From: Bustillos, Leticia
Sent: Fri, 11 Jun 2021 16:19:10 +0000
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (Sexual Harassment)
Attachments: AAUW Title IX Hearing Comments 06.11.21 FINAL.pdf

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Hello,
Attached are our written comments and recommendations in regard to sexual harassment.
Thank you,
Leticia Bustillos

Leticia Tomas Bustillos
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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:

On behalf of the 170,000 members and supporters of the American Association of University Women (AAUW), we are pleased to submit this comment regarding the Title IX regulations addressing sexual harassment in education. We appreciate President Biden's commitment to enforcing Title IX protections to ensure an educational environment free from discrimination on the basis of sex and his directive to the Department of Education and all other relevant agencies to review all existing regulations, orders, policies and guidance documents that are or may be inconsistent with Title IX.[1] We are further encouraged by the steps the Department will take to produce new guidance documents to provide clarity to schools about their existing obligations under the 2020 amendments to Title IX and its intent to publish a new Title IX rule that upholds the commitment to ensuring equal and nondiscriminatory access to education for students at all educational levels.[2] We write to offer our recommendations for changes to Title IX regulations to ensure protections against all forms of sex-based harassment that were gutted by the 2020 amendments are restored.

Despite tremendous progress, challenges remain

Title IX was enacted nearly 50 years ago to ensure all students have access to an education free from sex discrimination. This groundbreaking civil rights statute has had a dramatic effect on all areas of education, opening many opportunities for women. Indeed, women and girls have made tremendous progress during that time. Throughout the first part of the 20th century, colleges could—and did—openly exclude or limit the number of female students. In the ensuing decades, women and girls have made progress at every level of education, from P-12 to graduate school. Today women make up a majority of undergraduates on college campuses, but inequities remain. Over the past decade, there has been increased recognition that sexual harassment and assault create an unequal educational environment. An environment fraught with sexual harassment and violence can severely impede a student's ability to perform well in school, and in extreme cases can even prompt them to drop out. Recognizing this reality, the Department of Education and advocates have spent years honing enforcement of Title IX to ensure that students who experience sexual harassment and assault can come forward, seek justice, and proceed in a supportive educational environment.

However, AAUW's own research reveals that despite decades of enforcement, two-thirds of college students experience sexual harassment.[3] Studies have also found that approximately 20 percent of

women college students are targets of attempted or completed sexual assault.[4] Additionally, AAUW research found that 56 percent of girls and 40 percent of boys in grades 7-12 face sexual harassment.[5] Our most recent analysis of the 2017-18 sexual harassment and bullying data from the Civil Rights Data Collection (CRDC) leads us to believe that there is a severe underreporting of incidences of sexual harassment in American schools. Of the nearly 98,000 public and public charter P-12 educational institutions, a full 83.9 percent of P-12 schools and 78 percent of schools with any one of grades 7-12 reported zero incidents of harassment or bullying on the basis of sex. The CRDC data also likely underreports the sexual harassment of girls of color. According to the CRDC, for instance, Hispanic girls account for a lower portion of harassment victims than they do of overall enrollment, while white girls account for a higher portion of harassment victims than they do of overall enrollment.[6] But a national study by the Centers for Disease Control indicates that the opposite might be true: 12.2 percent of Hispanic girls reported having been forced to have sexual intercourse when they did not want to, compared to 9.1 percent of white girls.[7] Research suggests that this underreporting by victims of sexual harassment may be due to students feeling shame or self-blame, fear of retaliation, or a belief that they will be ignored or disciplined. Research also shows that when survivors do report their assaults, they are ignored or punished rather than receiving the support they need.[8]

Attacks to Title IX and the weakening of protections for survivors

Since the passage of this landmark civil rights law, opponents have sought to weaken it. Beginning in 2017, rather than addressing the challenges facing survivors of sexual harassment, efforts were undertaken to systematically dismantle Title IX protections. In 2017, the Department of Education rescinded multiple important guidance documents,[9] including those that had clarified what Title IX requires schools to do to prevent and address sexual harassment and violence and to protect transgender students. While the Department issued an interim Q&A document to guide schools on how to investigate and adjudicate allegations of sexual misconduct, it was woefully inadequate to protect the rights of students.[10] And despite the submission of over 125,000 comments – including from AAUW, our members and supporters, and our state affiliates – the majority of which were in opposition to the proposed rule changes to Title IX, the Department of Education finalized regulations[11] that make it harder for students who have experienced sexual harassment to come forward to get the protections Title IX was created to provide.[12]

This new rule, which went into effect on August 14, 2020, includes substantive changes that are likely to reduce the number of Title IX investigations by making it harder for victims to come forward.[13]

- Sexual harassment is redefined in a much narrower way, to only include conduct that rises to the level of being "severe, pervasive, and objectively offensive."
- Schools can subject victims to drawn-out, grueling investigations, may coerce them into participating in mediation with their assailant, and must allow victims to be cross-examined.
- Schools can also choose the standard of proof to use, including diverging from long-standing practices by allowing the use of the inappropriate "clear and convincing evidence" standard. This would force one party – survivors – to meet a higher bar, rather than leveling the field for both survivors and the accused by using the appropriate "preponderance of the evidence" standard.
- Schools can ignore victim complaints if the harassment occurred at the wrong place – outside of a campus-controlled building or activity – or was reported to the wrong person. Additionally, if the victim is no longer participating in the school's program or activity, perhaps because they graduated or transferred, the school cannot investigate the complaint.

This rule turns back the clock, reversing policies that were put in place to make it easier for survivors to report sexual misconduct. The rule stacks the deck against survivors, making it too onerous, even traumatic, for many to come forward. In short, the rule is antithetical to the fundamental promise of Title IX, that all students deserve access to an education free from sex discrimination.[14]

Restoring the promise and protections of Title IX

It is imperative that Title IX protections are restored and strengthened to ensure students are guaranteed an educational environment free from all forms of sexual harassment, including 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. And survivors must trust that they will be treated with dignity, provided the supports they need, and afforded the protections originally envisioned decades ago. To achieve these goals, we join other survivor advocate groups and civil rights organizations in recommending the following provisions be included in a new proposed 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, 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;
- Allow states and schools to provide additional protections beyond those in the Title IX rule; and
- 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.

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 raise to their complaint; or
    - 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 a 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 and direct cross-examination, where not otherwise required by law; and
- For schools that rely on direct cross-examination, allow schools to consider 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 time and consideration of our concerns and recommendations for a new Title IX rule. Please do not hesitate to contact me at nielsonk@aauw.org or 202.728.7617 if you have any questions.

Sincerely,

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Kate Nielson
Senior Director of Public Policy, Legal Advocacy & Research

[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] Hill, Catherine and Silva, Elena. *Drawing the Line: Sexual Harassment on Campus.* Washington DC: American Association of University Women, 2006. https://www.aauw.org/app/uploads/2020/02/AAUW-Drawing-the-line.pdf; Hill, Catherine and Kearl, Holly. *Crossing the Line: Sexual Harassment at School.* Washington, DC: American Association of University Women, 2011. https://www.aauw.org/resources/research/crossing-the-line-sexual-harassment-at-school/.

[4] Krebs, Christopher P., Lindquist, Christine H., Warner, Tara D., Fisher, Bonnie S., and Martin, Sandra L. *The Campus Sexual Assault (CSA) Study, Final Report*. Rockville, MD: National Criminal Justice Reference Service, 2007. https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf; DiJulio, Bianca, Norton, Mira, Craighill, Peyton, Clement, Scott, Brodie, Mollyann. *Survey of Current and Recent College Students on Sexual Assault* San Francisco, CA: Kaiser Family Foundation, 2015. https://www.kff.org/other/poll-finding/survey-of-current-and-recent-college-students-on-sexual-assault/.

[5] Hill, Catherine and Silva, Elena. *Drawing the Line: Sexual Harassment on Campus.* Washington DC: American Association of University Women, 2006. https://www.aauw.org/app/uploads/2020/02/AAUW-Drawing-the-line.pdf.

[6]

	Number enrolled	Percent of girls' enrollme	Number harassed	Percent of girls harassed
Hispanic	6763088	0.273246288	6881	0.234950661
American Indian/Alaska N	245129	0.009903847	330	0.011267798
Asian	1281702	0.051784084	628	0.021442961
Native Hawaiian/Pacific Is	93838	0.003791298	91	0.003107181
Black	3763447	0.152053015	5096	0.174002117
White	11646416	0.470545399	15210	0.519343053
Two or More races	957267	0.038676068	1054	0.035988664
Total	24750887	1	29287	1

[7] Centers for Disease Control, *Youth Risk Behavior Surveillance – United States, 2013.* Washington, D.C.: U.S. Department of Health and Human Services, 2013. https://www.cdc.gov/mmwr/pdf/ss/ss6304.pdf.

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

[9] U.S. Department of Education, Office of Civil Rights. *Dear Colleague Letter.* Washington, DC: U.S. Department of Education, Office of Civil Rights. https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

[10] U.S. Department of Education, Office for Civil Rights. *Q&A on Campus Sexual Misconduct.* Washington, DC: U.S. Department of Education, Office of Civil Rights. https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

[11] National Archives, Federal Register. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.* Washington, DC: National Archives, 2020. https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

[12] American Association of University Women. *AAUW Statement on Rollback of Title IX Protections,* 2020. https://www.aauw.org/resources/news/media/press-releases/aauw-statement-on-rolling-back-title-ix-protections/.

[13] National Women's Law Center. *DeVos's New Title IX Sexual Harassment Rule, Explained.* Washington, DC: National Women's Law Center, 2020. https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/05/Title-IX-Final-Rule-Factsheet-5.19.20-v3.pdf.

[14] American Association of University Women. *AAUW Statement on Rollback of Title IX Protections,* 2020. https://www.aauw.org/resources/news/media/press-releases/aauw-statement-on-rolling-back-title-ix-protections/.