

**From:** Samantha Skaller  
**Sent:** Thu, 10 Jun 2021 20:31:14 +0000  
**To:** T9PublicHearing  
**Cc:** TitleIX;Tracia Banuelos  
**Subject:** Written Comment: Title IX Public Hearing (New York City Alliance Against Sexual Assault)  
**Attachments:** NYCAASA Written Comment (1)- FINAL.pdf

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To the Department of Education, Office for Civil Rights:

The New York City Alliance Against Sexual Assault respectfully submits the attached comment as testimony to inform the Department of Education's review of regulations, guidance, and other agency actions under Title IX, and to request changes to the rule entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance."

We welcome any opportunity to provide additional input and information toward this effort, as well as an understanding about what the DOE will do with the comments shared and how it will be reported back out.

Sincerely,  
Sam Skaller and Tracia Banuelos  
*on behalf of the New York City Alliance Against Sexual Assault.*

**Sam Skaller, M.A** | she/they  
Senior Campus Coordinator  
**New York City Alliance Against Sexual Assault**  
32 Broadway, Suite 1101 | New York, N.Y. 10004  
212.229.0345 | [www.svfreenyc.org](http://www.svfreenyc.org)





New York City Alliance  
Against Sexual Assault

32 Broadway, Suite 1101  
New York, NY 10004  
212 229 0345  
www.svfreenyc.org

RE: Office of Civil Rights hearing pursuant to Executive Order 14021, Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity

Document Citation 86 FR 27429

The New York City Alliance Against Sexual Assault respectfully submits this comment as testimony to inform the Department of Education's review of regulations, guidance, and other agency actions under Title IX, and to respectfully request changes to the rule entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance."

Over the last five years, the New York City Alliance Against Sexual Assault has taken every opportunity to participate in the national discourse surrounding Title IX. Notably, our fervent opposition to the Department's Notice of Proposed Rulemaking concerning Title IX of the Education Amendments of 1972 is published in the Federal Register. With our participation in the Department of Education's current review of regulations, guidance, and other agency actions under Title IX, we are requesting immediate action on the portions of the current rule that directly impact our membership and the New York City communities we strive to serve.

- Ensure Protections for Transgender Students

In recent years we have watched a stark increase in violence against transgender and non-binary students and significant attacks on their civil rights. As we know, sex-based discrimination is an intersectional issue and must account for a range of identities and experiences. We urge the DOE to both reinstate and codify into regulations, consistent with years of case law, that Title IX prohibits discrimination based on gender identity and that Title IX protects transgender students from discrimination. We also urge the DOE to look critically at the ways in which Title IX protections intersect with Title VII and Title II protections for all students and offer institutions guidance on best practices to ensure that the protections transgender and non-binary students are intersectional in both approach and implementation. To further the effort in protecting transgender and non-binary students' civil right to an education free from discrimination, we also urge the DOE to eliminate the options for schools to be exempted from Title IX compliance based on religious tenets. Since 1979, religious exemption to Title IX has been an option for schools throughout the country and has been weaponized in ways that discriminate and deny rights to pregnant students, non-binary students, transgender students, and LGBTQ+ students. In addition to the religious exemption, we have witnessed an increase in attempts to pass anti-transgender legislation throughout the nation. We ask that the DOE interprets Title IX's prohibition on sex discrimination consistently with current Supreme Court precedent. In *Bostock v. Clayton County*, the Supreme Court ruled that Title VII's prohibition against sex discrimination protects employees from discrimination based on their gender identity. Further, we ask that the DOE interprets Title IX consistently with the Fourth Circuit Court of Appeals case *Grimm v. Gloucester County School Board* and the Eleventh Circuit Court of Appeals case *Adams v. School Board of St. Johns County*. In *Grimm* and *Adams*, both the Fourth Circuit and Eleventh Circuit ruled that Title IX's prohibition against sex discrimination gives public school students the right to use bathrooms consistent with their gender identity. Persuasively, in *Adams*, the Eleventh Circuit relied on the *Bostock* ruling.

- Divest from Campus Safety Policing Model and Invest in Community Safety Model Approaches to Sexual Violence Prevention and Response

While we are thrilled to see the DOE consider multiple procedural options for students who have experienced sexual violence, we believe more guidance should be provided regarding schools'

responsibilities for informal resolutions such as mediation. Mediation can often reinforce or replicate power imbalances that are harmful to the victim/reporting individual. While we have experienced multiple benefits of NYS Education Law 129B, *Enough is Enough*, however; one of its pitfalls is the bolstering of campus safety department budgets. We can confidently say that increased presence and interaction with law enforcement during a vulnerable and traumatizing incident such as sexual violence does not make all students feel safer. Additionally, there is little to no evidence to suggest that campus safety officer presence prevents sexual violence from occurring on campus. In NYC, many campuses and universities have outsourced campus safety positions to local police. Anecdotally, the students that we strive to serve have shared both a distrust and fear for their personal safety when engaging with campus public safety, consistent with the national discourse surrounding the inherent systemic racism and discrimination present in law enforcement nationwide. In a recent *NYC Student Policy Town Hall* held by the Alliance in April 2021 for NYC schools, 0% of students who attended said that they felt safer with campus safety officers and/or NYPD present in schools regarding sexual violence. Many of our members have experienced the benefits of restorative and transformative justice models in response to instances of sexual violence. Because of our members' positive experiences with these models, we would like to advocate that the DOE provides resources and guidance around trauma-informed best practices to institutions regarding informal resolution, rooted in the Indigenous practices of restorative and transformative justice.

- Discipline versus Criminality

As we as a nation reimagine policing in America, we urge the DOE to re-envision the ways in which the federal government protects students from sex discrimination without further exposing them to harm. Over the last two decades, we have witnessed politicians at the local, state, and federal level use the experiences of survivors to bolster policing budgets and increase the standards of criminality throughout the reporting process and the retraumatization it causes. We request that the DOE sets new precedent in their efforts to combat sexual violence and sex-based discrimination and reduce retraumatization of survivors at every point in the Title IX process.

More specifically, we believe the DOE should remove the requirement for live cross examination during Title IX hearings. Requiring live cross-examination during hearings for Title IX cases, and not other student disciplinary proceedings, mimics the criminal justice system more than a campus conduct system. Campus conduct systems exist separately from the criminal justice system and have different goals. The Clery Act, as amended by VAWA, requires institutions to notify victims (1) of their right to contact law enforcement and (2) the right not to notify law enforcement, thus making legislative intent clear. Many students, particularly those from historically marginalized communities, with emphasis on Black and Brown students and undocumented students, feel unsafe interacting with the criminal justice system and reporting to the police. This does not diminish their right to access an education free from violence and engage with the Title IX process.

In closing, on behalf of the NYC Alliance Against Sexual Assault and those we strive to serve, we strongly encourage the current DOE to ensure that the diverse needs and experiences of students enrolled at city schools are considered in the review of the current regulations. We also welcome any opportunity to provide additional input and information toward this effort. Thank you for your time.

Sincerely,

Tracia Banuelos and Sam Skaller, Co-Chairs of the Title IX Committee  
The New York City Alliance Against Sexual Assault