



Submitted via T9PublicHearing@ed.gov

June 11, 2021

The Honorable Miguel Cardona
Secretary
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

The Victim Rights Law Center (VRLC) is a non-profit law center in Massachusetts and Oregon that represents victims of sexual assault. The VRLC has represented thousands of K-12 and higher education students in legal matters to restore their safety and access to education following a sexual assault. This includes advising reporting parties in Title IX disciplinary processes, advocating for a victim's accommodations, and representing plaintiffs in civil protection order hearings. We are writing to share our concerns about the detrimental impact the Trump Administration's Title IX rule has on students who have experienced sexual assault and to offer recommendations to realign federal regulations with the object and purpose of Title IX.

The Title IX rule revealed a fundamental disregard for the purpose and meaning of Title IX and victims of sexual harassment. The rule creates confusion among higher education administrators, leaves open critical questions regarding interpretation, and has resulted in fewer victims of rape and sexual assault engaging in their school's disciplinary process.¹ Our attorneys have witnessed firsthand that many student victims would prefer to stay quiet, transfer, take a leave of absence, or withdraw from school altogether than to engage in the disciplinary process outlined by the Title IX rule.

The Biden-Harris administration must restore the purpose and protections of Title IX. Students who have experienced sex-based discrimination should have continued access to their education by stabilizing their academic progress through accommodations and safety measures. They should have an opportunity to engage in a disciplinary process that is fair and does not intentionally favor the accused. We submit this comment with hopes that Title IX protections will be restored, and the Department will once again be a place for students to turn if they experience sex-based discrimination.

¹ Throughout this comment, "school" is used to refer collectively to elementary, secondary, and postsecondary schools.

SUMMARY OF RECOMMENDATIONS:

- Define sexual harassment as “unwelcome sexual conduct” and remove the requirement that the conduct be severe, pervasive, and objectively offensive.
- Require institutions and districts to respond to any sex-based harassment that creates a hostile environment in the education program even if the harassment occurred outside of the school buildings or off campus.
- Re-establish a school’s flexibility when responding to sex-based harassment.
 - Permit schools to implement a process without live cross-examination by an opposing party’s advisor.
 - Permit decision-makers to consider statements made by individuals who do not participate in cross-examination at a hearing.
 - Clearly identify preponderance of the evidence as the best practice in campus adjudications and urge schools to adopt this standard in policy.

DEFINE SEXUAL HARASSMENT AS UNWELCOME SEXUAL CONDUCT.

The Title IX rule’s definition of sexual harassment is very limited and intentionally designed to reduce reports and investigations of sex-based discrimination.² The requirement that students demonstrate that the conduct is severe, pervasive, and objectively offensive creates a situation where, in order to obtain relief, some students experiencing harassment may have to continue to do so to meet the standard. There are instances in which some severe sexual harassment may not yet be pervasive, requiring those complaints to be dismissed without investigation. This leads to harmful and illogical results. Requiring students to wait and continue to endure harassment – directly impacting their ability to learn and their safety – before a complaint can be investigated undercuts the entire purpose of Title IX.

REQUIRE INSTITUTIONS AND DISTRICTS TO RESPOND TO ANY SEX-BASED HARASSMENT THAT CREATES A HOSTILE ENVIRONMENT IN THE EDUCATION PROGRAM EVEN IF THE HARASSMENT OCCURRED OUTSIDE OF THE SCHOOL BUILDINGS OR OFF CAMPUS.

Institutions of higher education and school districts routinely respond to misconduct that occurs outside of school buildings, off campus, and outside of education programs and activities. Codes of conduct have historically and consistently extended their reach in this way because what occurs off campus often has lingering impacts within the education program. By removing the requirement that schools respond to all sex-based harassment that creates a hostile environment in the education program, the Title IX rule creates a system that specifically targets and offers fewer protections to victims of sex-based discrimination. Students who engage in any type of off campus misconduct other than sex-based harassment will be held accountable for their actions, but students accused of sexual assault, dating and domestic violence, stalking, or sexual harassment will not. For example, if a university student hosts a party at their off campus apartment and serves alcohol to minors at that party, many schools will respond to that conduct violation through its disciplinary process. Yet, under the Title IX rule, a student who experiences

² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61487 (Nov. 29, 2018).

a sexual assault at that same party will have their complaint dismissed because the sexual assault did not occur within an education program or activity.³ This singles out and denies support to victims of sex-based discrimination – the very people Title IX was created to protect.

REINSTATE A SCHOOL’S FLEXIBILITY TO RESPOND TO SEX-BASED HARASSMENT, SO LONG AS THE RESPONSE IS PROMPT, EQUITABLE, AND FAIR TO ALL PARTIES.

Prior to the Trump administration’s Title IX rule, districts and institutions had flexibility to respond to sex-based discrimination in ways that aligned with the school’s culture and resources so long as the response was prompt and equitable. This allowed schools to develop a response that could be implemented fairly with the resources it had available.

The disciplinary procedures outlined by the Title IX rule are time-intensive, costly, and require people power beyond what many schools have available. It is not the Department of Education’s place to dictate overly prescriptive rules such as the number of days schools must offer to provide a written response or that the cross-examination be conducted orally and in real time. Instead, the Department should outline general practices and clear requirements that schools must follow when responding to reports of sex-based discrimination. Schools should be able to construct a process that meets these requirements while also considering their available resources, which vary significantly.

- **PERMIT SCHOOLS TO IMPLEMENT A PROCESS WITHOUT LIVE CROSS-EXAMINATION BY AN OPPOSING PARTY’S ADVISOR.**

The Title IX rule requires parties to submit to cross-examination by the opposing party’s advisor. In a case where a student has access to financial resources to retain counsel to act as their advisor, this can be highly beneficial and significantly influence a case outcome. Students without access to the same financial resources are faced with selecting or being assigned an advisor without any skills or experience in cross-examination. Many schools lack the resources to compensate for this inequity by hiring attorney-advisors for students and are therefore forced to implement a process that heavily favors individuals with financial resources. Without rules of evidence, legally trained decision-makers, and similarly trained advisors, cross-examination does not lead to a more just outcome.⁴ Schools should be permitted to devise disciplinary procedures that are equitable to all individuals within their community, including a process that uses a highly trained, neutral investigator to cross-examine all parties and witnesses.

- **PERMIT DECISION-MAKERS TO CONSIDER STATEMENTS MADE BY INDIVIDUALS WHO DO NOT PARTICIPATE IN CROSS-EXAMINATION AT A HEARING.**

Some institutions will continue to use a live hearing model and may permit cross-examination. In these cases, statements should not be summarily removed from consideration simply because an individual does not submit to cross-examination. The “exclusionary rule” is overly complicated

³ 34 C.F.R. § 106.44(a).

⁴ Letter from American Council on Education on behalf of 61 Higher Education Associations to Betsy DeVos, Sec’y, Dept. of Educ., at 9 (Jan. 30, 2019), <https://www.acenet.edu/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf>.

and has been inconsistently interpreted and applied.⁵ This rule favors accused parties who have a very clear incentive not to participate in cross-examination if they have made any statements that support a victim’s account. The sweeping nature of this rule can remove everything from a police report or medical records to a text message admission by the accused. On the contrary, a victim’s case virtually always relies on their own statement, as there are often no witnesses to a sexual assault. If a victim does not submit to cross-examination and therefore their statements are excluded from consideration, the finding will nearly always be not responsible. Rules that encourage manipulation and strategy have no place in the educational setting. They do not lead to outcomes that are fair or reliable, the very justification the Department has offered for this rule, and certainly do not support the purpose of Title IX.

- **REQUIRE SCHOOLS TO USE A PREPONDERANCE OF THE EVIDENCE STANDARD AND REMOVE THE PRESUMPTION OF NOT RESPONSIBLE.**

The Title IX rule reversed a longstanding – and appropriate – requirement that schools use the preponderance of the evidence standard.⁶ In so doing, the Department yet again singled out sex-based discrimination, encouraged alignment of the educational process with the criminal process, and allowed the disciplinary process to favor the rights of the accused.

Additionally, the Title IX rule requires schools to adopt a presumption of non-responsibility on the part of the accused student.⁷ Consequently, victims have a hurdle from the outset of an investigation and inevitably bear the burden of proof. This is incompatible with a preponderance of the evidence standard. Presumptions do not belong in disciplinary processes; investigations should be undertaken fairly, equitably, and with the parties starting out on equal footing.

By implementing the Title IX rule, the Trump administration sent a clear message to victims of sex-based discrimination and sexual assault specifically – we don’t believe you. Victims are subjected to an entirely unique system with a greater burden of proof, a complex maze of reporting requirements, and a disciplinary process that favors accused students. We encourage the Biden-Harris administration to restore protections for victims of sexual assault to ensure their continued access to a safe learning environment following a sexual assault.

Thank you for your consideration.



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⁵ The “exclusionary rule” refers to the 34 C.F.R. § 106.45(b)(6) requirement that a decision-maker remove must remove from consideration statements made by a party or witness who does not submit to cross-examination.

⁶ Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence & Student Discipline in Education*, 54 WAKE FOREST LAW REV. 303, 312 (2019) (“The NPRM thus departs from ED’s consistent and at least twenty-four-year-old practice of requiring schools to use the preponderance of the evidence standard in investigating and resolving sexual harassment complaints.”).

⁷ 34 C.F.R. § 106.45(b)(1)(iv).