Dear Mr. Marcus:

As state legislators, we write in response to the Department of Education’s Notice of Proposed Rulemaking, to express our strong opposition to the Department’s proposal to amend rules implementing Title IX of the Education Amendment Act of 1972. The Department’s proposed rules would endanger students targeted by sexual harassment and undermine state laws protecting student rights.

As elected state officials, we work to ensure that our constituents are able to thrive and are protected from discrimination in their workplaces, communities, and schools. Title IX is a crucial federal civil rights law that addresses the far-reaching impact of sexual harassment, including sexual assault, on students’ education by ensuring that schools respond appropriately and effectively to sexual harassment. Far too many students throughout this country experience sexual harassment, often with devastating impacts on their ability to successfully complete their educations.

Unfortunately, the Department’s proposed Title IX rules fail to respond to the realities of sexual harassment in schools and if finalized, would make schools less safe for students. Instead of effectuating Title IX’s purpose of keeping students safe from sexual abuse and other forms of sexual harassment—that is, from unlawful sex discrimination—they would make it harder for students to report abuse, allow (and sometimes require) schools to ignore reports when they are made, and unfairly tilt the grievance process in favor of respondents to the direct detriment of survivors. Under the proposed rules, for example, schools would only be responsible for addressing sexual harassment that is known by a small subset of school employees—that is, those with “authority to institute corrective measures.” If a middle school student told a school counselor that she was experiencing sexual abuse at the hands of a teacher, or a college student told her professor that she was being targeted by severe sexual harassment, the school would have no responsibility under the proposed rules to take any action whatsoever. Schools would also be required to ignore harassment that occurs outside of a school activity, including most off-campus and online harassment, even when a student must sit in her assailant’s classroom each day. In the rare cases when schools would be required to respond to a complaint of sexual harassment, the proposed rules allow—or even require—schools to deny harassment victims a fair process by encouraging use of the improper clear and convincing evidence standard, which stacks the deck.
against complainants, and by requiring schools to presume that no harassment occurred. Under the proposed rules, schools would have far lower obligations to protect children from sexual harassment than employers have to protect adult employees from harassment.

For many years, particularly after the Department issued sexual harassment guidance in 2011 and 2014 and stepped up enforcement of Title IX, students in our states have relied on Title IX protections and, in many cases, protections under our state laws, to be able to continue their education despite experiencing sexual harassment. But the Department’s proposed Title IX rules ignore the significant efforts states have made to increase student protections from sexual violence. In at least 10 states, current statutory provisions do not align with the Department’s proposed Title IX rules in some way.¹ In a few of those states, compliance with the proposed rules may put institutions’ access to state funding in jeopardy because those states' institutions of higher education are required to create sexual harassment policies that include provisions that appear to directly conflict with those required by the Department’s proposed Title IX rules. In other states, laws diverge from the Department’s proposed Title IX rules by mandating that schools use different standards of proof, covering students both on and off campus, providing more robust supportive measures to victims, or laying out different procedures for cross examination or mediation. The consequences of these conflicts could be wide ranging, posing problems for enforcement, leading to confusion for schools and students, imposing additional cost burdens, and prompting lengthy litigation battles.

The longstanding Title IX rules currently in place properly balance federal interests in regulating civil rights compliance and states’ interests in regulating education and public health and safety – areas traditionally reserved to the states.² They create a floor of protections upon which states are free to build. But the proposed rules threaten to upset that balance by directing educational institutions to ignore some complaints of harassment, even if state law requires a response, and by purporting to limit the procedural protections that schools can provide survivors of sexual assault and other forms of harassment, even if state law says otherwise. Under Executive Order 13132, the Department should have consulted with state and local officials before issuing the proposed rules because it is “undertaking to formulate policies that have federalism implications” and because, if finalized, these regulations could draw into question different requirements under some state laws for educational institutions addressing sexual harassment.³ It failed to do so. By seeking to reinterpret Title IX in a manner that limits a state’s ability to protect the safety of its constituents without first consulting those elected by the people to legislate for the states, the Department has failed to respect the principles of federalism upon which our nation is built.

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² See e.g., United States v. Lopez, 514 U.S. 549, 580 (1995) (“it is well established the education is a traditional concern of the States”); Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) (explaining that health and safety are traditional state powers).

For these reasons, we call on the Department of Education to immediately withdraw these proposed rules.

Sincerely,

Adline Clarke
Representative
Alabama

Valerie Longhurst
House Majority Leader
Delaware

Scott Kawasaki
Senator
Alaska

Charles Allen
Councilmember, Ward 6
District of Columbia

Athena Salman
Minority Whip
Arizona

David Grosso
Councilmember
District of Columbia

Buffy Wicks
State Assemblywoman, District 15
California

Anna V. Eskamani
State House Representative
Florida

Connie M. Leyva
State Senator
California

Linda Stewart
Senator
Florida

Lorena Gonzalez
Assemblywoman
California

David Dreyer
Representative
Georgia

Nancy Skinner
State Senator
California

Elena C. Parent
State Senator
Georgia

Wendy Carrillo
Assemblymember, 51st District
California

Matthew Wilson
Representative, District 80
Georgia

Daneya Esgar
State Representative
Colorado

Nan Grogan Orrock
State Senator
Georgia

Jillian Gilchrest
State Representative
Connecticut

Park Cannon
Representative
Georgia
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State Representative  
Georgia

Kim Schofield  
State House Representative  
Georgia

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State Representative, House District 82  
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112th District Representative
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Illinois

Kelly Cassidy
IL State Representative
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State Representative, 5th District
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State Rep
Illinois

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Illinois

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Speaker of the House
Illinois

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State Representative
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State Representative, 96th District
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State Representative, 38th District
Illinois

Natalie A Manley
State Representative
Illinois

Rep. Carol Ammons
Chair - Higher Education
Illinois
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Senator  
New Jersey

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Elizabeth “Liz” Thomson  
Representative  
New Mexico

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Senator  
New Mexico

Senator Mimi Stewart  
Senate Majority Whip  
New Mexico

Aravella Simotas  
Assembly Member  
New York

Marcia Morey  
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North Carolina

Rep. Joshua A. Boschee  
House Minority Leader  
North Dakota

Allison Ikley-Freeman  
State Senator  
Oklahoma
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Katrina Shankland  
State Representative  
Wisconsin

Lisa Subeck  
State Representative  
Wisconsin

Melissa Agard Sargent  
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Wisconsin