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Sent: Fri, 11 Jun 2021 20:28:28 +0000
To: T9PublicHearing
Cc: Elizabeth Karam;Lindsey Crusan-Muse
Subject: Written Comment: Title IX Public Hearing (Definition of Sexual Harassment, Requirement for Live Hearings and Cross-Examination, Geographic Scope of Title IX, Time Frame of Investigations)
Attachments: SPCVS Title IX Hearing Comment - June 2021.docx

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Dear Representative of the United States Department of Education,

We at St. Peter's Crime Victim Services submit the attached comment to the Department of Education for consideration in the Title IX Public Hearing. We thank you for taking the time to view our statement, and we hope you will address our concerns when making decisions on this matter.

With regards,

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The Staff of St. Peter's Crime Victim Services

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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

We at St. Peter's Crime Victim Services respectfully submit this comment as testimony to inform the United States 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."

St. Peter's Crime Victim Services (SPCVS) is part of St. Peter's Health Partners, the largest healthcare network in the Capital Region of New York state. The mission of St. Peter's Crime Victim Services is to reduce the incidence and trauma of all crimes through person-centered emotional support, advocacy, medical and legal assistance, and community-based prevention efforts. We are comprised of New York State Certified Sexual Assault Counselors, including trauma therapists, victim advocates, community liaisons, and Forensic Examiners. All of our colleagues work directly with survivors of sexual harassment, sexual assault, intimate partner violence, and stalking. Our team serves several colleges and universities in the Capital Region of New York state. Our direct work with college students, in conjunction with an examination of peer-reviewed research, has granted us a uniquely clear view of on the topics of college campus sexual violence and the Title IX reporting process.

Sexual violence can do remarkable harm to the physical, emotional, and psychological health of college students. Furthermore, the Title IX process can exacerbate the harm to student survivors, potentially subjecting them to greater trauma than the initial act of violence, when conducted without consideration for the students' safety and wellbeing. Our comment on the department's Notice of Proposed Rulemaking concerning Title IX of the Education Amendments of 1972, submitted to and published in the Federal Register, outlined our ardent opposition to the Proposed Rule, which was subsequently enacted in August 2020 as the Final Rule. We believe the provisions in the Final Rule place students at significant risk of avoidable, unnecessary harm, and thus we wish to request action on specific portions of the Final Rule most detrimental to the safety and wellbeing of the students we serve.

Adopt an All-Encompassing Definition of Sexual Harassment

According to the Final Rule, sexual harassment is defined in part as conduct that a reasonable person would find so "severe, pervasive, and objectively offensive" that it denies a person equal educational access. This definition is highly restrictive and fails to protect students from significantly harmful behaviors.

SPCVS defines sexual harassment as any unwanted contact of a sexual nature. This can include physical, verbal, and online contact, such as using demeaning sexual language, unwanted touching, and unwelcome sexual messages through email or social media. Whether harassment occurs once or is part of an ongoing pattern, these behaviors can cause significant mental and emotional harm to survivors. For college students, short-term and long-term health concerns can include difficulty studying or concentrating on other tasks, difficulty sleeping, a desire to leave school, anxiety depression, social isolation, substance abuse, self-harm, and suicidal thoughts (Black et al., 2011; Campbell, Dworkin, & Cabral, 2009; Hill & Kears, 2011). By enforcing the definition of severe, pervasive, and objectively offensive, the Final Rule forces students to endure a much wider range of harmful behaviors, increasing their risk of the aforementioned health consequences.

As written in the Final Rule, conduct must meet all three criteria (*severe and pervasive and objectively offensive*) before falling under the purview of Title IX. This leaves students vulnerable to continuously harmful and escalating behaviors. Under this rule, Title IX may not address a single incident of unwanted sexual behavior, even if the behavior is deemed severe and/ or objectively offensive (such as unwanted touching or the sending of unwanted pornographic images). The behavior would have to occur repeatedly until it could be described as “pervasive,” meaning that person would have to be victimized multiple times before they could seek recourse through Title IX.

Furthermore, the Final Rule fails to specify what constitutes severe or objectively offensive conduct, leaving that interpretation to the subjective discretion of schools. What one student may interpret as harmless behavior (such as a demeaning joke or hand gesture), another student may consider severe and/or objectively offensive (Hill & Silva, 2005). Even if such a behavior were to persist after the target told the perpetrator to stop, it might not rise to the level of Title IX due to the subjectivity of “severe” and “objectively offensive” as outlined in the Final Rule. Therefore, the target may be forced to continue to endure the behaviors or leave the academic institution.

To better protect students and their access to educational opportunities, we request that the department adopt a definition of sexual harassment to include conduct that is so “severe, pervasive, or objectively offensive” that it denies a person equal educational access. This definition implies that conduct need only rise to one of the three criteria to fall under the jurisdiction of Title IX, thereby encompassing a wider range of behaviors reportable under Title IX and offering greater protection to students and victims.

Eliminate the Requirement for Live Hearings Including Cross-Examination

The Final Rule includes the provision that a college’s grievance process must provide for a live hearing in which each party’s advisor of choice must be permitted to cross-examine the other party. Cross-examinations must allow for questions to examine relevant evidence and challenge the credibility of the other party. Additionally, schools must dismiss any testimony provided by a participant or witness who does not submit to cross-examination. This provision effectively forces students to participate in a potentially distressing process and engage with their harasser, both of which can be extremely harmful to reporting students.

As stated previously, survivors of any form of sexual violence can experience significant mental health challenges, including post-traumatic stress (Black et al., 2011; Campbell, Dworkin, & Cabral, 2009). Symptoms of post-traumatic stress can include hypervigilance, anxiety, fear, social isolation, intrusive memories of the traumatic event, and flashbacks. Essentially, survivors live in a state in which they are constantly bracing for the traumatic event to happen again. Moreover, survivors of sexual violence are more vulnerable to “triggers,” or external reminders of that event (American Psychiatric Association, 2013; National Institute of Mental Health, 2016). Triggers can take many forms, including direct exposure to one’s assailant and disclosure of the details of sexual violence.

By forcing students to participate in live hearings in which they must face their assailant, the Final Rule subjects survivors to an intensely triggering proceeding, one that can severely destabilize a student’s mental health (Zajac & Cannan, 2009). Even if the complainant and respondent are in separate rooms and the hearing is facilitated by audio-visual technology, the on-screen image and voice of one’s assailant may still trigger intense emotional responses, such as flashbacks or panic attacks. While being forced to face reminders of the traumatic experience, survivors may in fact be re-traumatized during a live hearing, making it considerably harder to heal and return to their education.

Within the live hearing itself, cross-examination poses unique risks to students’ mental health while tipping the scales away from survivors. When survivors share their experiences of sexual violence, they are often presented with questions that effectively blame them for becoming victims (i.e. questions

about the way they were dressed, if they said ‘no’ or tried to fight off the assailant, etc.). Questions like these invalidate a survivor’s experiences and can contribute to worsening mental health outcomes, listed previously (Campbell, 2005). Cross-examination, by design, includes questions aimed at invalidating a reporting student’s account, creating further harm. Cross-examination also includes questions that challenge the survivor’s recollection of the event, making it less likely that survivors will continue to seek help (Campbell, 2005; Zajac & Cannan, 2009). In addition to invalidating a survivor’s experience, these questions ultimately offer little benefit to the grievance procedure due to the nature of traumatic memory.

When a person experiences something traumatic, that person’s brain enters a survival state, commonly referred to as “flight, fight, or freeze” mode (van der Kolk, 2014). When that happens, the part of the brain responsible for processing memories temporarily deactivates, meaning that survivors rarely remember the sequence of events during an assault. Instead, they may remember sporadic details or sensory information, informing what might act as triggers for that person (American Psychiatric Association, 2013; National Institute of Mental Health, 2016; van der Kolk, 2014). As a result, it is not uncommon for survivors to have an unclear account of what happened during an assault. Additionally, over time, the person may recover memories of the event, ultimately changing their account from one that was initially presented. Therefore, when a survivor changes the account of the traumatic event or struggles to recall certain details, one cannot assume that the survivor was ever being dishonest. Cross-examination is a process designed to find inconsistencies in one’s account and challenge them as dishonesty. Subjecting a student to cross-examination may lead to inaccurate interpretations of traumatic memory recall as dishonesty, further invalidating and traumatizing survivors (Campbell, 2005; van der Kolk, 2014).

According to the Final Rule, in order for reporting students’ statements to be accepted, those students must submit themselves to questions of this nature, risking further harm at the hands of an advisor of choice. Cross-examination questions, sanctioned by the institution, deliberately harm students in the course of grievance procedures. In order for schools to maintain their promise to protect all of their students, we request that the department remove the requirement for live hearings and live cross-examination in favor of a process that protects the mental health and wellness of student survivors.

Widen the Geographic Scope for Which Academic Institutions May Investigate Reports

In accordance with the Final Rule, schools are obligated to respond to sexual harassment occurring within the school’s education program or activity, against a person in the United States. Within the United States, the school’s scope of responsibility with respect to Title IX includes “locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context within which the sexual harassment occurred” or “within any building owned or controlled by a student organization that is officially recognized by a post-secondary institution”. Furthermore, schools may elect to address sexual harassment occurring outside Title IX’s purview in accordance with their own respective policies.

By instating the provision that schools need only respond to sexual harassment occurring in the United States, the Final Rule narrows the geographic scope of Title IX’s jurisdiction, thereby failing to address sexual harassment occurring in study-abroad programs or other circumstances in which students and/or staff may be participating in an education program or activity outside of the United States. Similarly, the Final Rule provides that schools are not obligated under Title IX to respond to sexual harassment occurring outside their own campus, so long as the harassment did not occur within a school’s education program or activity. For the many students living in off-campus housing and experiencing sexual harassment within that context, this leaves the possibility that the school they

attend may not be obligated to respond to their report, even if the respondent is another member of the school's community (Fisher, Cullen, & Turner, 2000; Department of Justice, Bureau of Justice Statistics, 2014; Hill & Silva, 2005). By excluding these students from the scope of Title IX, institutions fail to protect significant portions of their student bodies.

While schools are not inhibited by the Final Rule to respond to sexual harassment occurring outside of Title IX's jurisdiction, schools are not uniformly required to establish processes by which sexual harassment occurring outside Title IX's jurisdiction may be remediated. This creates disparity between the response of schools to sexual harassment, wherein a student who is sexually assaulted outside of Title IX's scope of coverage may have access to a parallel process at one school, but not at another. In narrowing the scope under which schools are obligated to respond to sexual harassment, the Final Rule has left major gaps in coverage, hinging a school's responsibility to redress non-Title IX instances of sexual harassment upon self-determination. Furthermore, the Final Rule fails to address how a school's scope intersects with online harassment and the recourses available for complainants of that crime, for which a location is typically indeterminate. This creates inequitable access to a school grievance process across student survivors and leaves some survivors little to no opportunity for remediation within their school system.

We request that the department widen the scope of Title IX to protect all enrolled students, including those enrolled in study-abroad programs, those who live off-campus, and those victimized by online harassment. In doing so, the department can ensure equal protections for all students under Title IX.

Mandate a Specific, Prompt Time Frame for Investigations

The Final Rule provides that grievance processes must include "reasonably prompt time frames" for conclusion of said grievance processes, including the opportunity for appeals and informal resolutions, and "with the allowance for short-term, good cause delays or extensions of the time frames." No time frames are specified within the text of the Final Rule, allowing each institution further determination in what constitutes a "reasonably prompt time frame". While this may seem reasonable given that each institution may have different staffing capacity with respect to Title IX administration, leaving the work of defining what constitutes a "reasonably prompt time frame" entirely up to the discretion of the school may prove detrimental to the reporting party.

Specifically, prolonging of the grievance process may result in a myriad of negative outcomes for student survivors, including living day after day with uncertainty around the resolution of the grievance process while simultaneously dealing with other impacts of victimization, including PTSD, anxiety, and depression (Black et al., 2011; Campbell, Dworkin, & Cabral, 2009). Furthermore, the longer a student survivor sits in indeterminacy around their case, the more exacerbated the mental health impacts survivors experience may become. This may seriously compromise the emotional safety of the student survivor as they attempt to continue their education post-victimization (Black et al., 2011; American Psychiatric Association, 2013; National Institute of Mental Health, 2016; van der Kolk, 2014).

Additionally, allowing for too much flexibility in the timeframe of the grievance process may also grant respondents the opportunity to be out of reach by the time schools begin to investigate all relevant parties, release investigative findings, hold hearings, or impose sanctions. Furthermore, the opportunity for additional violence and retaliation to be perpetrated against the complainant by the responding party is widened the longer the grievance process takes. The likelihood that the grievance process will successfully redress sexual harassment is impacted by the aforementioned provision and may fail survivors in addressing their concerns.

We request that the department mandate a specific, prompt time frame for conducting investigations and grievance procedures. We believe that doing so will offer students safety and

security during the course of Title IX proceedings, better enabling them to pursue their educations in the process.

Conclusion

Through the provision of services to victims and survivors of crime, our agency seeks to meet three basic needs of victims/survivors: (1) the need to feel safe, (2) the need to express emotion, and (3) the need to know “what comes next” after victimization. Each survivor has their own healing journey and the right to self-determination in pursuing remediation, and our responsibilities as victim service providers are to inform and support survivors in the choices they make with respect to their victimization and the needs that follow. Following victimization, victims/survivors are left in an increased state of vulnerability and may seek recourse for the sake of their own physical, mental, and emotional safety. In our service to student survivors, we find ourselves having conversations about remediation through the Title IX process. As written, the Final Rule renders the Title IX process detrimental to the wellbeing of survivors, if not inaccessible. We hope with reconsideration of the provisions outlined in the Final Rule, the Department of Education may allow the Title IX process to successfully redress sexual harassment with care and consideration for the individuals brave enough to report it.

We thank you for your time and consideration on this critical matter, and we hope going forward we may work continue to together in creating safe and supportive learning environments.

Respectfully,
The Staff of St. Peter's Crime Victim Services

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