



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

Re: Written Comment for Title IX Public Hearing (Sexual Harassment)

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

The undersigned 58 survivor advocate organizations and civil rights organizations are pleased to submit this comment regarding the Title IX regulations addressing sexual harassment in education in response to the Department of Education's public hearing. We greatly appreciated President Biden's executive order affirming the administration's commitment to enforcing Title IX's protections against all forms of sex discrimination,¹ as well as the Department's subsequent announcement of its plans to publish a new proposed Title IX rule.² We write to share our concerns about the current challenges student survivors face, the harms of the Trump administration's Title IX rule finalized last year, and our recommendations for changes to the Title IX rules that will better protect students from all forms of sex-based harassment, including sexual harassment, sexual assault, dating violence, domestic violence, and stalking, as well as harassment based on sexual orientation, gender identity, transgender status, sex stereotypes, sex characteristics (including intersex traits), parental status, pregnancy, childbirth, termination of pregnancy, or related conditions.

Sexual harassment of students is widely prevalent in K-12 schools and higher education, but most students do not report it to their schools. One in five girls ages 14-18 have been kissed or touched without their consent,³ 58 percent of LGBTQ youth ages 13-21 are sexually harassed,⁴ and children with disabilities are 2.9 times more likely than their peers to be sexually assaulted.⁵ In college, one in four women, one in fifteen men, and one in four transgender, non-binary, and gender-nonconforming students are sexually assaulted during their time as

¹ Exec. Order No. 14021, 86 Fed. Reg. 13803 (Mar. 8, 2021), <http://federalregister.gov/d/2021-05200>.

² Dep't of Educ., Office for Civil Rights, *Letter to Students, Educators, and other Stakeholders re Executive Order 14021* (Apr. 6, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf>.

³ National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 3 (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.

⁴ GLSEN, *The 2019 National School Climate Survey* xix, 30 (2020), <https://www.glsen.org/research/2019-national-school-climate-survey>.

⁵ Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017) [hereinafter *Let Her Learn: Girls with Disabilities*], available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities>.

undergraduates.⁶ In addition, one in three college women and one in six college men are survivors of dating violence or domestic violence,⁷ and one in six women and one in nineteen men have experienced stalking.⁸ However, few students report these incidents to their schools, often because of shame or self-blame, fear of retaliation, fear of being ignored or disciplined, and/or fear of police or immigration officials. For instance, only 2 percent of girls ages 14-18⁹ and only 12 percent of college women¹⁰ who are sexually assaulted report the incident to their schools. When student survivors do come forward, they are often ignored or punished by their schools instead of receiving help.¹¹ This is especially common for women and girls of color (particularly Black women and girls), LGBTQ students, pregnant and parenting students, and disabled students due to stereotypes that label them as more “promiscuous,” less credible, and/or less deserving of protection. When schools fail to protect survivors, they suffer in the form of lower grades, lost scholarships, and lost degrees. One in three college survivors end up dropping out altogether.¹²

Instead of addressing these problems, the Trump administration made sweeping, illegal changes to the Title IX regulations last year that have made it exceedingly more difficult for student survivors to receive help.¹³ Under the Trump rule, schools are now required to ignore many reports of sexual harassment and to use uniquely burdensome procedures for sexual harassment that are not required for any other type of student or staff misconduct.¹⁴ These changes—which single out sexual harassment as uniquely suspect—rely on and reinforce the toxic myth that women and girls lie often about having been sexually assaulted. When the Trump rule was proposed, nearly 125,000 members of the public spoke out through public comments, with the overwhelming majority registering their strong opposition. Nonetheless, the Trump administration finalized its dangerous rule, which has now been challenged in five separate lawsuits filed on behalf of individual student survivors, a student organization, survivor advocacy organizations, and eighteen states and the District of Columbia.

The Department of Education must restore and strengthen Title IX protections against sexual harassment and other forms of sex-based harassment. Survivors of sexual assault need a rule that offers healing, dignity, and justice, including a safe and supportive learning environment. Schools also need fair procedures that allow them

⁶ AAU, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, ix (Oct. 15, 2019) [hereinafter AAU Campus Climate Survey], <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>.

⁷ Knowledge Networks, *2011 College Dating Violence and Abuse Poll*, at 15 (2011), http://www.loveisrespect.org/pdf/College_Dating_And_Abuse_Final_Study.pdf.

⁸ National Center for Victims of Crime, *Stalking Fact Sheet* (2015), https://victimsofcrime.org/docs/default-source/src/stalking-fact-sheet-2015_eng.pdf.

⁹ NWLC Sexual Harassment Report, *supra* note 3, at 2.

¹⁰ AAU Campus Climate Survey, *supra* note 6, at A7-27.

¹¹ Sarah Nesbitt & Sage Carson, Know Your IX, *The Cost of Reporting* (2021), <https://www.knowyourix.org/thecostofreporting>.

¹² Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), <https://doi.org/10.1177/1521025115584750>.

¹³ Dep’t of Educ., Office for Civil Rights, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020), <https://www.federalregister.gov/d/2020-10512>.

¹⁴ The Trump Title IX rule included dating violence, domestic violence, and stalking in its definition of “sexual harassment.” 34 C.F.R. § 106.30(a). The Trump rule also purports to allow schools to address sexual harassment that must be dismissed under Title IX using a “non-Title IX” school policy instead. See 34 C.F.R. § 106.45(b)(3)(i); 85 Fed. Reg. at 30,283, 30,289, 30,037-38 (May 19, 2020). Still, the mandatory dismissal of certain Title IX sexual harassment complaints distorts the purpose and effect of Title IX: The statute does not grant schools authority to address sexual harassment—an authority that schools inherently possess—but rather requires them to do so in certain circumstances. The mandatory dismissal rule also promotes confusion. And as a practical matter, it creates uncertainty for complainants and respondents alike, as well as potential liability for schools if their classification of conduct is challenged by either party.

to determine what happened and to impose appropriate consequences so that harassers can learn from their mistakes, make amends, and change their behavior. To that end, we recommend the following provisions be included in the forthcoming Title IX rule:

- **Restore and strengthen protections against harassment:**
 - Define sexual harassment as unwelcome sexual conduct, including quid pro quo harassment;
 - Affirm that sex-based harassment includes sexual harassment, sexual assault, dating violence, domestic violence, and sex-based stalking, and harassment based on sexual orientation, gender identity, gender expression, transgender status, sex stereotypes, sex characteristics (including intersex traits), parental status, pregnancy, childbirth, termination of pregnancy, or related conditions;
 - Require schools to respond to sex-based harassment regardless of where it occurs (including off campus or abroad), that interferes with or limits an individual's ability to participate in or benefit from an education program or activity;
 - Require schools to address sex-based harassment that they know or should know about, as well as all harassment by school employees that occurs in the context of their job duties, regardless of whether the complainant faces further actionable harassment post-notice;
 - Require schools to provide a prompt, effective, and reasonable response to sex-based harassment, including by providing supportive measures to complainants no later than five school days after receiving notice, and prohibit schools from conditioning a complainant's access to supportive measures on their agreement to a nondisclosure agreement or waiver of legal claims against the school;
 - Allow schools to use non-investigative processes (such as a restorative justice process) to resolve complaints of sex-based harassment as long as participation is truly voluntary, the parties are able to withdraw at any time before the process concludes, and the facilitators are adequately trained;
 - Clarify that Title IX protects all persons, including those who are neither students nor employees, who seek to access or benefit from an education program or activity; and
 - Allow states and schools to provide additional protections beyond those in the Title IX rule.

- **Develop robust protections against retaliation:**
 - Explicitly prohibit these and other common forms of retaliation:
 - Disciplining a complainant for collateral conduct that is disclosed in a complaint or investigation (e.g., alcohol or drug use, consensual sexual contact, reasonable self-defense, presence in restricted parts of campus) or that occurs as a result of the reported harassment (e.g., nonattendance);
 - Disciplining a complainant for a "false report" or for prohibited sexual conduct solely because the school has decided there is insufficient evidence for a finding of responsibility or because the respondent is found not responsible;
 - Disciplining a complainant for discussing the allegations that gave rise to their complaint; and
 - Disciplining a victim of sex-based harassment for misconduct charges the school knew or should have known were brought by a third party for the purpose of retaliation; and
 - Allow schools to dismiss, without a full investigation, a complaint of sex-based harassment that is patently retaliatory (e.g., a disciplined harasser files countercomplaint against their victim).

- **Ensure fair disciplinary procedures:**

- Require schools to resolve complaints using grievance procedures that are fair and afford both parties the same procedural rights, including by applying a preponderance of evidence standard;
- Otherwise allow schools flexibility in implementing grievance procedures, particularly when addressing complaints that, if substantiated, would not result in serious sanctions;
- Do not foreclose schools from forgoing live hearings attended jointly by the parties or from forgoing direct cross-examination, where not otherwise required by law; and
- For schools that rely on direct cross-examination, do not foreclose recipients from considering past statements by parties or witnesses who are not available for direct cross-examination.

To ensure that no type of harassment is singled out for uniquely burdensome standards or labeled as uniquely suspect, we also ask the Department to apply uniform standards for other forms of sex-based harassment, including harassment based on sexual orientation, gender identity, gender expression, transgender status, sex stereotypes, sex characteristics (including intersex traits), parental status, pregnancy, childbirth, termination of pregnancy, or related conditions; as well as harassment based on other protected traits, including race, color, national origin, and disability.

Thank you for your consideration of our recommendations. If you have any questions, please contact Shiwali Patel (spatel@nwlc.org) and Elizabeth Tang (etang@nwlc.org).

National Women's Law Center, joined by:

American Association of University Women (AAUW)
 American Atheists
 American Federation of Teachers
 American Psychological Association
 Autistic Self Advocacy Network
 Chicago Alliance Against Sexual Exploitation (CAASE)
 Clearinghouse on Women's Issues
 Clery Center
 Connecticut Women's Education and Legal Fund (CWEALF)
 Council of Parent Attorneys and Advocates
 End K-12 Violence
 Enough is Enough Voter Project
 Equal Rights Advocates
 Family Equality
 Family Violence Appellate Project
 Feminist Majority Foundation
 Futures Without Violence
 Girls Inc.
 GLSEN
 Idaho Coalition Against Sexual & Domestic Violence
 Illinois Coalition Against Sexual Assault
 It's On Us
 Jane Doe Inc.
 Japanese American Citizens League
 Jewish Women International
 Justice for Migrant Women
 Kentucky Association of Sexual Assault Programs

Know Your IX a Project of Advocates for Youth
LatinoJustice PRLDEF
Lawyers' Committee for Civil Rights Under Law
Legal Aid at Work
Legal Aid Chicago
Legal Momentum, the Women's Legal Defense and Education Fund
Los Angeles Center for Law and Justice
Maryland Coalition Against Sexual Assault
Michigan Coalition to End Domestic & Sexual Violence
Michigan Organization on Adolescent Sexual Health
Movements for Violence Prevention
National Council of Jewish Women
National Crittenton
National Education Association
National Indian Education Association
New Jersey Parents Caucus
Prevention. Action. Change.
Rocky Mountain Victim Law Center
Stop Sexual Assault in Schools
Survivor Strong
The Army of Survivors
The Education Trust
The Every Voice Coalition
The National Domestic Violence Hotline
TIME'S UP Now
Union for Reform Judaism
University of Hawaii at Manoa, LGBTQ Center
Victim Rights Law Center
Women of Reform Judaism
Women's March Portland