



Submitted via T9PublicHearing@ed.gov

June 11, 2021

The Honorable Miguel Cardona
Secretary of Education
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 (Retaliation & Discipline)*

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

On behalf of the Federal School Discipline & Climate Group (FedSDC), the undersigned 32 organizations, students, youth, families, and community members, we submit this comment regarding the Title IX regulations addressing sexual harassment in education and protections against retaliation and discipline of student survivors in response to the Department of Education's ("the Department") public hearing. FedSDC is a diverse group of local community organizers, national organizations, directly impacted students, youth, families, and community members that exists to protect the interests and educational rights of Black and Brown students through a racial and educational equity lens.

In response to the Department's review of its rules implementing Title IX of the Education Amendments of 1972 (Title IX),¹ we write to share our concerns about the harms of the Trump administration's Title IX rule and our recommendations for changing the Title IX rule so that it will better protect students from all forms of sex-based harassment, including retaliation and other discriminatory discipline.

Title IX prohibits retaliation against those who complain of sex discrimination, in addition to ensuring that schools respond effectively to sexual harassment, including by having "prompt and equitable" grievance procedures.² Unfortunately, we know too well how student survivors who summon the courage to report—especially survivors of color, survivors with disabilities, LGBTQ survivors, and pregnant or parenting survivors—are often punished when they turn to their schools for help. Some are disciplined for physically defending themselves against their

¹ Dep't of Educ., Office for Civil Rights, *Letter to Students, Educators, and other Stakeholders re Executive Order 14021* (Apr. 6, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf>.

² 34 CFR § 106.71 (2021); see also *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) ("Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action.").

harassers, acting out in age-appropriate ways in response to trauma, violating nondisclosure agreements imposed by the school by talking to friends about their harassment, and missing school to avoid seeing their harasser.³ Others are punished for sexual contact on school grounds, based on administrators' conclusions that the contact was "consensual," premarital, or that the accusations of assault were false—meaning these students are punished for their own sexual assaults.⁴ Student survivors in college have also increasingly faced retaliation from their assailants, who seek to weaponize school disciplinary proceedings by filing baseless cross-complaints in an effort to silence and punish victims.⁵ The Title IX rule must make it clear that these types of treatment constitute unlawful retaliation.

Students of color, LGBTQ students, students with disabilities, and pregnant and parenting students, who face *additional* discrimination also based on these identities, are most likely to be retaliated against after reporting sexual harassment. Research shows that students of color and LGBTQ students are at least twice as likely to be sexually assaulted as their white and non-queer counterparts.⁶ For example, combined sex and race stereotypes lead school educators and administrators to "adultify" Black girls, seeing them as more promiscuous and less deserving of protection and care than their peers.⁷ These stereotypes cause schools to view the sexual harassment reports of Black girls and other girls of color as less serious and to ignore, blame, or punish them instead of launching an investigation. Similarly, schools are less likely to believe LGBTQ student survivors due to reliance on stereotypes that they are "hypersexual," "deviant," or bring the "attention" upon themselves.⁸ These biases fuel discriminatory responses to reports of harassment or assault and unjust disciplinary practices. For example, a national survey of LGBTQ youth found that 7.3% were disciplined after reporting their own victimization

³ See, e.g., National Women's Law Center, *100 School Districts: A Call to Action for School Districts Across the Country to Address Sexual Harassment Through Inclusive Policies and Practices 2* (2021), <https://nwc.org/wp-content/uploads/2021/04/100SD-report-5.3.21-vF.pdf>; Christina Cauterucci, *BYU's Honor Code Sometimes Punishes Survivors Who Report Their Rapes*, SLATE (Apr. 15, 2016), <https://slate.com/human-interest/2016/04/byu-s-honor-code-sometimes-punishes-survivors-who-report-their-rapes.html>.

⁴ See, e.g., *S.M. v. Sealy Ind. Sch. Dist.*, No. CV H-20-705, 2021 WL 1599388, at *2-*3 (S.D. Tex. Apr. 23, 2021); *100 School Districts*, *supra* note 5, at 2; Brian Entin, *Miami Gardens 9th-grader says she was raped by 3 boys in school bathroom*, WSVN-TV (Feb. 8, 2018), <https://wsvn.com/news/local/miami-gardens-9th-grader-says-she-was-raped-by-3-boys-in-school-bathroom>; Nora Caplan-Bricker, "My School Punished Me," SLATE (Sept. 19, 2016), <https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html>; Aviva Stahl, "This Is an Epidemic": How NYC Public Schools Punish Girls for Being Raped, VICE (June 8, 2016), https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped.

⁵ Know Your IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout 17-22* (Mar. 2021), <https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf>.

⁶ Tyler Kingkade, *LGBT Students Face More Sexual Harassment and Assault, and More Trouble Reporting It*, THE HUFFINGTON POST (Jul. 14, 2015), https://www.huffpost.com/entry/lgbt-students-sexual-assault_n_55a332dfe4b0ecec71bc5e6a.

⁷ Georgetown Law Center on Poverty and Inequality, *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, 1 (2018), <https://www.law.georgetown.edu/poverty-inequality-center/wpcontent/uploads/sites/14/2017/08/girlhood-interrupted.pdf>.

⁸ See, e.g., Gillian R. Chadwick, *Reorienting the Rules of Evidence* 39 CARDOZO L. REV. 2115, 2118 (2018), <http://cardozolawreview.com/heterosexism-rules-evidence>; Laura Dorwart, *The Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women*, MEDIUM (Dec. 3, 2017), <https://medium.com/@lauramdorwart/the-hidden-metoo-epidemic-sexualassault-against-bisexual-women-95fe76c3330a>.

to school staff.⁹ Black and Indigenous LGBTQ youth were almost twice as likely to report experiencing out-of-school disciplinary action (suspension or expulsion), compared to their white LGBTQ peers.¹⁰ When LGBTQ student survivors don't report being harassed or assaulted—as most don't because they doubt an effective response—they may nonetheless be disciplined for it.¹¹ Student survivors with disabilities also face challenges when reporting sexual harassment based on schools' reliance on stereotypes that students with disabilities are less credible¹² and because they may have difficulty describing or communicating about the harassment they experienced, especially if they have a developmental or cognitive disability.¹³

When schools fail to respond effectively to sexual harassment, the impact can be devastating—with many student survivors being pushed out of school because they don't feel safe, expelled for lower grades in the wake of their trauma, or suspended after they report.

Unfortunately, the changes that former-Secretary Betsy DeVos made to the Title IX rule last year fail to create safe and supportive school environments. For example, it narrows the definition of sexual harassment so that it now has to be “severe, pervasive, *and* objectively offensive” before a school can respond, even though OCR's race and disability harassment standards appropriately obligate schools to respond if harassment is “sufficiently serious,” which is generally determined by the severity, pervasiveness, *or* persistence of the harassment. The DeVos rule also requires schools to use procedures that treat victims unfairly and subject sexual harassment complaints to grievance procedures more burdensome than those used for other types of student or staff misconduct, including other types of discrimination. Not only does this communicate the message that sexual harassment victims are *uniquely* unreliable, but it also creates inconsistent standards, making it confusing at best, and nearly impossible at worst, for schools to investigate complaints of sexual harassment that are compounded with disability or race discrimination through an intersectional lens. These burdensome standards will also particularly harm student survivors of color, LGBTQ student survivors, and student survivors with disabilities, who already face additional hurdles and discrimination when reporting harassment.

The DeVos rule also allows schools to discipline student survivors for making a “materially false statement in bad faith” without it being considered retaliation under Title IX, as long as the decision to discipline is not based solely on the outcome of an investigation. The threat of

⁹ Joseph G. Kosciw, Caitlin M. Clark, Nnah L. Truong, & Adrian D. Zongrone, *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 34 (2020), GLSEN, <https://www.glsen.org/research/2019-national-school-climate-survey>.

¹⁰ *Id.* at 28.

¹¹ The same survey found that higher levels of victimization are associated with higher rates of discipline: compared to LGBTQ students who experienced no or low levels of victimization, LGBTQ students who experienced higher levels of victimization based on their sexual orientation were nearly twice as likely to have been disciplined at school (47.0% vs. 26.7%). LGBTQ students who experienced higher levels of victimization based on their gender expression were substantially more likely to have been disciplined at school (46.8% vs. 27.2%). In this case, “victimization” included sexual assault and harassment, verbal harassment, physical harassment, and physical assault. *Id.* at 50.

¹² Leigh Ann Davis, *People with Intellectual Disabilities and Sexual Violence* 2, The Arc, <https://www.thearc.org/document.doc?id=3657> (last updated Mar. 2011).

¹³ *E.g.*, Nat'l Inst. of Justice, *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14-15 (2016), <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facingsexual-assault-survivors-with-disabilities.aspx>.

discipline if a school determines an accusation is “false” will deter many student survivors from coming forward to ask for help or initiate an investigation. Like other changes to the rule, this change also especially harms women and girls of color (particularly Black girls who already face disproportionate, discriminatory discipline),¹⁴ pregnant and parenting student survivors, LGBTQ student survivors, and student survivors with disabilities who are harassed because they are more likely to have their trauma minimized, be disbelieved, and be blamed due to rape myths and stereotypes that label them as more promiscuous, aggressive, and/or less credible.

Most fundamentally, and contrary to the claims of the previous administration, there is no conflict between protecting student survivors' educational opportunities and ensuring fair disciplinary procedures. As the Department's guidance has long made clear, schools must investigate allegations of sexual harassment using disciplinary procedures fair to all parties. There is simply no reason for the Department to provide special protections to people accused of sexual harassment that are unavailable to others who face similar sanctions for analogous forms of misconduct. And such exceptional treatment of sexual allegations both is rooted in and reinforces exactly the sort of sex stereotyping Title IX forbids.

The Department must restore and strengthen Title IX protections. This includes restoring the definition of sexual harassment consistent with earlier guidance (and with OCR's standards for race- and disability-based harassment claims) and requiring that schools' disciplinary procedures be fair by allowing both parties the same procedural rights, also consistent with earlier guidance (including, but not limited to, requiring a standard of proof that equally burdens both parties). The Department should require schools to provide supportive measures, including reasonable academic, safety, and mental health accommodations for complainants to ensure they are able to learn and stay in school and disability accommodations for both respondents and complainants to ensure fair responses. The Department should also explicitly prohibit any forms of retaliation against those who complain of sex discrimination and protect student survivors against retaliation. This includes, but is not limited to, prohibiting punishing or disciplining a victim for collateral conduct that occurred during or in response to the harassment or assault (e.g., alcohol or drug use, consensual sexual contact, reasonable self-defense, presence in restricted parts of campus, nonattendance to avoid seeing the harasser). The Department should also continue to prohibit punishment and discipline for false reports that are based solely on the school's conclusion that there wasn't sufficient evidence to support a finding of harassment.

Even before the DeVos rule, student survivors were being discouraged from reporting in the first place, met with unfair skepticism, blamed, and wrongly disciplined. The DeVos rule only makes it harder for people like them to come forward, and it denies them fair treatment under a system

¹⁴ See e.g., Tyler Kingkade, *Schools Keep Punishing Girls — Especially Students of Color — Who Report Sexual Assaults, and the Trump Administration's Title IX Reforms Won't Stop It*, THE 74 MILLION (Aug. 6, 2019), <https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it/>; Tyler Kingkade, *NYC Schools Suspended Sexual Assault Victims Because They're Black: Attorney*, THE HUFFINGTON POST (Jun. 13, 2016), https://www.huffpost.com/entry/nyc-schools-sexual-assault-victims_n_575ebf51e4b00f97fba8d405.

that is supposed to protect them. We look forward to working with you to ensure Title IX's equity mandate is restored.

Thank you for your consideration of our recommendations. If you have any questions, please contact Christopher Scott (christopher.scott@opensocietyfoundations.org), Shiwali Patel (spatel@nwlc.org), and Sabrina Bernadel (sberadel@nwlc.org).

Organizations

Advancement Project National Office
American Federation of Teachers
Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
Center for Disability Rights
Center for Popular Democracy
Clearinghouse on Women's Issues
Council for Children's Rights
Enough is Enough Voter Project
Family Equality
Feminist Majority Foundation
Girls Inc.
GLSEN
Jane Doe Inc.
Legal Aid at Work
Legal Clinics at Southwestern Law School
LGBTQ Center, University of Hawaii at Manoa
Mazzoni Center
Movements for Violence Prevention
National Crittenton
National Disability Rights Network (NDRN)
National Immigration Law Center
National Indian Education Association
National Parents Union
National Women's Law Center
Open Society Policy Center
Public Advocacy for Kids (PAK)
The Education Trust
The Every Voice Coalition

Individuals

Dara Baldwin
Julia Paris
Pam Harbin