

May 17, 2021

Secretary Cardona and Acting Assistant Secretary Goldberg:

As organizations that advocate for student survivors' civil rights, we were pleased to see President Biden's Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity. We welcome, too, the Department of Education's announced intentions to solicit public feedback, provide interim technical assistance on the Department's Title IX regulations, and begin the rule-making process. As the Department undertakes its review of federal regulations and other agency actions concerning discrimination on the basis of sex, we urge the Department to replace the Title IX regulations promulgated by former Secretary of Education Betsy DeVos with rules consistent with the spirit and letter of Title IX.<sup>1</sup> In this letter, we lay out what we believe are the most important changes the Department must make to prevent sexual harassment and ensure survivors are able to learn.

## **I. Restore Longstanding Protections for Student Survivors**

For decades, across both Democratic and Republican administrations, the Department of Education applied consistent substantive protections to students who experience harassment based on sex, race, national origin, or disability.<sup>2</sup> The most important of these include:

- The requirement that recipients address harassment that is sufficiently serious as to interfere with or limit a person's ability to participate in or benefit from the recipient's

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<sup>1</sup> Consistent with Title VII and Title IX case law, and OCR and EEOC guidance, we use the term "sexual harassment" to encompass a wide range of sexual harms, including sexual assault.

<sup>2</sup> See generally Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter "2014 Q&A"]; Dear Colleague Letter on Sexual Violence (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter "2011 DCL"]; Dear Colleague Letter: Harassment and Bullying (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> [hereinafter "Bullying Guidance"]; Dear Colleague Letter (Jan. 25, 2006), <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html> [hereinafter "2006 DCL"]; Revised Sexual Harassment Guidance, 66 Fed. Reg. 5,512 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> [hereinafter "Revised Sexual Harassment Guidance"]; Dear Colleague Letter on Prohibited Disability Harassment (July 25, 2000), <https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html> [hereinafter "Disability Harassment Guidance"]; Sexual Harassment Guidance, 62 Fed. Reg. 12,034 (Mar. 13, 1997) [hereinafter "1997 Guidance"]; 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> [hereinafter "Racial Harassment Investigative Guidance"].

program or activity, with “seriousness” generally determined with reference to the severity, pervasiveness, or persistence of the harassment in question;<sup>3</sup>

- The requirement that recipients address harassment that creates a hostile environment in the program or activity, regardless of where the harassment occurred;<sup>4</sup>
- A standard under which recipients are responsible for addressing harassment of which they knew or should have known, as well as all harassment by an employee when the employee engaged in the harassing conduct in the context of the employee’s responsibilities to provide aid, benefits, or services within the recipient’s program or activity;<sup>5</sup>
- The requirement that recipients address harassment in a prompt and effective manner to address the impact on all students.<sup>6</sup>

The DeVos rules are a dramatic and unjustified deviation from these long-standing positions as to sexual harassment only. The regulations inappropriately import to agency enforcement the onerous standards developed for private suits for money damages, and inexplicably treat sexual harassment complaints differently from complaints concerning all other

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<sup>3</sup> See, e.g., 2014 Q&A at 1; 2011 DCL at 3; Bullying Guidance 2; Disability Harassment Guidance; Revised Sexual Harassment Guidance at 6; Racial Harassment Investigative Guidance, 66 Fed. Reg. at 11449, 11452; see also Questions and Answers on Campus Sexual Misconduct (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix201709.pdf> [hereinafter “2017 Q&A”]. As noted in the Revised Sexual Harassment Guidance, sexual harassment includes both hostile environment harassment and “quid pro quo” sexual harassment. Revised Sexual Harassment Guidance at 5.

<sup>4</sup> See, e.g., 2017 Q&A at 1 n.3; 2014 Q&A at 29-30; 2011 DCL at 4; Bullying Guidance at 7 (noting school required to address harassment on social networking sites that created a hostile environment in school); 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>.

<sup>5</sup> See, e.g., 2017 Q&A at 1, 4; 2014 Q&A at 2; 2011 DCL at 4; Bullying Guidance at 2; Revised Sexual Harassment Guidance at 10, 13; Disability Harassment Guidance; Racial Harassment Investigative Guidance, 66 Fed. Reg. at 11450, 11453. 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).

<sup>6</sup> See, e.g., 2014 Q&A at 2; 2011 DCL at 2, 16; Bullying Guidance at 2-3; Revised Sexual Harassment Guidance at 14, 15; Disability Harassment Guidance; Racial Harassment Investigative Guidance, 66 Fed. Reg. at 11,450, 11453-54.

forms of prohibited discrimination. Now, recipients only need to address sexual harassment that is severe, pervasive, *and* objectively offensive<sup>7</sup> and that occurs on campus or during an off-campus recipient activity.<sup>8</sup> And if a survivor files a Title IX complaint with OCR, the Department must employ a deliberate indifference and actual knowledge standard in analyzing the complaint.<sup>9</sup> In deviating from its long-standing position, then, the Department gutted protections for survivors, reducing funding recipients' responsibility to address harassment and depriving OCR of critical enforcement power. Indeed, some have (not unreasonably) read the DeVos regulations' nonsensical mandatory dismissal provision to restrict recipients' inherent authority to address sexual harassment.<sup>10</sup>

In adopting these new rules, the Department inappropriately relied on narrow legal standards that the Supreme Court expressly limited to private damages suits, as the Department had acknowledged for years prior.<sup>11</sup> Administrative civil rights enforcement by the federal government implicates very different considerations than does private litigation for money damages. Most importantly, the Department's administrative enforcement seeks to prevent and correct discrimination through policy change and other injunctive relief. And so for years, the Department has required funding recipients to address harassment before such harassment escalates to the point that the recipient is liable for money damages in private litigation. And, as the Supreme Court recognized in choosing an "actual knowledge" standard, the statutorily-

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<sup>7</sup> 34 C.F.R. § 106.30(a). Some forms of sexual assault and other abuses are also encompassed in the disjointed definition of sexual harassment. *Id.*

<sup>8</sup> *Id.* at § 106.44(a).

<sup>9</sup> *Id.*

<sup>10</sup> The DeVos rule purports not to foreclose recipients from addressing alleged misconduct that they are not required to address by Title IX. *See* 34 C.F.R. § 106.45(b)(3)(i); 85 Fed. Reg. 30,026, 30,283, 30,289, 30,037-38 (May 19, 2020). Yet the rule requires that recipients dismiss all such complaints "for purposes of sexual harassment under title IX." 34 C.F.R. § 106.45(b)(3)(i). That provision distorts the purpose and effect of Title IX: The statute does not grant recipients authority to address sexual harassment—an authority that recipients inherently possess—but rather requires them to do so in certain circumstances. The mandatory dismissal rule also promotes confusion. What does it mean for a recipient to "dismiss" a complaint of a sexual harassment if it intends to investigate it under its own inherent authority to address misconduct? How can a recipient judge, from the outset, whether an allegation meets the rule's definition? As a practical matter, then, the mandatory dismissal provision creates uncertainty for complainants and respondents alike, as well as potential liability for schools if their classification of conduct is challenged by either party.

<sup>11</sup> 85 Fed. Reg. at 30,033 (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998) and *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643, 648 (1999)); *see also* Dear Colleague Letter regarding *Gebser v. Lago Vista* (Aug. 31, 1998), <https://www2.ed.gov/offices/OCR/archives/pdf/AppC.pdf> ("The *Gebser* decision expressly distinguished the limits on private recovery of money damages from the Department of Education's enforcement of Title IX. Thus, the obligations of schools that receive federal funds to address instances of sexual harassment have not changed as a result of the Supreme Court decision.").

mandated process the Department of Education uses to enforce Title IX—which includes an opportunity for post-complaint voluntary compliance by the institution—necessarily supplies the very notice to recipients that the Court feared would be absent in a damages lawsuit brought by a private party.<sup>12</sup>

The Department must promulgate regulations that reinstate its decades-old view of recipients’ Title IX responsibilities to survivors and the standards by which OCR reviews complaints. Specifically, the Department should:

- Explain that sex-based harassment includes sexual harassment, dating violence, domestic violence, and sex-based stalking<sup>13</sup> and harassment based on sexual orientation, gender identity, gender expression, parental status, pregnancy, childbirth, termination of pregnancy, or related conditions;<sup>14</sup>
- Define sexual harassment as unwelcome sexual conduct, including the form of harassment sometimes referred to as “quid pro quo” sexual harassment;<sup>15</sup>
- Define actionable sex-based harassment as:
  - all quid pro quo harassment and
  - any other sex-based harassment that is sufficiently serious as to create a hostile environment that interferes with or limits an individual’s ability to participate in or benefit from the recipient’s program or activity, specifying that:
    - the “seriousness” of harassment will generally be determined by considering whether the harassment is severe, pervasive, or persistent, and
    - if harassment is sufficiently serious as to create a hostile environment, the harassment has interfered with or limited the victim’s education, such that a complainant need not demonstrate a specific additional educational injury, beyond the hostile environment itself, to allege actionable sex-based harassment.<sup>16</sup>

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<sup>12</sup> See *Gebser*, 524 U.S. at 288-289.

<sup>13</sup> One of the few welcome provisions of the DeVos regulations were their inclusion of “dating violence, domestic violence, [and] stalking” in the definition of sexual harassment. 34 C.F.R. § 106.30(a)(3).

<sup>14</sup> See, e.g., Exec. Order No. 14021, 86 Fed. Reg. 13,803 (Mar. 8, 2021) (noting “discrimination on the basis of sex . . . include[es] discrimination on the basis of sexual orientation or gender identity”); Supporting the Academic Success of Pregnant and Parenting Students (June 2013), <https://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.html> (noting Title IX requires recipients to address pregnancy-based harassment); Bullying Guidance at 7-8 (acknowledging forms of sex-based but non-sexual harassment); Revised Sexual Harassment Guidance at 3 (same).

<sup>15</sup> See, e.g., 2011 DCL at 3; 2001 Revised Sexual Harassment Guidance at 2, 5.

<sup>16</sup> See *supra* note 3. As noted in previous Department guidance documents, the more severe the conduct, the less need there is to show repeated or frequent incidents to meet this standard. 2014 Q&A at 1; 2011 DCL at 4; Revised Sexual Harassment Guidance at 6; Racial Harassment

- Require funding recipients to respond promptly and effectively to actionable sex-based harassment that they know or should know about, as well as any sex-based harassment by employees when the employee engaged in the harassing conduct in the context of the employee’s responsibilities to provide aid, benefits, or services within the recipient’s program or activity,<sup>17</sup> specifying that:
  - A recipient is responsible for taking prompt and effective action to eliminate the sex-based harassment, prevent its recurrence, and remedy its effects;<sup>18</sup>
  - What constitutes a “prompt” response will depend on the complexity of the investigation and the severity and extent of the alleged conduct, though a “prompt” response will almost always include the provision of supportive services and accommodations as immediately as possible but no later than five school days of a report;<sup>19</sup>
  - Effectiveness is measured based on a reasonableness standard;<sup>20</sup>
  - An effective response will include reasonable provision of supportive services and accommodations to victims, at no cost to victims, regardless of whether they pursue a disciplinary proceeding, and regardless of whether the respondent is found responsible for the harassment;<sup>21</sup>
  - When appropriate, an effective response may include restorative justice or other alternatives to traditional student discipline, so long as the parties’ participation is truly voluntary and all parties are able (and aware they are able) to terminate the alternative resolution at any time, and that those conducting the informal processes are adequately trained to do so;<sup>22</sup>

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Investigative Guidance, 66 Fed. Reg. at 11,449. Indeed, a single sufficiently severe incident of sexual harassment, such as a sexual assault, will meet this standard. Revised Sexual Harassment Guidance at 5-7, 2011 DCL at 3, 2014 Q&A at 1. The Revised Sexual Harassment Guidance correctly explains that determination of whether harassment is serious enough to be actionable under Title IX is appropriately based on consideration of multiple contextual factors. Revised Sexual Harassment Guidance at 5-7.

<sup>17</sup> See *supra* notes 5-6.

<sup>18</sup> See *supra* note 6.

<sup>19</sup> It may be helpful for sub-regulatory guidance to provide more detailed advice about what sort of timelines will be appropriate for different kinds of institutions investigating different kinds of reports.

<sup>20</sup> Revised Sexual Harassment Guidance at vi; Racial Harassment Investigative Guidance, 59 Fed. Reg. at 11,450; see also *supra* note 6.

<sup>21</sup> The DeVos rules required that recipients provide supportive measures to complainants. 34 C.F.R. § 106.44. However, the power of that provision was greatly diminished by the rule’s adoption of a deliberate indifference standard, because a funding recipient’s choice of which measures to provide, and how, does not need to be effective or reasonable; it must merely not be clearly unreasonable.

<sup>22</sup> Cf. 34 C.F.R. 106.45(b)(9).

- An effective response will address not only the specific impacts of the harassment on any targets, but also any impacts on third parties;<sup>23</sup>
- If a recipient’s response proves ineffective, the recipient must reform its response.<sup>24</sup>
- Explain that funding recipients must address sex-based harassment that may create a hostile environment in their program or activity (and is therefore actionable sex-based harassment), regardless of where the sex-based harassment occurred, specifying that recipients’ non-exhaustive resultant responsibilities include that:
  - Funding recipients must address actionable sex-based harassment that occurs outside its program or activity if the complainant shares a campus, classroom, or other (physical or virtual) space or is otherwise likely to be required to interact with the respondent within the program or activity;<sup>25</sup>
  - Funding recipients must address actionable sex-based harassment that occurs in any program or activity, even if it occurs outside the United States, such as a study abroad program.

The Department should not prohibit states and local entities from providing protections beyond those promulgated in the Department’s Title IX rule.

## II. Develop Robust Protections Against Retaliation

Title IX prohibits retaliation against those who complain of sex discrimination.<sup>26</sup> Yet student survivors—and especially survivors of color—continue to face punishment when they turn to their schools for help in the wake of violence.<sup>27</sup> Some are disciplined for rule-breaking,

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<sup>23</sup> See *supra* note 6; see also Revised Sexual Harassment Guidance at 6; Racial Harassment Investigative Guidance, 59 Fed. Reg. at 11,449.

<sup>24</sup> Cf. *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1261 (11th Cir. 2010) (“[W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior” (quoting *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000)).

<sup>25</sup> See *supra* note 4; 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). The regulations should take care to emphasize that contact between a victim and harasser is not the only way harassment outside the program or activity can create a hostile environment within the program or activity that a recipient is required to address.

<sup>26</sup> *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005).

<sup>27</sup> 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*,

like drinking or drug use, that they must divulge in order to report.<sup>28</sup> Others are punished for sexual contact on school grounds—that is, for their own sexual assaults.<sup>29</sup> In recent years, student survivors—primarily those in higher education—have also increasingly faced retaliation from their assailants, who use schools’ reporting mechanisms to dissuade and punish victims.<sup>30</sup> For example, many survivors who report to their colleges are later met with retaliatory cross-complaints by their harassers who, after insisting that the sexual contact in question was consensual, now claim the survivor raped them.<sup>31</sup>

The Department must promulgate regulations that explicitly prohibit these common forms of retaliation. Specifically, the Department should:

- Define prohibited retaliation to include:
  - Discipline of a complainant for minor student conduct violations or collateral conduct that must be disclosed in order to lodge a report of sex discrimination or that is disclosed in an ensuing investigation (e.g., alcohol or drug use, consensual sexual contact, reasonable self-defense, or presence in restricted parts of campus) or that occurs as a result of the reported harassment (e.g., nonattendance);
  - Discipline of a complainant for a false report based solely on a funding recipient’s conclusion that there was not sufficient evidence to support a finding of a respondent’s responsibility or that the respondent is found not responsible;<sup>32</sup>
  - Discipline of a complainant for violating the recipient’s prohibition against consensual sexual conduct if the putative violation is the sexual contact that is the subject of their complaint (e.g., a school’s discipline of a student who reports she was raped for prohibited sexual conduct on school grounds based on the school’s conclusion that the reported sexual contact was welcome);
  - Discipline of a complainant for discussing the events that gave rise to a sexual harassment report;

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The 74 (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/>.

<sup>28</sup> See, e.g., 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>.

<sup>29</sup> 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); 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>.

<sup>30</sup> 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> [hereinafter “*Cost of Reporting*”].

<sup>31</sup> *Id.* at 19.

<sup>32</sup> Cf. 34 C.F.R. § 106.71(b)(2); 85 Fed. Reg. 30026, 30537 (May 19, 2020). A valid reason for disciplining a student for making a false report would be if a complainant’s demonstrable motivation in filing the report was to retaliate against a person they had sexually harassed.

- Discipline for charges the recipient knew or should have known were brought by a third party for the purpose of using the recipient’s disciplinary process to retaliate against a victim of sexual harassment or other sex discrimination.<sup>33</sup>
- Permit recipients to dismiss without a full investigation any complaints of sexual harassment that are patently retaliatory (e.g., where a student is reported for sexually assaulting a classmate, insists the contact was consensual, and then, after being found responsible, files a counter-complaint that their victim in fact sexually assaulted them).<sup>34</sup>

### III. Ensure Fair Disciplinary Procedures and School Flexibility

As the Department has long made clear, school discipline for harassment, including sexual harassment, must be fair to all involved parties.<sup>35</sup> It is uncontroversial that while protecting student survivors, schools must also respect the rights of those accused of harassment, which derive from a range of sources, including schools’ own policies and (in public schools) federal and state constitutions. The Department and courts, however, have long recognized that schools must retain discretion in designing disciplinary systems that fulfill their various, and varying, legal commitments and fit their unique institutional needs and characteristics.<sup>36</sup> There is no one-size-fits-all model that is necessary, or even appropriate, for every school regardless of its type, size, location, and resources.

Yet DeVos’s regulations prescribe specific disciplinary procedures for sexual harassment—and sexual harassment alone—at a truly unprecedented level of granular detail. Undoubtedly, the Department has heard, and will continue to hear, from schools for which these rules are a poor fit, cost prohibitive, and otherwise unnecessarily burdensome.

The DeVos rule is not only overly prescriptive; the procedures it requires are also riddled with serious problems, and appear designed to promote impunity for sexual harassers rather than fairness. For example, the rules require institutions of higher education (IHEs) to ignore evidence that would be admissible in any other student conduct or legal proceeding if parties or witnesses

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<sup>33</sup> *Contra Bose v. Bea*, 947 F.3d 983 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1051 (2021).

<sup>34</sup> Both the regulations and recipients must take care to ensure this provision is not used to dismiss meritorious complaints, given the risk that abusers may file pre-emptive complaints, much like they learn to call the police first. *See* Susan L Miller, *The Paradox of Women Arrested for Domestic Violence: Criminal Justice Professionals and Service Providers Respond*, 7 *Violence Against Women* 1339, 1355 (2001). Toward that end, the Department should make clear that a complaint is not retaliatory simply because it was filed second in time.

<sup>35</sup> *See, e.g.*, 2014 Q&A at 26; 2011 DCL at 12; Revised Sexual Harassment Guidance at 22.

<sup>36</sup> *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 578 (1975); 2014 Q&A at 13-14, 26; Revised Sexual Harassment Guidance at 19-22; *see also* Hélène Barthélemy, *How Men’s Rights Groups Helped Rewrite Regulations on Campus Rape*, *The Nation* (Aug. 14, 2020), <https://www.thenation.com/article/politics/betsy-devos-title-ix-mens-rights/> (quoting Hans Bader, a principal architect of the DeVos rules, explaining that Department action that “micromanag[es] school discipline” “conflicts with past administrative practice (and court rulings) about the reach of Title IX”).



refuse to submit to cross-examination or do not answer every question posed.<sup>37</sup> Had the Department included that requirement in its proposed rule, commenters might have had the opportunity to point out the truly absurd results that inevitably follow, such as a student admitting to sexually assaulting a classmate but administrators being barred from considering that dispositive evidence because they refused to be cross-examined.<sup>38</sup> The rule’s requirement that IHEs provide opportunities for direct cross-examination discourages survivors from reporting in the first place.<sup>39</sup> And it flies in the face of the consensus among appellate courts that an inquisitorial model—in which parties submit questions to each other through a neutral intermediary—satisfies due process in the context of student discipline.<sup>40</sup>

Separate and apart from the specifics of the required procedures, we have grave concerns about regulations singling out sexual harassment allegations for unique procedural requirements. As a matter of law and policy, there is simply no reason for the Department to provide special protections to people accused of sexual harassment unavailable to others who face similar sanctions for analogous forms of misconduct. And such exceptional treatment of sexual allegations is both rooted in and reinforces exactly the sort of sex stereotyping Title IX forbids.

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<sup>37</sup> 34 C.F.R. § 106.45(m); 85 Fed. Reg. at 30346, 30347, 30349 (May 19, 2020).

<sup>38</sup> See, e.g., Tyler Kingkade, *Activists increase pressure on Biden to scrap Betsy DeVos’ Title IX Rules*, NBC News (Mar. 15, 2021), <https://www.nbcnews.com/news/us-news/activists-increase-pressure-biden-scrap-betsy-devos-title-ix-rules-n1261017>. By the plain text of the regulation, a funding recipient may also not consider as evidence the very harassing statements at issue in a report if the harasser will not submit to cross-examination. 34 C.F.R. § 106.45(m). After commenters pointed out this absurd result, the Department issued a blog post of questionable force that “clarified” a funding recipient could consider such statements. Office for Civil Rights, *The New Title IX Rule: Excluding Reliance on a Party’s “Statements” When the Sexual Harassment at Issue Consists of Verbal Conduct* (May 22, 2020),

<https://www2.ed.gov/about/offices/list/ocr/blog/20200522.html>; see also Nicole Bedera, Seth Galanter, and Sage Carson, *A New Title IX Rule Essentially Allows Accused Assailants to Hide Evidence Against Them*, TIME (Aug. 14, 2020), <https://time.com/5879262/devos-title-ix-rule/>.

<sup>39</sup> 34 C.F.R. § 106.45(m); Suzannah Dowling, *(Un)due Process: Adversarial Cross-Examination in Title IX Adjudications*, 73 Me. L. Rev. 123, 159 (2021); see also University of Michigan Annual Report Regarding Student Sexual & Gender-Based Misconduct & Other Forms of Interpersonal Violence, July 2018-June 2019 at 1 (Nov. 11, 2018), <https://studentsexualmisconductpolicy.umich.edu/files/smp/FY-2019.pdf> (demonstrating decrease in reporting during year school implemented direct cross-examination).

<sup>40</sup> E.g., *Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. 2020); *Doe v. Univ. of Arkansas-Fayetteville*, 974 F.3d 858, 867–78 (8th Cir. 2020); *Doe v. Colgate Univ.*, 760 F. App’x 22, 33 (2d Cir. 2019); *Haidak v. University of Massachusetts*, 933 F.3d 56, 68–70 (1st Cir. 2018); *Butler v. Rector & Bd. of Visitors of Coll. of William & Mary*, 121 F. App’x 515, 520 (4th Cir. 2005); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987); *Doe v. Westmont Coll.*, 34 Cal. App. 5th 622, 635 (Cal. Ct. App. 2019). The Sixth Circuit has held that, where “credibility is in dispute and material to the outcome,” a public university must allow an accused student to cross-examine witnesses either directly or through a representative. *Doe v. Baum*, 903 F.3d 575, 583-84 & n.3 (6th Cir. 2018). In doing so, it did not explain its departure from past precedent allowing “indirect” cross-examination. *Id.* at 588-89 (Gilman, J., concurring).

For centuries, Anglo-American criminal law imposed exceptional obstacles to rape convictions, including corroboration requirements, prompt complaint requirements, and special cautionary prescriptions.<sup>41</sup> These were explicitly rooted in stereotypes about how women behave when they are sexually assaulted, and how prone they are to “crying rape” when scorned or shamed. Because women so often lodge false reports, the logic went, special procedures were necessary to protect innocent men.<sup>42</sup> Fortunately, courts and legislators abandoned these rules in the latter half of the 20<sup>th</sup> century. But DeVos’s rules resuscitate that shameful exceptionalist history by imposing unique procedural requirements on complaints of sexual harassment.<sup>43</sup>

In doing so, the rule sends a clear message that such complaints are uniquely suspect. That’s exactly the wrong lesson for a civil rights agency to teach. Consider a student whose two friends have each been accused of bullying classmates. He sees that one friend is investigated and disciplined through the school’s ordinary procedures. The other, however, is accused of bullying of a sexual nature, so is subject to an extraordinary procedure and guaranteed extraordinary federal protections. The observing student will learn that his friend accused of sexual harassment was owed special rights—and might reasonably conclude that such allegations are especially incredible. It is particularly offensive that such sex-stereotyped responses are being carried out in the name of Title IX enforcement, when they in fact represent the very sex discrimination that Title IX proscribes.

It might be tempting for the Department to replace DeVos’s prescribed single disciplinary procedure with a new one. The better course, we believe, is to outline general requirements for fairness that flow from Title IX’s equality mandate, much as previous guidance documents did. For example, the Department should require that where a recipient’s disciplinary procedures provide a certain opportunity (e.g., an appeal) to one side, it must provide it to the other party,

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<sup>41</sup> See, e.g., Alexandra Brodsky, *Sexual Justice: Supporting Victims, Ensuring Due Process, and Resisting the Conservative Backlash* 158-68 (forthcoming 2021); Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 Boston U. L. Rev. 945, 954-64 (2004).

<sup>42</sup> See, e.g., *Brown v. State*, 127 Wis. 193, 106 N.W. 536, 538 (1906) (explaining a putative victim must prove “the most vehement exercise of every physical means or faculty within the woman’s power” due to “the proneness of the woman when she finds the fact of her disgrace discovered or likely of discovery, to minimize her fault”); *State v. Neel*, 60 P. 510, 511 (Utah 1900) (“[t]he natural instinct of a female thus outraged and injured prompts her to disclose the occurrence, at the earliest opportunity, to a relative or friend who naturally has the deepest interest in her welfare”); Model Penal Code § 213.6 comment at 421 (“The requirement of prompt complaint springs in part from a fear that unwanted pregnancy or bitterness at a relationship gone sour might convert a willing participant in sexual relations into a vindictive complainant.”); 3A Wigmore, *Evidence*, § 924a, at 736 (Chadbourn rev. ed. 1970) (justifying requirements for rape convictions on “young girls and women’s” propensity to lie about rape due to their “psychic complexes,” which “are multifarious and distorted”); Brodsky, *supra* note 41, at 158-68 (explaining roots of exceptionalist obstacles to rape convictions); Anderson, *supra* note 41, at 978-86 (same).

<sup>43</sup> See, e.g., Brodsky, *supra* note 41, at 144-49.

too.<sup>44</sup> We also urge the Department to explain that the preponderance standard—the standard used for civil rights lawsuits in court and by OCR in its own enforcement actions under both Democratic and Republican administrations since at least 1995<sup>45</sup>—is the one most compatible with recipients’ civil rights obligations.<sup>46</sup> But the Department should not dictate the granular details of how funding recipients investigate sexual harassment.

This approach, we believe, will best avoid stigmatizing sexual harassment survivors; provide recipients the flexibility they need to design fair, community-specific solutions; and prevent Title IX from turning into a political football, with each new presidential administration dictating new, specific procedures schools must use to address sexual harassment.

Of course, new Title IX regulations need not and should not be the end of the Department’s efforts to ensure fairness in student discipline. We urge the Department to re-issue a revised version of the 2014 Discipline Guidance Package<sup>47</sup> and take other steps to ensure schools use fair procedures in student discipline for all forms of misconduct, rather than only for sexual harassment allegations. The Department might also consider issuing guidance providing schools with an array of models that, in its opinion, are consistent with schools’ civil rights obligations to victims of discrimination (including but not limited to sexual harassment) and with respondents’ legal rights. Such solutions have the benefit of ensuring fair process in student discipline for all students, not just those accused of one particular type of harm, and avoiding sex stereotypes.

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<sup>44</sup> See, e.g. 2014 Q&A at 26, 2011 DCL at 12-13.

<sup>45</sup> U.S. Department of Education, Office for Civil Rights, *Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University* (Oct. 16, 2003), at 1, <http://www.ncherm.org/documents/202-GeorgetownUniversity--110302017Genster.pdf>; U.S. Department of Education, Office for Civil Rights, *Letter from Gary Jackson, Regional Civil Rights Director, Region X, to Jane Jervis, President, The Evergreen State College* (Apr. 4, 1995), at 8, [http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed\\_ehd\\_1995.pdf](http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf).

<sup>46</sup> The Trump Administration continued to require schools to use the preponderance standard for disability- and race-based harassment. See, e.g., Resolution Agreement, Indep. Sch. Dist. No. 1 of Woods City, Oklahoma, OCR Case No. 07–15–1154, 9 (Sept. 28, 2017), <https://tinyurl.com/yak27ens> (requiring school use preponderance standard for disability-based harassment); Resolution Agreement, BASIS Scottsdale, OCR Case No. 08–16–1676, 2 (Mar. 20, 2017), <https://tinyurl.com/y7kkzr66> (requiring school use preponderance standard for racial harassment). If the Department does not require the preponderance of the evidence, it should, at the very least, prohibit recipients from using a higher standard of evidence for sexual harassment than for other forms of discrimination and other interpersonal harms that may result in similar discipline (e.g. non-sexual assaults).

<sup>47</sup> U.S. Department of Education, “U.S. Departments of Education and Justice Release School Discipline Guidance Package to Enhance School Climate and Improve School Discipline Policies/Practices” (Jan. 8, 2014), <https://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-school-discipline-guidance-package->.

If the Department nonetheless decides to prescribe detailed procedural requirements for sexual harassment, we urge it to avoid mandating unnecessarily traumatic investigations and to give recipients greater flexibility. Most importantly:

- The regulation should not foreclose recipients from forgoing live hearings attended jointly by the parties in addressing (1) complaints involving minors and/or K-12 students, (2) complaints that do not turn on credibility determinations, and (3) complaints that, if substantiated, would not result in suspension or expulsion;<sup>48</sup>
- The regulation should not foreclose recipients from using inquisitorial questioning models rather than direct cross-examination by a party's representative;<sup>49</sup>
- The regulation should not foreclose recipients from considering past statements by parties or witnesses who are not available for cross-examination;<sup>50</sup>
- If the regulation dictates specific procedures and/or procedural timelines, it should permit recipients to use simplified procedures with shorter timelines when imposing detentions, suspensions shorter than ten days, or other short-term and/or minor disciplinary sanctions.<sup>51</sup>

If the Department would appreciate further information about the views of the undersigned groups on specific disciplinary models, we are happy to provide that information. But, again, we believe strongly that the Department's efforts to regulate school discipline procedures should provide recipients with flexibility and should not single out sexual harassment allegations for unique treatment.

#### **IV. Address Other Forms of Harassment**

In addition to sexual harassment, too many students face harassment based on other protected characteristics, including race, color, national origin, disability, sexual orientation, gender identity or expression, and pregnancy or parenting status. Many students are targeted for harassment based on their particular intersection of identities. For example, Black girls may be harassed based on specific stereotypes about Black women and girls' sexual practices and preferences.

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<sup>48</sup> Cf. 34 C.F.R. § 106.45(b)(6)(ii). The current rules allow K-12 schools to avoid the use of live hearings, but do not make similar allowances for colleges and universities when dealing with complaint brought by minors. That could lead to terrible results where, for example, a professor's toddler enrolled in a university day care is required to submit to cross-examination.

<sup>49</sup> See *supra* note 40 (citing cases); see also Suzanne B. Goldberg, *Keep Cross-Examination Out of College Sexual-Assault Cases*, *The Chronicle of Higher Education* (Jan. 10, 2019), <https://www.chronicle.com/article/Keep-Cross-Examination-Out-of/245448/>. If the Department requires some form of cross-examination, it should limit that only to complaints that turn on credibility determinations. See *Doe v. Baum*, 903 F.3d 575, 583-84 (6th Cir. 2018).

<sup>50</sup> See *supra* notes 37-38 and accompanying text.

<sup>51</sup> See, e.g., *Goss*, 419 U.S. at 584 (noting different procedures may be appropriate based on the severity of a disciplinary sanction).

Fortunately, civil rights laws that the Department enforces require funding recipients to address these forms of harassment. We encourage the Department to enforce these protections meaningfully and consistently and to return to its long-standing practice of employing uniform standards for different forms of harassment.<sup>52</sup>

## V. Make Clear the Department's Views on Open Legal Questions

Survivors have long faced steep barriers in Title IX litigation for money damages.<sup>53</sup> In recent years, federal courts have debated whether to add additional onerous obstacles and restrictions to foreclose relief. The Department should use its anticipated rulemaking as an opportunity to express authoritative, deference-worthy views on these issues, one of which is already the subject of a deep circuit split. Specifically, the Department should make clear that:

- A funding recipient may be liable under Title IX for its deficient response to sexual harassment regardless of whether the survivor experiences further actionable harassment post-notice;<sup>54</sup>
- Title IX protects all persons—not only students and employees—who seek to access or benefit from a funding recipient's program or activity;<sup>55</sup>
- Title IX requires funding recipients to address hostile environments that result from sexual harassment that occurs outside their program or activity;<sup>56</sup> and
- Title IX requires funding recipients to address dating and domestic violence as forms of sex-based harassment.<sup>57</sup>

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<sup>52</sup> See generally *Bullying Guidance*; see also *Cannon v. Univ. of Chi.*, 441 U.S. at 694 & n.16 (1979) (“Title IX was patterned after Title VI of the Civil Rights Act of 1964.”); *Shotz v. City of Plantation*, 344 F.3d 1161, 1170 n.12 (11th Cir. 2003) (noting courts consistently “construe Titles VI and IX *in pari material*”), accord *Barnes v. Gorman*, 536 U.S. 181, 185 (2002).

<sup>53</sup> See generally Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 Yale L.J. 2038 (2016).

<sup>54</sup> See *Farmer v. Kansas State Univ.*, 918 F.3d 1094, 1103 (10th Cir. 2019); *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 171 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009); *Williams v. Board of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1296 (11th Cir. 2007); *but see Kollaritsch v. Michigan State Univ. Bd. of Trs.*, 944 F.3d 613, 619 (6th Cir. 2019); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017).

<sup>55</sup> See, e.g., *Doe v. Univ. of Kentucky*, 971 F.3d 553, 558 (6th Cir. 2020). *Cf. Doe v. Brown Univ.*, 896 F.3d 127, 131 & n.6 (1st Cir. 2018). *But see, e.g., Conviser v. DePaul Univ.*, No. 20-CV-03094, 2021 WL 1212800, at \*7 (N.D. Ill. Mar. 31, 2021).

<sup>56</sup> See, e.g., *Kinsman v. Fla. State Univ. Bd. of Trustees*, No. 4:15CV235-MW/CAS, 2015 WL 11110848, at \*4 (N.D. Fla. Aug. 12, 2015). *But see, e.g., Brown v. Arizona*, No. CV-17-03536-PHX-GMS, 2020 WL 1170838, at \*2 (D. Ariz. Mar. 11, 2020).

<sup>57</sup> See, e.g., *DeGroot v. Arizona Bd. of Regents*, 18cv000310-PHX-SRB (D. Ariz., Feb. 7, 2020); *Larios v. Chadron State Coll.*, 409 F. Supp. 3d 719 (D. Neb. 2019); 34 C.F.R. § 106.30(a)(3). *But see, e.g., Fraser v. Temple University*, 25 F. Supp. 3d 598, 614 (E.D. Pa. 2014); *Benjamin v. Lawrence Twp. Metro. Sch. Dist.*, No. IP000891CT/K, 2002 WL 977661 at \*1-\*3 (S.D. Ind. Mar. 27, 2002).

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As groups that work alongside, represent, or are comprised of student survivors, we are ready and eager to assist the Department in its Title IX regulatory review. If the Department would appreciate additional information—including technical legal analysis or real world examples—please let us know. You can reach Alexandra Brodsky of Public Justice at [abrodsky@publicjustice.net](mailto:abrodsky@publicjustice.net), Shiwali Patel of the National Women’s Law Center at [spatel@nwlc.org](mailto:spatel@nwlc.org), and Lara Kaufmann of Girls Inc. at [lkaufmann@girlsinc.org](mailto:lkaufmann@girlsinc.org).

Sincerely,

American Association of University Women (AAUW)

Atlanta Women for Equality

Campus Advocacy and Prevention Professionals Association

Cari Simon, Title IX attorney

Clearinghouse on Women's Issues

Colorado Coalition Against Sexual Assault (CCASA)

Council for Learning Disabilities

Disability Rights Education & Defense Fund (DREDF)

Education Law Center – Pennsylvania

Equal Rights Advocates

The Every Voice Coalition

Feminist Majority Foundation

Girls Inc.

GLSEN

Harvard Law School Gender Violence Program

Human Rights Campaign

It's On Us

Know Your IX, a project of Advocates for Youth

Legal Momentum, the Women's Legal Defense and Education Fund

NASPA - Student Affairs Administrators in Higher Education

National Alliance to End Sexual Violence  
National Association of Councils on Developmental Disabilities  
National Black Justice Coalition  
National Center for Youth Law  
National Council of Jewish Women  
National Indian Education Association (NIEA)  
National Organization for Victim Assistance (NOVA)  
National Women's Law Center  
Public Justice  
Rocky Mountain Victim Law Center  
Stop Sexual Assault in Schools  
Victim Rights Law Center  
Women's Law Project