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The Disinformation You're Falling for on Title IX

Title IX is a federal civil rights law that prohibits sex discrimination in schools, and for decades, Title IX has been vital for ensuring that schools respond appropriately to sexual violence and other sexual harassment. However, in recent years, opponents of gender equity have spread harmful lies and disinformation about Title IX and sexual harassment. Their goal is to use that confusion to shield harassers from consequences and prevent institutions from being held accountable for addressing and preventing sexual harassment. In the process, they're hurting all survivors. In 2020, the Trump administration [released harmful new Title IX rules](#)¹ based on these myths, which are currently being reexamined by the Biden administration. Here's the truth about Title IX.

1. Title IX is a civil rights law, not a criminal law.

Title IX is a civil rights law, and the goals and stakes of a school's Title IX investigation are very different from a criminal investigation. Violating a criminal law can result in incarceration and a criminal record, and criminal cases are brought by the government against an individual defendant, whose *freedom* is at stake. In contrast, the most severe sanction a school can impose on a student who violates its policies is expulsion, and even that is rarely the consequence in sexual harassment cases. And school cases are between individuals who have equal stakes in the outcome of the proceeding--that is, their ability to benefit from the education program or activity.

School sexual harassment proceedings should not be mini-criminal trials, and importing criminal procedure into Title IX proceedings undermines Title IX's ability to fulfill its purpose, which is to protect civil rights and ensure gender equity in our schools, including by addressing and stopping sexual harassment. For example, the "preponderance of the evidence" standard is the only fair standard of proof for school Title IX investigations. The preponderance standard (which means "more likely than not") is used by courts in all civil rights lawsuits. The Supreme Court has only required a standard of proof higher than the preponderance standard when the government is bringing a case against an individual and severe consequences are possible, like incarceration or deportation or involuntary civil commitment.² In contrast, Title IX investigations involve two students who have equal stakes in the outcome of the proceeding and require a standard of proof that treats both sides equally.

2. Making it harder for schools to respond to sexual harassment than any other type of misconduct harms students who experience sexual harassment.

Schools have long addressed a wide range of student misconduct through their disciplinary processes, including physical fighting, threats, and hazing. And for decades, the Department of Education required schools to respond to sexual harassment, racial harassment, and disability

harassment using a uniform set of legal standards.³ But the Trump administration's Title IX rule requires schools to use uniquely unfair and complainant-hostile procedures for sexual harassment that are not required for school investigations of any other type of student or staff misconduct. For example, under the Trump Title IX rule, victims of sexual harassment must show that they experienced more significant harm than victims of other types of harassment before their schools are obligated to help.⁴ Similarly, the Trump Title IX rule requires students in higher education who have suffered sexual assault or dating violence to submit to adversarial cross-examination at a live hearing, even though their peers who have been physically assaulted by a classmate are not required to do so.⁵ This double standard is unjustifiable. It relies on and perpetuates false and toxic stereotypes that individuals, especially women and girls, tend to lie about sexual assault, dating violence, and other sex-based harassment, and therefore need to be subjected to more scrutiny.

3. The Title IX policies in place before the Trump administration protected due process rights.

Since 1997, the Department of Education has consistently stated that schools must respect respondents' due process and Title IX rights when addressing sexual harassment.⁶ And what's considered due process in school proceedings is not the same as due process for criminal proceedings—for good reason, because the stakes of each are very different.

For school investigations and hearings, the U.S. Supreme Court has stated that due process only requires public school students who are facing short-term suspensions⁷ to have "some kind of" notice and "some kind of hearing."⁸ While the Trump Title IX rule requires colleges and universities to have hearings with direct, live cross examination by a party's advisor of choice, a majority of federal appellate courts have said that's actually not required to protect due process rights, and have instead held that a neutral hearing officer or panel can ask the parties questions.⁹ In so doing, courts have not only recognized the efficacy of allowing neutral panels or hearing officers to ask the parties questions, but also the emotional harm or trauma that could be caused by allowing parties or their representatives to directly conduct the cross examination. Only two federal appellate courts have required cross-examination by parties or their representatives in Title IX investigations—and they have only required cross examination in limited circumstances, where

witness credibility was at issue and serious sanctions were possible.¹⁰ Thus, the Title IX guidance in place before the Trump Title IX rules, which discouraged cross-examination conducted directly by parties, prohibited schools from disciplining students unless they had been given enough information to respond to the allegations against them, and required schools to have fair procedures, was consistent with due process and Title IX requirements.

The truth is, as survivor advocates, we strongly believe in protecting due process rights while ensuring that school grievance procedures are trauma-informed and fair to all parties. It's possible to advocate for all of these, and anyone claiming otherwise by invoking concerns about "due process" do so merely as a dog whistle to weaken meaningful protections against sexual harassment.

4. Respondents in school sexual harassment investigations rarely face any discipline, but sexual harassment often leads to student survivors being pushed out of school.

Most students who experience sexual harassment do not report the harassment to their school.¹¹ When they do report it, named harassers are usually not suspended, much less expelled, from school.¹²

However, one in three students who experience sexual assault in college end up dropping out of school altogether.¹³ Student survivors are also often disciplined or punished¹⁴ based on school administrators' conclusions that they engaged in "consensual" sexual activity or premarital sex or that they made a false accusation. Students who experience sexual harassment are also punished for physically defending themselves against their harassers, for missing school due to fear of experiencing further harassment or seeing their harasser, or for merely talking about their harassment with other students. These patterns of punishment are especially common for women and girls of color (particularly Black women and girls), LGBTQ students, pregnant and parenting students, and disabled students due to stereotypes that label them as more "promiscuous," less credible, and/or less deserving of protection. When schools fail to protect survivors, survivors experience lower grades, lost scholarships, lost degrees, and insurmountable student loans.

5. Survivor justice is a racial justice issue.

Strong civil rights protections for student survivors is certainly a racial justice issue. Because of systemic racism and discriminatory stereotypes, Black and brown survivors are less likely to be believed and less likely to come forward after experiencing sexual harassment, and when they do come forward, they are more likely to experience school pushout. Yet studies show that women and girls of color are also disproportionately targeted for sexual harassment and face unique barriers to getting help.

This is because they face stereotypes that are both racist and sexist, which ultimately cause administrators to consider them as untruthful or even responsible for their victimization. As the Trump Title IX rule pushes schools to use standards that will make it harder for all victims to be believed, this will fall particularly hard on survivors of color.

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- 1 Resource: *DeVos's New Title IX Rule, Explained*, National Women's Law Center (May 12, 2020), available at <https://nwl.org/resources/devos-new-title-ix-sexual-harassment-rule-explained/>.
 - 2 *Addington v. Texas*, 441 U.S. 418, 424 (1979) (civil commitment); *In re Winship*, 397 U.S. 358, 367-68 (1970) (juvenile delinquency with the "possibility of institutional confinement"); *Woodby v. INS*, 385 U.S. 276, 286 (1966) (deportation).
 - 3 Department of Education, Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>; Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance*, 66 Fed. Reg. 5,512 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>; Department of Education, Office for Civil Rights, *Dear Colleague Letter on Prohibited Disability Harassment* (July 25, 2000), <https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>; Department of Education, Office for Civil Rights, *Sexual Harassment Guidance*, 62 Fed. Reg. 12,034 (Mar. 13, 1997), <https://www.govinfo.gov/app/details/FR-1997-03-13/97-6373>; Department of Education, Office for Civil Rights, *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,448 (Mar. 10, 1994), <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html>.
 - 4 34 C.F.R. § 106.30(a) ("sexual harassment").
 - 5 34 C.F.R. § 106.45(b)(6)(i).
 - 6 Indeed, under the Obama administration, the Department of Education found schools in violation of Title IX when they did not adequately protect a male respondent's Title IX rights. In 2016, OCR found that Wesley College violated a male student's Title IX rights, when he was a respondent in a sexual misconduct proceeding and was not provided equitable protections, including an opportunity to share his version of the events during an investigation, to challenge the evidence used by the college to impose an interim suspension, to review written statements and reports, and have adequate time to prepare a defense for the hearing. See Jake New, *A Title IX Win for Accused Students*, INSIDE HIGHER ED (Oct. 13, 2016), <https://www.insidehighered.com/news/2016/10/13/us-says-wesley-college-violated-rights-students-punished-over-sexual-misconduct>.
 - 7 Constitutional due process requirements do not apply to private institutions.
 - 8 *Goss v. Lopez*, 419 U.S. 565, 566, 579, 583 (1975). See also *Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 23 (D. Me. 2005); *B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 247 (D. Vt. 1994).
 - 9 *Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. 2020), cert. denied, 141 S. Ct. 1693 (2021) (due process is satisfied by questions from neutral hearing panel); *Doe v. Univ. of Arkansas*, 974 F.3d 858, 867 (8th Cir. 2020) (same); *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019) (same); *Doe v. Colgate Univ.*, 760 F. App'x 22, 27, 33 (2d Cir. 2019) (respondent's Title IX rights not violated when hearing panel questioned him and complainants instead of allowing them to directly cross-examine each other); *Doe v. Loh*, No. CV PX-16-3314, 2018 WL 1535495, at *7 (D. Md. Mar. 29, 2018), aff'd, 767 F. App'x 489 (4th Cir. 2019) (due process satisfied by questions from neutral hearing panel); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (same).
 - 10 *Doe v. Univ. of Scis.*, 961 F.3d 203, 215 (3d Cir. 2020) (fundamental fairness requires private school to provide cross-examination if credibility is at issue); *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (due process requires cross-examination if credibility is at issue and serious sanctions are possible).
 - 11 Poll: *One in 5 women say they have been sexually assaulted in college*, WASH. POST (June 12, 2015), <https://www.washingtonpost.com/graphics/local/sexual-assault-poll/>; Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 1, 2 (Apr. 2017), available at <https://nwl.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence/>.
 - 12 A 2018 report studying more than 1,000 reports of sexual misconduct in institutions of higher education found that "[f]ew incidents reported to Title IX Coordinators resulted in a formal Title IX complaint, and fewer still resulted in a finding of responsibility or suspension/expulsion of the responsible student." Despite the myth that respondents in school sexual harassment investigations are being unfairly punished, the study found that "[t]he primary outcome of reports were victim services, not perpetrator punishments." See Tara N. Richards, *No Evidence of "Weaponized Title IX" Here: An Empirical Assessment of Sexual Misconduct Reporting, Case Processing, and Outcomes*, L. & HUMAN BEHAVIOR (2018), available at <http://dx.doi.org/10.1037/lhb0000316>.
 - 13 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), <https://doi.org/10.1177/1521025115584750>.
 - 14 Wagatwe Wanjuki, *What Happens to Victims of Campus Sexual Assault*, <https://wagatwe.com/blog/campus-sexual-assault-victim-impact-data>; 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*, BUZZFEED NEWS (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/>.