



**CONSORTIUM FOR CITIZENS  
WITH DISABILITIES**

Comments from the Consortium for Citizens with Disabilities Education Task Force  
Title IX Public Hearing, Docket No. ED-2018-OCR-0064, RIN 1870-AA14  
June 11, 2021

The Consortium for Citizens with Disabilities (CCD) is the largest coalition of national organizations working together to advocate for Federal public policy that ensures the self-determination, independence, empowerment, integration, and inclusion of children and adults with disabilities in all aspects of society. As co-chairs of the CCD Education Task force, we are pleased to provide comments to the U.S. Department of Education's Office for Civil Rights (OCR) public information gathering process focused on improving enforcement of Title IX of the Education Amendments of 1972 (Title IX). There are several steps the Department can take to ensure that schools are providing educational environments for students with disabilities that are free from discrimination in the form of sexual harassment -- starting with repudiation and revision of the harmful Title IX regulations promulgated under the Trump Administration which made schools less safe for students with disabilities who were involved in incidents of sexual harassment.

Students with disabilities are more likely than their peers to experience sexual harassment, less likely to report it, and more likely to be pushed out of school as a result of sexual harassment. Schools must meet their obligations to address this harassment under both Title IX and laws that protect the civil rights of students with disabilities. We depend on OCR to have deep understanding of not only Title IX, but also the interplay between Title IX and other federal laws to ensure that students with disabilities receive education free from discrimination.

In 2019, the CCD Education Task Force responded to former Secretary of Education Betsy DeVos's proposed regulations to eliminate OCR's strong enforcement tools and to severely undermine safety in our education system. Twenty-three national disability advocacy organizations signed onto the letter which underscored how the proposed and now final changes would make schools less safe and negatively impact students with disabilities.<sup>1</sup> We

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<sup>1</sup> See CCD Education Task Force. CCD Title IX Comments (January 30, 2019) at <http://c-c-d.org/fichiers/CCD-Title-IX-comments-1.30.19.pdf>.

incorporate by reference all of the arguments we made in our prior comment, with several repeated here, to support our request that you replace the Title IX enforcement regulations with revised provisions consistent with statutory and case law that are shown to protect all students from discrimination including sexual harassment and sexual assault.

In revising the current Title IX regulations, you have an opportunity to fully restore longstanding protections for students, to improve OCR standards for reviewing complaints, and to ensure the regulations enforce meaningful standards and legal obligations of schools and higher education institutions under Title IX to maintain environments free from sexual harassment and sexual assault. To accomplish this, we recommend the following:

**(1) Regulations must define sexual harassment in a meaningful way and hold schools accountable.**

Revisions to the current Title IX regulation should take into account the reality of sexual harassment, including assault, and the different experiences, challenges, and needs of students with disabilities in elementary and secondary schools and in post-secondary institutions. Students with disabilities are more likely to be victims of sexual assault and may be particularly vulnerable due to a range of factors, including physical challenges that can prevent them from protecting themselves, stereotypes about people with disabilities, and lack of opportunities for comprehensive sexual education.

Children with disabilities are at great risk of sexual abuse and violence. In general, children with disabilities (of both genders) are 2.9 times more likely than children without disabilities to experience abuse and violence.<sup>2</sup> Students with disabilities face sexual harassment, including assault, that threatens their equal opportunity to access education. College students with disabilities are also more likely than their peers without disabilities to experience sexual assault. A recent study by the Association of American Universities revealed that 31.6 percent of undergraduate females with disabilities reported nonconsensual sexual contact involving physical force or incapacitation, compared to 18.4 percent of undergraduate females without a disability.<sup>3</sup> This means that one of every three female undergraduates with a disability had been sexually assaulted during their time at college. In addition, students may experience mental health disabilities after an incident of sexual assault. The National Council on Disability has addressed the difficulties colleges face when effectively supporting students with mental health disabilities in a recent report.<sup>4</sup> Students with disabilities are less likely to be believed

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<sup>2</sup> National Women’s Law Center. *Let Her Learn: Stopping School Pushout for Girls with Disabilities* (2017) at [https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Final\\_nwlc\\_Gates\\_GirlsWithDisabilities.pdf](https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Final_nwlc_Gates_GirlsWithDisabilities.pdf)

<sup>3</sup> National Council on Disability. *Not on the Radar: Sexual Assault of College Students with Disabilities* (2018) at <https://ncd.gov/publications/2018/not-radar-sexual-assault-college-students-disabilities>.

<sup>4</sup> National Council on Disability. *Not on the Radar: Sexual Assault of College Students with Disabilities*. *Supra* at 3 and *Mental Health on College Campuses: Investments, Accommodations Needed to Address Student Needs* at [https://www.ncd.gov/sites/default/files/NCD\\_Mental\\_Health\\_Report\\_508.pdf](https://www.ncd.gov/sites/default/files/NCD_Mental_Health_Report_508.pdf).

when they report and often have greater difficulty describing the harassment they experience.<sup>5</sup> Also, sexual violence has been employed as a means by which anti-disability animus is expressed, including within the context of higher education. The FBI Hate Crimes Report found college campuses were the most common location in which hate crimes against persons with disabilities occurred and rape is the third most common type of hate crime committed against persons with disabilities.<sup>6</sup> Students with disabilities who face multiple forms of discrimination are more likely to have negative outcomes because recipients handle Title IX and disability policy in isolation of the other. Incidents that trigger concurrent Title IX and other civil rights (race, sexual orientation, religion, and ethnicity) responsibilities on part of recipient institutions may not be comprehensively remedied. For example, students with disabilities who also identify as members of other historically marginalized and underrepresented groups, such as LGBTQ or students of color are more likely to be ignored, blamed, and punished when they report sexual harassment due to harmful stereotypes that label them as “promiscuous.”<sup>7</sup>

Schools frequently struggle to balance establishing a positive school culture while disciplining students whose behaviors are disruptive to the learning environment. Unfortunately, several studies show that students with disabilities are at greater risk of removal from classes because of disproportionate discipline. Suspension and expulsion rates for K-12 students with disabilities are about two times higher than for their typically developing classmates.<sup>8</sup> While disproportionate discipline in Title IX is an important topic for further study, students with disabilities are far more likely to be victims of violence than instigators of it, and they are more likely to suffer physical and mental illnesses because of violence. Furthermore, we believe previous OCR guidance provided due process protections, yet schools were failing to provide accommodations necessary under current law.<sup>9</sup>

Tragically, many people still hold negative stereotypes that people with disabilities are not sexual and remain a child or child-like for their life. Just as harmful are negative stereotypes that people with disabilities who express sexual desires are sexual deviants and a menace.<sup>10</sup>

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<sup>5</sup> E.g., Angela Browne, et al., *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14-15 (2016), available at <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx>.

<sup>6</sup> Brian T. McMahon, et. al, *Hate Crimes and Disability in America*, 47 *Rehabilitation Counseling Bulletin* 66, 71-72 (2004).

<sup>7</sup> E.g., Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*. 42 *HARVARD J.L. & GENDER* 1, 16, 24-29 (forthcoming), available at <https://ssrn.com/abstract=3168909>; National Women’s Law Center, *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color.* (2016) at <https://nwl.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color>.

<sup>8</sup> National Center for Special Education in Charter Schools. *Key Trends in Special Education in Charter Schools: A Secondary Analysis of the Civil Rights Data Collection 2013-2014*. (2018) at <http://www.ncsecs.org/crdc-analysis-13-14/>.

<sup>9</sup> National Council on Disability. *Not on the Radar: Sexual Assault of College Students with Disabilities*. *Supra* at 3.

<sup>10</sup> Advocates for Youth. *Sexual Health Education for Young People with Disabilities – Research and Resources for Educators* (undated) at <https://advocatesforyouth.org/resources/fact-sheets/sexual-health-education-for-young-people-with-disabilities/>.

Both stereotypes have a tragic impact on the student's access to sexual health rights and justice in cases of sexual harassment or assault if the schools fail to counteract those stereotypes with comprehensive training.

In addition, students with disabilities that limit their ability to communicate may find it even more difficult to discuss incidents of a sexual nature. People with a significant intellectual disability may not understand what is happening or have a way to communicate the sexual assault to a trusted person. Others with a less significant disability may realize they are being assaulted, but do not know they have a right to say no. In addition, they are rarely educated about sexuality issues (including consent) or provided assertiveness training. Even when a report is attempted, they face barriers when making statements to police because they may not be viewed as credible due to having a disability.<sup>11</sup> Some people with intellectual disability have trouble speaking or describing things in detail, or in proper time sequence. For that reason, prosecutors are often reluctant to take these cases because they are difficult to win in court.<sup>12</sup> For that reason, Title IX is the only option for survivors and all students who want to learn in a safe environment that is free of sexual harassment.

The job of the Department is to protect the civil rights of students, including the right of survivors to access education, not to help shield schools from accountability.

For these reasons, we support a broad definition of sexual harassment that includes:

- Multiple forms of discrimination can occur simultaneously when a student with a disability is targeted for sexual harassment because of their disability in addition to their sex;
- Sex-based harassment includes sexual harassment, sexual assault, 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; and
- Defines sexual harassment as unwelcome sexual conduct.
- Require schools and institutions of higher learning to work with disability experts including but not limited to their Office of Disability to ensure their complaint process takes into account the needs of students with disabilities, especially those with problems communicating or understanding communication and offer accommodations in the complaint process for all students regardless of whether they have officially disclosed their disability status.

**(2) Revisions should take into account issues related to the needs of students and employees with disabilities when they make a claim and participate in a Title IX proceeding.**

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<sup>11</sup> Davis, Leigh Ann, M.S.S.W., M.P.A. *People with Intellectual disability and Sexual Violence* (March 2011) at <https://www.thearc.org/document.doc?id=3657>.

<sup>12</sup> Shapiro, Joseph. "The Sexual Assault Epidemic No One Talks About." NPR, 8 Jan. 2018, [www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about](http://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about).

The current Title IX regulations tilt the grievance process in favor of named harassers, re-traumatize complainants, and conflict with Title IX's nondiscrimination mandate. Requiring schools to presume that the reported harassment did not occur reinforces the myth that survivors often lie about sexual assault and that students with disabilities are not sexual beings capable of being sexually harassed. Additionally, the regulations need to be revised because students with disabilities, especially intellectual disability, are particularly vulnerable in adversarial proceedings outlined in the previous administration's regulations.

For these reasons, the regulations concerning the complaint and Title IX proceedings must be revised to:

- Require schools and institutions of higher learning to work with disability experts including but not limited to their Office of Disability to offer accommodations for all students regardless of whether they have officially disclosed their disability status in all complaint and administrative proceedings. 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;
- 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 address sex-based harassment that may create a hostile environment in their program or activity, regardless of where it occurred. For example, students with disabilities may receive educational services outside of the traditional classroom;
- Require institutions to 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. In particular, reporting requirements for students with disabilities who have problems communicating or understanding communication should be as broad as possible;
- Require institutions to 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);
- Make clear that an effective response may include restorative justice or other alternatives to traditional student discipline, 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; and
- Make clear that states and local entities can provide additional protections beyond those in the Department's Title IX rule.
- Explicitly prohibit all forms of retaliation;

- Ensure fair disciplinary procedures and school flexibility by removing from regulation any added detailed and burdensome procedural requirements on all educational institutions for addressing sexual harassment, regardless of school type, size, location, and resources. For example, the Department should require that school’s disciplinary procedures be fair and allow both parties the same procedural rights;
- Require that schools use the preponderance of evidence standard in determining responsibility for sexual harassment and other forms of sex-based harassment because that standard is used in civil rights lawsuits and by OCR in its own enforcement actions.
- Undo the current regulation that forecloses institutions from considering past statements by parties or witnesses who are not available for cross-examination. But the Department should not dictate the specific details of how schools must investigate sexual harassment, dating violence, domestic violence, and stalking, or other forms of sex-based harassment.

We are grateful that the Biden-Harris Administration has indicated a renewed interest in enforcing the requirements for all federal education funding recipients to address these forms of harassment, including under Title IX. Please let us know if you have any questions.

Sincerely,

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*The Consortium for Citizens with Disabilities (CCD) is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. The Education Task Force of CCD monitors federal legislation and regulations that address the educational needs of children and youth with disabilities and their families, including regulatory efforts under federal law such as the Individuals with Disabilities Education Act (IDEA), the Every Student Succeeds Act (ESSA), Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act (ADA). The Education Task Force advocates for high expectations for children with disabilities under these and other laws.*

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