



June 10, 2021

Submitted via T9PublicHearing@ed.gov

Written comment prepared by John L. Finley, Policy Manager (jfinley@valor.us)

RE: Office of Civil Rights hearing pursuant to Executive Order 14021, *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*

Document Citation 86 FR 27429

VALORUS (VALOR), formerly known as the California Coalition Against Sexual Assault (CALCASA), respectfully submits this comment as testimony to inform the Department of Education's review of regulations, guidance, and other agency actions under Title IX, and to respectfully request changes to the rule entitled "*Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*". VALOR (as CALCASA) previously submitted comment to the Department in January of 2019 in strong opposition to the Department's Notice of Proposed Rulemaking concerning Title IX of the Education Amendments of 1972, as published in the Federal Register on November 29, 2018.

VALOR is a national organization committed to advancing equity and ending sexual violence. Since our founding in 1980 as the California State Coalition of Rape Crisis Centers, we have continued to build dynamic relationships across a diverse range of communities, institutions and systems, and to mobilize our network of survivors and advocates to influence change. Through leadership, prevention and advocacy, we continue to engage and amplify the voices of rape crisis centers, sexual assault service providers, and survivors in pursuit of a world free from violence where the dignity of every person is valued and respected. A critical piece of the world VALOR envisions is securing the right for everyone to an equal education, free from gender discrimination – and the eradication of sexual and gender-based violence in education.

916.446.2520 | Valor.US

1215 K Street | Ste 1850 | Sacramento, CA 95814

SACRAMENTO | LOS ANGELES | WASHINGTON D.C.



Changes to the Title IX rule made last year under then-Secretary of Education Betsy DeVos are discriminatory, illegal, and profoundly restrict the legal duties of educational institutions to respond to sexual violence and harassment. The changes have created arduous and unnecessary hurdles for students to seek help when victimized by sexual violence, and have created a confusing and capricious legal environment for educational institutions and governments wishing to implement critical gender equity protections. Most devastatingly, the rule has seriously undermined the progress made over the last twenty years to lessen the effects of sexual harassment in schools, reduce the stigma of experiencing sexual harassment and violence, and improve overall educational outcomes for student survivors. For these reasons, VALOR greatly appreciates the opportunity provided by the Office of Civil Rights to comment on the urgent need to address Title IX protections in schools, and to provide recommendations and input as you consider important changes to harmful aspects of the new regulations that have made schools less safe for everyone.

We join in the concerns raised by several national advocacy organizations, educational institutions, and students themselves who have demonstrated that at its very core, the DeVos regulations have had the effect of discouraging students from reporting sexual assault and other forms of sexual harassment. Furthermore, the new regulations completely contradict the purpose of Title IX as a civil rights law, which is to protect equal access to education, by erecting intimidating and harmful barriers for impacted people at every turn, and replicating a traumatic approach that deprives survivors of their agency and their dignity. The experience and stress of sexual harassment create significant barriers for student success in school, further exacerbated when a school does not or cannot respond effectively with support for the student. Impacts on students can include serious emotional and mental health problems, such as anxiety, depression, and substance use and abuse – both in immediate crisis and for several years after. Students may drop out of school because they do not feel safe or may be forced to leave school due to performance issues related to the trauma. In addition to physical and emotional trauma, there are financial burdens as well related to student loans, costs of treatment, and additional expenses of relocation. Student survivors need support and learning environments free of discrimination, else they face devastating life outcomes that are costly and difficult to ever truly overcome.

Restore Protections for Student Survivors

Prior to the DeVos Title IX regulations, and since 1997, the Department of Education's longstanding guidance led to more meaningful action by institutions to address sex-based



harassment and support victims, an increase in reporting by victims to their schools and the Department, and greater accountability when institutions failed to comply with Title IX. To restore Title IX's purpose and effectiveness, the Department must reinstate the following guidance:

- Clearly define sex-based harassment to include sexual harassment, dating violence, domestic violence, and sex-based stalking and harassment based on sexual orientation, gender identity, gender expression, parental status, pregnancy, childbirth, termination of pregnancy, or related conditions;
- Define sexual harassment as unwelcome sexual conduct;
- Require schools to respond to all quid pro quo harassment and any other sex-based harassment that is sufficiently serious 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;
- Require institutions to promptly and effectively respond to, take action to eliminate, and prevent the recurrence of sex-based harassment, specifying that:
 - Institutions must address sex-based harassment that may create a hostile environment in their program or activity, regardless of where it occurred;
 - Institutions should respond to harassment that they know or should know about, as well as any sex-based harassment by employees that occurs in the context of the employee's responsibilities to provide aid, benefits, or services within the institution's program or activity;
 - To ensure a "prompt" response to sex-based harassment, institutions should be required to provide supportive services and accommodations to the complainant as immediately as possible, but no later than five school days after a report is made;
 - Institutions must take reasonable steps when responding to sex-based harassment (rather than just avoiding a response that is "clearly unreasonable," which is known as the "deliberate indifference" standard); and
 - An effective response may include restorative justice or other alternatives to traditional student discipline (but not including mediation), as long as participation is truly voluntary, all parties are able (and aware they are able) to terminate the



alternative resolution process at any time, and those facilitating it are adequately trained to do so.

- Make clear that states and local entities can provide additional protections beyond those in the Department’s Title IX rule.

Develop Robust Protections Against Retaliation

Title IX prohibits retaliation against those who complain of sex discrimination. Yet student survivors— especially survivors of color, students with disabilities, and LGBTQ survivors— continue to face punishment when they turn to their schools for help. Some are disciplined for rule-breaking that they must divulge in order to report their own victimization. And student survivors—primarily those in higher education—have increasingly faced retaliation from their assailants, who file baseless cross-complaints to dissuade and punish victims, and often obtain access to costly legal assistance and counsel in response to a filed report that survivors go without.

The Department’s regulations should explicitly prohibit these common forms of retaliation:

- Define prohibited retaliation to include (but not limited to):
 - Disciplining complainants for collateral conduct violations that must be disclosed in order to report sexual harassment, dating violence, domestic violence, or stalking; that is disclosed in the 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);
 - Disciplining complainants for false reports based solely on the school’s conclusion that there wasn’t sufficient evidence to support a finding of harassment;
 - Disciplining complainants for prohibited sexual conduct in school based on the school’s conclusion that the reported sexual harassment was instead welcomed sexual contact;
 - Disciplining a victim for charges the school knew or should have known were brought by a third party for the purpose of using the disciplinary process to retaliate against a victim of sex-based harassment.
- Allow institutions to dismiss, without a full investigation, complaints of sexual harassment, dating violence, domestic violence, and stalking 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).

Ensure Fair Disciplinary Procedures and School Flexibility

Prior to the DeVos regulations, the Department long affirmed the agreed-upon notion that school discipline for sexual harassment must be fair to all involved parties. Yet DeVos's regulations require unique disciplinary procedures for sexual harassment that differ from other civil procedures. In this regard, new regulations should:

- Outline general requirements for fairness that flow from Title IX's equity mandate, and not impose a one-size-fits-all model that may not be effective given the diversity of institutions;
- Require that schools use the preponderance of evidence standard in determining responsibility for sexual harassment and sex-based harassment, the standard used in civil rights lawsuits more broadly;
- **Eliminate** the current regulation that prevents institutions from considering past statements by parties or witnesses who are not available for cross-examination.
- Enable institutions to create and pursue options for non-hearing resolutions, with the appropriate protections and oversight, that allow students to receive trauma-informed and/or necessary accommodations. This would permit engagement in processes that promote healing and accountability, such as restorative justice practices, rather than focusing on adversarial practices and punishment. The restorative justice option, when chosen by both parties, allows for alternative ways in which the survivor can be heard and the responsible party can take responsibility and help explore options for an appropriate resolution.

Address Other Forms of Harassment

In addition to sexual harassment, too many students face non-sexual sex-based harassment, including harassment based on sexual orientation, gender identity or expression, and pregnancy or parenting status, as well as harassment based on other protected characteristics, including race, color, national origin, and disability.

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.

Advance Partnerships with Community-Based Rape Crisis Centers

Community-based rape crisis centers, such as the 84 programs represented by VALOR in California, exist in every state and territory, meeting the needs of all victims and survivors. Rape crisis centers are experts in their communities on survivor services and sexual violence prevention. Schools should be encouraged to partner and develop memoranda of understanding (MOUs) with local organizations that have the expertise and community knowledge about how to best meet survivor needs and prevent future sexual violence. They can help schools improve their own policies and procedures, while providing free and confidential services outside of the school context, which is a critical option for student survivors. Critically, rape crisis centers possess a wealth of experience and knowledge on the prevention of sexual violence, and should be empowered to build relationships with educational institutions on the best ways to engage a campus community in prevention.

On behalf of survivors, sexual assault service providers, and the diverse advocates and activists that provide frontline response to sexual assault in our communities, and based on the aforementioned reasons, VALOR strongly encourages President Biden, the Department of Education, and the entire administration to reverse harmful elements of the Title IX regulations that have taken us dangerously backward in our national response to sexual violence. We welcome any opportunity to provide additional input and information toward this effort.

CONTACT: John L. Finley, Policy Manager (jfinley@valor.us)