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**Sent:** Thu, 10 Jun 2021 16:08:30 +0000  
**To:** T9PublicHearing  
**Cc:** Randi Bregman;Samantha Skaller  
**Subject:** Written Comment: Title IX Public Hearing (NYS Campus Working Group)  
**Attachments:** NYS Campus Working Group\_Public Hearing Comment 6.10.21.pdf

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To the Department of Education, Office for Civil Rights:

The New York State (NYS) Campus Working Group 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."

The NYS Campus Working Group has been leading a multidisciplinary effort to combat campus sexual violence in New York State with membership comprising institutions of higher education, attorneys, and rape crisis programs with years of expertise serving college and university populations.

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.*

Warmly,

Rachel Geller (NYC Alliance Against Sexual Assault), Randi Bregman (Vera House), and Samantha Skaller (NYC Alliance Against Sexual Assault), on behalf of the NYS Campus Working Group



New York City Alliance  
Against Sexual Assault



June 10, 2021

**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 State Campus Working Group 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.”

Since 2015, The New York State Campus Working Group has been leading a multidisciplinary effort to combat campus sexual violence in New York State with membership comprising institutions of higher education, attorneys, and rape crisis programs with years of expertise serving college and university populations. The significant existing expertise in New York State was bolstered by the introduction of Education Law 129-B or ‘Enough is Enough’ in 2015. This is a comprehensive campus sexual assault law, which addresses prevention and response to campus sexual assault, stalking and dating violence - including due process rights for all, protections for students of all genders, and requirements for accommodations, resources and prevention education. Due to this law, New York State colleges and universities have been working in close partnership with over 50 rape crisis programs and community-based organizations consistently since 2015, building multidisciplinary responses to campus sexual violence.

Over the last five years, the NYS Campus Working Group 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 can be seen 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’d like to request action more specifically on portions of the current rule that most directly impact our membership and the communities we strive to serve throughout New York State.

**Mandate a Uniform “Preponderance of the Evidence” Standard**

Members of the NYS Campus Working Group stand firmly behind the “preponderance of the evidence” standard as the uniform evidentiary standard for all Title IX proceedings, as this is the evidentiary standard for all other student conduct cases. We do not believe that the DOE should give schools a choice to increase the evidentiary standard for Title IX cases to “clear and convincing.” The option to increase evidentiary standards in Title IX cases places a burden on complainants that they would not be subject to if they were the victim of other types of prohibited student conduct. In accordance with the argument set forth in the *Doe V. Brandeis* decision (cited in the 2017 Dear Colleague Letter) a uniform standard for student disciplinary proceedings creates a more equitable process for all those involved. The NYS Campus Working strongly believes that the DOE should make the “preponderance of the evidence standard” the uniform standard for all Title IX cases.

**Ensure Fair Campus Conduct Systems**

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 also (2) the right not to notify law enforcement, thus making legislative intent clear. Many students,

particularly those from historically marginalized communities, 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.

Furthermore, requiring cross-examination places significant financial burdens on complainants, respondents, and institutions. In schools that cannot afford to provide qualified “advisors of choice” or reimburse students for hiring outside counsel, students will have to hire their own advisors of choice. Many of our members have witnessed first-hand the inequity that exists when wealthy students are able to hire attorney’s as their advisor of choice for the cross-examination process and low-income students do not have that ability. The new regulations do not state that if students cannot afford to hire private counsel, counsel will be provided to them. This requirement of the 2020 Title IX Regulations has had a chilling effect on reporting, as it has forced many student survivors to contemplate how reporting will affect them economically in their cost-benefit analysis of whether or not to disclose.

### **Develop Equitable Informal Resolution Options**

While we are thrilled to see the DOE take into account multiple procedural options for students who have experienced sexual violence, we believe more guidance needs to 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. Many of our members have experienced the benefits of restorative and transformative justice models in response to instances of sexual violence. Because of many of our 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.

### **Remove Religious Exemption to Title IX:**

We remain concerned about institutions’ ability to request an exemption from compliance with Title IX if compliance is in conflict with the institution’s 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 the rights to pregnant students, non-binary students, transgender students and LGBTQ+ students. As the current rule stands, the DOE is assuring religious institutions that they would not be required to claim an exemption from DOE, or give students any notice that they are claiming a religious exemption from Title IX, before they engage in discrimination on the basis of sex, or against LGBTQ students, pregnant or parenting students (including those who are unmarried), and/or students who access or attempt to access birth control or abortion. Schools could come up with a religious excuse justifying their discriminatory action once they are already under investigation for violating Title IX. 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.

### **Encourage Collaboration with Community-Based Rape Crisis Centers:**

Much of the success in New York State’s response to campus sexual violence is largely in part due to the requirement for schools to collaborate with community-based rape crisis centers. New York State Education Law 129B both funds and outlines the ways in which community-based rape crisis organizations can provide prevention education, policy support, and direct services to students, faculty, and staff. Based on the many successful collaborations throughout New York State, we strongly recommend the DOE adopt a similar model of encouraged collaboration on the federal level.

On behalf the New York State Campus Working Group and those we strive to serve, we strongly encourage the Biden-Harris administration to reverse Title IX rule elements that have created discriminatory and inequitable educational environments for those who have experienced sexual violence in any form. We also welcome any opportunity to provide additional input and information toward this effort.