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

**Docket ID: ED-2018-OCR-0064 – Proposed Rule update; Title IX**

Dear Ms. Bull:

Thank you for the opportunity to provide comments on the proposed regulation changes to Title IX, specifically regarding the required response of federally funded education programs and organizations receiving federal assistance to sexual assault. We appreciate the Department's desire to clarify these regulations so that students and families have a clearer view on what to expect from schools and programs. However, we have serious concerns with several of the proposed changes as they relate to K-12 schools. Specifically, we are concerned these changes will contribute to conditions that may further traumatize, or in many cases re-traumatize, victims of abuse. While we applaud any effort to provide more clarity, we caution against any update that sacrifices victims in the process.

National Children's Alliance is the national association and accrediting body for, as well as a provider of training and technical assistance to, nearly 900 Children's Advocacy Centers (CACs) throughout the United States. We also empower local communities to respond to child abuse by providing grants for the start-up and development of CACs. CACs are community-based, public-private partnerships that coordinate child abuse investigations and intervention services by bringing together professionals from law enforcement, prosecution, child protective services, victim advocacy agencies, mental health, and medical professionals and volunteers in a multidisciplinary team to respond to investigate abuse, hold offenders accountable, and help child victims heal. Each year, CACs serve more than 334,000 child victims of abuse throughout the U.S., two-thirds of whom were victims of sexual abuse. Even more, CACs provide prevention education to more than 1.9 million individuals annually, many times in partnership with schools. Thus, on behalf of CACs and the hundreds of thousands of child abuse victims served by these centers every year, we

appreciate the opportunity to provide our comments on the possible changes to the Title IX regulations, especially as they relate to students in grade K- 12.

The principle purpose of a CAC is to prevent further victimization by ensuring that child abuse investigations are comprehensive, and that services are available to meet the age appropriate needs of the child. Communities with CACs not only demonstrate increased successful prosecution of perpetrators, but more importantly, a reduction in re-abuse rates for child victims, as well as better access to medical and mental health care for the victims. This model of comprehensive care for child abuse victims has significant evidence of its efficacy. Specifically, the evidence-based, trauma-informed mental health treatments used by CACs help kids recover from the trauma of abuse and go on to thrive. Because of this, CACs have a deep understanding of best practices when investigating abuse allegations, specifically allegations of sexual abuse, as well as best practices on how to help children heal. As such, we would like to share our thoughts regarding several of your proposed changes.

Much progress has been made nationally over the past few years in assisting schools in becoming trauma-informed. A trauma-informed school is one that both reduces the trauma that children may be exposed to in the educational setting (by eliminating bullying and abuse) and effectively responding to trauma children bring to school—and inhibits their learning—from home and the larger community. Removing contributors to trauma and responding to existing trauma in the student population create a safe environment in which students can live up to their educational potential.

This trauma-informed approach is the true essence of what Title IX intends to accomplish by ensuring equal access and educational opportunities for all school children. Unfortunately, many of the proposed updates included in ED-2018-OCR-0064 are in contrast to what we know are trauma-informed best practices. The proposed Title IX changes for K-12 schools are particularly important to Children’s Advocacy Centers because they not only impact the more than 334,000 children served last year in our centers, but some of these changes have the potential to reduce the possibility of identifying a child who needs the services of a CAC

### Proposed Title IX changes of concern:

#### **§ 106.30 – Definitions for sexual harassment and actual knowledge**

- *“Sexual harassment” is defined to mean either an employee of the recipient conditioning the provision of aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct; or unwelcome conduct on the basis of sex so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or sexual assault as defined by 34 CFR 668.46.*

We have serious concerns with a more narrow definition of “sexual harassment”. By changing the definition to unwelcome conduct that is so severe and pervasive that it precludes the student effectively receiving education, this precludes taking action when

action is likely to be most effective, ensures that a child is traumatized before action is taken thereby necessitating therapeutic intervention, and passively allows the ongoing inappropriate sexualizing of the relationship. Escalating sexual harassment is both a form of bullying by the perpetrator in exercising sexual power over the victim and often the beginning of “grooming” behaviors. Grooming behaviors—such as inappropriate touches, repeated sexual comments, sexting, and unwanted contact-- often lead to child sexual abuse or assault by a “gradual sexualization of the relationship and the psychological manipulation that is used to promote increased sexualization.”<sup>1</sup> Halting these behaviors at the earliest moment both prevents harassment from turning into abuse and assault, and also reduces trauma reminders for those children who have already been the victims of such abuse. **It is for this reason that we caution any change from the 2011 OCR definition of sexual assault included in your new definition for sexual harassment.**

- *“Actual knowledge” is defined as notice of sexual harassment or allegations of sexual harassment to...a teacher in the elementary and secondary context regard to student-on-student harassment.*

We also have serious concerns in defining “actual knowledge” only as notice of sexual harassment by or to a teacher in the elementary and secondary context. While we agree the teachers often do notice, witness or are told of sexual harassment or assault by victims, that is not always the case. Indeed, research demonstrates that the majority of youth told another peer prior to telling an adult. Often, it is that peer seeking help for their friend that raises the issue to the attention of teachers or other school personnel. However, information of alleged sexual harassment or assault involving fellow students comes to the attention of school personnel these allegations should be formally addressed in order to ensure a safe educational environment for all students. In addition, we believe this definition is too narrow and should include *all* school employees, not just teachers. By ensuring that a student can confide in counselors, aides, coaches, etc., it is more likely they will feel comfortable to speak up and ultimately receive the benefits entitled to them by Title IX. **It is for this reason that we urge you to expand your definition of “actual knowledge” to include all school employees and avoid limiting action taken on only those instances directly disclosed by the affected student to the teacher.**

**§ 106.44 (a) – Required response only on official educational programs or activities**

*Proposed § 106.44 (a) also reflects the statutory provision that a recipient is only responsible for responding to conduct that occurs within its “education programs or activity.”... Whether conduct occurs within a recipient’s education programs or activity does not necessarily depend on the geographic location of an incident.*

We also have concerns with the proposal that a Title IX response is only triggered if the assault or harassment occurred as a part of the official educational programs or activities of the school. In many communities, schools act as a community hub and are used for a wide range of community activities. Peer-on-peer sexual harassment and assault may occur as frequently in these events as those that are officially sanctioned as educational events. Moreover, peer-on-peer harassment and abuse that occurs outside the school or

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<sup>1</sup> Katz, C., & Barnett, Z. (2016). Children’s narratives of alleged child sexual abuse offender behaviors and the manipulation process. *Psychology of Violence, 6*(2), 223-232.

educational program setting has the same profound impact on students as that which occurs within the educational setting. A youth sexually harassed or bullied in the community by another student will have his/her trauma triggered by seeing the offending student in the school setting; may be unsafe in the presence of the offending student; and may well feel so unsafe his/her ability to learn is diminished irrespective of the original source or location of the harassing or abusive incident. Educational institutions have a responsibility to provide a physically and psychologically safe environment for all students; which necessarily means addressing student contact within the school even if the originating incident was unconnected to educational endeavors. Research shows that “prevalence of adolescent sexual assault committed by peers is high, regardless of where the assault occurred... Although the number of cases of peer-on-peer assault occurring in school remained constant (for boys) or increased (for girls) from early adolescence to later adolescence, it appears as though there is an increase (for boys and girls) in the number of cases of assault occurring outside of the school setting as youth transition through adolescence.”<sup>2</sup> By limiting Title IX responses to assaults only occurring as part of the educational programming of a school, one would ignore a significant number of assault cases that students experience. These students will likely still encounter their abusers daily, further traumatizing them. This approach leaves victims with no options, remedies or recourse, and might prevent them from coming forward in the first place. **For this reason, we urge you expand the requirement of Title IX responses to conduct involving students that would have continuing contact irrespective of location, setting, or whether it is part of an officially sanctioned educational activity or program.**

**§ 106.45 (b) (3) – Live hearings**

*For recipients that are elementary and secondary schools, the recipient’s grievance procedures may require a live hearing...With or without a hearing, the complainant and the respondent must have equal opportunity to pose questions to the other party and to witnesses prior to a determination of responsibility, with each party being permitted the opportunity to ask all relevant questions and follow-up questions, including those challenging credibility, and a requirement that the recipient explain any decision to exclude questions on the basis of relevance.*

Finally, we have grave concerns with the proposal that a K-12 school can hold a “live hearing” and allow for cross-examination of the victim, including a cross-examination by the alleged perpetrator. CACs fully understand that the right to cross-examine your accuser is one of the foundational principles for our criminal justice system. However, allowing for the abused child to be subject to a live hearing, and possibly cross-examined by their abuser, “may be exposing the child to additional harm. Not only has the child suffered the unspeakable trauma of the abuse...but the child now faces a possible secondary assault by having to recount the abuse...in the presence of the perpetrator and by being subjected to cross examination.”<sup>3</sup> In *Maryland v Craig*, the United States Supreme Court found that a “State’s interest in ‘the protection of minor victims of sex crimes from further trauma and

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<sup>2</sup> Young, Amy. M, Greg, Melissa, Boyd, Carol J. (2009). Adolescents’ Experiences of Sexual Assault by Peers: Prevalence and Nature of Victimization Occurring Within and Outside of School. *J Youth Adolescence*, 38, 1072-1083.

<sup>3</sup> Richards, Janet Leach (2000). Protecting Child Witnesses in Abuse Cases. *Family Law Quarterly*, Vol. 34, p. 393. *University of Memphis Legal Studies Research Paper No. 98.*

embarrassment' is a 'compelling' one and that a State's interest in the physical and psychological well-being of child abuse victims could outweigh a defendant's right to face-to-face confrontation."<sup>4</sup> Moreover, such administrative hearings, while well-meaning, require school personnel to act outside their expertise and potentially confound criminal investigations. Teachers, counselors, and principals have no training in, and are not, forensic interviewers, criminal investigators, judges, or evidence technicians. Much of what falls under the Title IX statute is also criminal behavior and therefore any criminal investigation should not be jeopardized by repeated questioning, duplicative interviewing, and other such actions that a live hearing would entail. While we recognize the proposed change to Title IX wouldn't require K-12 schools to hold live hearings and allow for cross-examinations, it does allow for a school to choose this option. **We oppose this option, and urge you not to include it in any final regulation.**

### **Summary**

Child sexual abuse is a far too common experience for America's children. CACs serve as first responders in communities all across the United States, working in partnership with those charged with protecting and caring for our children, and helping the abused heal. This partnership includes working with the very schools charged with educating them. Because we have been on the frontlines in responding to child sexual abuse for more than 30 years, we understand the importance of a trauma-informed response to any allegation of assault. It is with this experience and knowledge that we ask the Department to reconsider the proposed Title IX changes impacting K-12 schools. Understanding the impact of these proposed changes, both their potential for harm and their scope, will not only ensure that there is justice and healing for students of sexual assault, but will also ensure schools are able to carry out their primary mission of supporting all students in educational achievement by making sure they feel safe, supported, and ready to learn.

Thank you again for your consideration.

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<sup>4</sup> Ibid, 395.