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To:	T9PublicHearing
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Subject:	Written Comment: Title IX Public Hearing (Sexual Harassment)
Attachments:	Title IX Written Comments June 2021 OCR Hearing.pdf

June 11, 2020

Miguel Cardona
Secretary of Education

Suzanne Goldberg,
Acting Assistant Secretary for Civil Rights

Re: Written comments addressing ED/OCR Title IX Review pursuant to E.O. 14021 *"Guaranteeing an Educational Environment Free from Discrimination on theBasis of Sex, Including Sexual Orientation or Gender Identity."*

Thank you for the opportunity to comment on the above-referenced review of the rule entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," published in the Federal Register on May 19, 2020 (85 FR 30026). I am the Vice President for Legal Affairs and submit these comments on behalf of the Clearinghouse on Women's Issues (CWI). I also provided testimony on Thursday, June 10 on behalf of CWI. As Acting Assistant Secretary in the Office for Civil Rights, OCR's Director of the Program Legal, and a policy attorney, I developed, oversaw, and signed numerous civil rights regulations and policy guidance on sex harassment, racial and disability harassment. Further, I was the Deputy Assistant Secretary in the Office of Elementary and Secondary Education awarding grants of over $12 Billion including Title I programs for at risk, poor students. The DeVos regulatory changes set back decades of my and other public officials' work that established meaningful and effective law and norms for addressing sexual harassment, assault and violence. As a staff policy attorney in OCR in 1983 I wrote the first internal guidance on how to investigate Title IX complaints of sexual harassment. These allegations in 1983 described a new form of discrimination based on sex and at the same time ED was receiving complaints; the Equal Employment Opportunities Commission (EEOC) and the Department of Labor were also receiving similar allegations of discriminatory treatment. We recognized these as new forms of gender discrimination and the term sexual harassment referred to this newly identified form of discrimination. As I worked on writing OCR's guidance I relied on my experience of being sexually harassed at a major university. I discovered that based on that experience I was able to articulate the elements of proof, describing the power differences, intimidation, and isolation that uniquely define sexual harassment. As you revise the sexual harassment regulation it is important to take into account the importance of power, a basic component of acts of harassment, assault, intimidation and bullying. Power can simply be a matter of physical strength of one person over another, or it can be withholding a benefit such as a job or continuing employment, financial reward, or a grade. A harasser typically is using some element of dominion over the harassed. The 2020 regulation fails to understand and attend to this power element. Rather, the DeVos regulation emphasizes the due process rights of the accused, thus providing additional power to potential harassers.

Grievance Procedure for Complaints of Sexual Harassment, § 106.45(b)(3)(vi)-(vii)
The 2020 regulation undermines former Title IX's protections by making it harder to investigate and resolve complaints of sexual harassment and assault. The regulation

prescribes to a level of granular detail requirements of procedures for sexual harassment investigations and for sexual harassment alone. Justified as providing due process for those accused, the regulation has required courtroom-like procedures which emphasize an adversarial approach which works against resolution of complaints. These requirements are costly for all parties and are not conducive to a safe and supportive environment for all students, both survivors and accused. Furthermore, disciplinary procedures should be uniform for allegations of civil rights violations including but not limited to, for example race, disability, age, and LGBTQ complaints. Reporting sexual harassment is always hard, and the 2020 regulations require procedures that turn an institution's disciplinary procedures into an advocacy courtroom-like procedure that is not conducive to learning. There is now a body of experience and information based on regulatory and policy guidance whose purpose aims to provide a safe environment supportive of academic achievement. Regulatory changes are needed to reinstate procedures that rely on the experiences of OCR investigations, colleges', universities', and K-12 experiences. Up until the 2020 regulation, the fundamental purpose of these documents was consistency with OCR's mission to ensure equal access to education and to promote education excellence through the vigorous enforcement of civil rights laws. Providing a safe environment free of sexual harassment, abuse and intimidation has been the goal of previous guidance, but this goal has been undermined by the DeVos regulation and discourages students from coming forward to ask their schools for help. Only 12% of college survivors and 2% of girls ages 14-18 report sexual assault to their schools or the police (National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence 3 (2017) (NWLC Sexual Harassment Report)*. Students often choose not to report for fear of reprisal, because they believe their abuse was not important enough, or because they think the no one would believe them or do anything to help. Some students—especially students of color, undocumented students, LGBTQ students, and students with disabilities—are less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence and/or deportation. Survivors of color may not want to report to the police and add to the criminalization of men and boys of color. For these students, schools are often the only avenue for relief. See (NWLC Sexual Harassment Report). When schools fail to provide effective responses, the impact of sexual harassment can be devastating. Too many survivors end up dropping out of school because they do not feel safe on campus: some are even expelled for lower grades in the wake of their trauma. For example, 34% of college survivors drop out of college. See Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, J.C. Student Retention: Res., Theory & Prac. 234, 244 (2015); See also Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, Vice (Sept. 26, 2017).

Section 106.44(a) Recipient's Response to Sexual Harassment and Assault, Deliberate Indifference and Institutional Security Policies and Crime Statistics defined in 34 CFR 668.46(a)

The 2020 regulations have confounded Federal fund recipients' responsibilities for complaints of sex-based harassment. The changes addressing the notice and deliber-

ate indifference standards and definition of sexual harassment create inconsistent rules for students as compared to employees. Differences between Title VII of the Civil Rights Act of 1964 (Title VII) and the regulation would mean that in many instances schools are *prohibited* from taking the same steps to protect children in schools that they are *required* to take to protect adults in the workplace. An educational institution is only liable for harassment against a student by an employee who "...conditions the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct … that is it is so severe, pervasive, and ('or' under Title VII) objectively offensive that it denied ('alter' under EEOC standards) the student access to the school's program or activity. Under Title VII, a school is potentially liable for harassment of an employee if the harassment is "sufficiently severe *or* pervasive to *alter* the conditions of the victim's employment". If the employee is harassed by a coworker or other third party, the school is liable if (1) it "knew or should have known of the misconduct" and (2) failed to take immediate and appropriate corrective action. If the employee is harassed by a supervisor, the school is automatically liable if the harassment resulted in a tangible employment action such as firing or demotion, and unless the school can prove that the employee unreasonably failed to take advantage of opportunities offered by the school to address harassment. However, under the 2020 regulation, a school would only be liable for harassment against a student if it is (1) deliberately indifferent to (2) sexual harassment that is so severe, pervasive, *and* objectively offensive that it *denied* the student access to the school's program or activity; (3) the harassment occurred within the school's program or activity; and (4) a school employee with "the authority to institute corrective measures" had "actual knowledge" of the harassment. In other words, under the proposed rules, schools would be held to a far lesser standard in addressing the harassment of students—including minors—under its care than addressing harassment of adult employees. How does that make sense or meet the need to protect the rights of children? ED and OCR need to reexamine the effects on the responsibilities of educational institutions to provide safe learning environments and establish policy that protects students to at least the same degree as its employees.

The "deliberate indifference" standard adopted by the regulation is a much lower standard than that was required of schools under previous guidance, which should be reinstated requiring schools to act "reasonably" and "take immediate and effective corrective action" to resolve harassment complaints. Under the current regulation, by contrast, schools would simply have to not be deliberately indifferent—which means that their response to harassment would be deemed to comply with Title IX as long as it was not *clearly* unreasonable. The declaration that the Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence is particularly egregious. The practical effects of this is to shield schools from any accountability under Title IX, even if a school mishandles a complaint, fails to provide effective support for survivors, and wrongly determines against the weight of the evidence that an accused harasser was not responsible for sexual assault. This amounts to providing an open invitation for recipient institutions to refuse to accept complaints of sexual harassment with impunity from Title IX violation findings. It falls on the sur-

vivor to correct recipient errors in this regard to file a complaint or appeal to OCR and await the determination of the Assistant Secretary after a review of the record. This puts an additional burden on the survivor and delays the Title IX rights of the complainant survivor. Results in justice delayed with impunity to the recipient is an unacceptable public policy and certainly not within the expectations for the enactment of Title IX.

Moreover, in contrast to the Title VII approach, which recognizes employer responsibility for harassment enabled by supervisory authority, and in contrast to the 2001 Guidance, the proposed rule does not recognize any higher obligation by schools to address harassment of students by school employees who are exercising authority over students. The 2001 Guidance imposed liability when an employee "is acting (or . . . reasonably appears to be acting) in the context of carrying out these responsibilities over students" and engages in sexual harassment. By jettisoning this standard, the Department would free schools from liability in many instances even when their employees use the authority they exercise as school employees to harass students. Under the regulation, for example, serial abusers like Michigan State University's Larry Nassar, who assaulted hundreds of student gymnasts in his role as a school doctor, would not be held responsible for harassment that survivors were too confused, embarrassed or afraid to report.

A clarification of the Title IX definition of sexual harassment should include through an incorporation by reference to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act and the Higher Education Opportunity Act 20 U.S.C.§1092(f) and regulations implementing the General Provisions of the Higher Education Act (HEA) at 34 CFR Part 668(a). Institutional Security Policies and Crime Statistics require higher education institutions to keep and report the most recent eight years (as of 2012) of crime statistics that occurred on campus, in residential facilities, **in non-campus buildings, or on public property** (emphasis added)**.** In 2014, regulations were promulgated implementing amendments to the Clery Act made by provisions of the Violence Against Women Reauthorization Act of 2013 requiring reporting on domestic violence, dating violence and stalking. These regulatory requirements clearly recognize that sexual harassment and violence occur in non-campus buildings and locations. And by way of requirements to report these incidents, recipients acquire knowledge and are definitely informed of these reported acts, which cannot be ignored.

Section 106.45 Grievance procedures for formal complaints of sexual harassment (1) Basic requirements (iii) and (iv)

Section (iii) addresses requirements that a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents and receive appropriate training. These are all good requirements but additional conflicts of interest should be added. The additional conflicts of interests are derived from individuals' misplaced loyalty and a desire to protect the reputation, business success of the institution and needs to be addressed. We have witnessed prevalent situations and notorious cover ups by postsecondary executives, officials and coaches at postsecondary institutions such as at Pennsylvania State University, Michigan State University

and numerous others. These conflicts are well known and must be addressed and included in the training and attention to conflicts of interest and bias. The regulation that grievance procedures must include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. This requirement is a misguided attempt to follow fundamental principles of justice embraced within the concept of due process of law to protect those accused. However the requirement inappropriately skews in favor of the accused or respondent and overlooks the rights of the complainant. It is fundamentally unfair in that without a balance of a presumption of the credibility and veracity of the complainant the grievance procedures requirement is significantly flawed based on standards of due process or any fairness principle. Addressing a presumption of innocence is an important component of due process but not when there is no similar and balancing for fairness that requires a presumption of the credibility of the complainant. There are numerous reports that many sexual harassment complaints are not filed because of the survivors feelings of fear and intimidation that their allegations will not be deemed credible. This one-sided presumption benefiting the respondent is biased, insensitive and unworthy of ED and OCR.

(3) Investigations of Formal Complaint (vi)(vii) Live Hearings

The regulation provides that elementary and secondary schools' grievance procedures may require a live hearing. And §106.45(b)(3)(vii) for institutions of higher education, the recipient's grievance procedure must (not may) provide for a live hearing. A live hearing requires survivors, parties and witnesses to submit to cross-examination by the other party's "advisor of choice," often an attorney who is prepared to grill the survivor about the traumatic details of the assault, or possibly an angry parent or a close friend of the named harasser. The adversarial and contentious nature of cross-examination would further traumatize college and graduate school survivors who seek help through Title IX. Being asked detailed, personal, and humiliating questions often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced would understandably discourage many students, parties and witnesses from participating in a Title IX grievance process, chilling those who have experienced or witnessed harassment from coming forward. The live cross examination requirement would also lead to sharp inequities if one party can afford an attorney and the other cannot. Questioning by a neutral, trained official was the norm for Institutions of Higher Education (IHEs) grievance procedures during the past several decades. Current requirements have altered that practice significantly. With the requirement for a live hearing, each party is permitted to ask the other party and any witnesses all relevant and follow-up questions. Each party is permitted to have an advisor of choice. Appropriate limits and exclusion of evidence of complainant's sexual behavior is defined. Separate rooms with technology enabling the decision-maker and parties to see and hear all questions and answers are required. The proposed regulations forbid institutions from relying on statements of students who decide they are unable for emotional or other trauma reasons, to subject themselves to cross-examination, even if under professional care and recommendation. Some students will hire lawyers but for many that option will be unaffordable creating a disparity between students that will certainly amplify inequities and increase the risk of learning the truth of what happened. No proof that ad-

versarial questioning is an improvement over neutral questioning which has generally been the norm under most conditions with adversarial conditions only when extreme conditions warrant. Eliminating experience-based procedures and creating a nationwide cross-examination rule for IHEs undermines complaint resolutions, and will not encourage the fair and impartial treatment that all students deserve. Neither the Constitution nor any other federal law requires live cross examination in school conduct proceedings. The Supreme Court does not require any form of cross-examination (live or indirect) in disciplinary proceedings in public schools under the Due Process clause. Instead, the Court has explicitly said that a 10-day suspension does not require "the opportunity … to confront and cross-examine witnesses" and has approved at least one circuit court decision holding that expulsion does not require "a full-dress judicial hearing, with the right to cross-examine witnesses."See Goss, 419 U.S. at 583. See also Coplin, 903 F.Supp. at 1383; Fellheimer, 869 F.Supp. at 247. See also Dixon, 294 F.2d at 158, cert.denied, 368 U.S. 930 (1961); Osteen v. Henley, 13 F. 3rd221, 225 (7th Cir. 1993), holding no due process violation in expulsion of college student without providing him the right to cross-examination.

The vast majority of courts that have reached the issue have agreed that live cross-examination is not required in public school disciplinary proceedings, as long as there is a meaningful opportunity to have questions posed by a hearing examiner. The Department itself admits that written questions submitted by students or oral questions asked by a neutral school official are fair and effective ways to discern the truth in K-12 schools, and has retained that method for K-12 proceedings. the Department has not explained why the processes that it considers effective for addressing harassment in proceedings involving 17- or 18-year-old students in high school would be ineffective for 17- or 18-year-old students in college.

The American Bar Association recommends that schools provide "the opportunity for both parties to ask questions through the hearing chair. See American Bar Association, *ABA Criminal Justice Section Task Force On College Due Process Rights and Victim Protections:Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct* 8-10 (June 2017). Incorporating legal trial aspects into a schools grievance or disciplinary proceedings goes too far and permits turning education institutions into courtrooms where a party with resources is able to hire an attorney to grill the opposing party. These conditions have no place in college investigations as they do not lead to resolutions but typically polarize and harden positions.

Notification of Nondiscrimination Policy, 34 C.F.R.§106.9 and Educational Institutions Controlled by Religious Institutions, 34 C.F.R. §106.12(b) Exemptions

A Title IX religious exemption is statutorily provided to educational institutions by specific legislative language that reads as follows: "this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization…" The 2020 regulation overturns previous policy and practice of this exemption by permitting an educational institution controlled by a religious organization to seek an exemption from a Title IX requirement only after it is under investigation. This clearly contravenes the Title IX Notice requirement that "Each recipient must notify

applicants for admission and employment, students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner." Essentially the Department and OCR are permitting the recipient to hide their legitimate religious exemptions from the public which furthers no public policy, adds to the confusion of Title IX compliance, and contravenes the long-standing and firmly established public policy of providing assurances of compliance with civil rights laws in a transparent and open manner. During the time I was the Program Legal Director in OCR, numerous requests were made and granted following the statutory religious exemption requirements. These religious exemption assurances were granted by the OCR Assistant Secretary during Presidents Reagan and George H.W. Bush administrations. Complying with the statute an educational institution receiving federal financial assistance established an agreement with ED OCR for an approved Title IX exemption. Institutions seeking an exemption identified the Title IX regulation from which exemption was requested, the policy upon which the exemption was requested, and the specific religious tenet supporting the policy and the exemption. This process worked seamlessly and recipients were given every opportunity to seek and be granted religious exemptions under Title IX. This process resulted in numerous exemptions which continue to be valid today. Furthermore there has been no litigation or challenges to the policy and practice for granting Title IX religious exemptions which have withstood the test of time. There is no common sense reason to implement this change which only adds to confusion and lack of transparency and leads religious institutions to violate the notice of nondiscrimination requirements. This is not a worthy amendment to the Title IX religious exemption.

The regulation encourages a more demanding standard of proof to investigate sexual harassment than they would use to investigate other types of student misconduct. §106.45(b)(4)(i)

Previously the Department's longstanding practice required that schools use a "preponderance of the evidence" standard-which means "more likely than not"-in Title IX-cases and for all other student misconduct cases. The 2020 regulation permits the preponderance of evidence standard in sexual harassment cases only if the preponderance standard is used for all other misconduct that carries the same maximum disciplinary sanction, and also uses preponderance in complaints against employees. The regulation now requires schools to use the more demanding "clear and convincing evidence" standard in sexual harassment cases, if the "clear and convincing evidence" standard is used in complaints against employees. The result is that schools impose a more burdensome standard in sexual harassment and assault cases than in any other student misconduct case. The preponderance standard is used by courts in all civil rights cases. It is the only standard of proof that treats both sides equally and is consistent with Title IX's long standing requirement that grievance procedures be "equitable." By allowing schools to use a "clear and convincing evidence" standard, the regulation tilts investigations in favor of respondents and against complainants. Using the clear and convincing standard tilts the investigation in favor of named harassers

and aggressors and against survivors especially when dealing with violent acts of sexual assault as many occur with no witnesses present and it is usually a "he said...she said"situation. The clear and convincing standard along with the presumption on behalf of the respondent under §106.45(b)(1)(iv) tilts the grievance procedure requirements in favor of the respondent and against the survivor. The Department and OCR's review should result in uniform standards for all misconduct complaints including harassment based on sex, LGBTQ status, as well as on other protections including race, color, national origin and disability.

Cost and Economic Effect

Finally, former Secretary DeVos claimed that colleges and schools could collectively save hundreds of millions of dollars over the next decade under its sexual -misconduct regulations. Also a claim that OCR would save money from their investigative budget due to diminished jurisdiction. The logic is simple, according to the former education secretary: If campus administrators were conducting fewer investigations, colleges wouldn't have to spend as much money on them. However, according to an October, 2018 New York Times article, colleges have become concerned with the financial impact on their institutions and a report from United Educators (UE) attempts to quantify that cost. United Educators is a member-owned insurance cooperative that insures hundreds of colleges and universities. Over a five-year study, UE received reports of about 1,000 cases at its member institutions in which a student reported being sexually assaulted. While only 100 of those cases resulted in monetary losses for the institution, those amounted to $21.8 million over the five-year period between 2011 and 2015. Several incidents costs the institutions more than $1 million, including one $2 million claim. On average, those 100 or so colleges and universities lost $350,000, between legal action and demand for damages in sexual assault cases, the report found. Alex Miller, associate vice president of learning programs in the risk management department at UE is quoted in the report as stating, "It's not that common, but when it happens, it's actually very expensive." Because of its role in helping higher education institutions avoid risk and liabilities, United Educators is privy to information about sexual assault reports and investigations that almost no other organization has and believes it helpful to share "When we have data like this, we think it's helpful to get it out," Miller said. "It's another data point emphasizing the importance of these issues." The report, which comes from UE's branch of services called Canopy Programs, outlines a number of ways institutions can avoid the high costs of litigation over sexual assault cases: provide appropriate training for staff, ensure university employees know their reporting obligations, enforce sanctions consistently, make sure students understand what consent is, and audit institutional security policies, among others. The recommendations may not be anything new, but Miller said it's important to drive home the point about how to prevent sexual assault in the first place. Colleges and universities are experiencing a great deal of uncertainty right now with the change in administrations. Department budget and training should be provided to support Coordinators and other relevant officials who are essential to ensure compliance with Title IX and assist institutions' prevention efforts.

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