

From: Terry Fromson
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Attachments: Women's Law Project Written Testimony June 2021 Title IX Public Hearing.pdf

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Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

The Women's Law Project (WLP) submits this written comment to support the Department's plans to publish a new proposed Title IX rule on sexual harassment.

Thank you for your consideration of our commentary and recommendations.

Respectfully,

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Submitted via T9PublicHearing@ed.gov

June 10, 2021

The Honorable Miguel Cardona
Secretary
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Written Comment for Title IX Public Hearing (Sexual Harassment)

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

The Women's Law Project (WLP) submits this comment to support the Department's plans to publish a new proposed Title IX rule. The Women's Law Project supports new regulations that will provide stronger protections against the sex-based harassment in our schools and on our campuses. We encourage the Department to propose regulations that will broadly construe Title IX so that its protections extend to the types and sources of harassment that negatively impact students and enable students who have been subjected to harassment to continue their education by providing equitable procedures, supportive measures, and resolutions of complaints.

WLP is a Pennsylvania-based Women's Law Project is a nonprofit public interest legal organization working to defend and advance the rights of women, girls, and LGBTQ+ people in Pennsylvania and beyond. We leverage impact litigation, policy advocacy, public education, and direct assistance and representation to dismantle discriminatory laws, policies, and practices and eradicate institutional biases and unfair treatment based on sex or gender.

WLP has been representing and assisting students who have been subjected to serious sexual misconduct in K-12 schools and higher education institutions for decades. We recognize the trauma resulting from sexual harassment in educational programs, the challenges faced by the victims seeking remedial assistance to preserve their access to education, and the further victimization they experience as they pursue these efforts. Before the 2011 DCL, schools ignored the sexual harassment in their midst and disbelieved complainants, deprived victimized students of accommodations necessary for them to access their education, and elevated the interests of the accused over the interests of the complainant when assessing complaints. The 2011 Dear Colleague Letter (DCL) made some progress in helping schools develop fair and equitable procedures for investigating and adjudicating sexual harassment and misconduct in violation of their required Title IX policies. The guidance addressed the needs of victims, balanced the rights of students, and accomplished improvement in school responses.

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The 2020 Trump Administration Final Rule imposed an extremely narrow range of responsibility for schools to respond to students seeking relief from sexual harassment and mandated specific and burdensome procedures and standards that favor accused students and place students in greater danger of physical, mental, and emotional harm and loss of educational opportunity in violation of the law.

The prevalence of sexual harassment at all levels of education and challenges to reporting the harassment demand appropriate responses. More than half of 7th-12th grade girls have experienced some form of sexual harassment.¹ One in 5 women and one in 16 men are sexually assaulted while in college.² The harm will fall disproportionately on girls of color, pregnant and parenting students, girls with disabilities, and LGBTQ students, who suffer disproportionately from sexual harassment and whose complaints are ignored due to stereotypes that blame the victim.³ Thirty-four percent of student sexual harassment survivors already drop out of school because they feel unsafe, are subjected to retaliation, or are expelled due to bad grades caused by the trauma of harassment.⁴ Only 12 percent of college survivors⁵ and 2 percent of girls ages 14-18⁶ report sexual assault to their schools or the police. Reporting can be difficult for young people for a number of reasons, including confusion about how to report and mistrust of the school procedures.⁷

¹ AAUW, *Crossing the Line: Sexual Harassment at School* (2011); see also National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 3 (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence> (“[M]ore than 1 in 5 girls (21 percent) ages 14 to 18 reported that they had been kissed or touched without their consent, with LGBTQ girls even more likely to report that they had been assaulted in this way.”).

² Christopher P. Krebs, et al., *The Campus Sexual Assault (CSA) Study* (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

³ Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARVARD J.L. & GENDER 1, 16, 24-29 (forthcoming), available at <https://ssrn.com/abstract=3168909>; National Women’s Law Center, *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color* 1 (2016), available at <https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color>; Chambers & Erausquin, *The Promise of Intersectional Stigma to Understand the Complexities of Adolescent Pregnancy and Motherhood*, JOURNAL OF CHILD ADOLESCENT BEHAVIOR (2015), available at <https://www.omicsonline.org/open-access/the-promise-of-intersectional-stigma-to-understand-the-complexities-of-adolescent-pregnancy-and-motherhood-2375-4494-1000249.pdf>; David Pinsof, et al., *The Effect of the Promiscuity Stereotype on Opposition to Gay Rights* (2017), available at <https://doi.org/10.1371/journal.pone.0178534> National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls With Disabilities* 7 (2017), available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities>; GLSEN, *The 2019 National School Climate Survey* xix, 30 (2020)

⁴ Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), available at <https://doi.org/10.1177/1521025115584750>.

⁵ *Poll: One in 5 women say they have been sexually assaulted in college*, WASHINGTON POST (June 12, 2015), <https://www.washingtonpost.com/graphics/local/sexual-assault-poll>.

⁶ National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017), available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.

⁷ Christopher P. Krebs, et al., *The Campus Sexual Assault (CSA) Study* 2-4 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

We respectfully request that the Department of Education propose new regulations that will restore and strengthen protections for sex-based harassment and retaliation and ensure fair disciplinary procedures, by including the following provisions:

- Define sex-based harassment as unwelcome sexual conduct, including quid pro quo harassment, dating violence, domestic violence, sex-based stalking, and harassment based on sexual orientation, gender identity, gender expression, transgender identity, sex stereotypes, sex characteristics, parental status, pregnancy, childbirth, or related conditions, including termination of pregnancy (without the Trump Administration's inappropriate application of the judicial standard of requiring that the harassment be severe, pervasive, *and* objectively offensive, forcing students to endure repeated and worsening harassment before their schools are required to respond).⁸
- Require schools to respond to sex-based harassment that interferes with or limits an individual's ability to participate in or benefit from an education program or activity regardless of where it occurs, including off-campus or abroad;
- Require schools to respond to sex-based harassment that interferes with or limits an individual's ability to participate in or benefit from an education program or activity whenever the school exercises substantial control over both the perpetrator and the context of the sexual harassment;
- Clarify that Title IX protects all persons, including those who are neither students nor employees, who seek to access or benefit from an education program or activity;
- Require schools to address sex-based harassment that they know or should know about as well as harassment by school employees that occurs in the context of their job duties regardless of whether the harassed individual is at risk of further actionable harassment or whether the school was previously on notice that the accused was a harasser. Students should not have to file a formal complaint with a specific individual before a school will respond to sex-based harassment;
- Require schools to provide a prompt, effective, and reasonable response to sex-based harassment, including by providing supportive measures to complainants no later than five school days after receiving notice (without limiting their response by the Trump Administration's misapplication of a rule limiting the school's response to the judicial standard for damages of responding only in a way that is deliberately indifferent);⁹ schools should always endeavor to eliminate the harassment and restore full access to educational opportunities;
- Prohibit schools from conditioning a complainant's access to supportive measures on signing a nondisclosure agreement or waiver of legal claims against the school;

⁸ 34 C.F.R. §§ 106.30(a), 106.45(b)(3)(i).

⁹ 34 C.F.R. § 106.44(a).

- Prohibit schools from ceasing an investigation and adjudication of sex-based harassment after the complainant is no longer enrolled or seeking to be enrolled;
- Allow states and schools to provide additional protections beyond those required by the Title IX regulations;
- Strengthen anti-retaliation protections by:
 - Explicitly prohibiting common forms of retaliation, including but not limited to:
 - Disciplining a complainant for collateral conduct that is disclosed in a complaint or investigation (e.g., alcohol or drug use);
 - Disciplining a complainant for a “false report” or for prohibited sexual conduct solely because the school has decided there is insufficient evidence for a finding of responsibility or because the respondent is found not responsible;
 - Disciplining a complainant for discussing the allegations that gave rise to their complaint; and
 - Disciplining a victim of sex-based harassment for misconduct charges the school knew or should have known were brought by a third party for the purpose of retaliation.
 - Allowing schools to dismiss, without a full investigation, a complaint of sex-based harassment that is patently retaliatory (e.g., a disciplined harasser files a counter-complaint against their victim).
- Ensure fair disciplinary procedures by:
 - Requiring schools to use grievance procedures that are fair and afford parties the same procedural rights, including application of a preponderance of evidence standard; and
 - Permitting schools to require live hearings attended by both parties with direct cross-examination *only* when required by law; otherwise providing trauma-informed accommodations to allow complainants to participate in a space separate from the respondent and include remote options as well, without direct questioning by the respondent or the respondent’s representative. When the law permits direct-examination, do not prohibit schools from considering past statements by parties or witnesses who are not available for direct examination.
- To the extent schools believe they should be exempt from Title IX for religious reasons, require that such exemptions are only provided after an application and review and determination by the Department of Education.

Finally, in developing the new proposed regulations, it is important *not* to impose any uniquely burdensome standards to sex-based harassment that are not applied to other forms of harassment prohibited under federal law, such as Title VI. Consistency is not only fair, but will eliminate any confusion by schools who have to apply these standards, particularly when a student complaint raises multiple forms of discrimination or harassment.

Thank you for your consideration of our recommendations.

Respectfully,

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