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Secretary of Education
U.S. Department of Education
400 Maryland Ave SW
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Catherine E. Lhamon
Assistant Secretary, Office for Civil Rights
U.S. Department of Education
400 Maryland Ave SW
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Re: Docket ID ED–2021–OCR–0166, RIN 1870–AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

September 11, 2022

Dear Secretary Cardona and Assistant Secretary Lhamon,

My name is Bridgette Stumpf, and I am the co-founder and Executive Director of the Network for Victim Recovery of DC (“NVRDC”). On behalf of NVRDC, I wish to express support for the Department of Education’s (“the Department”) Notice of Proposed Rulemaking published in the Federal Register on July 12, 2022.

Founded in May 2012, NVRDC has provided holistic services to over 3,400 victims of crime in our nation’s capital. Nearly 60% of our clients are survivors of sexual assault and over 50% of them were college or university students at the time they sought services with NVRDC. Our services include free legal representation, advocacy, and case management in Title IX, crime victims’ rights enforcement, and civil protection order cases. In addition to wraparound services, NVRDC also provides advocacy services as part of the District of Columbia’s 24-hour sexual assault crisis response program for adults seeking a medical forensic exam (aka. “rape kit”) following a sexual assault in DC. Very few providers across the country provide legal representation to survivors during campus Title IX proceedings; even fewer have the expertise to also assist survivors with related representation in civil matters and criminal prosecutions.

Based on NVRDC’s unique direct-service experience, which includes assisting over 500 student-survivors with Title IX issues at DC’s colleges, universities, and high-schools, and our unique understanding of Title IX’s interaction with other laws, we submit the following comments for the Department’s consideration. We hope to explain our support for the new “floor” that the Department’s proposed rules will create for the scope and applicability of Title IX, while also highlighting aspects where further rulemaking is necessary.

Sincerely,

Bridgette Stumpf, NVRDC Executive Director

I. Scope of the Proposed Prohibition on Sex Discrimination

NVRDC strongly supports the proposed rule 106.44(a), which would reset the general standard applicable to recipients under Title IX and realign Title IX with its intended purpose.¹ At its core, Title IX serves as an acknowledgment that sex-based discrimination and harassment actively limit a person’s ability to access educational programming. Thus, based on that acknowledgment, Title IX creates a paradigm where, if an educational facility receives federal funding, that recipient must actively ensure that access to programming is not limited by sex-based discrimination or harassment. The purpose is to require recipients to take decisive action to cure the conditions causing interference and restore access. To this end, Title IX must embrace a realistic and practical definition of what causes interference and when that interference necessitates action.

The proposed rule 106.44(a) would require: “[a] recipient must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.” This proposal aligns both in form and in practice with the spirit of Title IX.

A. The Proposed Definition of Sex-Based Harrassment Appropriately Captures the Scope of Conduct that May Limit Access to Educational Opportunities

NVRDC supports the Department’s proposed use of the term “sex-based harrassment” instead of “sexual harrassment” because sex-based harassment would more broadly include sexual harassment and harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity, and other sex-based conduct.² As the Department recognized in 2020, while Title IX does not explicitly prohibit discrimination on the basis of the sex-based harassment characteristics, “gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond.”³ Despite this acknowledgement, the current definition of “sexual harassment” fails to explicitly recognize these other forms of sex-based harassment as requiring recipient attention.⁴

By requiring recipients to respond to notices of sex-based harassment, the proposed rules (through the term “sex-based harassment”) would appropriately capture the scope of conduct that limits an individual’s access to educational opportunities. Expanding the scope of prohibited conduct to various forms of sex-based harassment recognizes the myriad ways in which

¹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41572 (proposed July 12, 2022) (to be codified at 34 C.F.R. Part 106) [hereinafter *NPRM*].

² *NPRM* at 41390.

³ 85 Fed. Reg. 30026, 30179 (May 19, 2020) (quoting 2001 Revised Sexual Harassment Guidance at 3).

⁴ 34 C.F.R. Part 106.30(a).

sex-based harrasment can impact educational opportunities and clarifies for recipients and advocates the scope of harassment covered by Title IX.

B. The Proposed Definition of Hostile Environment Recognizes the Complexity of Sex-Based Harrasment

NVRDC supports the Department’s proposed expansion of the definition of sex-based harrasment to include harrasment that creates a hostile environment. The proposed rules would define a hostile environment as “unwelcome sex-based conduct that is sufficiently severe *or* pervasive that...it denies or limits a person’s ability to participate in or benefit from the recipient education program or activity.”⁵ The “sufficiently severe or pervasive” standard adopted by the Department would properly abandon the overburdensome requirement that unwelcome sex-based conduct must be “so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”⁶

Under the current rules, a complainant must demonstrate that conduct is both severe *and* pervasive *and* objectively offensive rather than “severe *or* pervasive.” This sets an unreasonably high threshold for conduct to be prohibited, and it suggests students must suffer repeated, escalating unwelcome conduct before it is so sufficiently severe and persuasive to be considered sexual harrasment. In effect, the 2020 rules accept that some, severe, sex-based harrasment is tolerable—even if it limits someone’s access to their education—so long as it does not wholesale deny access. This standard further contradicts previous guidance issued by the Department, which explained that “a single or isolated incident” can rise to the level of sexual harrasment.⁷ Conduct need not necessarily be both severe and pervasive to adversely affect a student’s ability to participate in or benefit from the school’s program. One serious isolated incident can amount to sex-based harrasment—such as sexual assault—but the current standard suggests that a student’s participation in a program must be reduced to nothing before a school is required to take action.

While the current rule effectively categorizes as de minimus all sexual harrasment that does not wholesale deny participation in an educational program, the Department’s proposed rule would recognize the complexity of sex-based harrasment by abandoning the perspective that some severe or pervasive unwelcome sex-based conduct is acceptable so long as the student can still participate or benefit to any degree.

C. The Department Should Proactively Define De Minimis Harm Related to Gender-Based Discrimination

⁵ *NPRM* at 41410 (emphasis added).

⁶ 34 C.F.R. § 106.30(a) (emphasis added).

⁷ U.S. Dep’t of Educ., Office For Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at 12 (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

NVRDC supports the Department’s proposed prohibition on subjecting students to “more than de minimis harm” when separating or treating students differently on the basis of sex in an otherwise permissible manner.⁸ NVRDC also supports the proposed clarification that a policy or practice that prevents a person from participating in an education program or activity consistent with their gender identity is more than de minimis harm. We encourage the Department to be assertive in defining “de minimis harm” to ensure that certain actions are not incorrectly categorized as de minimus. For example, using incorrect pronouns or deadnaming a student repeatedly, intentionally, or otherwise in a discriminatory manner should not be considered de minimus harm. Such conduct has the impact of limiting a student’s access to programming and should, therefore, be appropriately identified above the “de minimis” threshold.

As the Department’s proposed rulemaking appropriately intends to provide needed protections to LGBTQI+ individuals, it is important to be as assertive as possible in defining the ways these students may face sex-based discrimination and harassment. Unfortunately, the LGBTQI+ community is frequently discriminated against in the form of policies or conduct that systematically refuse to consider their gender-identity, sexual orientation, or sex-based characteristics as legitimate. If the Department does not explicitly recognize and identify the harm caused by such discrimination as more than de minimis, the recipient institutions that are most likely to discriminate on this basis are also the most likely not to consider the resulting harm as real, serious, or above de minimis.

D. The Extension of Title IX Obligations to Off-Campus Conduct Aligns with Title IX’s Focus on the Impact of Sex-Based Conduct on Access to Education

NVRDC supports extending recipients’ obligations under Title IX to off-campus conduct. Under the proposed rules, a recipient would be required to address a sex-based hostile environment even if harassment contributing to that hostile environment occurred outside the recipient’s education program or activity or outside the United States.⁹ This extension would align with Title IX’s central focus, which is on the impact to students’ access to education, by acknowledging that off-campus activities can have such an impact. This change would correctly focus on the impact of sex-based harassment on a survivor’s ability to access the program rather than myopically focusing on the location of the contributing conduct.

We agree with the Department that the proposed rule would reflect the understanding that conduct occurring wholly outside a school’s program or geographical location can still create circumstances where a student’s ability to participate or benefit from the school’s program is limited. For example, NVRDC has represented survivors who were sexually assaulted by a classmate in a foreign country or another state. In those instances, the survivors’ access to education was dramatically limited by the presence of the attacker upon returning to campus – in shared classes, dormitories, clubs, and common areas or food halls. These impacts were quite

⁸ *NPRM* at 41391.

⁹ *NPRM* at 41401.

real and caused survivors to avoid going to class, return to campus, or return to school altogether. Title IX, at a minimum, should be an apparatus to promptly and effectively provide supportive measures and otherwise offer remedies to restore access to education. In addition, the current rules' restriction of the scope of Title IX fails to account for community colleges or predominantly commuter-schools, schools in metropolitan areas with decentralized campuses, or recipients that are primarily online.

In these circumstances, off-campus conduct can certainly create a hostile environment on-campus or in such a manner that limits a survivor's access to their education. Under such circumstances, the recipient is in the best position to take prompt and effective action to end the discrimination and provide appropriate supporting measures.

II. Title IX Proceedings – Areas of support with additional recommendations

NVRDC welcomes the Department's efforts to reform many of the flawed and harmful procedural changes from the previous administration. In particular, the current rules adopt a viewpoint on Title IX that fundamentally fails to recognize the nature and nuances of adjudicating sex-based harassment complaints between students and other students or employees. In so doing, the last administration adopted rules and procedures that narrowed Title IX's applicability and the scope of effective enforcement or supportive measures. NVRDC is pleased, here, to see the Department's proposed rules display a more pragmatic and functional understanding of the issues and potential harms that Title IX is intended to guard against. By creating a "floor" of safeguards and procedures, the Department can ensure a baseline level of fairness and protection for students while leaving individual recipients to craft some of the finer, practical details according to their unique institutional needs. NVRDC views this approach positively, as the built-in flexibility should prevent recipients from adopting Title IX procedures that are incompatible with the needs of their program while also permitting recipients to change policy components that, in practice, are ineffective or unwieldy.

That said, there is still significant danger in a "floor not ceiling" approach. On the one hand, the floor must be sufficiently detailed, clear, and specific to ensure that program recipients cannot inadvertently (or purposefully) adopt procedures or practices that frustrate Title IX's core promises; on the other, the floor must not be so contrived as to force Title IX proceedings into an inappropriate, pseudo-court structure. This danger is particularly perilous when setting the floor for grievance procedures, fact-finding safeguards, and investigative or hearing rules where the lawyers proposing the evidence and hearing procedures tend to fall back on what they know – court rules.

In our view, the current rules fail to achieve the objectives of Title IX in establishing appropriate grievance procedures because, in part, the current rules overly rely on certain cherry-picked court-like "due process" concepts as opposed to establishing a framework suited to the objectives of Title IX. Most prominently, the Trump Administration thrust a rigid, mandatory conception of

cross-examination into the Title IX process during the 2020 rulemaking such that the current rules require recipients to endure that conception through a contested hearing model. The Department reasoned that this model was the only means to ensure procedural “fairness” for respondents, but the current rules fail to consider the practicality of imposing complex legal concepts into a non-court setting. Cross-examination may very well represent a constitutionally protected tool to facilitate the search for truth in a criminal trial, but cross-examination does not serve that purpose in a vacuum. There are myriad other rules and court processes that are fundamentally necessary to make cross-examination serve its intended purpose without becoming abusive or farcical. For example, evidentiary rules regarding hearsay and the ability to pose foundational objections to improper evidence or testimony, are required to prevent cross-examination (or court hearings generally) from producing the kinds of misleading and improper evidence that obfuscates the truth rather than elucidating it. Crudely adopting these concepts into Title IX and forcing its use without the context of other rules, procedures, or judges has led to confusing and inconsistent practical experiences for recipients and students. It neither promotes fairness nor serves the intended purpose of Title IX.

Thus, the “floor” must take into account that the procedural safeguards created will be used in a setting where potentially none of the participants, administrators, or decision-makers are attorneys; nor is NVRDC suggesting that they should be. In these circumstances, “fairness” is a more practical concept than it may be in a criminal proceeding, and the “floor” must focus on establishing safeguards that consider equity as much as equality. NVRDC supports the proposed rules’ adoption of these concepts into the proposed 106.44, 106.45, and 106.46.

III. The Proposed Grievance Procedure Guidelines Should Precisely Define Equitable Treatment

NVRDC supports the Department’s proposed rule requiring recipients to adopt grievance procedures that treat the parties equitably.¹⁰ However, NVRDC recommends incorporating additional procedural details that clarify “equitable” does not mean strictly “equal” and that the purpose is to achieve fundamental fairness as opposed to the rigid application of procedural rules. Many procedures and models may be equal on their face but produce inequitable conditions in practice, taking into account the relative situations of the parties and circumstances.

For instance, a recipient’s contested hearing procedures may provide both parties an equal amount of time to submit or review evidence prior to a hearing. In the strictest sense, it is equal if a procedural rule requires both parties to submit final evidence 24 hours before a contested hearing, but in practice, it would not be “equitable” for one party to avail themselves of this rule by submitting thousands of pages of evidence 24 hours before the hearing. This kind of gamesmanship is not uncommon, and NVRDC has represented individuals in contested hearings where the opposing party submitted tens of thousands of written communications at the last permissible moment prior to the contested hearing. At the time, because there was no

¹⁰ *NPRM* at 41575.

clarification, the recipients viewed their procedures as equitable – both parties had the same opportunity and timeframe to submit evidence – and therefore did not believe it was fair to “change the rules” to either exclude the properly submitted evidence or delay the hearing.

Whereas a court might be structured for the parties to litigate these issues and may fashion remedies such as exclusion, proffers for relevance, or other sanctions on use, the Title IX grievance procedures are ill-suited for this type of motions practice. The “floor,” therefore, must set the proper definitions and expectations to guide recipients as they craft their specific policies. Thus, NVRDC supports the proposed rule 106.46(e)(5), which would require recipients to allow for the reasonable extension of timeframes in the complaint investigation process on a case-by-case basis for good cause,¹¹ but, NVRDC would urge the Department to further clarify that “good cause” is intended to achieve reasonable, fundamental fairness as opposed to enforcing a strictly equal application of the timeframe policies.

In another example, NVRDC has served as an advisor in multiple instances where, in order to protect evidence from disclosure, the recipients crafted “equal” but harshly burdensome requirements upon parties dictating the manner in which the student or advisor could review evidence and reports. In some circumstances, the recipients have required the complainant and their advisor to physically view the investigative materials in the Title IX Coordinator’s office without the ability to receive electronic copies or take photos of the materials for later review. This required NVRDC and the student to pre-arrange multiple one to two hour blocks of time and simultaneously meet in the Title IX Coordinator’s office to review evidence and draft the necessary responsive statements. These rules were enforced when the investigation occurred during the summer months and the student was living at home in another state, and, when the advisor’s schedule was incompatible with the student’s. Even though the respondent may, later, have been required to follow this same process, this rule disproportionately impacted the complainant, who was required to submit responsive materials first and carried the burden of proof. It also failed to recognize the traumatic nature of such proceedings and the potential for re-traumatization when a survivor of sex-based harassment was forced to review evidence under such confining circumstances.

Thus, NVRDC supports the proposed rule 106.46(e)(7), which would require recipients to provide each party and the party’s advisor with equitable access to evidence;¹² but, NVRDC would urge the Department to clarify that “equitable” means more than simply “equal.” Fairness and reasonableness require that the manner in which the evidence is provided must take into account the logistical and practical realities of parties’ circumstances, including those of the party’s advisor.

¹¹ *NPRM* at 41577.

¹² *NPRM* at 41575.

IV. The Appropriate Standard of Proof in Grievance Proceedings is a Preponderance of the Evidence

NVRDC supports the Department’s proposed rule requiring a “preponderance of the evidence” standard of proof in grievance proceedings and discourages the Department from permitting recipients to use a “clear and convincing” standard.¹³ Most civil cases, including the majority of civil rights cases, use a preponderance of the evidence standard for burden of proof that directs the finder of fact to determine whether an allegation has a greater than 50% chance of being true.¹⁴ The more burdensome “clear and convincing” standard is reserved for limited civil cases, often involving limitations on life or liberty, and requires the finder of fact to determine that the allegation is highly and substantially more likely to be true than untrue. The preponderance of the evidence standard is widely adopted in part because of its simplicity. Unlike the clear and convincing standard, which requires the finder of fact to determine whether the complainant has met a nebulous standard, the preponderance standard adopts a “more likely than not” standard, which is easier to understand and equitable to both parties.

Moreover, the factfinders in civil court are either judges or jury members that have the benefit of carefully constructed jury instructions that, in most cases, the parties have litigated or tailored to the specifics of their case and were ultimately approved by the judge. These instructions are especially necessary because the “clear and convincing” standard is simply difficult to understand in a practical sense. The meticulously crafted jury instructions serve a vital function in educating the jury on how that standard can be applied in the specific case. In Title IX proceedings, there is no litigation over the application of the standard into the posed questions of fact nor a judicial officer to make the final decision on instructions.

The preponderance standard, on the other hand, is sufficiently clear. “More likely than not,” “51%,” “good cause to believe,” and similar phrases describe a standard that is understandable, explainable, and can be applied with consistency. Because the preponderance of the evidence standard is the standard for most civil proceedings, it is the most appropriate standard for grievance procedures and the most likely to ensure equitable application.

A clear and convincing standard of proof is most appropriate where life or liberty is at stake. NVRDC understands and acknowledges the high stakes involved in grievance proceedings both for complainants and respondents. However, the consequence of an adverse decision risks neither life nor liberty, and thus, the standard of proof for grievance proceedings should not exceed the proof required in civil trials where life and liberty are similarly not at risk. Additionally, NVRDC recommends requiring a uniform standard of proof to be implemented across recipients. Allowing recipients to adopt different standards based on existing institutional

¹³ *NPRM* at 41483.

¹⁴ Letter from Leadership Conference on Civil and Human Rights to Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ., at 7 (Jan. 30, 2019), <https://civilrights.org/resource/civil-and-human-rights-community-joint-comment-on-title-ix-nprm>.

practices will lead to nonuniform outcomes across institutions. For example, a case that would succeed at a “preponderance” institution could possibly fail at a “clear and convincing” institution despite having the same evidence.

V. Training Requirements Should Include Subject-Matter-Relevant Topics

NVRDC supports the proposed regulations requiring appropriate procedural training for Title IX Coordinators, decisionmakers, investigators, informal resolution facilitators, and all other persons implementing the recipient’s grievance procedures or that can impact supportive measures.¹⁵

We recommend these parties also receive subject-matter training on topics that are highly likely to be relevant when interacting with victims of sex-based discrimination, and that without such training, may adversely impact the recipient’s ability to promptly and effectively end discrimination. Specifically, these employees should have specific training on trauma-informed approaches to investigating sex-based harassment and interviewing survivors of sexual abuse, domestic violence, and stalking. Understanding the biological and neurological responses to trauma, at a base level, is critical for these employees’ abilities to comprehend the conduct, statements, and reactions of survivors in the appropriate context. Behaviors or statements from complainants are often judged as being inconsistent with “what a real victim would do or say” by recipient personnel that simply lack a fundamental understanding of how trauma and stress impact neurobiology. In the context of Title IX, it is critical that all recipient personnel have the training necessary to avoid the assumptions, stereotyping, and false expectations that derive from a lack of knowledge of trauma responses.

In addition, it is very common for incidents involving drugs or alcohol to be a component of sex-based discrimination. Recipient employees involved in the Title IX process should be trained on the presence of alcohol and its influence on the perception of pieces of evidence. Understanding how the effects of alcohol are influenced by quantity to weight/time ratios or how alcohol is metabolized differently by women can provide common and critical context when the presence of alcohol is a narrative factor. Understanding the meaning of terms such as “black out” vs “brown out” is likewise critical to understanding the very common occurrence where a person may be conscious but unable to object to the unwelcome conduct or recall events at a later time.

NVRDC also strongly supports the proposed rules’ requirement that all recipient employees have training regarding the recipient’s obligations, scope, and notification requirements under the proposed rules.¹⁶

¹⁵ *NPRM* at 41570.

¹⁶ *Id.*

VI. The Written Notification of Determination Should Allow the Parties to Identify the Standard of Proof Applied to Each Element of the Allegation

NVRDC supports the Department's proposed rule requiring recipients to issue a written notification of determination following grievance proceedings.¹⁷ We suggest the Department include a requirement that when a recipient determines that a respondent violated or did not violate the recipient's policy prohibiting sex discrimination, a written notification should expressly identify the elements of the allegation(s) found by a preponderance of the evidence as well as those elements that were not found by a preponderance. Attaching a clear explanation of the decisionmaker's findings, with the appropriate standard, to the elements presented for consideration is necessary to properly convey the substance of the determination. This notification would allow the parties to better understand each decision regarding a finding of responsibility or non-responsibility, would require the decision-maker to sufficiently explain their determination, and would save the parties from speculating on appeal.

In addition, a standard should be attached to the appeal procedures to ensure that appeals are conducted fairly and consistently. For example, we recommend requiring the appealing party to prove that an irregularity or bias would "materially alter the outcome" of the case or that the recipient otherwise violated its own procedures, such as by applying the incorrect standard of proof to the proceedings.

III. Title IX Proceedings – Areas of Opposition with Additional Recommendations

A. The Proposed Credibility Exclusionary Rule Fails to Distinguish Between Those Who Will Not and Those Who Cannot Answer Questions

NVRDC opposes the Department's proposed credibility exclusionary rule, which would require the finder of fact to exclude any party statements that support the party's position if a party does not respond to questions related to their credibility.¹⁸

At present, the Department has failed to distinguish between a witness's willful refusal to cooperate with an investigation and instances where a witness may not or cannot remember the particulars of an event due to trauma or intoxication. By requiring recipients to exclude any statement that supports the party's position where a recipient "does not respond" to questions of credibility, the Department treats both individuals who do not cooperate and those who cannot as the same. This problem is further compounded because the Department has not yet provided guidance as to when a question is "related to [a witness's] credibility." Should the Department wish to include an exclusionary rule, NVRDC would propose changing "does not respond to questions" to "refuses to respond to questions" in order to avoid inadvertently disregarding witness testimony from otherwise cooperative witnesses.

¹⁷ *NPRM* at 41578.

¹⁸ *NPRM* at 41578.

B. The Decisionmaker Should be Separate from the Title IX Coordinator and Investigator

NVRDC opposes the proposed portion of 106.45(b)(2) that provides that the decisionmaker may be the same person as the Title IX Coordinator or investigator.¹⁹

The decisionmaker's primary responsibility is to make an objective and fair determination about whether sex-based discrimination has occurred. The integrity of that decisionmaker's adjudicatory power is easily undermined if that same person also carries the responsibilities of the investigator or the Title IX Coordinator. In any permutation, the functions of these three positions are likely to be the source of any claimed irregularity by an appealing or complaining party.

The investigator is responsible for collecting evidence, interviewing witnesses, posing questions to the parties, and writing reports that summarize or opine on their findings. These functions are often a source of consternation and dispute for the parties. In representing survivors, NVRDC has had occasion to raise concerns, file appeals, and submit Department or Clery Act complaints based on the conduct, professionalism, bias, or negligence of recipient investigators. In these instances, genuine disputes have arisen regarding the fidelity and accuracy of investigative reports, questions about why or what evidence was obtained or the investigator failed to timely obtain, instances where investigators did not interview witnesses properly, asked inappropriate questions, forgot to interview witnesses, or grossly misunderstood or misreported the statements of witnesses. In these instances, NVRDC (or sometimes the opposing party) first sought to address these issues with recipient officials supervising investigators; it would be extremely problematic to raise these concerns if the investigator was also the decisionmaker.

Similarly, Title IX Coordinators are responsible for a variety of tasks involving the structure and execution of the recipient's Title IX grievance process. The Title IX Coordinator is often the person to whom complaints are first made, who initiates the formal onset of grievance proceedings, who handles coordination of setting timeframes, who reviews materials, and with whom students discuss supportive measures. All of these functions also serve as friction points between students and Title IX Coordinators; it is common for some level of conflict to arise between complainants and the Title IX Coordinators in charge of managing the response to claims of sex-based discrimination. For these reasons, it raises major concerns to force students into a potentially adverse dialogue with the Title IX Coordinator, only for that same person to later serve as the decisionmaker in the case.

NVRDC recommends requiring recipients to create a formal separation between the decisionmaker, investigator, and the Title IX Coordinator to ensure that the investigator in any given Title IX case does not also have an oversight or adjudicatory role. We suggest, at a minimum, requiring the decisionmaker to obtain a sign-off on decisions regarding findings of responsibility (or of non-responsibility) from a third party, such as an individual or panel of

¹⁹ *NPRM* at 41575.

investigators with the same training.

IV. Other Areas for Comment

A. The Department Should Empower Title IX Offices to Enact Supportive Measures

NVRDC supports the Department's proposed rule requiring the Title IX Coordinator to offer and coordinate supportive measures for both parties as well as the proposed rule permitting support measures to be offered without filing a formal complaint or prior to a finding on discrimination.²⁰ While providing a clear party responsible for supportive measures is a welcome change from the current rules, Title IX Coordinators must also be empowered by their institutions to act independently to provide such support. To that end, we would recommend that the Department include additional requirements that recipients allow Title IX Offices to enact accommodations with minimal coordination or interference from other institutional offices.

NVRDC has experienced multiple incidents where our clients have been unable to benefit from reasonable supportive measures because the Title IX Coordinator lacked the authority or willpower to confront our clients' professors or deans. In one such instance, a student survivor who was sexually assaulted by another student asked for a reasonable supportive measure to attend the remainder of her classes virtually as she did not feel safe on campus. The university's Title IX office told the client that they did not have the authority to permit her to do so and told her to speak to the Dean of Students. The client then had to disclose her assault to her Dean to request the supportive measure. The Dean told her that she would need to speak to individual professors to obtain their permission to attend classes virtually. Forcing yet another disclosure, the client had to then share her assault with five different professors to get the supportive measure she should have initially obtained directly from the Title IX office.

In other instances under similar circumstances, NVRDC has represented students where some professors permitted the survivor to retake quizzes while others did not; where some department heads permitted exceptions to retake courses for graduation eligibility while others refused; and where some professors waived attendance components while others required additional work. These examples continue and encompass everything between individual professors' views on writing assignments through whether a survivor can withdraw or take an incomplete on a specific class. These inconsistent, absurd experiences were both offensive and unnecessary and, in all cases, required the individual survivor to personally negotiate with their deans, professors, department heads, or the bursar's office. The explanation as to why was universal: the Title IX Coordinator lacked the authority to provide these supportive measures on their own.

B. The Proposed Rules Permitting the Informal Resolution Are Appropriately Expansive and Empowering

NVRDC supports the informal resolution process outlined in proposed rule 106.44(k) as well as

²⁰ *NPRM* at 41573.

the included procedures, warnings, and facilitator criteria.²¹ Of particular note, the option to engage in the informal resolution process prior to onset of the formal complaint process is both empowering and necessary.

During the 2020 rules comment period, NVRDC explained that one of our guiding principles was to empower victims to achieve survivor-defined justice. Many of our clients express the desire to engage in alternative systems of justice with non-punitive outcomes; this includes framing their path to healing by having a discussion with the respondent or a third party, coming to an agreement about what parts of campus each party would be able to access or other possible accommodations that meet the interests of the parties.

While this position was not popular at the time, NVRDC supported the incorporation of an informal resolution process in 2020 because it empowered survivors and allowed for different models of justice. Now, as then, NVRDC believes that every survivor should be given the opportunity and support to choose their unique pathway to recovery – a path should not be chosen for them.

Our support was not unconditional, however, and we cautioned that the potential for abuse and coercion required appropriate safeguards to ensure that all parties were participating voluntarily and that these processes were facilitated by sufficiently trained personnel. We also recommended that the process be non-binding, so that at any point either party could withdraw from the informal resolution process and resume the formal grievance procedures. NVRDC is pleased that 106.44(k)(iii) provides precisely this mechanism.²² Moreover, because the proposed rules would permit the parties to engage in the informal resolution process prior to initiating formal grievance procedures, survivors are truly empowered to consider informal resolution as a viable option without waiving or committing to the formalized process. In this fashion, the rules would create an environment where informal resolution can be safely considered and therefore more likely to achieve its intended purpose.

C. The Department Should Specifically Define the Extent to Which an Advisor May Interact with Recipient Personnel or Take Action on a Party's Behalf

NVRDC generally supports the proposed rules' clarification of a party's access to and functioning of a chosen advisor. For instance, 106.46(e) would require that recipients "provide each party and the party's advisor, if any, with equitable access to the evidence that is relevant to the allegations of sex-based harassment and not otherwise impermissible...".²³ This proposed rule would make practical sense and appropriately note that the advisor must have access to evidence to facilitate the advisor's role in the process. NVRDC notes, however, that the conjunctive "each party and the party's advisor" could be interpreted to obligate the recipient

²¹ *NPRM* at 41574.

²² *Id.*

²³ *NPRM* at 41577.

only to provide access to both the party and their advisor simultaneously.

As discussed earlier, NVRDC has served as an advisor where recipients permitted access to evidence only at certain physical locations or even specific virtual locations. In those instances, NVRDC was not able to access the evidence unless the party was also present or online contemporaneously. This greatly hindered NVRDC's ability to serve in an advisory capacity since we could only view the necessary materials while our client was available to chaperone. In other contexts, NVRDC has had the awkward experience of emailing Title IX Coordinators or investigators with questions or concerns only to find that the recipient personnel would either reply only to our client directly (and remove NVRDC from the email chain) or would include NVRDC but only address the client. The explanation was universally the same, disappointing rhetoric: advisors are there to advise and not directly participate.

For the reasons above, NVRDC supports proposed rule 106.46(e), and the various other proposed rules that contain similar language, for clarifying the more active role served by an advisor. That said, NVRDC would urge the Department to further and specifically clarify the extent to which a party may delegate specific functions or communications to their advisor. Beyond merely offering advice or serving as a proxy during contested hearing, an advisor can be especially valuable for relieving some of the administrative and substantive stress associated with Title IX proceedings. Most parties are either young adults or children, and even the most sophisticated college-aged student is likely to feel overwhelmed navigating the complaint and evidence collection processes thrust upon them – let alone engaging in the typically tense dialogue with adult school officials surrounding retaking exams, refunding tuition, or other supportive measures. The parties must have the power to designate that their advisor may share in communications with school officials, access evidence unchaperoned, or execute otherwise routine, procedural, and perfunctory tasks on behalf of the party.

D. The Department Should Expand the Definition of Retaliation to Include Information Revealed in the Course of Investigating a Complaint or Receiving Information About Possible Sex Discrimination

NVRDC supports the proposed rule 106.71 expanding the current rules on retaliation to specifically include “peer retaliation” and seeking to protect a person from an unrelated code of conduct violation that might derive from the same facts or circumstances as the complaint or information reported about sex discrimination.²⁴ This expansion is so critical because, for example, a victim of sex-based harassment might be unwilling to initiate a complaint about having been sexually assaulted out of fear that doing so would necessarily reveal their own drug or alcohol use during the same series of events.

NVRDC urges the Department to expand the protections under this section to protect against other code of conduct violations, beyond those arising out of the “same facts and circumstances,”

²⁴ *NPRM* at 41579.

to include any information learned as a result of the formal grievance process, informal resolution, or deliberate retaliation by another party or witness.

For example, the proposed rules might protect a survivor for having violated a recipient's alcohol policy at the time they were sexually assaulted, but it would not protect that survivor from having violated the alcohol policy a month prior. This survivor could still feel too intimidated to make a complaint out of fear that the wholly unrelated code violation will necessarily be revealed as a consequence of initiating a formal complaint. Such concerns are hardly abstract; it is likely that through the production of evidence, including text messages, social media content, witness interviews, and opposing party statements, evidence of other infractions may be revealed.

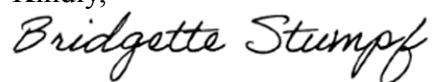
NVRDC represented a survivor in precisely this situation. The amount and frequency of the parties' alcohol-consumption habits was an intensely disputed factual component of the contested hearing that, while relevant to certain aspects of the alleged sexual assault, were wholly unrelated in time or circumstances to the actual facts and circumstances of the complaint. As a result of evidence and testimony adduced through the grievance process, the survivor's resident advisor eligibility was revoked, which in turn, impacted her ability to afford university housing.

This very common scenario utterly frustrated the purpose and functioning of Title IX, and NVRDC urges the Department to expand 106.71 to protect against derivative retaliation.

V. Conclusion

Thank you for considering our comments. I would be happy to answer any questions or discuss these recommendations in further detail.

Kindly,



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