June 8, 2021

Dear Office for Civil Rights,

We are the volunteer victim advocates of Sexual Offense Support (S.O.S.) serving victims in the University of Delaware community. Our organization was founded in 1976 as a grassroots movement through the collaboration of students and staff. We provide services to victims of all forms of sexual harassment, sexual assault, intimate partner violence, stalking and sexual exploitation (www.udel.edu/sos). Our organization currently has 38 volunteer victim advocates who are a mix of undergraduate and graduate students, UD staff, and alumni community members. Campus victims access an advocate by calling the University’s 24/7 Helpline. We listen, provide support, share information and options, provide accompaniment to the hospital and to other services, and make referrals to campus and community resources. Our training program is credentialed by the National Advocate Credentialing Program of the National Organization for Victim Assistance. We believe that the new Title IX Regulations pose a threat to the safety of campus victims by rolling back the great strides that had been made regarding Title IX in 2011 and 2014. We have been trained in trauma-informed responses and services, and we have extensive collective experience responding to victims who are in the throes of trauma. The new regulations tilt campus adjudication processes to benefit those accused and reflect a lack of understanding of survivors’ experiences and needs.

**Definition of Sexual Harassment**

The new definitions under Title IX that allow a portion of sexual harassment to be categorized as so “severe, pervasive and objectively offensive” that it interferes with a victim’s education...
requires schools to ignore harassment behaviors that still create a hostile environment for the victim and interfere with the victim's education. It also minimizes the options available to victims for addressing the victimization they experienced and seeking accountability. The fact that a school can ignore some harassment contributes to campus rape culture which organizations like ours have worked hard to eliminate. Allowing such behaviors also promotes toxic masculinity. If schools are unable to set and maintain standards of appropriate behavior that prevent and address sexual harassment in all its forms, it will send a message to those who wish to engage in abusive behaviors that this is acceptable.

**Standard of Evidence**

Our greatest concern with this portion of the regulations is the statement that if schools use the Clear and Convincing Standard in any other place, they must also use this standard in sexual harassment cases. If a school uses the Preponderance Standard for all other Student Conduct policies, but then must adopt a higher standard for Sexual Harassment policies only, it is essentially discriminating against victims by imposing a higher burden of proof. DOE should not allow, let alone require, this type of discrimination.

**Live Hearings with Cross-Examination**

Some survivors who call our helpline have questions and concerns about reporting and about how the University's adjudication process works. They have many misgivings, hesitation and fear about how stressful and overwhelming each step in the conduct process will be. The requirement that schools allow live cross-examination has already caused some survivors to opt out of reporting and/or of participating in the process as complainants. The conduct process is scary to most participants already. We know that sexual assault in particular is a highly underreported crime in the criminal justice system and fears about being blamed, judged or having to be cross-examined in court by a defense attorney prevent many from reporting. The same concerns are now a factor in Title IX cases, with the possibility that an attorney will act as the respondent's "advisor" to ask the respondent's questions during cross-examination. This creates a great deal of anxiety for survivors, is unnecessary in a private campus deliberation, and is not trauma-informed. Many victims think that when they report to University officials, these entities are the authorities responsible for taking action to address the inappropriate behavior of one of its students. They feel protected by the process and don't see a need to secure a private attorney, and many cannot afford it. We believe it would be best for DOE to remove the requirement of cross-examination. After 2011 and 2014 guidance, many institutions including our own adopted the investigative model for handling cases, which increased reporting and made it more accessible to survivors to report.

**Location of the Offense**

We believe that colleges should be required to address incidents of sexual misconduct that occur between two students in off-campus residences, in the local community, online or on school-sanctioned study abroad programs that take place outside of the United States. This is important because after an assault or incidence of dating violence, the victim may be especially
fearful and afraid to walk around on campus, worrying about the danger that might be present if they run into the perpetrator. This is what a “hostile environment” is – not being free to go where you need to go, study in any location, eat in the dining hall, focus on courses, think clearly while studying, feel safe participating in campus activities – because of worry about running into the perpetrator or because of literal threats the perpetrator has made.

Furthermore, limiting those cases that must be investigated to only those that took place on campus or in a school sponsored program creates a disparity of services provided to victims and a severe disparity of accountability. For example, if student A lives in a residence hall and is raped by a fellow student, and student B lives in an off-campus rental apartment and is raped by a fellow student, this proposed regulation would require the University to hold the perpetrator of student A accountable but not hold student B’s perpetrator accountable. Why should an institution be allowed to hold one student accountable to its conduct policy and allow another student’s violation of the same policy to be ignored – based on the criteria of location? This is irresponsible, unfair and inequitable. If a school is allowed to set its expectations for student behavior, then it should also be empowered to hold all students accountable to those standards, regardless of location of the conduct. We realize that the DOE allowed schools to hold students accountable for off-campus behaviors through a separate, non-Title IX process, but that means some schools may have opted not to do so.

Responsibility to Investigate
During the 2019 public comment period, we supported the shift to a model in which only reports to certain parties with corrective authority are required to be investigated because we believe that requiring all faculty to be mandatory reporters made it difficult for some survivors to speak freely about their experiences and be referred to helping resources. However, because the DOE removed the language around “responsible employees” and left it up to each school to determine who would be mandated reporters, different institutions made different decisions. At our institution, faculty are still mandated reporters. Especially in classes where the topic of sexual harassment and misconduct are part of the curriculum, students are forced to be silent about their own experiences if they are not comfortable having their story be reported to the Title IX Coordinator. As advocates, we believe firmly in giving survivors the choice to decide whether or not to report the harm that was done to them. There are too many employees who are required to report, versus not enough places where victims can go to share their experiences confidentially and seek help.

Presumption of Not Responsible
Historically, victims of sexual harassment and sexual violence have had many obstacles preventing them from seeking justice. The majority of sexual assaults, 2 out of 3, are not reported and looking specifically at people of college age, only 20% of female student victims report and 32% of female non-student victims report (Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, as cited by rainn.org). This is exactly why legislation like Title IX, the Clery Act, and the Violence Against
Women Act were created. The Clery Act was initiated after Jeanne Clery was raped and murdered in her residence hall. Her parents advocated that schools must be required to disclose past crime so that families would be fully aware of potential danger to make an informed decision when choosing a college. While some of these initiatives have had unintended consequences, they all originate from a similar goal to prevent and address harm.

Of the sexual violence crimes not reported to police from 2005-2010, victims gave the following reasons for not reporting (DOJ, OJP, Bureau of Justice Statistics, Female Victims of Sexual Violence, 1994-2010.):

- 20% feared retaliation
- 13% believed the police would not do anything to help
- 13% believed it was a personal matter
- 8% reported to a different official
- 8% believed it was not important enough to report
- 7% did not want to get the perpetrator in trouble
- 2% believed the police could not do anything to help
- 30% gave another reason, or did not cite one reason

Thus, the expectation that schools provide a written presumption of not responsible to the respondent reflects a lack of understanding of sexual misconduct and the psychology of perpetration. It also demonstrates acceptance of the rape myth that victims often lie and falsely report sexual assault/harassment. According to FBI statistics, sexual assaults are falsely reported at the same rate as all other felony crimes (2-8%). Sending respondents the message of a presumption of not responsible serves no purpose. Why would the DOE allow schools to appear as though they favor respondents, rather than requiring schools to appear impartial?

**Time Frame for Resolution of Cases**
Past guidance encouraged schools to complete the adjudication process within a 60 day time frame, and as a result, many schools were diligent in striving to stay within those constraints. We are concerned that the elimination of the 60 day time frame has led to schools taking a much longer period of time to complete the process. We have had contact with survivors whose cases seemed to be dragging on for several months, well outside of this recommended time frame and even beyond the point where the respondent has graduated. Once the parties leave the institution, it becomes much harder for the institution to implement sanctions in cases where the respondent is found responsible for violating policy. Furthermore, complainants must endure severe mental duress when the school drags its feet, which likely impedes their ability for academic success. It also sends a message that accountability and safety are not priorities to the school or to the DOE.

**Supportive Measures**
Past guidance required schools to take steps to protect victims and remedy the harm. Examples outlined in the guidance included initiating a Ban from Contact; allowing changes to the complainant’s academics, clubs or sports, or his or her living, transportation, dining, and
working situation; and making the complainant aware of their rights and resources under Title IX. We have seen how important these measures are to victims who call us in crisis. Some survivors only opt to engage in the conduct process because they specifically want to access the Interim Measures available in the process. Because the new regulations do not allow schools to take any steps that may be considered disciplinary, punitive or “unreasonably burdensome” to respondents, schools are disempowered from taking action that would immediately protect the community. Not being allowed to remove a respondent from campus until the outcome of a case is determined may put not only the victim at risk, but also other potential victims. We recommend keeping the language in past guidance which allowed schools to take steps to protect victims and remedy the harm.

**Religious Exemption**

Faith-based schools should be allowed to claim a religious exemption. That said, there was no good reason to remove the expectation that schools seek assurance of their religious exemption in advance by submitting a written request for the assurance to the Assistant Secretary. This practice allowed students to be aware of their schools’ exemption, and potentially the school’s interest in not having to provide Civil Rights to all students. Our worry is based on past history, in which the Religious Exemption has been used to justify discrimination against LGBTQ students, and to prevent women from utilizing their reproductive rights.

**Accountability**

Schools should be held accountable for not meeting their Title IX requirements to investigate incidents of sexual misconduct. And DOE should hold all schools that fail to meet the Title IX regulations accountable, not just those found to be “deliberately indifferent” to harassment.

Thank you for the opportunity to provide comment.

Respectfully,

The volunteer Victim Advocates of Sexual Offense Support
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Submitted by Angela DiNunzio Seguin, Assistant Director for Victim Advocacy on behalf of the volunteer Victim Advocates of S.O.S.
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