From: JUDITH HERMAN
Sent: Fri, 11 Jun 2021 13:57:59 -0400 (EDT)
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (Sexual Harassment Comment from Mental Health Specialists)
Attachments: Dr. Herman Written Comment for Title IX Public Hearing.pdf
Importance: Normal

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To whom it may concern:

Please see attached letter. Thank you.

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Submitted via T9PublicHearing@ed.gov

June 11, 2021

The Honorable Miguel Cardona
Secretary
Department of Education
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SW
Washington, DC 20202

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
Department of Education
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Washington, DC 20202

Re: Written Comment for Title IX of the Education Amendments Act of 1972 Public Hearing

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

I am a Professor of Psychiatry at Harvard Medical School and the author of *Trauma and Recovery*,[1] which is considered a fundamental text for understanding psychological trauma. I am a founder of the Victims of Violence Program in the Department of Psychiatry at Cambridge Health Alliance, a teaching hospital of Harvard Medical School, where for over 30 years I have trained post-graduate students in the mental health disciplines on how to promote healing in traumatized people. In working directly with hundreds of victims of sexual assault, I have developed clinical expertise regarding what mechanisms can aid victims in reporting assault, and what social responses, including by individuals in positions of authority, will help or impede their recovery.

On behalf of the 290 undersigned mental health professionals and trauma specialists, I am submitting this written comment in response to the Department of Education's notice of a virtual public hearing on protections against sexual harassment, including sexual assault, under Title IX of the Education Amendments Act of 1972 (Title IX) to strongly encourage the Department to redirect its attention to enforcement of strong Title IX protections so that schools respond with care and diligence to the problems of sexual harassment in schools.

Although under Title IX, schools are required to respond to acts of sexual harassment, including sexual assault, that impact students' access to education, the reality is that many schools, have for so long, utterly failed to protect victims or hold perpetrators accountable.[2] The response of

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[1] JL Herman: Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror. New York: Basic Books, 1992, 1997, 2015.

[2] Know Your IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 23-26 (Mar. 2021), https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf;

the survivor's community--family, peers, and especially authority figures-- is of immense importance in determining the course of recovery. Survivors who are met with compassion and support usually recover well and can have successful educational outcomes if they are students.[3] In contrast, survivors who are met with indifference or blame from authority figures will predictably suffer increased symptoms of post-traumatic stress and depression, as they will feel betrayed by their community.[4] Their education will also likely suffer. Authority figures in schools are therefore in a position of great social responsibility. Given the prevalence of sexual assault and harassment, it is incumbent on school authorities to develop pro-active measures of intervention based on an understanding of the social realities of sexual assault and the psychology of people who have been traumatized.

Based on our experience in treating survivors of sexual assault and harassment, it is our opinion that the Department can effectuate Title IX's purpose as a broad remedial statute by doing the following:

a. Restore longstanding protections for student survivors

The Title IX rules, promulgated by former U.S. Secretary of Education Betsy DeVos[5] last year, narrowed the definition of "sexual harassment," requiring that students be subjected to harassment that is severe, pervasive, and objectively offensive before a school has an obligation to take action. This narrow standard is detrimental to students' well-being because it necessitates prolonged exposure to harassment, which exacerbates the harm to a student's mental health. The negative effects of harassment include anxiety, increased isolation, increased risk of self-harm, depression, and suicidal ideation. Exposure to sexual harassment is associated with lower grades, negative academic performance, and dropping out of school entirely.[6] Research has shown that 11 percent of harassed students in grades 7 through 12 said they stayed home from school because of the harassment.[7] Other students changed the way they travelled to and from school or

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MP Koss: "Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students of Higher Education." In Rape and Sexual Assault. Vol 2. Ed. AW Burgess. New York: Garland, 1987, 3-26 (In a recent study of rape on college campuses, only 8% of sexual assaults were reported to police).

[3] AW Burgess & LL Holmstrom, "Adaptive Strategies and Recovery from Rape." American Journal of Psychiatry 1979; 136:1278-1282.

[4] CP Smith & JJ Freyd: "Institutional Betrayal." American Psychologist 2014; 69: 575-587

[5] 34 C.F.R. § 106.30(a).

[6] *See* Karen Rothman, et al., *Sexual Assault Among Women in College: Immediate and Long-Term Associations with Mental Health, Psychosocial Functioning, and Romantic Relationships*, JOURNAL OF INTERPERSONAL VIOLENCE (2019).https://journals.sagepub.com/doi/10.1177/0886260519870158. (Finding that women with a history of college sexual assault reported lower grade-point averages, poorer class attendance and increased risk of dropout).

[7] Catherine Hill and Holly Kearl, *Crossing the Line: Sexual Harassment at School*, 11 AM.ASS'N OF U. WOMEN 22 (2011), https://www.issuelab.org/resource/crossing-the-line-sexualharassment-at-school.html (32 percent of students reported that they did not want to go to school as a result of the sexual harassment.).

quit an activity or sport.[8] With regard to college students, 34 percent of victims drop out of school altogether.[9] Victims of continued sexual harassment manifest physical effects as well, including feeling nauseated and having difficulty sleeping.[10] These impacts on emotional well-being and education occur regardless of the location of the harassment.

The harm from an environment where sexual harassment remains unaddressed extends beyond the individual victim.[11] Settings where frequent and prolonged experiences of sexual harassment are witnessed by other students create a climate where they perceive that sexual harassment is tolerated and condoned by teachers and school administrators.[12] A culture of perceived tolerance not only discourages already hesitant students from coming forward if they themselves are victimized,[13] but also creates confusion as to what is considered acceptable conduct in the minds of youth. This makes educational institutions less safe.

The increased exposure and severity of harassment required by the DeVos rule only exacerbates the physical and psychological harms impacting victims. We recommend that the Department:

- Restore the definition of sexual harassment as unwelcome sexual conduct and require schools to also respond to dating violence, domestic violence, stalking, and other forms of harassment based on sex;
- Require schools to respond to all quid pro quo harassment and any other sex-based harassment that is sufficiently serious to create a hostile environment that interferes with or limits an individual's ability to participate in or benefit from the recipient's program or activity;

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[8] *Id.* (9 percent of students in the same age range reported that they changed the way they went to or from school, and 8 percent of students quit an activity or sport.)

[9] Cecilia Mengo and Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J. OF C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), https://doi.org/10.1177/1521025115584750. Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017) https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bearto-see-my-rapist-on-campus.

[10] James Gruber and Susan Fineran, *Sexual Harassment, Bullying, and School Outcomes for High School Girls and Boys*, 22(1) VIOLENCE AGAINST WOMEN, 15 (2015) (31 percent of students from the same study of harassed students between grades 7 through 12 said they felt sick to their stomach as a result of the sexual harassment. Trouble sleeping was a problem for 19 percent of students, including 22 percent of girls and 14 percent of boys; girls were also more likely than boys to say they had a hard time sleeping for quite a while, rather than a short time.)

[11] Catherine Hill and Holly Kearl, *Crossing the Line: Sexual Harassment at School*, 11 AM. ASS'N OF U. WOMEN 22 (2011), https://www.issuelab.org/resource/crossing-the-line-sexualharassment-at-school.html (32 percent of students reported that they did not want to go to school as a result of the sexual harassment.).

[12] James Gruber and Susan Fineran, *Sexual Harassment, Bullying, and School Outcomes for High School Girls and Boys*, 22(1) VIOLENCE AGAINST WOMEN, 15 (2015).

[13] *See e.g.* DOJ Bureau of Justice Stats., *Criminal Victimization, 2016: Revised*, at 7 (Oct. 2018), https://www.bjs.gov/content/pub/pdf/cv16.pdf. (2016 statistics showing only 20 percent of rape and sexual assault survivors reported these crimes to the police.); *Poll: One in 5 Women Say They Have Been Sexually Assaulted in College*, Wash. Post (June 12, 2015), https://www.washingtonpost.com/graphics/local/sexual-assault-poll; *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 2 (2017). https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting. (only 12 percent of college survivors and two percent of female survivors ages 14-18 reported sexual assault to their schools or the police.)

- Require institutions to respond promptly and effectively to specific incidents of sex-based harassment, specifying that:
    - Institutions must address sex-based harassment that may create a hostile environment in their program or activity, regardless of where it occurred;
    - Institutions should respond to harassment that they know or should know about, as well as *any* sex-based harassment by employees that occurs in the context of the employee's responsibilities to provide aid, benefits, or services within the institution's program or activity; and
    - Institutions must take reasonable active steps to address sex-based harassment (rather than just avoiding a response that is "clearly unreasonable.")

- Make clear that states and local entities can provide additional protections beyond those in the Department's Title IX rule.

b. Require institutions to provide prompt supportive measures to complainants:

Following sexual assault and harassment, survivors often suffer from intrusive, overwhelming flashback memories of the event, as well as nightmares, insomnia, and pervasive feelings of terror. Any reminder of the event, such as encountering the perpetrator in a dormitory or classroom, provokes these symptoms, which interfere with the student's ability to concentrate on her studies and participate in campus life. Research supported by the Substance Abuse and Mental Health Services Administration confirms that adverse childhood experiences including sexual assault and other forms of harassment are strongly related to the development and prevalence of a wide range of health problems throughout a person's lifespan.[14]

Supportive measures, such as changes in class schedule, are necessary short-term crisis responses that must be executed in a manner that does not further alienate the student. But the DeVos rule is leading schools to put the onus on student victims to change housing and classes in order to avoid further traumatization or harassment.

It is incumbent on institutions to take active measures to protect survivors. It is neither unreasonable nor excessively harsh to ask the accused to make some accommodations to stay away from the survivor, such as changing classes or transferring to a new dormitory. To ensure a "prompt" response to sexual harassment, institutions should be required to almost always provide supportive services and accommodations to the complainant as immediately as possible. Further, an effective response will include reasonable provision of supportive services and accommodations to victims, at no cost to victims, regardless of whether they pursue a formal complaint or participate in a disciplinary proceeding.[15]

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[14] *See* Jennifer J. Freyd and Carly Parnitzke Smith, *Institutional Betrayal*, 69(6) AMERICAN PSYCHOLOGIST 575, 575-578 (2014); *See also* Louise F. Fitzgerald, et. al, *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82(4) Journal of Applied Psychology, 578 (1997).

[15] The DeVos rules required that recipients provide supportive measures to complainants. 34 C.F.R. § 106.44. However, the power of that provision was greatly diminished by the rule's adoption of a

c. Remove the presumption of non-responsibility provision:

The DeVos Rule requires schools to operate on the presumption that the named harasser or assailant is not responsible for the harassment or assault.[16] This means in effect that institutions are required to presume that the complaining victim is lying, reinforcing sexist rape myths, and prejudging the institutional response in favor of the accused perpetrator. In reality, false complaints of sexual assault are exceedingly rare, while false denials and claims of innocence are commonplace.

The presumption of innocence is appropriate in criminal proceedings, where the liberty of the accused is at stake, in order to protect the accused individual against the overweening power of the state. It is not appropriate in matters of educational discipline, where what is at stake is the privilege of the accused to be part of an educational community. It is certainly not appropriate as applied to gender-based violence, where perpetrators currently enjoy what amounts to impunity.[17] This rule continues to foster impunity for perpetrators and since it is only required for complaints of sexual harassment, it exacerbates sexist rape myths that complaints of sexual harassment are uniquely untrustworthy. The Department must repeal this presumption to prevent institutions from humiliating and re-traumatizing survivors of sexual assault and harassment and perpetuating sex discrimination. Rather, to ensure an equitable process, schools should not make any presumptions of responsibility or non-responsibility before investigating a complaint of sexual harassment.

d. Develop robust protections against retaliation:

Title IX prohibits retaliation against those who complain of sex discrimination.[18] Yet student survivors— especially survivors of color, survivors with disabilities, and LGTBQ survivors—continue to face punishment when they turn to their schools for help. Some are disciplined for rule-breaking that they must divulge in order to report.[19] Others are punished for sexual contact on school grounds—that is, for their own sexual assaults.[20] Student survivors have

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deliberate indifference standard, because a funding recipient's choice of which measures to provide, and how, does not need to be effective or reasonable; it must merely not be clearly unreasonable.

[16] Rule 106.45(b)(1)(iv)

[17] K Daly & B Bonhours: "Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries." Crime and Justice 2010; 39: 485-565.

[18] [18] *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005).

[19] [19] *See, e.g.*, Christina Cauterucci, *BYU's Honor Code Sometimes Punishes Survivors Who Report Their Rapes*, Slate (Apr. 15, 2016), https://slate.com/human-interest/2016/04/byu-s-honor-code-sometimes-punishes-survivors-who-report-their-rapes.html.

[20] *See, e.g., S.M. v. Sealy Ind. Sch. Dist.,* No. CV H-20-705, 2021 WL 1599388, at *2-*3 (S.D. Tex. Apr. 23, 2021); Nora Caplan-Bricker, "*My School Punished* Me," Slate (Sept. 19, 2016), https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html

also increasingly faced retaliation from their assailants, who file baseless cross-complaints of sexual harassment in an effort to dissuade and punish victims.[21]

Studies demonstrate that concerns about confidentiality and fear of retaliation are leading reasons why victims choose not to report sexual harassment or assault.[22] In our experience and based on research relating to victims of sexual violence, victims fear that if their name and allegations become public, they may face backlash from peers, hostility, judgment, disbelief and other social or legal consequences.[23]

The Department's regulations should explicitly prohibit these common forms of retaliation and:

- Define prohibited retaliation to include (but not be limited to):
    - Disciplining complainants for collateral conduct violations that must be disclosed in order to report the sexual harassment, dating violence, domestic violence, or stalking, that is disclosed in the investigation (e.g., alcohol or drug use, consensual sexual contact, reasonable self-defense, or presence in restricted parts of campus), or that occurs as a result of the reported harassment (e.g., nonattendance);
    - Disciplining complainants for false reports based solely on the school's conclusion that there wasn't sufficient evidence to support a finding of harassment;
    - Disciplining complainants for prohibited sexual conduct in school based on the school's conclusion that the reported sexual harassment was instead welcomed sexual contact;
    - Disciplining a complainant for discussing the sexual harassment, dating violence, domestic violence, or stalking report; and
    - Disciplining a victim for charges the school knew or should have known were brought by a third party for the purpose of using the disciplinary process to retaliate against a victim of sexual harassment, dating violence, domestic violence, or stalking.

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[21] Know Your IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 17-22 (Mar. 2021), https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf [hereinafter "*Cost of Reporting*"].

[22] *E.g.* Marjorie R. Sable, et al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55(3) J. OF AM. C. HEALTH 159 (Nov./Dec. 2006); Chiara Sabina and Lavina Y. Ho, *Campus and College Victim Responses to Sexual Assault and Dating Violence: Disclosure, Service Utilization, and Service Provision*, TRAUMA VIOLENCE ABUSE (Feb. 4, 2014), http://tva.sagepub.com/content/early/2014/02/04/1524838014521322.

[23] Jill Shcwarz, et al., *Sexual Assault on College Campuses: Substance Use, Victim Status Awareness, and Barriers to Reporting*, 1(2) BUILDING HEALTHY ACADEMIC COMMUNITIES 54 (2017).

- Allow institutions to dismiss, without a full investigation, complaints of sexual harassment, dating violence, domestic violence, and stalking that are patently retaliatory (e.g., where a student is reported for sexually assaulting a classmate, insists the contact was consensual, and then, after being found responsible, files a counter-complaint that their victim in fact sexually assaulted them).

e. Remove barriers to reporting and overly stringent investigation requirements:

Victims' decisions to report can often depend on their trust and perception of the legitimacy of the process, and their belief that organizations will follow fair procedures.[24] Research confirms that logistical hurdles to making a report discourage reporting.[25] Under DeVos, the Department acknowledged that its proposed Rule would result in far fewer sexual harassment investigations, which means fewer formal findings by the institution and less accountability for harassment.[26] Students already perceive the process for reporting sexual assault as intimidating, unlikely to result in accountability, and unsympathetic.[27] The requirements set forth in the DeVos rule increases this mistrust, chills reporting, and prevents schools from properly investigating complaints. Without appropriate resolution and response, schools are less safe and incidences of sexual harassment and violence are likely to increase.[28]

Direct live cross examinations, which the DeVos rule requires in investigations of sexual harassment in institutions of higher education, is another characteristic of criminal trials that is inappropriate in an educational setting, where the liberty of the accused is not at stake. Direct live cross-examination can cause serious harm to victims who complain, as it subjects them to hostile attacks on their credibility and public shaming at a time when what they most need for healing from trauma is social support. It also means being forced to relive their traumatic experiences in excruciating detail, a situation almost guaranteed to aggravate their symptoms of post-traumatic stress. Requiring direct live cross examinations will also likely lead to less probative information for adjudicators. Intimidation and shaming will tend to silence victims, while compassionate questioning will tend to elicit freer communication.

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[24] *Id. Awareness, and Barriers to Reporting*, 1(2) BUILDING HEALTHY ACADEMIC COMMUNITIES 54 (2017).

[25] Victoria Kar-Yan Sit, Dep't of Applied Psychology and Human Development, Univ. of Toronto, dissertation, *The Development and Psychometric Evaluation of the Sexual Assault Help-seeking Barriers Scale*, at 38 (2018).https://tspace.library.utoronto.ca/bitstream/1807/92123/3/Sit_Victoria_201811_PhD_thesis.pdf.

[26] E.g., Rule, pp. 30,550, 30,553-30,554, 30,548-30,549, 30,568 (stating that Title IX investigations will decrease by about 33% per year in colleges and Universities, 50% per year in elementary and secondary schools, and 50% for non-schools, such as libraries, as a result of the Rule).

[27] Kristen Jones, *Barriers Curb Reporting on Campus Sexual Assault,* the Center for Public Integrity (updated Mar. 26, 2015), https://publicintegrity.org/education/barriers-curb-reportingon-campus-sexual-assault/.

[28] *See* Camille Nelson, et.al., *Organizational Responses for Preventing and Stopping Sexual Harassment: Effective Deterrents of Continued Endurance,* 56 SEX ROLES 811, 812 (2007)("The perception that remedial actions will be taken to punish perpetrators and enforce anti-harassment policies often results in significant decreases in sexual harassment frequency.")

Thank you for the opportunity to submit written testimony.

Sincerely,

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