

Submitted via T9PublicHearing@ed.gov

June 11, 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 of the Education Amendments Act of 1972 Public Hearing

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

We are survivors of the serial sexual abuse perpetrated by university doctors Larry Nassar at Michigan State University, George Tyndall at University of Southern California, Richard Strauss at Ohio State University, and Robert Anderson at University of Michigan. Our experiences demonstrate how common it is for university employees to use their position, influence, and trust to sexually abuse students on a regular basis, and how school officials enable, facilitate, and conceal the abuse—sometimes for decades. We write to you because we believe it is crucial that the Department of Education restore its longstanding protections for survivors.

More than one in four women, nearly one in fifteen men, and nearly one in four transgender, nonbinary, and gender-nonconforming undergraduate students are sexually assaulted in college.¹ More than one third of college students who experience sexual assault end up dropping out of school; this is higher than the overall dropout rate for college students.² Some of us dropped out of college, or came close to doing so, because of sexual abuse. Many of us received lower grades, lost scholarships, stopped participating in athletics, changed majors, and/or had to change our future plans to pursue graduate degrees. But we survived, and we now ask the Department to undo the harmful changes to the Title IX regulations made by the last administration and strengthen Title IX protections so that all students have equal access to education.³

Under the DeVos regulations issued in 2020, institutions of higher education (IHEs) are permitted to ignore the vast majority of students' reports of sexual harassment, including sexual assault. IHEs are only required to investigate complaints made directly to Title IX Coordinators or school

¹ David Cantor, et.al, Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct* ix (Oct. 15, 2019; revised Jan. 17, 2020), <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>. “Transgender and gender-nonconforming” includes students who listed their gender identity as transgender woman, transgender man, nonbinary or gender queer, gender questioning or gender not listed.

² See Karen Rothman, et al., *Sexual Assault Among Women in College: Immediate and Long-Term Associations with Mental Health, Psychosocial Functioning, and Romantic Relationships*, JOURNAL OF INTERPERSONAL VIOLENCE (2019).<https://journals.sagepub.com/doi/10.1177/0886260519870158>

³ Dep't of Educ., Office for Civil Rights, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020), <https://www.federalregister.gov/d/2020-10512>.

officials with the authority to “institute corrective measures.”⁴ This “actual knowledge” requirement allows schools to ignore sexual abuse known to other school officials such as coaches, assistant coaches, athletic directors and trainers, professors, school doctors or nurses, or other school employees who are not high-ranking officials.

Before the DeVos rule, the Department recognized the particularly egregious harm that occurs when students are preyed upon by school employees and pressured to remain silent. Thus, it acknowledged schools’ heightened responsibility for employee-on-student harassment, requiring schools to take action regardless of whether they had actual notice of the harassment.⁵

The DeVos rule enables serial sexual predators like Nassar, Tyndall, Strauss, and Anderson to thrive at universities. Under this rule, even if dozens of employees know about or suspect the sexual abuse—as they did at our respective universities—the university would not have to take any action unless the “right” employee actually knows about the alleged abuse. This rule is a serious threat to student safety and must be eliminated. We do not want others to suffer the trauma we experienced when our schools enabled physicians to abuse us without any consequences.

To prevent schools from perpetuating sexual abuse, the Department should require schools to respond to harassment that they know or should know about, as well as *any* sex-based harassment by employees that occurs in the context of the employee’s responsibilities at the school.⁶ Because students seeking help often turn to the adults they trust the most, and many students are not informed about which employees have authority to address the harassment, the Department should clarify that sexual harassment which a non-high-ranking employee knows or should know about triggers schools’ responsibilities under Title IX.

The DeVos regulations also allow schools to escape liability so long as their response is not “clearly unreasonable.”⁷ Reducing schools’ responsibility to address sexual harassment normalizes

⁴ 34 C.F.R. § 106.30(a) (defining “actual knowledge”); see also § 106.44(a)

⁵ U.S. Department of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at 10 (2001) [hereinafter “Revised Sexual Harassment Guidance”], available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

⁶ See e.g., Questions and Answers on Campus Sexual Misconduct at 1, 4 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix201709.pdf>; Questions and Answers on Title IX and Sexual Violence at 2 (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Dear Colleague Letter on Sexual Violence at 4 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; Dear Colleague Letter: Harassment and Bullying at 2 (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>; Revised Sexual Harassment Guidance at 10, 13; Dear Colleague Letter on Prohibited Disability Harassment (July 25, 2000), <https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>; Sexual Harassment Guidance, 62 Fed. Reg. 12,034 (Mar. 13, 1997); Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448 at 11450, 11453 (Mar. 10, 1994), <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html>. Under Title VII of the Civil Rights Act of 1964, if an employee is harassed by a coworker, the employer is liable if it knew or should have known about the harassment and failed to take reasonable steps to address the harassment. If an employee is sexually harassed by their supervisor, the employer is ordinarily strictly liable, regardless of whether it had any notice of the harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁷ 34 C.F.R. § 106.44(a); see also § 106.44(b)(2).

and perpetuates abuse. The Department must require schools to take *reasonable steps* when responding to sexual harassment and not get away with doing less.

Another problem with the DeVos regulations is that schools are only required to investigate sexual harassment, including sexual assault, that occurs on campus or during an off-campus school activity.⁸ This requirement will prevent thousands of students who experience sexual violence off-campus, such as in the homes of their abusers or other private locations, from getting the help they need and preventing the abuse from recurring. Often, it will also force students to continue having contact with their abuser. For example, some of us were sexually abused off campus by a university doctor and were still required by our sports teams to submit to physical exams by our abuser. This should never be permitted to happen.

The Department should instead require schools to address sexual harassment that may negatively impact survivors' learning environment or feeling of safety at school, *regardless* of where it occurs. This requirement must include sexual harassment that occurs outside a program or activity if the survivor is likely to be required to interact with the abuser.⁹

We are outraged and deeply saddened that the DeVos rule deters survivors from reporting, makes schools more dangerous, and denies many survivors their legal right to equal access to education after experiencing sexual assault. It allows schools to sweep sexual abuse under the rug without any consequences. In some respects, it even protects schools that perpetuate sexual abuse instead of the people Title IX was designed to protect. We do not want current and future generations to experience the institutional betrayal and trauma that we did. It would be unconscionable to keep the DeVos rule as it is.

Respectfully submitted,

Adrienne Davet, personal representative
of the Estate of Donald Davet

Alana Victor

Alexia Rosenfield

Amanda Rose Thomashow

Ana Delgado

Ohio State University

University of Southern California

University of Southern California

Michigan State University

University of Southern California

⁸ 34 C.F.R. § 106.44(a).

⁹ See David Jackson et al., *Federal officials withhold grant money from Chicago Public Schools, citing failure to protect students from sexual abuse*, Chicago Tribune (Sept. 28, 2018), <https://www.chicagotribune.com/news/local/breaking/ct-met-cps-civil-rights-20180925-story.html> (noting funding recipient found out of compliance with Title IX for failing to address off-campus sexual harassment that created a hostile environment); *Weckhorst v. Kansas State University*, ECF No.26, Department of Justice State of Interest 11-14 (Oct 27, 2016), <https://www.justice.gov/crt/case-document/file/906112/download>; see also, e.g., *Doe 1 v. Manhattan Beach Unified Sch. Dist.*, No. 19CV6962DDPRAOX, 2020 WL 2556356, at *5 (C.D. Cal. May 19, 2020) (noting the “possibility of further encounters ‘between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a [school]’” (quoting *Kinsman v. Fla. State Univ. Bd. of Trustees*, No. 4:15CV235-MW/CAS, 2015 WL 11110848, at *4 (N.D. Fla. Aug. 12, 2015) (quoting *Kelly v. Yale Univ.*, No. CIV.A. 3:01-CV-1591, 2003 WL 1563424, at *3-*4 (D. Conn. Mar. 26, 2003))); *Ellison v. Brady*, 924 F.2d 872, 883 (9th Cir. 1991) (stating similar rule for Title VII).

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Jane Doe #44	University of Southern California
Jane Doe #5	University of Southern California
Jane Doe	University of Southern California
Jeff Bucher	Ohio State University
Jennifer Goodie	University of Southern California
Jerome Jaffee	University of Michigan
Jessica Gonzales	University of Southern California
John Doe	University of Michigan
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John Doe	Ohio State University
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John Doe (Class of 1998)	Ohio State University
John Doe EB-15	University of Michigan
John Doe 1	Ohio State University
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John Doe 86	Ohio State University
John Doe 87	Ohio State University
John Doe 88	Ohio State University
John Doe 89	Ohio State University
John Doe 90	Ohio State University
John Doe 91	Ohio State University
Joseph Bechtel	Ohio State University
John William "Bill" Herndon, Jr.	University of Michigan
Jonathan Vaughn	University of Michigan
Karin Polischuk	University of Southern California
Katherine Carter	Ohio State University
Kimberly Spadaro	University of Southern California
Kristine Plotnick	University of Southern California
Kurt Huntsinger	Ohio State University
Lauren Majewski	Michigan State University
Lila Marshall, M.D.	University of Southern California
Lisa Poole-Daly	University of Southern California
Lori Love	University of Southern California
Lucy Chi	University of Southern California
Madeleine Manasse	University of Southern California

Mark Woods	Ohio State University
Melvin Robinson	Ohio State University
Meredith Schulte	University of Southern California
Mia Carter	Michigan State University
Monica Cuen-Randall	University of Southern California
Morgan McCaul	University of Michigan
Nancy Luca	University of Southern California
Priscilla H.	University of Southern California
Richard Alleshouse	Ohio State University
Richard Goldman	University of Michigan
Riley Ransom	University of Southern California
Rob Williams	Ohio State University
Ronald McDaniel	Ohio State University
Sarah Szalavitz	University of Southern California
Shannon Mullins	University of Southern California
Shernae Hughes	University of Southern California
Shiva (Bill) Wheeler	University of Michigan
Steve Snyder-Hill	Ohio State University
Susie Oh	University of Southern California
T. Brennan	University of Southern California
Vanessa Rodriguez	University of Southern California
William Rieffer	Ohio State University
Ward Black	University of Michigan
Yoon Ju Ellie Lee	University of Southern California