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Network for Victim Recovery of DC Releases Position Statement on the U.S. Department of Education's Issuance of the 2020 Title IX Regulation

On May 6, 2020, the Department of Education released their new, comprehensive Title IX regulation. The regulation rolls back Obama-era guidance on how schools must respond to sexual harassment under Title IX. In November 2018, the Department of Education (DOE) released its Proposed Regulation, with the notice and comment period concluding in January 2019. Despite calls from universities, students, legislators, advocates, and activists to delay release of this new regulation in the middle of a national state of emergency due to the coronavirus pandemic, the DOE did so anyway. Even more concerning, the DOE expects schools to issue finalized policies that comply with the new regulation by August 14, 2020.

NVRDC joins other survivors, advocates, and advocacy organizations in expressing its concern over the new regulation. The regulation essentially encourages institutions to create inconsistent, impartial, and potentially unjust Title IX policies which will weaken protections for student-survivors of sexual assault, dating violence, stalking, and sexual harassment. As an organization that provides legal assistance to victims of crime, including representation of student-survivors in Title IX-based grievance proceedings, NVRDC urges universities to take further action to protect students from sexual harassment beyond the bare-minimum that the DOE requires.

The following changes that were included in the DOE's new Title IX regulation are of particular interest to NVRDC and the community we serve:

I. Jurisdiction

NVRDC urges schools to adopt a harm-centered approach to sexual harassment that prohibits sexual harassment regardless of where it occurred, because of the harm that sexual harassment has on a student-survivor's access to education. The text of Title IX prohibits discrimination based on sex in a school's program or activity.¹ Under prior guidance, a school was obligated to respond to a reports of sexual harassment if the harassment itself occurred *within* the school's program or activity or it had *an effect within* the school's program or activity.² Under the new

¹ Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a).

² Questions and Answers on Title IX and Sexual Violence, p. 36 (April 29, 2014).

regulation, the effect of sexual harassment is not taken into account, and instead, schools are only obligated to respond to sexual harassment that occurred within the program or activity, which includes on-campus conduct as well as off-campus conduct that occurs in a context over which the school exercises some amount of control.³ Such contexts may include a field trip, housing of a university-sanctioned organization, a school event hosted off campus, among others.

As the 2014 guidance recognized, limiting a school's obligations to respond to sexual harassment based on where the actual assault or violence occurred fails to accomplish the purpose of Title IX; Title IX recognizes that sexual harassment constitutes sex-based discrimination when it denies a student-survivor equal access to education. A survivor may experience the same potential loss of access to educational opportunities regardless of whether they experienced an assault (or other prohibited conduct) on or off campus. A school's obligation to respond to sexual harassment should not be based on an arbitrary line in the sand about the physical location of where the underlying sexual violence occurs, but instead, such obligation should be harm-centered. If a student-survivor is denied educational opportunities, that harm is always within an educational program or activity.

The Department of Education has noted that schools are free to prohibit students from perpetrating sexual harassment off-campus, outside of a school's program or activity, under their student conduct policies, even though it cannot be investigated under Title IX.⁴ NVRDC urges schools to protect student-survivors' access to education by adopting policies that prohibit sexual harassment *regardless* of where it occurs. To fully protect its students, schools must commit to remedying the insidious effects of sexual violence on students' access to education.

I. Definition of sexual harassment

NVRDC urges schools to continue using a more expansive definition of sexual harassment than is required by the Department of Education. When defining behavior that schools must address under the new Title IX regulation, the DOE limited what qualifies as sexual harassment. The regulation separates sexual harassment into three categories: (1) quid pro quo sexual harassment, (2) "unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity," and (3) sexual assault, dating violence, domestic violence, and stalking.⁵

NVRDC is extremely happy that the DoE expanded the third category from the proposed language, which did not include dating violence, domestic violence, and stalking, and instead only included sexual assault. As an organization that represents student-survivors, this omission caused significant concern to us because a school, under the proposed regulation, was only obligated to respond to dating violence, domestic violence, and stalking if it met the criteria in the

³ 34 C.F.R. §106.44(a); DOE Final Regulation at 615-664.

⁴ 34 C.F.R. §106.45(b)(3)(i); DOE Final Regulation at 541, 545, 631, 636, 642, 645, 652.

⁵ 34 C.F.R. §106.30.

second category. Now, a school can respond to incidents of dating violence, domestic violence, or stalking without the need to meet a certain level of severity.

While NVRDC is glad to see categories 1 and 3 included as per se sexual harassment, we nonetheless feel that the second category is far too narrow. The definition drastically limits schools' obligations to respond to unwelcome conduct on the basis of sex. Under prior guidance, DOE defined sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."⁶ In weakening that definition with the qualifiers "severe, pervasive, and objectionably offensive", the DOE created a higher threshold for when unwelcome sexual conduct must be addressed by a school.

The weakening of the definition of sexual harassment could be detrimental to survivors because a school's obligation to offer supportive measures and grievance procedures are triggered only when they receive a report of conduct that meets this higher threshold. Sadly, the DOE is signaling that some conduct *previously* recognized as sexual harassment and, therefore, intolerable under Title IX, is *now* acceptable under this new regulation. A more limiting definition may have a chilling effect on reporting, as students may not want to risk reporting to the Title IX Office if they don't believe that the conduct they've experienced is sufficiently severe, pervasive, and objectionably offensive for the Title IX Office to take any action.⁷

While the DOE has stated that schools *can* adopt policies with more expansive definitions of sexual harassment if they wish to do so, only the conduct meeting the new definition can be investigated by a school for the purposes of Title IX. Schools have the discretion to investigate conduct that falls outside of Title IX by pursuing them as violations of their student codes of conduct. NVRDC believes schools should continue to prohibit "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature" when it denies the survivor equal access to education, even where Title IX does not require it. This includes investigating and adjudicating these offenses under their Office of Student Conduct.

II. Definition of Formal Complaint

NVRDC believes schools should clarify who will qualify as a complainant under the school's Title IX policies. The new Title IX regulation states that "at the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed."⁸ NVRDC is concerned about the possible implications of this provision for several reasons. For example, this requirement may limit the ability of a former student to report sexual harassment, even if the perpetrator is still a student. Another particular concern is a scenario that NVRDC commonly encounters: a survivor transfers schools after being sexually assaulted by a fellow student and then wishes to pursue a grievance process against their assailant who still attends the other school. In that scenario, despite the

⁶ Dear Colleague Letter: Sexual Violence, p. 3 (April 4, 2011).

⁷ See e.g. Negar Katirai, *Retraumatized in Court*, 62 Ariz. L. Rev. 81, 96 (2020) (Noting that many survivors opt out of engaging in legal systems for fear of negative reactions and retraumatization).

⁸ 34 C.F.R. §106.30(a).

conduct otherwise fitting the necessary requirements, and despite the fact that the assault caused the survivor to stop engaging in a school's program or activity, a school under the new regulation is not obligated to respond in *any* manner to such a report. Additionally, in a large urban city like DC where we have a large number of higher education institutions, it is not uncommon for a survivor attending one school in a city to be assaulted by a student attending another school in the same city. As a result of this requirement, that student-survivor would be prohibited from filing a complaint against their assailant at the assailant's school unless the survivor could somehow otherwise be considered to be engaging in the school's "program or activity."

As with other provisions of this regulation, schools *may* prohibit more conduct than is required under Title IX. In order to ensure a safe and equal educational environment, NVRDC recommends schools carefully consider how to respond to reports of sexual violence committed by their students against non-students and decide under what circumstances it is in the university community's best interest to respond to such reports.

III. Hearing Process and Cross-Examination:

NVRDC is concerned about the effect that hearings and live cross-examination will have on survivor engagement with Title IX grievance proceedings. The DOE now requires that schools hold a live hearing at which both parties are subject to cross-examination by the other party's advisor.⁹ The regulation specifically states:

At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally.¹⁰

Prior DOE guidance discouraged cross-examination of parties, in part because of concerns that being cross-examined by their assailant can be traumatizing to survivors.¹¹

NVRDC is particularly concerned about this new cross-examination requirement because the regulation also specifies that an advisor may be *any* person of the parties' choosing.¹² While the regulation requires training of Title IX Coordinators, investigators, and those conducting informal resolution;¹³ there is absolutely no training required for advisors. This means that survivors may be subject to cross-examination by someone who is invested in the outcome of the case (such as the respondent's parent or coach), but lacks any formal education or training on how to conduct

⁹ 34 C.F.R. §106.45(b)(6)(i); DOE Final Regulation at 1033-1348.

¹⁰ 34 C.F.R. §106.45(b)(6)(i); DOE Final Regulation at 2024.

¹¹ Dear Colleague Letter: Sexual Violence, p. 12 (April 4, 2011).

¹² 34 C.F.R. §106.45(b)(5)(iv); DOE Final Regulation at 991-992.

¹³ 34 C.F.R. §106.45(b)(1)(iii)

an appropriate and professional cross-examination. This leaves a survivor open to intrusive and embarrassing questions and the likelihood of retraumatization.¹⁴

Untrained advisors could also be harmful to the parties that they are representing. If a school assigns an untrained advisor for purposes of cross-examination, students may be heavily relying on untrained and unprepared individuals for technical advice on extremely sensitive subjects.¹⁵ Furthermore, because an advisor's communications are not legally privileged (unless the advisor is an attorney), some advisors may be asked to testify regarding communications with the very students they are meant to be assisting. This makes it difficult for a student to be able to fully confide in and rely upon an advisor's advice.

NVRDC began representing student-survivors in the Washington, DC area under Title IX in 2012. Since that time, our attorneys have served as advisors under a variety of adjudication models. In our experience, hearing processes take longer and can be less efficient than the single-investigator model. This time expense combined with the resources required to have a trained and impartial hearing panel for every case can be burdensome on schools and students alike. For student-survivors, a process as required under the new regulation will likely require that a student-survivor tell their story at least two times to multiple people, something that can be retraumatizing even under the best of circumstances.

Therefore, NVRDC recommends schools *immediately* consider how to address these burdensome requirements so that the rights of students, staff, and faculty are not infringed upon due to a lack of preparation or resources on the school's part. NVRDC encourages schools to consult organizations in their community for resources and support, such as providing trained and impartial panel members, trained and trauma-informed advisors. Schools should encourage students to use advisors who have training in the school's process and how to conduct cross-examination, in addition to training about what types of questions are not allowed in such proceedings (for example, limitations on asking about a survivor's prior sexual history).

IV. Standards of Evidence

Colleges and universities should continue to use the "preponderance of the evidence standard" when adjudicating complaints of sexual harassment. Under the new Title IX regulation, DOE allows schools to choose between the evidentiary standards of "preponderance of the evidence" and "clear and convincing evidence." NVRDC encourages schools to use the preponderance of evidence standard in their Title IX proceedings. Preponderance of the evidence means that there

¹⁴ See *e. g.*, Negar Katirai, *Retraumatized in Court*, 62 Ariz. L. Rev. 81, 87-90 (2020). This article discusses the various ways in which engaging with the criminal legal system retraumatizes survivors of sexual assault, discussing how engaging with a formal system can be humiliating, degrading, and intrusive, and can constitute a trauma in itself.

¹⁵ As an organization that provides student-survivors with advisors who are attorneys, NVRDC is concerned that advisors may be unintentionally engaging in authorized practice of law if they are providing legal advice on federal regulation without being licensed attorneys. *Contra* DOE Final Regulation at 998-999 ("[T]he Department believes that assisting a party to a grievance process is best viewed not as practicing law, but rather as providing advocacy service to a complainant or respondent.").

is enough evidence to believe it is more likely than not (often described as being at least 51% sure) that the respondent committed the violation(s). Clear and convincing evidence means it is *substantially* more likely than not that the respondent committed the violation(s). Prior DOE guidance required schools to use the preponderance of the evidence standard, which is the standard not only used in the *majority* of civil court cases,¹⁶ but is the standard typically used in adjudicating civil rights complaints. Even the DOE assesses whether or not a school has violated civil rights laws using a preponderance of the evidence standard.¹⁷ Clear and convincing evidence is a less common standard, and also less defined than preponderance of the evidence. A non-lawyer can easily and accurately understand and apply the preponderance, more likely than not, over 50% standard; this is one reason this standard is used by jurors in civil cases. Clear and convincing evidence is a difficult, nebulous, and hardly-used technical legal term that is never analyzed, interpreted, or applied by non-lawyers.

Schools should continue to use the preponderance of the evidence standard. The lack of clarity about exactly what “substantially more likely than not” means will lead to inconsistent case outcomes even within the same school. Also, the DOE has not issued any guidance for schools on the difference between the standards and how to choose the standard that is right for their students, faculty, and staff. Allowing schools to choose ensures that the same set of facts would be treated differently between different schools, which will create uncertainty for survivors and ultimately fails in fulfilling the overall mission of Title IX.

V. Informal Resolution Processes

NVRDC supports DOE allowing schools to include informal resolution processes if they choose to, and believes informal resolution processes, when guided by principles of restorative justice and with appropriate safeguards, can be an important tool for empowering survivors. The new regulation allows schools to offer an informal resolution process as a way to resolve proceedings under Title IX, but specifies that schools are prohibited from requiring parties to participate in informal resolution processes.¹⁸ Under the regulation, in order to use an informal resolution process, the complainant must have filed a formal complaint, and the school must obtain voluntary, written consent to participate from both parties. Prior DOE guidance discouraged mediation or informal resolution processes in cases of sexual assault.¹⁹ While this prior guidance was rooted in protecting student-survivors from retraumatization or undue influence from the respondent, it failed to account for the fact that informal resolutions allow survivors to access remedies that may not be available through a school’s grievance procedure, and can empower student-survivors to seek justice without the often traumatic experience of participating in a hearing or investigation.

Many advocacy organizations are concerned that allowing informal resolutions encourages schools to pressure survivors to accept less justice than they deserve. However, NVRDC believes

¹⁶ Dear Colleague Letter: Sexual Violence, p. 10 (April 4, 2011).

¹⁷ Dear Colleague Letter: Sexual Violence, p. 11 (April 4, 2011).

¹⁸ 34 C.F.R. §106.45(b)(9).

¹⁹ Dear Colleague Letter: Sexual Violence, p. 8 (April 4, 2011).

that survivors should have access to more than one means of addressing the harm done to them. Not all survivors are interested in seeing an assailant punished. While many survivors may want to engage in a grievance process and have a finding made against the respondent, many may want alternative resolution options. NVRDC believes survivors have the right to choose what justice means for them and how they want to obtain such justice.

That being said, NVRDC reminds schools that for an informal resolution process to be an empowering tool for survivors, it must be *entirely* voluntary and have appropriate safeguards in place so that the process does not put unfair pressure on the survivor to go along with remedies that don't fit their needs. Schools should also ensure that the process is conducted in a safe and trauma-informed manner, and that survivors are never required to directly interact with their assailant to participate in an informal resolution process. Additionally, schools should be informed by research on the imbalance of power present in dating and domestic violence contexts and consider whether or not an informal resolution is appropriate in such cases, and if so, what additional tools will schools utilize to ensure that informal resolutions do not disadvantage the survivor. Schools should carefully craft their informal resolution processes and look to principles of restorative justice to create safe, voluntary, and effective processes for responding to sexual harassment.²⁰

VI. Mandatory Reporting

NVRDC believes in creating an on-campus culture where survivors feel comfortable disclosing their assaults and know who is and is not someone obligated to report to Title IX, so that they are not forced to go through any process in which they haven't actively elected to participate. Under prior guidance, DOE had stated that schools would be held responsible for responding to sexual harassment that it knew about (through a report to the Title IX Office) or that it should have known about.²¹ The latter requirement (called "constructive notice") created an incentive for schools to make all employees mandatory reporters (referred to by prior guidance as "responsible employees"), so that any time an employee learned of sexual harassment, it was reported to the Title IX Office. The new regulation no longer holds schools responsible for conduct the schools should have known about, thereby doing away with that incentive.

While mandatory reporting requirements may be founded in the goal of ensuring the safety of students, it is a policy that has an unintended effect of removing the survivor of their own agency. Many times, after survivors disclose their assault to a trusted professor, or even a close friend who is also a resident advisor (RA), this disclosure is reported to the Title IX Office. While we believe survivors should be informed of their options and provided with resources, who they

²⁰ See e.g. Mary Koss and Mary Achilles, *Restorative Responses to Sexual Assault*, National Online Resource Center on Violence Against Women (2008) available at http://vawnet.org/sites/default/files/materials/files/2016-09/AR_RestorativeJustice.pdf; Madison Orcutt et al., *Restorative Justice Approaches to the Informal Resolution of Student Sexual Misconduct*, 45.2 Journal of College and University Law (Publication Pending) available at <https://jcul.law.rutgers.edu/wp-content/uploads/2020/06/RESTORATIVE-JUSTICE-APPROACHES-TO-THE-INFORMAL-RESOLUTION-OF-STUDENT-SEXUAL-MISCONDUCT-POSTED.pdf>.

²¹ Dear Colleague Letter: Sexual Violence, p. 4 (April 4, 2011).

disclose their assault to should be entirely the survivor's choice. The harm resulting from a survivor's disclosure being reported to their school when the survivor is not ready to make such a report can have lasting and devastating effects on the survivor. After an assault, it is important that the survivor remain in control of who they disclose to and what is done with the information they disclose. Sexual assault and power-based violence are generally violations that take away a person's agency and it is important that the response to such violations serves to help the survivor regaining those feelings of control and power.

NVRDC believes that providing a transparent, safe, and confidential reporting culture can serve as both a method to combat sexual violence and a way to empower survivors. For this reason, NVRDC does not believe that the key to addressing sexual violence lies in having more or less mandatory reporters, but instead in ensuring that schools: 1) are as transparent as possible about which individuals have reporting duties on-campus, 2) train those individuals on how to inform survivors of the consequences of disclosing to those mandatory reporters, and 3) train all employees, regardless of their reporting obligations, on how to respond to disclosures in a sensitive, trauma-informed manner. If information is readily available about who is and is not a mandatory reporter, survivors will be empowered to disclose to the person and at the time that is best for the survivor. By having this agency, a survivor may be more likely to make an official report to the school, leading to more accurate crime statistics and accountability for students who commit violence within their community.

VII. Training Requirements

NVRDC believes that obligating training of key persons involved in the Title IX process is a great step towards creating a consistent response to reports of sexual assault. The new Title IX regulation states:

[Schools] must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.²²

This new requirement is a step in the right direction; however, NVRDC believes that in addition to the specific procedural requirements of a school's policy, the personnel mentioned in the regulation should be trained on supplemental matters, including trauma-informed interviewing, which will inform how personnel treat both complainants and respondents during interactions; common responses to trauma and sexual assault; the prevalence and dynamics of intimate partner and dating violence; implicit bias, and any other topics that are relevant to the community the school serves. As mentioned before, NVRDC also believes that training should be encouraged

²² 34 C.F.R. §106.45 (b)(1)(iii).

for advisors so that cross-examination can be conducted in a thorough, effective, and respectful manner.

VIII. Conclusion

NVRDC's significant concerns about the new regulation will only serve to harden our resolve to fight for the rights of student-survivors and against oppression and discrimination. In the face of this new regulation, NVRDC will continue to advocate for schools to support survivors beyond its Title IX requirements. We offer our continued legal, advocacy, and case management resources to all in need. NVRDC stands with survivors.

For media inquiries, please e-mail naida@nvrdc.org.

Network for Victim Recovery of DC empowers victims of all crimes to achieve survivor-defined justice through case management, advocacy and legal services. For more information, please visit our website (www.nvrdc.org) or call (202) 742-1727.