Comment of Citizens Against Collective Punishment on the Basis of Sex:

The attached document was part of the Administrative Record leading to adoption of the Title IX regulations that went into effect in 2020.

The considerations in the attached document are directly pertinent to the new Public Hearings addressed to possible revision of the 2020 regulations.

The attached document is hereby incorporated into this comment as if fully set forth herein and is hereby made a part of the Administrative Record in the 2021 Public Hearings.
Comment for the United States Department of Education Office for Civil Rights

Comment on Proposed Title IX Rulemaking
Docket No. ED-2018-OCR-0064-0001, RIN 1870-AA14
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance
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Citizens Against Collective Punishment on the Basis of Sex
Comment for the United States Department of Education Office for Civil Rights

This comment concerns the practice of some funding recipients to use “collective punishments” that violate Title IX. Collective punishment is a form of punishment whereby one person or group of people is punished because of the wrongdoings of another individual or entity that is in some way associated with the person or group. The punished person or group may have no direct association with the other individuals or groups, or ability to direct or control their actions. Collective punishment is repugnant.

On college and university campuses all over the country, schools regularly use collective punishments against single-sex groups, even though they do not use collective punishment against groups denominated along other lines, such as common cause, purpose, or interest. That disparity violates Title IX, as both Duke University and the University of Virginia learned through their costly settlements with victims of the universities’ collective punishments. The Department’s rules should explicitly state that the use of collective punishment against single-sex groups presumptively violates Title IX.

The Office for Civil Rights is responsible for, and has the jurisdiction to, prohibit discrimination on the basis of sex. Collective punishment has been recognized as a violation of moral norms, international law, and domestic statutory and Constitutional law. Collective punishment that occurs on the basis of sex violates Title IX and should be unacceptable.

I. Collective Punishment Is a Serious Problem

A. Collective Punishment Is Abhorrent

Collective punishment has long been recognized as abhorrent. Collective punishment used to be the norm in large swaths of the ancient world. In ancient Rome, for instance, military units could be subjected to the practice of “decimation” as punishment for the bad behavior of a few. Troops would be divided into groups of ten. Each group would then draw lots, and the soldier who drew the wrong lot would be beaten to death by the other nine members of his group. Lawrence A. Tritle, *Men at War*, in *The Oxford Handbook of Warfare in the Classical World* 285 (Brian Campbell & Lawrence A. Tritle eds. 2013). In ancient China, meanwhile, collective punishment was also a reality of life. Chinese law allowed the emperor to undertake “nine familial exterminations,” wherein an offender and nine categories of relatives—parents, grandparents, children, and so forth—were killed for his crime. In 1368, the Ming Emperor Hongwu murdered 40,000 associates of a minister who was found guilty of plotting against him. David Leafe, *The Merciless Ming*, *Daily Mail*, Sept. 17, 2014. And some of modern history’s most despicable regimes relied on collective punishment as a means of carrying out reprehensible policies. Nazi Germany, for instance, collectively punished both Jewish and non-Jewish communities to deter resistance.
International law has sought to curb the grisly and barbarous practices associated with collective punishment. The Third Geneva Convention, for instance, states that “collective punishment for individual acts ... are forbidden.” Geneva Convention Relative to the Treatment of Prisoners of War art. 87, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Similar prohibitions on collective punishment can be found in the Fourth Geneva Convention, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (“[C]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited.”), the International Red Cross’s commentary to the Fourth Convention, Int’l Comm. of the Red Cross, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Commentary 226 (1958) (clarifying that collective punishment is reprehensible because it “strike[s] at guilty and innocent alike.”), and Protocol II to the Geneva Convention, Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 4, June 8, 1977, 1125 U.N.T.S. 609 (stating that collective punishments “are and shall remain prohibited at any time and in any place whatsoever.”). The UN has also continued to expand and clarify the ban on collective punishment. In 1990, for instance, it expanded its previous treaties by barring any collective punishment against incarcerated juveniles. United Nations Rules for the Protection of Juveniles Deprived of their Liberty, U.N. Doc. A/Res/45/113 (1990).

Collective punishment also violates Title IX because it is a form of retaliation. Often, an incident or event involving one or a few people will trigger retaliatory actions against the entire community of single sex organizations and their members. This retaliation is a reflexive striking out against the disfavored groups and individuals on the basis of sex that, in many cases, is imposed even before adjudication of the merits of the charges against the individual claimed to have committed an offense. The transparent gender bias and sex discrimination in these reflexive retaliations may even be openly acknowledged by the institution committing the retaliation. Hostile and dehumanizing statements of bias from administrators regarding “male privilege” or “toxic masculinity” or “rape culture” are unambiguous proof of gender bias and gender stereotyping from institutions and individual officials that treat single sex organizations and their members on an unequal and disfavored basis in the campus community. By acting upon a presumption of blame and guilt directed against single sex organizations and their members, recipients violate Title IX both by direct gender based discrimination and by the creation of a hostile environment.
II. Collective Punishment Is Unconstitutional and Unlawful, Both as a General Matter and Under Title IX

The U.S. Supreme Court, and individual justices, have long recognized that collective punishment is unconstitutional and unconscionable. Writing in The Harvard Law Review, Oliver Wendell Holmes stated that “common-sense is opposed to making one man pay for another man’s wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility.” Agency, 5 Harv. L. Rev. 1, 14 (1891). Justice Holmes’s statement has been embodied in our nation’s jurisprudence. In Enmund v. Florida, a case concerning a co-defendant’s capital punishment sentencing process, the Court held that due process required that “the focus be on [the defendant’s] culpability, not on those who committed the robbery and shot the victims,” 458 U.S. 782, 798 (1982), and that “his punishment must be tailored to his personal responsibility and moral guilt.” Id. at 801. In Krulewich v. United States, meanwhile, Justice Jackson famously concurred to note that “it is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.” 336 U.S. 440, 454 (1949). Based on this reasoning, Jackson argued that the defendants in that case should be tried separately rather than grouped together and forced to face collective punishment and ire from the jury.

Thus, collective punishment is happily “not ... a part of our law.” Hessel v. O’Hearn, 977 F.2d 299, 305 (7th Cir. 1992) (Posner, J.). Judge Posner’s reasoning for this decision is simple and fundamental to the American legal tradition - “proximity to a wrongdoer does not authorize punishment.” Id. “[T]he Constitution,” as one court has put it, “disallows collective guilt. A person cannot be held responsible for an act unless he did it. We do not accept the concept that a person is responsible for what others of her race, town, profession, or politics may have done.” Houston Contractors Ass’n v. Metro. Transit Auth. of Harris County, 993 F. Supp. 545, 558 (S.D. Tex. 1997), vacated on other grounds, 189 F.3d 467 (5th Cir. 1999). Collective punishment cannot coincide with a Constitutional system where values like an individual trials and a presumption of innocence are held dear. Therefore, “[c]ollective punishment, searches and seizures based upon suspicion of entire classes ... have consistently been regarded as abhorrent to the American Constitution and the American psyche.” Ban gert v. Hodel, 705 F. Supp 643, 653 (D.D.C. 1989). “[T]he Constitution disallows collective guilt. A person cannot be held responsible for an act unless he did it. We do not accept the concept that a person is responsible for what others of her race, town, profession, or politics may have done.” Houston Contractors Ass’n v. Metro. Transit Auth. of Harris County, 993 F. Supp. 545, 558 (S.D. Tex. 1997), vacated on other grounds, 189 F.3d 467 (5th Cir. 1999).

A. Collective Punishment on the Basis of Sex Violates Title IX

Title IX prohibits collective punishment when exacted on the basis of sex, and thereby provides jurisdiction for the Civil Rights to act to stop this sort of punishment from being doled out at educational institutions. In the analogous Title VII context, Title VII makes it unlawful to punish a group of people in retaliation for one of them filing a Title VII complaint. McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996).
That form of “collective punishment” violates Title VII. Id. Similarly, where an educational institution selectively engages in collective punishment against single-sex groups, that violates Title IX. For example, if a fraternity or sorority member, who also happens to be a member of the honor society, violates a school disciplinary policy, a college or university violates Title IX if it punishes the entire fraternity or sorority, but does not similarly punish the entire honor society. That is discrimination on the basis of sex, and it violates Title IX.

**B. Collective Punishment “On the Basis of Sex” Is an Epidemic on College Campuses**

Collective punishment against single-sex organizations is rampant on college and university campuses. Colleges frequently use collective punishment to scapegoat individual single-sex organizations, or all single-sex organizations, for the actions of a few. Often, universities mete out these collective punishments even though the punished entities did not, and could not, control the actual wrongdoer’s actions. These collective punishments are being doled out on the basis of sex—single-sex institutions are being punished, oftentimes because of stereotypes and generalizations of genders or groups. Again, the notorious false allegations at Duke and UVA led to unlawful group punishments and ultimately led to both universal condemnation and expensive litigation settlements. These high-profile abusive collective punishments do not stand alone.

At Bowdoin College, for instance, the death of a non-student at a fraternity party led the university to disband all Greek organizations. The organizations and individuals who were subjected to group punishment were in no way responsible for the death of the non-student at a different organization’s event, yet they still were disbanded and punished by the university’s administration. Laura Krantz, *Harvard looks to Bowdoin as model in eradicating frats, but its decision had mixed results*, Boston Globe, July 31, 2017, https://bit.ly/2S9jQvX.

At California Polytechnic State University, the administration recently decided to suspend all fraternities and sororities after controversal social media posts surfaced from two specific fraternities’ social events. In a letter, university president Jeffrey Armstrong admitted that he “understood this impacts Greek Life organizations that have been operating responsibly and with integrity.” However, Armstrong insisted that this policy of collective punishment would continue “until all fraternities and sororities are conducting themselves in a manner that is respectful of all students—as well as holding each other accountable.” Kaytlyn Leslie, *This stops now*: Cal Poly suspends frats and sororities after new racial incident, *The Tribune*, Apr. 17, 2018, https://bit.ly/2sOlncm. On its face, the statement by the University President acknowledges a purpose and intention to impose collective punishment upon single sex organizations both to deprive them of constitutionally protected freedom of association and to deprive them of constitutionally protected freedom of speech while doing so in a way that violates Title IX as well by targeting the punishment only against single sex organizations and their individual members.
At a number of universities, recent tragedies at individual fraternity chapters have led the university to collectively punish Greek organizations writ large. At Florida State University, Louisiana State University, Texas State University, and West Virginia University, for instance, all Greek organizations were temporarily suspended following the death of a student at an individual fraternity’s event. Matthew Haag, Florida State Halts Fraternity Activities After Student’s Death, N.Y. TIMES, Nov. 7, 2017, https://bit.ly/2RPWqfJ; Stephanie Saul, 10 Arrested in Death of L.S.U. Student After Fraternity Drinking Ritual, N.Y. TIMES, Oct. 11, 2017; Eric Levenson & AnneClaire Stapleton, Texas State suspends all Greek life after pledge dies, CNN, Nov. 15, 2017, https://bit.ly/2FO4CqJ; Rachel Kleinman & Joy Y. Wang, Student in West Virginia University fraternity incident dies, MSNBC, Nov. 13, 2014, https://bit.ly/2RM12n7.

And, at Duke University, all ten of the campus’s PanHellenic sororities were suspended after a member of one individual sorority was hospitalized due to an “alcohol-related incident.” Oona Goodin-Smith, Duke suspends 10 sororities after student hospitalized in alcohol-related incident, USA TODAY, Jan. 27, 2016, https://bit.ly/2Mwwhwn. The University of Virginia similarly suspended all of its fraternities for two months in 2014 after Rolling Stone published a “A Rape on Campus,” which was ultimately disproven. UVA Suspends Fraternities Following Rolling Stone Campus Rape Investigation, ROLLING STONE, Nov. 22, 2014, https://bit.ly/2WsKO0D. The collective punishment wrongfully inflicted by UVA was widely condemned, see, e.g., Hans Bader, UVA Collective Suspension of Sororities and Frats a ‘Flagrant Violation of Constitutional Norms’”, CNS News, Dec. 9, 2014, https://bit.ly/2TjVv3J, and ultimately resulted in very expensive litigation settlements for the University’s unlawful behavior.

One of the particularly pernicious aspects of group punishment is that it often is imposed by unilateral administrative fiat with no adjudicative process at all. The single-sex organizations and their members are denied all pretense of due process and get no process, just a punishment inflicted upon them for no offense other than being members of a single-sex organization at an educational institution where perhaps one person who is affiliated with one organization has been accused of a bad action. These unilateral impositions carry all the worst attributes of unlawful group punishment. There is no opportunity to present a defense. There is no weighing of competing narratives for truth-finding. There is no recognition that the overwhelming majority of the members and organizations had nothing to do with the event that triggered the group punishment. There is no penalty imposed on other groups to which the single alleged offender might have belonged, e.g., the campus glee club. Instead, there is pure sex discrimination against single-sex organizations in violation of Title IX.

The tendency to treat single-sex organizations as “all the same” and to lump them together for collective treatment is widespread in U.S. educational institutions. “But it’s wrong to assume that every all-male group is toxic.” Alexandra Robbins, “A Frat Boy and a Gentleman,” NEW YORK TIMES, Jan. 26, 2019, https://nyti.ms/2DC0IP8. Individuals are entitled to individual assessment and individual respect from their educational institutions free from the wide-spread taint of gender bias. By imposing a collective punishment on the basis of sex discrimination and gender stereotyping, driven
by hostility to the personal choices of individuals in joining single sex organizations, the recipient violates Title IX.

It is no excuse that educational institutions sometimes try to camouflage group punishments under some soft phrasing such as “restricting rights and privileges.” When single-sex organizations or their members are banned from conducting recruiting activities, or banned from participating in campus activities or from the benefits generally available to other members of the academic community on the basis of their single-sex status, it is a deprivation of the liberties that are afforded to all others who do not share the identifying characteristic. When educational institutions inflict group punishments on the basis of sex, it operates to segregate them from the rest of the population and reinforce their inferior status. It is not a euphemistic matter of “restricting rights and privileges.” If a student is being denied access to any opportunity the school provides or permits to other students simply because of membership in a single-sex organization, it is punishment. It is based on sex. It is a violation of Title IX.

III. Policy Recommendations

A. Provide That Punishments or Withdrawal of Recognition from Single-Sex Organizations On the Basis of Actions By Individual Members Unrelated to their Membership In the Organization Presumptively Violates Title IX

The Office for Civil Rights should ensure that educational institutions do not continue to use sex-discriminatory collective punishments to punish the many for the actions of the few or of a single individual. Universities are currently using collective punishments to target groups specifically because of their members’ gender. Punishment should be reserved for an individual’s culpable behavior. The Department’s rules should therefore state that “the use of collective punishment against single-sex groups presumptively violates Title IX.”

B. Single-Sex Organizations Should Have Access to an Advisor and Mediator at the University Whose Role is to Advise Them of their Rights Under Title IX

The Office for Civil Rights should require universities to expand the role of the Title IX coordinator to require that the coordinator provide support to single-sex organizations, including and not limited to, advising them of their rights against discrimination under Title IX.

C. Provide That Punishments or Withdrawal of Recognition from Single-Sex Organizations May Not Be Done Without Providing The Organizations a Live Hearing Before an Unbiased Adjudicator

The Office for Civil Rights should ensure that single-sex organizations are provided fair and adequate procedures to ensure they are not erroneously punished for conduct by individual members or affiliates that the organizations could not and did not control. To ensure that the withdrawal of any benefits (such as university recognition)
or any punishments do not violate Title IX, single-sex organizations should have access to the same procedural protections as individual students who are subject to discipline, including the right to a live hearing before an unbiased adjudicator.

D. Provide That Single-Sex Organizations Must Have Access to a Process By Which to Appeal Punishments or Withdrawal of Recognition

The Office for Civil Rights should ensure that single-sex organizations have the right to appeal any decision by the university to withdraw benefits or inflict punishment.