From: Jody Rabhan
Sent: Thu, 10 Jun 2021 21:44:12 +0000
To: T9PublicHearing
Cc: Jody Rabhan
Subject: Written Comment for Title IX Public Hearing (Sexual Harassment)
Attachments: 06-10-2021_ NCJW Title IX DOE OCR Comment.pdf

Attached, please find National Council of Jewish Women's written comment for the Title IX public hearing. We appreciate the opportunity to weigh in on the current policy and suggest recommendations for a Biden Title IX rule.

Best,
Jody

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June 10, 2021

Submitted via email to T9PublicHearing@ed.gov

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:

I am writing on behalf of the 180,000 advocates of the National Council of Jewish Women (NCJW) in response to the Department of Education's Title IX Public Hearing to express our strong opposition to the current rule relating to sexual harassment and make recommendations for a Biden Title IX Rule. We are concerned that the current policy created under former Department of Education Secretary Betsy DeVos makes schools more dangerous for all students and offers little to nothing in the way of protecting students from sexual assault and harassment. We appreciate the opportunity to provide written comment to the Department of Education's Office for Civil Rights urging the restoration of longstanding protections for students and student survivors in a Biden Title IX Rule.

National Council of Jewish Women (NCJW) is an organization of grassroots advocates dedicated to improving the quality of life for women, children, and families and safeguarding individual rights and freedoms. As the first and most progressive Jewish women's organization, we have more than 125 years of experience as a leading voice for justice in the United States. Our core principle of "human rights and dignity are fundamental and must be guaranteed to all individuals" guides our work to advance the well-being of women, children, and all who are survivors of sexual harassment and assault. NCJW endorses and resolves to work for:

- Laws, policies, programs, and services that protect every woman from all forms of abuse, exploitation, harassment, discrimination, and violence;
- The enactment, enforcement, and preservation of laws and regulations that protect civil rights and individual liberties for all; and
- Laws and policies that provide equal rights for all regardless of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, gender identity and expression, economic status, immigration status, parenthood status, or medical condition.

Our Jewish values teach us to treat every human being with dignity and respect because each one of us is made in the image of G-d. The Torah teaches that we are obligated to pursue justice for all, we must always take action when we see an injustice, and we must "do what is right and what is good" (Deuteronomy 6:18). Every human being, regardless of race, religion, ethnicity, gender, sexual orientation or physical or mental disability is deserving of full inclusion and every opportunity.

Throughout our history, NCJW has prioritized the most pressing issues of the moment. Today, this critical work includes ensuring laws, policies, and programs are in place to prohibit sexual assault and harassment and to provide robust, survivor-centered, and culturally specific responses if and when and it occurs. Advancing protections for those victimized by violence, assault, and harassment has been at the forefront of NCJW's work since our founding in1893. NCJW helped draft and pass the Violence Against Women Act (VAWA) in 1994 — and subsequent reauthorizations — the first federal law enacted to end domestic

violence, sexual assault, and other forms of intimate partner violence. Along with it, NCJW networked our sections (chapters) across the United States working to end this scourge through our StoP (Strategies to Prevent) Domestic Violence campaign that included a newsletter, advocacy resources, and in person education about the issue at national events. In 2010, we launched Higher Ground, a domestic violence campaign that increased survivors' autonomy by improving their economic status. To this day, our work to reauthorize VAWA is rooted in our mission to protect survivors, prevent harassment and abuse, and create healthy, supportive, environments and relationships. We are concerned that the DeVos Title IX rule defeats this mission entirely.

NCJW is a member of three national coalitions that specifically focus on preventing and ending sexual and domestic violence by drafting, passing, and implementing legislative and regulatory policy. The National Task Force to End Sexual and Domestic Violence (NTF) has worked for decades to end domestic violence, dating violence, sexual assault, and stalking. NCJW sits on the steering committee of NTF. Additionally, Safety, Respect, and Equity (SRE) is a Jewish coalition that addresses sexual harassment and gender discrimination by raising the ethical standard to manage these issues and uniting through a collective voice. NCJW sits on both the stewardship and steering committees of this coalition. Lastly, we are a member of the Leadership Conference on Civil and Human Rights Workplace Harassment Working Group in which we address sexual assault, harassment, and discrimination through the lens of workplace procedures and policies and work to implement legislation to achieve real change in the public and private sectors. These impactful coalitions, along with many others, lift up the 10 million individuals who are the survivors of dating violence every year and the one in five college women who will be assaulted on their campus. **This is an area of urgent need, in which the DeVos Title IX rule has set the country back — harming rather than helping by making schools less safe and welcoming for students.**

Below, please find our rationale for this conclusion as well as the basis for our opposition.

Sexual harassment should never be the end of anyone's education. Yet the DeVos Title IX rule allows schools, in many cases, to ignore students who report sexual harassment. This not only minimizes the severity of this pervasive issue in schools around the country, but could lead to survivors leaving school more often than not.

In many instances, schools are not be responsible for addressing sexual harassment, even when school employees knew about the harassment. The role of "mandatory reporters" in educational institutions, as mandated by prior Title IX guidance, are imperative measures that help to make students feel more comfortable and safe when reporting their experiences with sexual harassment. Given that no school employee without "authority to institute corrective measures" is obligated to help students, many are left feeling vulnerable and further discouraged to report and seek out the resources they need. To fully understand the impact of these rules — if these rules were in place during the Michigan State and Penn State scandals, the universities would have had no obligation to stop Larry Nassar or Jerry Sandusky solely based on to whom the survivors reported.

Schools are required to ignore harassment that occurs outside of a school activity, including most off-campus and online harassment. Not only does this violate previous Title IX precedent set by the Supreme Court, it conflicts with the Clery Act which requires colleges and universities to address sexual assault and other campus crimes. 41% of college sexual assault involve off-campus parties, while only 8% of rapes occur on school property. This allows administrations to completely dismiss the sexual violence occurring within their student body and promotes a dangerous culture of ignorance and unawareness. Additionally, the DeVos Title IX rule does not take into consideration the trauma that can result from a victim seeing their harasser every day on campus and the re-victimization that can occur knowing that the person faced no consequences from the administration.

Schools are required to ignore harassment until it becomes quite severe and harmful and denies a student educational opportunities. The DeVos Title IX rule does not give schools an option, but rather requires them to ignore a complaint — even if it was made to the "right" person — if it is not actively harming a student's education. Only 12% of college survivors and 2% of girls ages 14-18 report sexual assault to their school. With this guidance in place, we believe these numbers will only decrease as reporting has become a less viable option to feel safe and protected.

Schools are allowed to treat survivors poorly as long as the school follows various procedures, regardless of how those procedures harm and fail to help survivors. The DeVos Title IX rule further narrows the scope of acceptable behavior for schools, negatively impacting survivors — schools are allowed to be indifferent and unreasonable towards a survivor so long as they are not "deliberately indifferent" or "clearly unreasonable." These stipulations are illogical, arbitrary, and allow schools to simply go through the motions instead of investing resources into helping survivors. The prior guidance holds a higher standard for a school's behavior and it is vital that the standard is reinstated in a Biden Title IX Rule.

Schools are allowed to give survivors weak or even harmful "supportive measures." These guidelines encourage institutions to speak without reinforcing their words with any meaningful actions. When survivors come forward it is imperative that they are provided with resources and measures that will help to ensure a safe and successful continuation at that institution. Prior to this rule, 34% of college survivors dropped out of school due to their schools' policies that did not support them in the wake of their assault and/or harassment. The current rule places the burden of changing classes or housing assignments on the survivor rather than the harasser, claiming it would "unreasonably burden" that person. This only further ostracizes and victimizes those who have suffered sexual assault. We cannot continue to contribute to the high dropout rate of college survivors and let schools ignore those who have experienced sexual harassment within their midst.

Religious schools are able to claim "religious" excuses for violating Title IX, even if the school had never before requested a religious exemption. This subsection of the DeVos Title IX rule is particularly degrading to all faith-based institutions and organizations — religion is not a "get out of jail free" card. As a faith-based organization, NCJW takes great offense at religion being used in this way. It is untenable to allow schools to hide behind religion to simply decrease their liability and obligation to students. This trivializes the role of religion in people's lives and disrespectfully manipulates religion as political leverage. The DeVos Title IX rule states that even if a school receives a religious exemption, they do not have to disclose the fact that they are claiming exemption to students *before* they engage in discriminatory actions. Schools can claim a religious exemption after the fact to shield themselves from a Title IX violation investigation allowing them to discriminate without *any* liability. This flies in the face of NCJW's Jewish values and our moral code.

There is no clear timeframe for investigations, and schools are able to delay taking any action if there is also an ongoing criminal investigation. Again, we see an extreme departure from Title IX guidance put in place by other administrations. Previously, schools were required to finish investigations within 60 days and an ongoing criminal investigation did not conflict with that restriction. Now, under the DeVos Title IX rule, ongoing criminal activity allows Title IX investigations to be given an unspecified "temporary delay" or "limited extension." Students can be forced to wait months or even over a year to receive the due process and justice they deserve. This further discourages reporting and promotes a complete distrust in the system that should be protecting these students.

Schools are required to presume that no harassment occurred. This presumption continues the false narrative that women and girls "lie" about their experiences with sexual assault or harassment. It

also ignores the clear statistics that show 1 out of 5 women and 1 out of 18 men are sexually assaulted in college. It additionally perpetuates the falsehood that men and boys do not face sexual harassment as well — in fact, they are more likely to be victims of it than to be falsely accused of it. Students of color, LGBTQ students, and students with disabilities already feel they will not be believed if they come forward. The DeVos Title IX policy only exacerbates the feeling that they won't be believed, leaving more students unprotected and vulnerable.

Many schools are required to use an inappropriate and more demanding standard of proof to investigate sexual harassment than to investigate other types of student misconduct. The Department of Education has used the "preponderance standard" in Title IX investigations since early 1995. Secretary DeVos implemented a standard that favors the named perpetrator, as the victim has to use "clear and convincing evidence" to make their case. However, the rule does not require this standard to be used in all forms of student misconduct, but only in cases of sexual violence. This egregious standard allows schools to behave inappropriately and distinctly discriminate against students at their own will, without facing repercussions.

Survivors in college and graduate school are required to submit to live cross-examination by their rapist's advisor of choice. This stipulation within the DeVos Title IX rule subjects survivors to additional trauma, apart from the trauma they are already living with. It allows anyone — a lawyer, an angry parent, or a friend — to cross-examine a survivor, an ability in which formal court proceedings cannot continue to abide by. The re-victimization that students face during this process is insensitive, disrespectful, and dismissive of a survivor's current situation. Schools must not continue to traumatize student survivors when there are other ways to encourage fair, flexible, and trauma-informed procedures to support survivors.

Schools are required to give unequal appeal rights with respect to sanctions. Secretary DeVos' "equal" appeals rights, again, give favor to the perpetrator by allowing them to appeal for lower sanctions but not letting a survivor appeal for appropriate sanctions if their perpetrator only received a slap on the wrist.

Schools are additionally allowed to pressure survivors into mediation with their assailants. Mediation implies that there is responsibility to be taken for both sides, however, in cases of sexual harassment and assault, it is never appropriate to place any blame on the survivor. This section of the rule, again, is a drastic departure from previous Title IX guidance where mediation was strictly prohibited in resolving sexual violence. These procedures re-traumatize survivors and encourage schools to ignore their humanity, relegating them to a liability for the school.

Indeed, previous Title IX rules supported, protected, and prioritized student survivors of sexual assault. The current DeVos Title IX rule does anything but. **Below, please find our suggested recommendations for a Biden Title IX Rule that would make schools safer and more just for all students.**

Restore longstanding protections for student survivors. Prior to the DeVos Title IX rule, since 1997, the Department of Education, across Democratic and Republican administrations, had consistently outlined recipients' (educational institutions) Title IX responsibilities to survivors and the standards by which the Office of Civil Rights reviews complaints. The Department of Education's longstanding guidance led to greater and more meaningful action by institutions to address sex-based harassment and support victims, an increase in reporting by victims to their schools and the Department, and greater accountability when institutions failed to comply with Title IX. However, much remains to be done to protect students who are sexually harassed, as too many experience it with little protections. To effectuate Title IX's

purpose as a broad remedial statute, the Department of Education must reinstate its decades-old view and:

- Explain 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;
- Define sexual harassment as unwelcome sexual conduct;
- 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;
- Require institutions to promptly and effectively respond to, take action to eliminate, and prevent the recurrence 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;
    - Institutions should be required to provide supportive services and accommodations to the complainant as immediately as possible, but no later than five school days after a report is made;
    - Institutions must take reasonable steps when responding to sex-based harassment (rather than just avoiding a response that is "clearly unreasonable," which is known as the "deliberate indifference" standard);
    - An effective response may include restorative justice or other alternatives to traditional student discipline, as long as participation is truly voluntary, all parties are able (and aware they are able) to terminate the alternative resolution process at any time, and those facilitating it are adequately trained to do so; and
- Make clear that states and local entities can provide additional protections beyond those in the Department's Title IX rule.

Develop robust protections against retaliation. Title IX prohibits retaliation against those who complain of sex discrimination.[1] Yet student survivor s— especially survivors of color, students 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.[2] Others are punished for sexual contact on school grounds — that is, for their own sexual assaults.[3] Student survivors — primarily those in higher education — have also increasingly faced retaliation from their assailants, who file baseless cross-complaints in an effort to dissuade and punish victims.[4]

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

[2] *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.

[3] *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.

[4] 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*"].

The Department of Education'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 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 sex-based harassment 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 sex-based harassment.
- 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).

Ensure fair disciplinary procedures and school flexibility. Prior to the DeVos Title IX rule, the Department of Education long affirmed the uncontroversial notion that school discipline for sexual harassment must be fair to all involved parties.[5] Yet DeVos' Title IX rule requires disciplinary procedures for sexual harassment — and sexual harassment[6] alone — that are uniquely hostile to complainants. In addition, the DeVos policy imposes detailed and burdensome procedural requirements on all educational institutions for addressing sexual harassment, regardless of school type, size, location, and resources. We know that schools vary tremendously in these characteristics, and there is no one-size-fits-all model that works for every educational institution and every educational program.[7] The Department of Education should instead outline general requirements for fairness that flow from Title IX's equality mandate, as it did in previous guidance. For example, the Department of Education should require that school's disciplinary procedures be fair and allow both parties the same procedural rights. The Department of Education should also require that schools use the preponderance of evidence standard in determining responsibility for sexual harassment and other forms of sex-based harassment because that standard is used in civil rights lawsuits and by the Office of Civil Rights in its own enforcement actions. And, the Department of Education should undo the current Title IX policy that forecloses institutions from considering past statements by parties or witnesses who are not available for cross-examination. But, the Department of Education should not dictate the specific details of how schools must investigate sexual harassment, dating violence, domestic violence, and stalking, or other forms of sex-based harassment.

Address other forms of harassment. In addition to sexual harassment, too many students face non-sexual sex-based harassment, including harassment based on sexual orientation, gender identity or

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[5] *See, e.g.*, 2014 Q&A at 26; 2011 DCL at 12; Revised Sexual Harassment Guidance at 22.

[6] The DeVos Title IX rule included dating violence, domestic violence, and stalking in its definition of sexual harassment.

[7] *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 578 (1975); 2014 Q&A at 13-14, 26; Revised Sexual Harassment Guidance at 19-22; *see also* Hélène Barthélemy, *How Men's Rights Groups Helped Rewrite Regulations on Campus Rape*, The Nation (Aug. 14, 2020), https://www.thenation.com/article/politics/betsy-devos-title-ix-mens-rights/ (quoting Hans Bader, a principal architect of the DeVos rules, explaining that Department action that "micromanag[es] school discipline" "conflicts with past administrative practice (and court rulings) about the reach of Title IX").

expression, and pregnancy or parenting status, as well as harassment based on other protected characteristics, including race, color, national origin, and disability.[8] Fortunately, civil rights laws that the Department of Education enforces require funding recipients to address these forms of harassment. We encourage the Department to enforce these protections meaningfully and consistently and to return to its long-standing practice of employing uniform standards for different forms of harassment.[9]

For the reasons detailed above, the Department of Education should prioritize survivors and improve the last administration's response by dedicating its efforts to advancing policies that ensure equal access to education for all students, including students who experience sexual harassment and assault.

Thank you for the opportunity to submit a comment on the current Title IX rule and share recommendations for making schools safer and more just for students.

Respectfully Submitted,

Jody Rabhan

(b)(6)

Chief Policy Officer
National Council of Jewish Women

[8] *See generally,* Onyeka-Crawford, A., Chaudhry, N., & Patrick, K. (2017). Let her learn: Stopping school pushout for girls of color. National Women's Law Center at 3; Epstein, R., Blake, J., & González, T. (2017), https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_GirlsofColor.pdf Girlhood interrupted: The erasure of Black girls' childhood, https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf.

[9] *See generally* Bullying Guidance; *see also Cannon v. Univ. of Chi.*, 441 U.S. at 694 & n.16 (1979) ("Title IX was patterned after Title VI of the Civil Rights Act of 1964."); *Shotz v. City of Plantation*, 344 F.3d 1161, 1170 n.12 (11th Cir. 2003) (noting courts consistently "construe Titles VI and IX *in pari material*"), *accord Barnes v. Gorman*, 536 U.S. 181, 185 (2002).