation, recipients should have the authority to identify allegations under their policy broadly, and then provide an additional, more specific, notice when the investigation process concludes. As written, the proposed regulations appear to require as many written notices to parties as there are changes to the allegations over the course of an investigation, placing an undue burden on recipients with no clear added value to the transparency of the investigation and remediation processes.

In §106.45, paragraph (b)(3)(iv) (i.e., *investigations of a formal complaint*), the Department mandates the opportunities for all parties to be accompanied by an "advisor of their choice". The proposed regulations open the door for attorneys to participate in what is an administrative, not civil or criminal, proceeding. The proposed regulation allows parties and/or their representatives to cross-examine complainants, respondents, and witnesses. The Department, in our view, is attempting to set standards of evidence and procedures in K-12 environments that are only appropriate in the context of civil and criminal trials. While the administrative procedures set by LEA may lead to a civil or criminal complaint that appropriately incorporates legal advocates and a higher standard of evidence, administrative procedures should not *require* these standards in the K-12 context. It is difficult to imagine any positive effects of a respondent's attorney cross-examining a 6th grader alleging sexual harassment at school or a complainant's attorney cross-examining the alleged perpetrator of said harassment. If the Department's proposed regulations are adopted, the "criminalization" of what should remain an administrative process will further dissuade complainants from coming forward.

In §106.45, paragraph (b)(3)(vi) (i.e., *live hearing*), the Department describes the limitations on the subject of questions that can be asked of parties in a Title IX case. The proposed regulations would disallow questioning of a complainant's "sexual behavior or predisposition" unless "the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and it offered to prove consent." In our view, this opens a door to the cross-examination (either live in the case of a recipient who takes up the option for live hearings or in writing) of a complainant's consent to sexual activity over time. That is, it appears to allow respondents' representatives or advocates to claim that a history of affirmative consent to sexual behavior applies to the alleged behavioral incident that is the subject of the current complaint. It would allow a line of questioning that allows respondents to claim that a history of affirmative consent justifies or excuses current unconsented conduct. Consistent with science-based approaches to developing healthy and responsible decision-making around young persons' relationships and sexual behavior, affirmative consent must be obtained and agreed to for **each** instance of sexual behavior.

In §106.45, paragraph (b)(3)(viii) (i.e., *live hearing*), the Department prescribes that recipients, whether or not they opt for a live hearing option, provide parties "equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination." This places an undue burden on recipients and will likely result in significant delays to proceedings.

The Department further mandates the mode of sharing by stipulating that recipients make such evidence available to all parties and their representatives using "an electronic format, such as a file sharing system, that restricts the parties and advisors from downloading or copying the evidence." There is no evidence to suggest that K-12 recipients universally have access to such technologies at present, placing undue burden on already under-resourced K-12 recipients.

In §106.45, paragraph (b)(4)(i) [i.e., *decision maker(s)*], the Department states that "the decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility." It is unreasonable to mandate an additional, burdensome layer in the administrative process for K-12. Title IX Coordinators and their investigator(s) are, in our experience, dedicated to objectivity. In an administrative process, then, there is no need for an additional "decision-maker." Additionally, K-12 Title IX case outcomes can always be appealed to the state's Department of Education and/or pursued through civil litigation.

In §106.45, paragraph (b)(6) (i.e., *informal resolution*), the Department fails to provide guidelines for determining when an informal resolution would be inherently inappropriate, such as in the case of alleged sexual assault. It would be completely inappropriate, and in fact harmful, for K-12 recipients to use conflict mediation approaches in such cases. We recommend the Department clarify this section by explicitly stating that informal resolution should never be used in cases alleging sexual assault.

Section 4: Comment on §106.12 – Private Religious Exemption

The proposed regulations expand the set of conditions under which a private religious recipient could assert an exemption from Title IX compliance. The proposed regulations would also allow exemption claims to be made after a complaint and investigation. The proposed regulation does not address how a post hoc claim of exemption would comply with the myriad notice, compliance and response requirements detailed in other sections of the proposed regulations. The proposed regulations also do not provide sufficient oversight of exemption claims by proposing that "an institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption," which appears to equate the composition and transmittal of an exemption claim with the Department's approval of said claim. As written, the proposed regulations are too vague and would create a loophole that allows religious organizations to effectively sidestep their Title IX responsibilities. All K-12 schools have a responsibility to keep their students safe, regardless of their religious orientation.

Section 5: Comments on Part 4.a. – Establishing a Baseline

The Department, in an effort to appraise the costs of the proposed regulations, has estimated the number of formal complaints received annually by recipients at 3.23 per academic year, based on Civil Rights Data Collection (CRDC) from school year 2015-16. The Department acknowledges a lack of reliable and valid data on the number of sexual harassment investigations conducted by recipients, and invites public comment on the extent to which the Department's current estimate of 3.23 per school year is a reasonable assumption.

Our work with a number of recipients shows the Department's estimate to be very low.

First, let us reiterate the distinction between a "complaint" and a "report," although we refer to both as "cases." A "complaint," as the Department suggests, is a "formal complaint" alleging sexual or gender-based harassment – these cases are initiated by students themselves, their parent(s)/guardian(s), or by another student representative (including an attorney). A "report," on the other hand, is based on an employee (e.g., teacher, staff member, or school administrator) reporting a case to their Title IX Coordinator. Both types of cases are fully investigated by the recipient, although in many cases "reports" are investigated by school-level personnel under the Title IX Coordinator's supervision and guidance, while "complaints" are investigated by a district-level Title IX Coordinator or other district-level designee (e.g., Title IX Investigator).

One of our clients has investigated over 650 cases since data tracking systems were developed in 2014 in response to a resolution agreement with OCR. Since that time, this K-12 district, which enrolls about 35,000 students in over 50 schools, has investigated and remediated an average of 33 complaints and 89 reports each year for the past four years. In the 2015-16 school year, the district investigated and remediated 73 complaints and 126 reports of sexual and/or gender-based harassment.

It is our experience that recipients generally have poor or underdeveloped data management systems that result in the significant underreporting of the number of cases to CRDC and other stakeholders. We strongly recommend the Department increase the baseline estimate – our data show recipients investigate 3.5 cases *per week* on average.

Other data sources also point to the need to develop data infrastructure and higher baseline estimates. The Centers for Disease Control & Prevention's (CDC) Youth Risk Behavior Survey (YRBS) provides important context across a few key indicators. Based on the most recently available national data from 2017, the CDC estimates that over 11% of female students and 3.5% of male students report being physically forced to have sexual intercourse. Across the recipients and States that participate in the YRBS, the indicators range from 7.5% to 15.3% for female students and from 2.5% to 16.1% for male students. While not a direct indicator of the number of incidents of forced sexual intercourse that result in a Title IX complaint or report, this CDC indicator provides rigorous evidence that the number of potential Title IX sexual assault cases are likely significantly higher than the current baseline estimate of 3.5 cases annually.

The California Department of Education's California Healthy Kids Survey (CHKS) also provides contextual indicators. Statewide, about 8% of students report being bullied or harassed at school due to their gender at least once, and over 4% report two or more instances of gender-based bullying or harassment.[i] Applying the 4% rate to the entire population of public school K-12 students in California, which was 6,220,413 in the 2017-18 school year, there are likely over 240,800 students who have been repeatedly bullied or harassed due to their gender in California. The prevalence of gender-based harassment also ranges significantly by the

race/ethnicity of survey respondents, from 6.1% among Asian students to 12.8% among Native Hawaiian/Pacific Islander students.

In our view, there is a significant need to improve data collection around the prevalence of K-12 Title IX reports and complaints nationwide. Recipients should be required to meet minimum standards necessary to accurately track and monitor Title IX cases in real time. Each recipient should be required to develop or procure a secure electronic system for maintaining records related to Title IX complaints, reports, investigation activities, findings of fact, and interim and remedial actions.

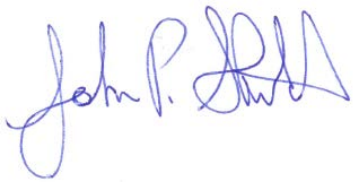
Conclusion

Overall, the Department's proposed regulations incorporate practices and procedures from formal litigation settings into what should remain an administrative grievance procedure, ratcheting up the adversarial nature of an often already contentious process. The proposed regulations place unnecessary administrative burdens on K-12 recipients by requiring unwieldy and costly notification and other compliance actions in the name of due process while creating loopholes that could lead to egregious impacts on student safety, health, and wellbeing.

If adopted, the proposed regulations would result in fewer students coming forward to report allegations of sexual and/or gender-based harassment and significantly undermine K-12 recipients' efforts to create and sustain safe and positive learning environments for all students regardless of their sex, sexual orientation, gender identity, or gender expression.

We strongly oppose the proposed regulations and request they be withdrawn in their entirety.

Sincerely,



John P. Shields, PhD, MSW
Senior Research Scientist
Director, ETR's K12T9 Initiative

Vignetta Charles, PhD (on behalf of ETR)
Chief Executive Officer, ETR

[i] Austin, G., Polik, J., Hanson, T., & Zheng, C. (2018). School climate, substance use, and student well-being in California, 2015-17. Results of the Sixteenth Biennial Statewide Student Survey, Grades 7, 9, and 11. San Francisco: WestEd.