From: Claire Kaplan
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To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing on Changes to Title IX Regulations from the perspective of a Victim Advocate
Attachments: TIX statement from C. Kaplan.docx

To: US Department of Education Office on Civil Rights
From: Claire N. Kaplan, Ph.D. Consultant and Victim Advocate

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Attached please find my statement regarding possible changes to Title IX regulations.

Many thanks,
Claire Kaplan, PhD

Until this past June, for nearly 30 years, I served as an advocate for survivors of sexual misconduct at the University of Virginia. During this time, I witnessed broad changes, many improvements, and some terrible missteps in the development of Title IX regulations. The most recent missteps occurred in 2020.

I am committed to equity and fairness for all concerned, and so want these suggestions to be taken in that spirit. An injustice in any case is an injustice; however, the Title IX regulations written during the Obama administration sought to correct decades of injustice for survivors. I know many people felt that they pushed the bar too far in that direction; I don't agree, given the burden that many survivors face, although I am willing to consider that certain measures have resulted in bias toward accused students. However, the reaction of ED under the Trump administration resulted in a swing back to the "bad old days" when survivors faced a gantlet of hostile interrogators and cross examinations in a hearing that mimicked all the worst aspects of a trial.

I have sat alongside many a survivor who had to bear this kind of hearing over the years. The process was terrifying, humiliating, and rarely had a good outcome. This second trauma drove survivors away from seeking justice. It does again today, due to confusing rules with arbitrary forms of enforcement, confusing and conflicting definitions, and an over-reliance on an adversarial process.

I have some specific suggestions for the ED that may move these policies back to some semblance of equity, fairness, and hopefully justice, that promotes accountability and safety not only for survivors, but for those who work in educational institutions. Sexual misconduct not only causes emotional and academic harm to survivors; it also harms other members of these communities through a climate that disregards the ripple effect of trauma on students, faculty and staff.

1. Allow for a broader definition of sexual harassment. The terms in the existing definition are subject to interpretation and most people have no idea what they mean in the regulatory sense. This is a disciplinary process; all a person should understand that sexual harassment is "unwelcome conduct of a sexual nature, or "that is sex-based." This definition should require measures that provide meaningful support (such as academic interventions, counseling, and advocacy) to all the parties involved.
2. The hostile environment standard is confusing to survivors AND those who are responsible for enforcing the policy. What is objectively offensive? How does one explain this to a child? How does one explain this to a college student? What about students with cognitive disabilities or who are neuro-atypical? In addition to be left to subjective interpretation, the current definition is even more restrictive than the earlier one—and even that was somewhat unworkable. I agree that we must take into consideration First Amendment rights, academic freedom and free speech laws. There is no reason why there can't be some consistency and clarity in this definition that is accompanied by respect for our free speech guarantees.
3. The expectation that institutions will establish parallel systems for hearing "non-Title IX" cases creates so much confusion for complainants and Title IX personnel alike. This includes the arbitrary rule that only incidents that occur on campus or in campus buildings fall under Title IX. This flies in the face of reality. Most assaults do not occur in academic buildings or even in residence halls (although many do). Gender-based violence occurs in private apartments, in Greek houses (many of which are not controlled by their host

schools), at informal social functions, field trips, and study abroad—all of which currently do not fall under Title IX regulations. These rules undermine the conduct codes of educational institutions, which are designed to promote the intellectual and psychological development of respectful and responsible adults. The creation of this sexual misconduct double standard undermines the entire purpose of student conduct rules.

4. The mandate of live hearings only creates barriers to those who wish to seek some kind of justice. The adjudication procedures should allow for flexibility in this area. Very few survivors report their cases to law enforcement precisely because a) they fear not being believed or being subject to blaming language; b) they are terrified of being questioned by defense attorneys; c) they are aware of the dismal conviction rates of rapists and abusers in the criminal court system; and when there is a conviction of the minimal sentences that they receive; and d) they are rightfully afraid of retaliation by their perpetrators.

   The same concerns apply to how Title IX is approached today. Yes, there are measures in place to try to prevent harassment and retaliation by accused students (and their friends/family. But the live hearing with cross examination by an accused student or their advisor in higher education institutions is too much like a criminal trial. If the purpose of this approach is to elicit more information or help in decision-making, it is an utter failure. There is no evidence that this approach is effective, and based on my anecdotal experience, only causes greater harm. Again, nobody will be incarcerated after a Title IX hearing; the stakes may feel very high for an individual student, but even if an accused student is found responsible and expelled from their institution, there is nothing preventing them from transferring to a different school.

5. Title IX officers should be thoroughly trained and if they are, should be given the latitude to offer a range of options to a complainant, based on the level of severity of the case. In addition to the fact that many survivors are open to alternative forms of adjudication I have seen the benefits of formal mediation and restorative justice processes. Survivors have told me that they felt more empowered in these alternative options, felt respected and even somewhat healed, as have the accused students. In my experience, some survivors do not want their perpetrators expelled; rather they want the school to establish specific boundaries that prevent the accused student from contacting them, taking the same classes, living nearby, attending the same sports and social events. They want accountability, and an admission that they caused harm. Restorative justice processes allow for this; but if the primary option is a formal hearing, they are launched into an adversary, often harmful process. Mediation may also be appropriate in some cases, although the accountability standard is lower than with RJ. That said, Title IX staff managing informal processes must be thoroughly trained in any process, including how to determine what cases are appropriate for this approach.

   Survivors understand that formal hearings must be available, and want it to be an option. Title IX regulations should allow for a range of processes that fit the culture of the institution, support survivors, promote restoration of the survivor and the community, and if the evidence does not support the accusation, restoration of the respondent. At the same time, while the procedural bar should be lowered, the expectations should still be high for ensuring that all parties are safe, supported and that when an injustice has occurred, the harmed person receives all the services that they need without hesitation, whether it's a tuition refund, academic accommodations, including leave without strings attached to return

to school, free counseling, the right to remain in student housing if returning home is not feasible, and more.

6. Finally, the evidentiary standard must be preponderance of the evidence. Clear and Convincing and Beyond a Reasonable Doubt should not be an option under any circumstances. This is a civil process and should follow that precedent.

Thank you very much for considering these suggestions.