

From: Rebecca Berkowitz
Sent: Wed, 9 Jun 2021 08:52:42 -0400
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (Sexual harassment in schools)
Attachments: MCASA Title IX public hearing comments.pdf

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Dear Ms. Goldberg,
Please see, attached, written comments from the Maryland Coalition Against Sexual Assault and its Sexual Assault Legal Institute regarding potential changes to the Title IX regulations concerning sexual harassment in schools. Thank you for your consideration and for holding public hearings.
Sincerely,

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MCASA & SALI are open during the COVID crisis - we are here for you.



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June 9, 2021

Submitted via email to T9PublicHearing@ed.gov
Suzanne B. Goldberg
Acting Assistant Secretary
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue SW
Washington DC, 20202

Re: Potential changes to the Title IX Regulations concerning sexual harassment in schools

Dear Ms. Goldberg,

We are writing on behalf of the Maryland Coalition Against Sexual Assault (MCASA) and the Sexual Assault Legal Institute (SALI) in response to the Department of Education's (the Department) request for public comment on improving enforcement of Title IX of the Education Amendments of 1972 (Title IX).

The mission of MCASA is to help prevent sexual assault, advocate for accessible, compassionate care for survivors of sexual violence, and work to hold offenders accountable. As the federally recognized statewide coalition MCASA provides technical assistance and support to schools, Title IX Coordinators, Advocates, Peer Leaders, and other individuals who are involved in helping student sexual assault survivors. With legislation, grant funded projects, trainings, and legal assistance, MCASA has forged a network of direct service providers, rape crisis center advocates, lawyers, and elected officials working to end sexual violence in our schools and universities and protect and provide resources for student sexual assault survivors. In addition, the Sexual Assault Legal Institute provides direct legal services to survivors of sexual assault, including students. MCASA commends the Department for soliciting comments from the public with the goal of guaranteeing an educational environment free from discrimination on the basis of sex, pursuant to Executive Order 14021.¹

Title IX should protect students from all forms of sexual harassment that deny them equal access to education, regardless of where the harassment occurs

The August 2020 amendments to the Title IX regulations arbitrarily restrict what constitutes "sexual harassment" under Title IX and require schools to dismiss formal complaints for conduct

¹ 86 FR 13803

that either does not meet the new, heightened definition² or that occurred outside of the recipient's "education program or activity"³ or outside of the United States.⁴ The definitional and jurisdictional limitations leave not just some, but a majority of student survivors without key legal protections.

During the 2018-2019 school year, 5,060 Maryland college students studied abroad for academic credit,⁵ and this figure does not include short-term experiential learning trips such as summer service trips or alternative spring breaks. The current interpretation of Title IX leaves thousands of Maryland students without adequate recourse should they experience sexual harassment while outside of the United States, even though they will likely return to campus with their harasser.

Most Maryland students (and students in general) live off campus and are therefore more likely to experience sexual assault outside of a recipient's "education program or activity." For example, at the University of Maryland College Park, Maryland's flagship institution, 61% of the University's 40,743 students lived off-campus in 2019.⁶ Whether a rape occurs in the dorms or at a privately-owned apartment complex should not determine if a student is forced to go to school with their rapist or receives supportive measures.

For example, one Maryland undergraduate student attended a party at a privately-owned, but exclusively student, apartment building across the street from campus. The student herself lived on campus and could see her dorm from the window of her friend's off-campus apartment. During the party, the attendees decided to go out to get food, while the student decided to stay behind and sober up in anticipation of a late evening. Unbeknownst to her, another student guest decided to stay behind as well, hiding in his bedroom until everyone else had left. As soon as they were alone together, this guest forcibly grabbed the student by the chin and kissed her. When she said she wasn't interested, he laughed, kissed her again, and pushed her down onto the couch. He proceeded to hold her down by the arms and rape her, all while she begged him to stop. When she reported the incident to her school's Title IX office the next day, they told her they would have to dismiss her complaint because the assault occurred across the street, so they didn't have jurisdiction.

² 34 CFR 106.30 *Sexual harassment* means conduct on the basis of sex that satisfies one or more of the following: (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

³ *Id.* at § 106.44 (a).

⁴ *Id.* at § 106.9(d).

⁵ Open Doors, 2020 Fact Sheet: Maryland <file:///C:/Users/SALI%20Advocate4/Downloads/Maryland-2020.pdf> (Accessed May 27, 2021).

⁶ US News and World Report Rankings, University of Maryland College Park 2021 Fast Facts, (2020), <https://www.usnews.com/best-colleges/university-of-maryland-2103/student-life>

Even when harassment does occur on campus, the current regulations may forbid a school from using Title IX to investigate it.

As an example, one survivor is a medical resident at a Maryland teaching hospital. Her supervisor told her he wanted to show her how to do a procedure as part of her medical training. Rather than teach her using a standardized patient in an exam room, the attending led her away from the other residents to a private area, where he proceeded to expose her bra strap and touch her torso for reasons unrelated to the procedure he was supposed to be demonstrating. Although the incident occurred on campus and was considered “severe,” the school dismissed the formal complaint because, as an isolated incident, the harassment was not “pervasive.” The student underwent a “Non-Title IX” process during which she was not afforded a fair and transparent disciplinary process.

The examples and statistics are consistent with MCASA’s experience providing legal services. Of all the student survivors whom SALI represented in a college misconduct matter this year, precisely zero of them experienced harassment that falls under the current definition of “Title IX harassment.” In all of our cases, the survivor experienced adverse effects on their ability to learn and continue to access their educational program or activity.

Whether these students receive adequate, or any, protections against their harassers is entirely at the recipient’s discretion. Some recipients, such as the University of Maryland system, have decided to apply the same, onerous process to “non-Title IX sexual harassment” as they do to “Title IX sexual harassment,” meaning that all complaints are subjected to an overly-long investigation that ends with cross examination at a live hearing. Other Maryland schools, such as Johns Hopkins University, have denied key legal protections to students who do not qualify for a formal Title IX process such as the right to information about their case and the right to appeal.

To effect Title IX’s true purpose of ensuring education free from discrimination and sexual harassment, the Department should reinstate the definition of sexual harassment to include any unwelcome sexual conduct that interferes with a person’s ability to participate in an education program or activity or creates a hostile environment, regardless of where the underlying conduct occurred.

Require a prompt and equitable grievance process that allows for institutional flexibility

The August 2020 amendments to the Title IX regulations prescribe a lengthy and burdensome grievance process that, for higher education recipients, culminates in a live hearing at which a complainant will be subjected to cross examination by their perpetrator’s advisor. The advisor could be anyone of the respondent’s choosing, including a parent, a teacher at the school, or someone who is also a witness in the case.⁷ The investigation process requires the recipient to compile all evidence related to the case, regardless of if it is relevant or whether the fact-finder can rely on it when making a decision, provide a ten-day comments period, issue a second report summarizing all relevant evidence, provide another ten-day comments period, and then provide a

⁷ 34 CFR 106.45(b)

live hearing at which the fact-finder cannot be the investigator who compiled the reports. This process is required regardless of how severe the underlying conduct is, what sanctions could potentially apply, or the type and size of the recipient institution.

Having a two-step written report requirement ensures that all investigations will be lengthier than necessary, and the first round of reports summarizing related but irrelevant evidence does not aid the recipient in getting to the truth of a complaint. Under the current process, all of SALI's misconduct cases (ones that involve "non-Title IX sexual harassment" but that are nonetheless following the Title IX process) have taken more than seven months to complete. Two complaints were filed in September and October of 2020 and have still not reached a resolution. This timeframe means that student survivors spend almost 20% of their college experience undergoing a Title IX investigation. It is impossible for schools to respond "promptly" when they are required to provide this multi-step process that involves compiling irrelevant evidence.

The investigation process itself is time-consuming for the student, usually conflicting with finals or other academic and extracurricular responsibilities. The majority of SALI's student clients have reported a decline in their grades during the process.

The cross-examination and hearing requirements seem calculated to retraumatize survivors and require schools to single out "sexual harassment" for heightened scrutiny compared to other forms of both discrimination and assault-based misconduct. Nonsensical and unique evidentiary rules, such as the rule that no statement may be considered unless the speaker submits to cross examination,⁸ impede the fact-finder from making an informed decision. If, for example, a respondent confesses to rape via text message, the respondent could simply refuse to submit to cross examination, and the fact-finder could not consider that confession in their decision. Furthermore, out-of-hearing statements that have certain assurances of reliability, such as medical records or video recordings, cannot be considered unless the declarant submits to cross examination, when no party to the matter has any authority to compel attendance at a hearing. While a cross-examination requirement makes the adjudication process quasi-legal, the current regulations deny the parties common-sense evidentiary rules, such as hearsay exceptions, that exist in all other legal and quasi-legal proceedings.

As a result, student survivors suffer not just from the trauma of their harassment, but from the trauma of a lengthy investigation process and confrontational adjudication, during which they have no guarantee that their perpetrators will eventually be held accountable, even when they have substantial exculpatory evidence. Recipients are hampered in their ability to offer a prompt, equitable process that is designed to get to the truth of the matter. The Department should require a disciplinary process that is transparent, prompt, and allows both parties the same procedural rights while understanding that there is no one-size-fits-all approach that works for every institution. However, the Department should prohibit clearly harmful and discriminatory procedures that are required under the current regulations, including the prohibition on considering statements by witnesses who do not submit to questioning.

⁸ *Id.* at 106.45 (b)(6)

The Department should specify what supportive measures a school must offer a complainant and ensure that the measures are enforced

Much of the Title IX discourse over the past decade has focused on due process concerns and on how to conduct a formal investigation. While sanctions can be an important tool in protecting survivors from having to live, work, or go to school with their perpetrators, they are far from the only thing a survivor needs to continue to access their education despite having experienced sexual harassment. When drafting new Title IX regulations, the Department should ensure that a recipient's response to sexual harassment includes robust supportive measures so that survivors can stay in school, as well as training on how to implement and uphold the measures.

The current Title IX regulations require recipients to discuss supportive measures with a complainant upon receipt of actual knowledge of alleged sexual harassment, regardless of the filing of a formal complaint.⁹ The measures must be free of cost, non-punitive, and not overly burdensome for the respondent.¹⁰ However, there is no requirement that specific supportive measures be offered, and there is no requirement that the recipient's faculty and staff receive training on supportive measures, despite the fact that they are usually the ones who must implement them.

Many student survivors are unaware that they can request supportive measures from their school regardless of whether they want to pursue a formal complaint. Without institutional support, survivors are likely to take time off from school or drop out entirely, as well as suffer declining grades and adverse mental health consequences.¹¹ The effects of trauma can lead to financial burdens, for example if a survivor fails a class and must pay to retake it, or if a survivor is unable to maintain a full course load and incurs additional student loan debt to graduate.

Under current law, faculty and staff outside of the Title IX office are not required to uphold supportive measures in most situations, for example when a survivor asks a professor for an extended deadline, and Title IX coordinators are not required to intervene on behalf of the survivor. The result is that survivors are often forced to disclose to several teachers and other school employees that they have been assaulted, and they are often met with hostility or sexism in response. Many survivors have reported being told some version of "that is unfortunate, but it is not my problem" or "I can't give you special treatment" when they were forced to disclose their sexual assault to a professor while requesting academic accommodations.

For example, one Maryland college student was raped by a classmate on campus. She did not want to pursue a formal investigation or report to the police. Following the assault, she went from a high GPA in a competitive STEM major to failing several classes. She was kicked out of her major, even after she disclosed that her grades were declining because she had been assaulted. Without institutional support, she attempted suicide. Eventually, she was told she could

⁹ *Id.* at § 106.44(a).

¹⁰ *Id.* at § 106.30(a)(3).

¹¹ Know Your IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* (March 2021), <https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf>.

report to Title IX without pursuing a formal investigation, which she promptly did. The Title IX coordinator refused to support the survivor's request to makeup work she had missed or failed due to having PTSD, due to being raped. They told her she could contact professors on her own, but they would not write a letter of support because "too much time had passed" and they "can't tell teachers what to do." They also told her that because she had a disability, she would need to get support from Disability Services instead of Title IX, but when she went to Disability Services, they told her they could not help her because it was a Title IX issue. Both offices closed her case while she was still a student and refused to offer any ongoing support. The survivor was unable to graduate on time or with her chosen major, and she accumulated thousands of dollars in additional tuition costs and student loan debt.

New regulations should require schools to proactively offer academic accommodations, financial adjustments, community resources, and safety planning. Students should not be placed in the position of having to already know their rights in order to access them. Faculty and staff should be required to undergo training on upholding supportive measures, and the Title IX coordinator should continue to be required to oversee the implementation of supportive measures, including contacting others on the survivor's behalf to require academic accommodations.

Thank you for the opportunity to submit comments on how to strengthen compliance with Title IX in regards to sexual harassment. Please do not hesitate to contact the Maryland Coalition Against Sexual Assault and its Sexual Assault Legal Institute to provide further information.

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