

**From:** Jennifer Becker  
**Sent:** Thu, 10 Jun 2021 21:44:17 +0000  
**To:** T9PublicHearing  
**Subject:** Written Comment: Title IX Public Hearing (Sexual Harassment)  
**Attachments:** Legal Momentum written comments for ED Title IX hearing 6.10.21.pdf

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Please find written comment on Title IX public hearing re: sexual harassment attached.

Respectfully,

**Jennifer M. Becker**

**Deputy Legal Director and Senior Attorney**

Pronouns: she/her/hers

**LEGALMOMENTUM**

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June 10, 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,

Legal Momentum is the first and longest-serving civil rights organization dedicated to advancing and protecting the rights of women and girls. For over half a century we have worked to prevent, and better respond to, gender-based violence and to achieve equity in education, recognizing that access to education is key to equity overall. We helped to craft, and ultimately pass the Violence Against Women Act and all its reauthorizations, as well as numerous other innovative policy measures aimed at ending gender-based violence and supporting survivors. We litigated some of the first cases leading courts to recognize sexual harassment as sex discrimination and have brought other challenges which have helped to define Title IX's scope and reach its intended goal, including as it protects access to education for pregnant and parenting students and scrutinizes sex-segregated education. For Title IX to serve its purpose, we urge reconsideration of several aspects of the 2020 regulations and encourage the Department to carry forward regulations and guidance which promote fairness and equity.

Personally, I have over a decade of experience responding directly to sexual harassment and violence prior to my joining Legal Momentum, first, as a sex crimes/child abuse prosecutor, and then as the Title IX Coordinator for the largest public K-12 school district in the country. I know firsthand the impact of sexual harassment and violence on a victim's life and education. I witnessed the limitations of the criminal justice system in addressing that harm. I also know firsthand the power of schools to positively diminish that impact and am uniquely familiar with the ways in which schools implement policies aimed at preventing and responding to sexual harassment.

We are grateful for the opportunity to provide comment about sexual harassment in our nation's schools and for the Department's re-consideration of prior regulations. This administration can, and should, restore the strength of Title IX and also improve the regulations so that the true purpose of Title IX is realized and gender-based harassment is no longer a reason why anyone's education is interrupted. The 2020 regulations run afoul of Title IX's civil rights framework by calling for a process more burdensome than any other form of harassment and discrimination. This is, in itself, gender discrimination. Mandating a more burdensome process for sexual harassment is inherently built upon the notion that sexual harassment



complaints are more suspect than complaints of other forms of discrimination. The 2020 regulations erect more barriers than already exist for survivors to seek healing, accountability and simply a harassment-free learning environment. They fail to promote fairness.

Restoring Title IX's intended purpose to the regulations must start with reinstating the long-established principle that schools must respond to *all* sexual harassment that interferes with a person's ability to participate in, or benefit from, the institution's educational programs and activities. Title IX regulations should expressly state that sex-based harassment includes sexual harassment, sexual assault, dating violence, domestic violence, and sex-based stalking and harassment based on sexual orientation, gender identity, gender expression, parental status, pregnancy, childbirth, termination of pregnancy, or related conditions. Sexual harassment should be defined as unwanted sexual conduct. And the regulations must clearly state that a school's obligation extends to sex-based harassment no matter where it occurs. There is no informed justification that explains mandating or allowing schools to ignore sex-based harassment simply because it is perpetrated off-campus or online. It is antithetical to Title IX's proscription and ignores the realities of how people learn and interact today.

Institutions must be required to address complaints of sex-based harassment of which they know, or should know about, promptly. This must include providing supporting measures and accommodations to survivors as soon as possible. Robust, clearly defined, protections against retaliation must be mandated. Rather than the uniquely burdensome and constrictive procedural requirements set out by the 2020 regulations, schools should be given guidelines to carry out an investigative and disciplinary processes that promote fairness and which flow from Title IX's equality mandate. Both parties must have the same procedural rights and a preponderance of the evidence burden of proof should be applied, consistent with civil rights litigation and OCR's own enforcement. But where otherwise allowable, schools should have flexibility in how they carry out a fair process. This might include offering a form of restorative justice where it can be offered and availed of truly voluntarily, those carrying it out are appropriately trained, and participants may terminate it at any time without losing access to other processes for accountability. Affording schools flexibility to these disciplinary processes will better realize the purpose and intent of Title IX—preventing and addressing sex-based harassment in a manner that promotes fairness and healing and restores a person's ability to continue their education without the barrier of discrimination while also promoting accountability and the ability for people to learn from their behavior and become safe members of their communities. Title IX is meant to serve everyone.

The recognition that education is a foundational element to equality underlies Title IX. Everyone deserves a safe and supportive environment in which to learn. The well-established principle that sexual harassment and other forms of gender-based violence and sex-based harassment are acts of gender discrimination requires that it be addressed through a civil rights framework. This framework should be applied evenly for all forms of discrimination. We encourage the Department to establish uniform principles for addressing harassment based on all protected characteristics and ensure consistent application and enforcement.

Sincerely,

Jennifer M. Becker, Esq.  
Deputy Legal Director & Senior Attorney  
Legal Momentum, the Women's Legal Defense and Education Fund  
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