

**From:** Ruth Perrin  
**Sent:** Fri, 11 Jun 2021 14:20:54 -0400  
**To:** T9PublicHearing;Naida Henao;Kristin Eliason;Bridgette Stumpf  
**Subject:** Written Comment: Title IX Public Hearing (2020 Title IX Regulations)  
**Attachments:** 2020.06 NVRDC Written Testimony for Title IX Public Hearing.pdf

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Good afternoon!

Please find attached my written testimony on behalf of Network for Victim Recovery of DC for the Title IX Public Hearing. I am submitting this to supplement the oral testimony I provided yesterday, June 10th.

Thank you,

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**June 11, 2021**

**Department of Education, Office for Civil Rights**

**Re: Office for Civil Rights Virtual Title IX Public Hearing**

**Written Testimony of Ruth Perrin, Esq., *Senior Counsel for Network for Victim Recovery of DC's Campus Violence Project***

**Hearing Date: June 7-11, 2021**

*Submitted via T9PublicHearing@ed.gov*

Thank you to Secretary of Education Miguel Cardona and Acting Assistant Secretary for Civil Rights Suzanne Goldberg for providing stakeholders the opportunity to provide testimony on the future of Title IX, and for your commitment to preventing and addressing sex-based discrimination in education. This testimony is to supplement the oral testimony I provided on June 10, 2021.

Founded in 2012, Network for Victim Recovery of DC (NVRDC)<sup>1</sup> has provided holistic services, including free legal representation, advocacy, and case management, to over 5,000 crime victims in the District of Columbia ("DC"). In addition to wraparound services, NVRDC also runs the advocacy portion of DC's 24-hour sexual assault crisis response program for adults seeking a medical forensic exam following a sexual assault in DC or who desire an advocate's accompaniment when they report a sexual assault to police. As a result of this advocacy work, NVRDC onboards between 400 and 500 new sexual assault survivor clients every year, with about 25% of those new clients being college students. Many of those students are referred to NVRDC's legal program in which they receive legal assistance in a variety of areas, including representation in their schools' Title IX processes. NVRDC feels that our perspective is unique because our organization is one of few across the country that provides free legal representation to survivors during campus proceedings; even fewer have NVRDC's competency and experience to also assist survivors with related representation in civil matters and criminal prosecutions.

NVRDC has served 900 higher education students since our founding, about 250 of whom received legal assistance with on-campus complaints and seeking supportive measures. Our attorneys have served as advisors in cases of campus violence for the last nine years. We have engaged with students and staff at the eight largest higher education institutions in DC, and experienced the different ways each school has handled changes in Title IX's implementation regimes over the years to address sexual assault, domestic and dating violence, stalking, and sexual harassment. Our testimony is informed by our unique experience working in the Title IX field.

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<sup>1</sup> Network for Victim Recovery of DC is a 501(c)(3) organization operating in the District which provides a variety of direct services to victims, outreach, education, and training. Our Campus Violence Project focuses on providing information, advice, legal clinics, brief services, and legal representation to student survivors of crime seeking to navigate their rights and options under Title IX and the Clery Act. More information about NVRDC and the services we provide can be found at [www.nvrdc.org](http://www.nvrdc.org).

Our work with student-survivors supports the assertion that gender-based violence uniquely harms a student's access to education. The spectrum of trauma experienced by students often leads to a decline in their academic performance, fundamental changes in their social lives and relationship with their community, all the while degrading their sense of safety on campus. We have worked with student-survivors who transferred schools or dropped out of school entirely. Of the hundreds of student survivors served by NVRDC, we cannot think of a single one whose college experience was not negatively impacted in some way in the wake of their victimization.<sup>2</sup> To effectively address the insidious effects of sexual assault, domestic and dating violence, stalking, and sexual harassment in education, NVRDC believes that new regulations must be passed to effectively implement Title IX in a fair and equitable manner.

Based on our experience, NVRDC respectfully asserts that any future Office for Civil Rights ("OCR") regulations, guidance, or other agency action must be grounded in the following principles:

1. The purpose of Title IX is to protect students from sex discrimination, including sexual violence, and ensure their equal access to education.
2. Students who experience sexual harassment, including sexual violence, must have access to multiple, varied, and individualized options within their school to meet the needs of survivors of all identities. These options include, but should not be limited to, access to information, counseling, confidential resources, health services, academic support, housing options, safety measures, a fair and impartial grievance process, and alternative forms of resolution.
3. Schools must respond to all reports of sexual harassment, regardless of where the underlying conduct occurs, in order to effectively remedy the denial of equal access to education that occurs when a student experiences sexual harassment *and* to ensure the safety of the campus community.
4. All parties to a grievance process must be afforded due process rights, including the equal rights to provide witnesses and evidence, to submit questions and have them asked of any party or witness in a grievance proceeding, to have a process concluded without unreasonable delay, and to have equal rights in appeals processes.
5. In every action they take, schools must strive for transparency and effective communication (1) with students who have experienced sexual harassment about options available to them, (2) to parties in a grievance process about that process, and (3) to the school's community about rights and obligations of community members.

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<sup>2</sup>Trauma science has shown that the impact of trauma is not just determined by the type or magnitude of an event, but also by the life experiences and resources available to the victim, including support and response systems (which can compound or mitigate the effects of trauma). *See* Center for Substance Abuse Treatment (US). Trauma-Informed Care in Behavioral Health Services. Rockville (MD): Substance Abuse and Mental Health Services Administration (US); 2014. (Treatment Improvement Protocol (TIP) Series, No. 57.) Chapter 3, Understanding the Impact of Trauma. Available from: <https://www.ncbi.nlm.nih.gov/books/NBK207191/>.

6. Schools must balance their safety obligations to the community and their confidentiality obligations to individual survivors when addressing sexual harassment.

With these principles in mind, NVRDC believes that the following changes must be made to the regulations implementing Title IX to ensure that students can access education uninterrupted by sexual harassment.

**I. New regulations must use expansive understandings of sexual harassment and jurisdictional obligations so that they protect the greatest number of individuals from sexual harassment in education.**

**A. OCR should restore its prior definition of sexual harassment.**

The 2020 regulations define sexual harassment in three categories: (1) quid pro quo sexual harassment, (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,” and (3) sexual assault, dating violence, domestic violence, and stalking.<sup>3</sup> This definition, focusing specifically on the second prong, drastically limits schools’ obligations to respond to unwelcome conduct on the basis of sex. In contrast, the April 2011 “Dear Colleague” Letter defined sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”<sup>4</sup> By weakening that definition in 2020 with the qualifiers “severe, pervasive, and objectively offensive,” DOE created a higher threshold for when unwelcome sexual conduct must be addressed by a school, thereby leaving some unwelcome sexual conduct unaddressed.

A school’s obligations to offer supportive measures and grievance procedures are triggered only when they receive a report of conduct that meets this higher threshold. Sadly, this change has signaled that some conduct *previously* recognized as sexual harassment and, therefore, intolerable under Title IX, is *now* acceptable. A more limiting definition can have a chilling effect on reporting, as students may not want to risk reporting to the Title IX Office if they do not believe that the conduct they have experienced is sufficiently severe, pervasive, and objectively offensive for the Title IX Office to take any action.<sup>5</sup> OCR itself has acknowledged this in the past; in its 2013 letter concerning the University of Montana’s compliance with its Title IX obligations, OCR explained that defining “sexual harassment” in this manner “leaves unclear when students should report unwelcome conduct of a sexual nature and risks having students wait to report to the University until such conduct becomes severe or pervasive or both.”<sup>6</sup> OCR explained that such a

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<sup>3</sup> 34 C.F.R. §106.30.

<sup>4</sup> Dear Colleague Letter: Sexual Violence, p. 3 (April 4, 2011).

<sup>5</sup> See e.g. Negar Katirai, *Retraumatized in Court*, 62 Ariz. L. Rev. 81, 96 (2020) (Noting that many survivors opt out of engaging in legal systems for fear of negative reactions and retraumatization).

<sup>6</sup> See DOJ Case No. DJ 169-44-9, OCR Case No. 10126001, p. 8 (May 9, 2013).

narrow definition was also contrary to the University's interest in "encourag[ing] students to report sexual harassment early, before such conduct becomes severe or pervasive, so that [the University] can take steps to prevent the harassment from creating a hostile environment."<sup>7</sup>

The definition also permits schools to be dismissive of unwelcome conduct that they deem isolated or insufficiently egregious, rather than encouraging schools to take early steps to *prevent* isolated and/or non-egregious conduct from escalating to a more severe level. In essence, the regulations permit and excuse a certain level of unwelcome sexual conduct, while sending a message to students that they are expected to tolerate a certain level of such conduct.

This limiting definition is particularly harmful in cases of stalking and harassing conduct, which may at first appear "innocent" or "harmless," or otherwise "objectively" unoffensive, such as "approaching the victim or showing up in places when the victim didn't want them to be there, making unwanted telephone calls, leaving the victim unwanted messages, and watching or following the victim from a distance."<sup>8</sup> It may also include conduct some may even consider caring or romantic, like leaving gifts or excessive "checking in," that individuals may not even realize themselves is a form of stalking.<sup>9</sup> Requiring conduct to meet the high threshold of "severe, pervasive, and objectively offensive" is dismissive of that type of alarming behavior, and, even worse, encourages survivors to endure escalating conduct until it seems bad enough to report. No survivor should have to play the guessing game of "is my harassment bad enough yet?" By the time authorities take a victim's report seriously,<sup>10</sup> there may already have been severe damage to the victim's physical, mental, and emotional well-being, in addition to disruptions to the victim's life, work, or study.<sup>11</sup> For this reason, it is of particular importance to reframe the standard to encourage reporting and to require that schools respond to "innocent" stalking behaviors.

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<sup>7</sup> See DOJ Case No. DJ 169-44-9, OCR Case No. 10126001, pp. 8-9 (May 9, 2013).

<sup>8</sup> The Nat'l Ctr. of Victims of Crime, Stalking Fact Sheet, Stalking Resource Center, available at [http://victimsofcrime.org/docs/default-source/src/stalking-fact-sheet-2015\\_eng.pdf](http://victimsofcrime.org/docs/default-source/src/stalking-fact-sheet-2015_eng.pdf) (last updated Jan. 2015).

<sup>9</sup> See Carrie Manner, *Stalking: Don't Confuse the Signs with Love*, One Love, available at <https://www.joinonelove.org/learn/stalking-dont-confuse-the-signs-with-love/> and Kathleen Washburn, *Addressing Stalking On Campus*, American Association of University Professionals, available at [https://www.aaup.org/article/addressing-stalking-campus#.YMJSK\\_IKiUI](https://www.aaup.org/article/addressing-stalking-campus#.YMJSK_IKiUI)

<sup>10</sup> See Judith McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 Homicide Studies (1999)(54% of femicide victims reporter stalking to police before they were killed by their stalkers). OCR is no doubt aware of the 2018 stalking and murder of Lauren McCluskey, a University of Utah student who repeatedly reported harassing texts from her ex-boyfriend and individuals she believed to be friends of his. This escalated to him extorting Ms. McCluskey over intimate images of her, which she also reported. Rather than respond in a manner commensurate with such an escalation, the assigned officer actually showed others the intimate photo and bragged about looking at it whenever he wanted. The next week, Ms. McCluskey was murdered by her ex-boyfriend. See Courtney Tanner and Sean P. Means, *Here's an updated timeline of the slaying of University of Utah student Lauren McCluskey and reform that has followed*, The Salt Lake Tribune (Updated April 14, 2021) available at <https://www.sltrib.com/news/2018/10/26/timeline-extortion/>. Stalking is routinely a crime that may not rise to the standard of the current definition but that may result in significant harm to the person experiencing the stalking behavior.

<sup>11</sup> Eric Blauuw et al., *The Toll of Stalking*, 17 J. of Interpersonal Violence, 50-63 (2002)("The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims than the general population, especially if the stalking involves being followed or having one's property destroyed."); Cynthia Hess &

The purpose of Title IX is to protect students from discrimination based on sex. OCR must use a broad definition of sexual harassment to protect the greatest number of students.

**B. Schools should be obligated to respond to *all* reports of sexual harassment, regardless of where the harassment itself occurred.**

The text of Title IX prohibits discrimination based on sex in a school’s program or activity.<sup>12</sup> Pursuant to OCR’s 2014 guidance, schools were obligated to respond to reports of sexual harassment if the harassment itself occurred *within* the school’s program or activity, or it had *an effect within* the school’s program or activity.<sup>13</sup> Under the existing regulations, the effects of sexual harassment are not taken into account, and instead schools are only obligated to respond to sexual harassment that itself occurred within the program or activity.<sup>14</sup>

As the 2014 guidance recognized, limiting a school’s obligations to respond to sexual harassment based on where the actual assault or harassment occurred fails to accomplish the purpose of Title IX; Title IX recognizes that sexual harassment constitutes sex-based discrimination when it denies a student-survivor equal access to education. NVRDC has assisted survivors who have lost access to educational opportunities like honors programs, scholarships, school employment programs, and their choice of their major or minor, due to the effect of assaults that occurred in off-campus residences or in study-abroad programs. A school’s obligation to respond to sexual harassment should not be based on an arbitrary line in the sand about the physical location of where the underlying sexual violence occurs, something wholly outside of the survivor’s control. Instead, such obligations should be harm-centered. If a student-survivor is denied educational opportunities, that harm is *always* within an educational program or activity.

**C. Schools should be obligated to respond to all reports of sexual harassment committed either by or against a student.**

The new Title IX regulations state, “at the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.”<sup>15</sup> Often, when discussing Title IX, the focus is on when

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Alona Del Rosario, *Dreams Deferred: A Survey on the Impact of Intimate Partner Violence on Survivors’ Education, Careers and Economic Security*, Institute for Women’s Policy Research (2018), [https://iwpr.org/wp-content/uploads/2018/10/C474\\_IWPR-Report-Dreams-Deferred.pdf](https://iwpr.org/wp-content/uploads/2018/10/C474_IWPR-Report-Dreams-Deferred.pdf) “[66% of intimate partner violence survivors] said an abusive partner had disrupted their ability to complete education or training through tactics such as not allowing them access to money to pay for school, socially isolating the survivor, controlling or monitoring their mobility, using physical or sexual violence, and damaging or destroying personal property.”)

<sup>12</sup> Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a).

<sup>13</sup> Questions and Answers on Title IX and Sexual Violence, p. 36 (April 29, 2014).

<sup>14</sup> 34 C.F.R. §106.44(a); DOE Final Rule Preamble, pp. 615-664 (August 14, 2020).

<sup>15</sup> 34 C.F.R. §106.30(a).

a current student sexually harasses another current student. However, operating in a large city with DC's eight largest higher education institutions, as well as with numerous college-aged individuals who have DC-based internships or attend summer programs at these institutions, our organization often sees other scenarios. The perpetrator or victim of sexual harassment may not be a student, and therefore they are left out by this definition.

For example, this requirement unnecessarily limits the ability of a former student to report sexual harassment, even if the perpetrator is still a student. We have worked with survivors that, upon transferring schools after being assaulted by a fellow student, wish to pursue a grievance process against their assailant who still attends the survivor's former school. In that scenario, despite the conduct otherwise fitting the necessary requirements, and despite the fact that the assault caused the survivor to stop engaging in a school's program or activity, a school is not obligated to respond in *any* manner to such a report. The lack of obligation to respond to such reports means that such respondents' conduct will go unaddressed, resulting in lost opportunities to hold respondents accountable and prevent future harm to other students. Title IX regulations should mandate that when a report of sexual harassment is made by a current or former student against a current student, the school is obligated to respond.

The purpose of Title IX is to protect students' access to education; however, students who are assaulted by people unaffiliated with their school, under the current Title IX regulations, have no right to any sort of support from their school, even if they were assaulted on campus, no matter how severe the effect on their education. While, of course, a school cannot initiate a grievance process over someone unaffiliated with the school, a school should still be obligated to provide supportive measures to a student who experiences such sexual harassment. In fact, supportive measures are often crucial to ensure that a student's education is not affected by the violence they experienced. We have represented many students whose schools offered supportive measures--despite the lack of legal obligation to do so--to students who were sexually harassed by persons unaffiliated with the school.<sup>16</sup> Those schools provided such support because, like NVRDC, they recognize that to preserve their students' continued access to education, those students need support. For Title IX to effectuate its purpose, schools should be obligated to provide supportive measures to students who report experiencing sexual harassment by someone unaffiliated with the school. Leaving out these student-survivors serves no purpose other than to perpetuate the harm that they are already experiencing.

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<sup>16</sup> Over the years, NVRDC has assisted students who were sexually assaulted by someone unaffiliated with the school--a common occurrence in a city as big as DC. In some instances, their schools provided supportive measures, from moving a student to a completely different area of campus to exam schedule adjustments to issuing persona non grata orders to prevent the assailant from coming on campus. Those supportive measures allowed the students to continue their education, access safety measures, and make progress in their healing. Not only did the schools who provided such measures do so swiftly, to the NVRDC staff assisting those clients the measures appeared to cause little to no burden to the schools.

Schools should also be obligated to respond to reports of sexual harassment committed by students against those unaffiliated with the school. How schools are obligated to respond may look different in different scenarios, and there is no blanket response (i.e. remedial action, grievance process, informal resolution, etc.) that we can suggest for every circumstance where a student sexually harasses a non-student. However, in order to fulfill its purpose, Title IX regulations must obligate schools to respond in some manner when they receive a report that a student has perpetrated sexual harassment against someone unaffiliated with the school. If a student is perpetrating or has perpetrated sexual harassment against an unaffiliated person, there is an increased risk to the community. The school can mitigate this risk by taking steps to prevent such harm from occurring in their educational program or activity. Additionally, campus community members may feel unsafe knowing that a fellow student has engaged in sexually harassing behavior and the school has not responded. Schools should take proactive action to respond in a manner that prevents harm to the school community

NVRDC acknowledges that in the scenarios discussed in this section, *how* a school must respond will be varied and fact-dependent. For example, a student who, while on summer break and several states away from their school, makes unwanted sexual advances at someone unaffiliated with the school, may not be subject to a grievance process given the nature of the conduct and the tangential relationship to the school. However, it may nonetheless be appropriate, if this conduct were reported to the school, for an administrator to have a conversation with that student about the behavior to prevent that student from perpetrating similar harm to someone in the university community. Conversely, where a student abuses their significant other who is a non-student and the abuse occurs on campus, it would be appropriate for the school to offer a grievance procedure. What is important in each situation is that the school assesses the report and responds in an appropriate manner designed to effectively address the harm caused and prevent it from happening again.

Title IX should obligate that schools respond to *all* reports of sexual harassment either by or against a student, recognizing that not all options are appropriate in all scenarios. Title IX's purpose is to restore or preserve a student's access to education, and only requiring that schools responding to some sex discrimination defeats this purpose.

**D. The current limits to how and when schools must respond to sexual harassment have resulted in the creation of unregulated adjudication processes.**

Limiting what sexual harassment a school must respond to, in practice, has resulted in schools creating separate policies for sexually harassing conduct that does not fall within the regulations' recent, narrower definitions. The Title IX regulations made it clear schools could choose if they wanted to prohibit conduct falling outside their Title IX obligations, but that such action would

not be subject to Title IX obligations (and, in fact, such complaints must be specifically dismissed for the purpose of Title IX). As a result, many schools now have two parallel processes, one for Title IX sexual harassment and one for non-Title IX sexual harassment. Since the rule went into effect on August 14, 2020, the majority of higher education institutions in DC have either created two separate processes, or have a single process that has alterations where Title IX sexual harassment is alleged. While NVRDC fully supports schools' efforts to ensure that students who experience sexual harassment have access to resources and grievance procedures, the current regulations make it needlessly confusing and difficult for them to do so. We have seen, on several occasions, students unsure of what policy applies to their case and why.<sup>17</sup>

Moreover, the procedures that schools use in non-Title IX sexual harassment procedures currently have little to no oversight by the Department of Education, other than in some circumstances through the Clery Act, which may apply more broadly than Title IX. However, all of the due process protections that the 2020 regulations supposedly provide only apply to a very limited number of sexual harassment cases. Frequently we work with students who have been sexually assaulted in off-campus residences by another student. Narrowing a school's obligation to respond does not protect respondents from unfair processes; it leaves respondents and complainants vulnerable to them. Any meaningful attempt to create a truly fair and equitable process must broadly define sexual harassment to protect the greatest number of students, both from sexual harassment, and from unfair and unregulated processes.

## **II. Regulations should ensure that there are alternative resolution processes available to survivors that are separate from the formal grievance procedures.**

As previously stated, responses to different circumstances and conduct may vary. Likewise, a response must also vary based on the needs of an individual survivor. NVRDC's guiding principle is to empower crime victims to achieve survivor-defined justice. We know that people who experience crime are not a monolith, and our work with thousands of sexual assault survivors teaches us that there is no one-size-fits-all approach to healing. Consequently, to effectively address the harm done by campus violence, a survivor must have multiple and varied options available to them. This is why NVRDC supports the option to have alternative resolutions<sup>18</sup> to the formal grievance process.

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<sup>17</sup> To NVRDC's knowledge, we are currently the only organization that provides free representation to students in school-based sexual harassment proceedings at DC's higher education institutions. Even with the assistance of NVRDC attorneys, the division in sexual harassment processes at the schools can be challenging to navigate. We can only imagine how these varied processes affect unrepresented students, compounding their difficulties in accessing education in the wake of experiencing sexual harassment.

<sup>18</sup> While the regulations, and many schools, refer to such processes as "informal resolutions," NVRDC believes "alternative resolutions" is more appropriate language. Though some responses outside of a formal grievance procedure may indeed be "informal," many are not. Restorative justice processes, for example, are not "informal," as they are thorough and structured responses to harm. Referring to such processes as "informal" is an inaccurate description, and risks diminishing the perceived value of such a process. "Informal" implies less serious or

The existing regulations allow schools to offer alternative resolutions if they so choose.<sup>19</sup> It is crucial for schools to have alternatives to the formal process that provide meaningful, safe, and voluntary ways for survivors to address harm that was done to them. Currently, many survivors we work with see “informal resolutions” as a means for their assailant to avoid accountability, rather than a different form of accountability, and express concerns that “informal resolutions” are a way for their school to ignore and “sweep under the rug” harm that was done to them. Creating more stringent requirements for offering and executing alternative resolution processes is critical to making this option a viable alternative to the formal grievance process, as well as creating trust in such systems.

Despite this distrust in their schools’ alternative resolution processes, in a survey that NVRDC conducted of former Title IX clients, we learned that the survivors we have worked with view “informal resolution” as a less intimidating option than either hearing panels or single-investigator models. They also reported that they would be more comfortable with an alternative process than with a hearing panel model. In fact, the hearing panel model was perceived as the most intimidating, least empowering, and least comfortable option. Especially in a Title IX structure that mandates a hearing process, it is crucial that students have alternatives that they feel safe accessing.

Restorative justice is an evidence-based alternative to the formal grievance process that can be employed in the campus context. The goal of restorative justice is not to make a determination of whether or not a student has violated the school’s policies, but to address the harm that was done to a survivor in a way that promotes healing and accountability.<sup>20</sup> Restorative justice promotes accountability in a way that is not focused on punishing an offender but on allowing them to take responsibility for the harm they have caused and change their behavior.<sup>21</sup> Schools should be encouraged to invest in restorative practices so that survivors have alternative options to the grievance process that nonetheless seek to hold respondents responsible for their conduct.

Additionally, the existing regulations’ requirement that schools may offer informal resolutions *only* once a formal complaint has been filed<sup>22</sup> significantly limits how schools can respond to sexual harassment reports. There is no clear reason for a formal complaint to be filed before a school can engage in an alternative resolution process. Formal complaints are part of the formal grievance process; it does not make sense to create an alternative to that process that can only be accessed by first engaging with the formal grievance process. In fact, this obligation has likely

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consequential than “formal,” when it is our experience that alternative processes can be just as consequential, if not more so, than formal grievance procedures.

<sup>19</sup> 34 C.F.R. §106.45 (b)(9).

<sup>20</sup> David R. Karp, Julia Shackford-Bradley, Robin J. Wilson, and Kaaren M. Williamsen, *A Report on Promoting Restorative Justice Initiatives for Sexual Misconduct on College Campuses* 11-14 (April 2016). Available at [https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus\\_PRISM\\_Report\\_2016.pdf](https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus_PRISM_Report_2016.pdf)

<sup>21</sup> *Id.* at 30.

<sup>22</sup> 34 C.F.R. §106.45 (b)(9).

limited schools' ability to respond to certain reports of sexual harassment. NVRDC has assisted survivors who do not want to pursue a formal process and instead simply want their Title IX office to speak to the person who harassed the survivor. Under the existing regulations, the school would be refrained from offering this option unless the survivor *first* filed a complaint, a process the survivor hoped to avoid. Students should never be required to engage in a formal process so that they might access an alternative process. This creates a significant barrier to accessing alternative processes, many of which may pose an easier and less burdensome solution to an incident than a formal grievance process.

### **III. Title IX regulations should not attempt to create due process by applying random criminal concepts to a non-criminal process.**

The 2020 regulations borrow concepts from the criminal legal system and drop them into an administrative case, completely devoid of the context and safeguards that exist in the criminal system. It is confusing and inappropriate to take some criminal procedure concepts and place them into a different system, with different goals, without any context. Future action by OCR to enforce Title IX must reverse the harmful steps taken by existing regulations. This action must be taken with the understanding that Title IX proceedings are not--and should not be--equivalent to criminal cases.

For example, the regulations require a hearing with cross-examination by a party's advisor.<sup>23</sup> Cross-examination in a criminal process is subject to the court's rules of evidence, rules of criminal procedure, rules of decorum, and a plethora of case law that explains what can and cannot be asked in a cross-examination. The Title IX regulations provide no limitations on cross-examination. There are no rules of evidence. There is no explanation of what questions are and are not relevant. The result is a bizarre and confusing quasi-criminal process that pays lip service to the concept of due process without actually meaningfully implementing it.

Moreover, any importation of criminal processes or standards ignores the innate difference in the characteristics of the parties in a Title IX case.<sup>24</sup> Criminal cases and Title IX cases are not the same; they do not have the same stakes or goals. A criminal case is a process for the government to respond to a violation of a law. A Title IX case is a process for an individual to address the harm that has denied them access to education. Criminal cases are balanced to protect defendants against the overwhelming power and resources of the government. In Title IX proceedings, like civil cases, the parties are equally situated.

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<sup>23</sup> 34 C.F.R. §106.45 (b)(6)(i).

<sup>24</sup> See Katharine Larson, *Discovery: Criminal and Civil? There's a Difference*, American Bar Association (Aug. 9, 2017), [https://www.americanbar.org/groups/young\\_lawyers/publications/tyl/topics/criminal-law/discovery\\_criminal\\_and\\_civil\\_theres\\_difference/](https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/criminal-law/discovery_criminal_and_civil_theres_difference/).

While conduct subject to claims under Title IX may also constitute a crime, this does not justify the conflation of the Title IX regulations with the rules and consequences of the criminal legal system. A survivor’s choice to report conduct under Title IX signals a desire for remedies available for civil rights violations—and not more severe criminal penalties, such as incarceration. If the survivor wished to see such penalties, they could report to the police. It is illogical to conflate a school administrative process with a criminal proceeding when a victim has clearly chosen one over the other.

#### **IV. OCR must mandate that schools implement fair, equitable, and trauma-informed grievance procedures.**

NVRDC believes that prior guidance lacked enough clear information for schools on how to implement fair grievance procedures in Title IX matters; however, existing regulations have overcorrected by providing overly prescriptive, burdensome requirements for processes that are not feasible at all institutions.

##### **A. Higher education institutions should not be obligated to hold a live hearing.**

The regulations foreclose the option of employing a “single-investigator” model, instead requiring claims be adjudicated at higher education institutions via live hearings that permit cross-examination.<sup>25</sup> The removal of the single-investigator model is extremely burdensome for schools and can negatively impact both complainants *and* respondents; specifically, in NVRDC’s experience, schools with hearing models often take far longer to address and resolve sexual harassment complaints. For this reason, many schools in the District of Columbia (prior to the 2020 regulations) began using single-investigator models, thereby significantly reducing the time for processing complaints and mitigating case backlog. In our experience, over the last year, this delay in processing has been detrimental to all affected parties on campus that would benefit from having a prompt claim resolution process.

Our experience representing survivors underscores other benefits in some single-investigator models.<sup>26</sup> Title IX investigators are often professional specialists with significant experience and training in investigation, Title IX, and other relevant topics. Their role requires understanding and knowledge that lay people do not have. In contrast, hearing officers or panelists are campus community volunteers without such job training or experience. While the existing regulations require that hearing panelists receive training, having some amount of yearly training is not the same as the expertise gained from a job specializing in a subject. The regulations require that

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<sup>25</sup> 34 C.F.R. §106.45 (b)(6).

<sup>26</sup> Additionally, in its 2020 survey of former Title IX clients to evaluate student-survivors’ perceptions of reporting cultures, NVRDC found that survey respondents largely favored the single-investigator model over the hearing panel model. They described it as the most empowering option available, and less intimidating than hearing panel models.

volunteer hearing officers then oversee cross-examination and make decisions in matters of relevance, with no guidance on what relevance is. While NVRDC has represented survivors in Title IX proceedings where community members who are attorneys serve in these roles, we are very cognizant that many educational programs or activities lack the resources to hire such panelists. Schools cannot be placed in a position where they must employ under-trained volunteers to serve in crucial roles because it is too costly to hire someone with the expertise truly needed under OCR's burdensome requirements.

To be clear, NVRDC does not take a position on whether a single-investigator model is better or worse than a hearing panel model; we have seen both executed well. Rather, we believe that OCR must mandate fair, equitable, and trauma-informed requirements for a grievance process, and allow schools to then decide what adjudication model they can institute that is both feasible and compliant with Title IX's requirements.

**B. Rather than create burdensome, detailed requirements of what exactly how a grievance process must operate, OCR should require schools to have processes that safeguard due process while effectively address sexual harassment.**

OCR need not provide schools with a step-by-step guide to the grievance process; instead, it should create specific umbrella requirements applicable to various processes. This will allow schools to create the process that meets these requirements and suits the needs of the school, while maintaining due process rights for both parties.

The following features of a grievance process are crucial to ensuring a fair, equitable, and trauma informed process<sup>27</sup>:

1. Parties must receive written notice of a formal complaint that states the charges and briefly states the facts giving rise to the charges.
2. Parties must have an equal opportunity to submit their own testimony, evidence, and witness names.
3. Parties must have an equal opportunity to submit questions and have them asked of the other party and any witnesses.

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<sup>27</sup> NVRDC believes that the discourse surrounding what it means to be "trauma-informed" is rife with misinformation. Trauma-informed does not mean favoring the complainant but, rather, treating both parties with respect and care to avoid causing further harm. Trauma is common, and systems can often retraumatize those who interact with them. See Substance Abuse Mental Health Services Administration, *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach* 2 (July 2014) available at [https://ncsacw.samhsa.gov/userfiles/files/SAMHSA\\_Trauma.pdf](https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf)

This is true for both complainants and respondents, who, in our experience, often both have histories of trauma preceding the incident.

4. Parties must have an equal opportunity to review all evidence and testimony and respond to it before a decision is made. The response to such a review must be considered in the final determination.
5. Parties must have equal opportunity to appeal decisions made in their case.
6. Schools must ensure that any decisionmaker has substantial relevant training in Title IX, trauma, credibility determinations, evidence evaluation, and the dynamics of sexual assault, domestic and dating violence, and stalking.
7. Schools must institute specific and reliable timeframes for processing complaints.
8. Schools must communicate with parties in a manner that is consistent and transparent.
9. Schools must be prohibited from bringing separate charges against parties for non-severe conduct<sup>28</sup> uncovered as a result of the complainant reporting sexual harassment.
10. Schools must specify in their policies the procedures that will apply if there are multiple complainants in a case, or if the complainant and respondent have cross-filed complaints against each other.
11. Schools must specify in their policies under what circumstances they will proceed with a grievance process against the wishes of a complainant.
12. Schools must publish and disseminate a policy on sexual harassment, and they must follow their established policy unless and until a formal change has been made to it.
13. Parties must be notified in writing of the above rights.

Such due process protections ensure that a process is fair, reliable, and transparent to both complainants and respondents. These recommendations are based on our experience with numerous schools and, particularly, based on the opinions we have heard from hundreds of students about the process they experienced. Lack of transparency, consistency, and disparate treatment of parties are the most complaints we hear from students about how schools have handled their cases. Creating a list of school obligations and students' rights incorporating the above recommendations are crucial to restoring public trust in the Title IX.

## **V. Schools must have clear procedures for seeking and obtaining supportive measures.**

Title IX regulations specify that schools must offer supportive measures, and provide examples of what supportive measures can be.<sup>29</sup> The regulations further state that the Title IX Coordinator is “responsible for coordinating the effective implementation of supportive measures.”<sup>30</sup> Beyond this, however, there is little clarity on the actual procedures for reviewing and responding to

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<sup>28</sup> By “nonsevere conduct,” NVRDC means, generally, conduct that is nonviolent. Alcohol and drug use violations are common examples for which many schools provide an amnesty provision. However, amnesty must also be provided for instances of any type of nonsevere conduct that is otherwise prohibited by the school that may cause a student to worry that they will be sanctioned for in the event they report sexual harassment. Fear of punishment can have a chilling effect on reporting.

<sup>29</sup> 34 C.F.R. §106.30.

<sup>30</sup> *Id.*

supportive measures requests. While NVRDC does not believe OCR needs to detail the exact process a school must use, we do feel it is crucial for schools to be obligated to publish (1) how to request supportive measures, including to whom the request should be submitted, (2) how the school will review the request, including who will make the decision regarding if the supportive measure requested is reasonable and appropriate, and (3) a timeframe for responding to the request for supportive measures.

We have seen that many students go directly to their professors or resident assistants to request academic, housing, or other support because they do not know that they have a right to supportive measures or the best way to request such measures. Students often do not know that they can speak to someone in the Title IX Office to obtain supportive measures without filing a formal complaint. Because of this, schools should also train faculty and staff in responding to such requests from students.

## **VI. Conclusion**

OCR has the opportunity to obtain meaningful public input from stakeholders to create Title IX regulations that provide for reliable and fair responses to sexual harassment. Controversies have plagued public discourse surrounding Title IX, but we believe that Title IX does not need to be controversial. As an organization that advocates for the rights of crime victims, we believe that respondents and complainants must have equal rights to ensure fair and reliable outcomes. An effective and robust response to sexual harassment does not need to come at the expense of the rights of respondents; rather, an effective and robust response *requires* meaningful due process rights for all parties. OCR must use the feedback that it receives to create a new system of obligations to ensure schools respond fairly and effectively to sexual harassment.

Thank you very much for your time and attention. NVRDC is more than happy to answer any questions you may have.