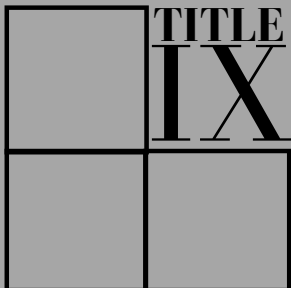


**Berkeley Center on Comparative Equality  
and Anti-Discrimination Law**

January 29 - 30 2021

# Continuing Legal Education Materials



CONFERENCE ANNOUNCEMENT

**Sexual Harassment at Schools, Colleges  
and Universities: A Global Perspective**

**Workshop A: The latest in Title IX investigations, including navigating the intersection of race and gender**

Berkeley Law Center on Comparative Equality & Anti-Discrimination Law  
2021 Conference on Sexual Harassment in Education

***The Latest Developments in Title IX Investigations, Including Navigating the  
Intersection of Race & Gender***

January 29, 2021  
11:00 a.m. – 12:15 p.m.

Presented by:

**Natasha Baker** – Managing Attorney, Novus Law Firm, Inc.

**Nyoki Sacramento** – Assistant Vice Chancellor, Title IX Officer, EEO Officer & ADA  
Coordinator, University of California, San Francisco

**Vida Thomas** – Partner, Oppenheimer Investigations Group LLP

**Learning Objectives**

This 75-minute panel presentation will update attendees on developments in 2020 that impact Title IX investigations, including:

- The increasing importance of identifying and reducing inherent bias throughout the investigation process.
- How the new Title IX regulations have impacted how campuses and investigators approach Title IX claims.
- The impact of the Black Lives Matter and racial justice movement on student and employee discrimination claims.
- How college and university campuses and investigators are grappling with the increasing intersection of race and gender in discrimination and harassment claims.



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**I. Introduction<sup>1</sup>**

As 2021 opens and the United States continues to grapple with issues of race, gender, privilege, explicit and implicit biases, and educational institutions continue to grapple with reports of sexual harassment and sexual assault, it is critical for investigators to understand the latest legal developments in conducting investigations pursuant to Title IX. In addition to understanding the legal developments, investigators must understand how issues of identity arise during these investigations to ensure that their investigations are fair, neutral, and fact-based. This will ensure that fact-finding, and in particular subjective credibility determinations are not based on explicit or implicit biases.

This paper will discuss the latest developments in Title IX investigations under the 2020 Title Regulations and relevant case law. This article will focus on the intersection of race and gender and the specific issues that arise when conducting Title IX investigations, because of these legal developments. (Given the session's particular focus on Title IX investigations, this paper will not focus on claims brought under other civil rights statutes, such as Title VI and Title VII, nor will it focus on basis concepts of intersectionality, which will be discussed in this session's live panel.)

Although the paper will focus on Title IX investigations primarily in the post-secondary context, investigators in the K-12 setting will also find many of these considerations relevant, despite having fewer procedural requirements under the 2020 Title IX Regulations.

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<sup>1</sup> The views set forth in this paper are the authors' own and do not represent the official views of the panelists' employers.



## **II. Legal Developments in Title IX Investigations**

### **a. The 2020 Title IX Regulations**

Plenty of ink has already been spilled on the procedural history of the 2020 Title IX Regulations that went into effect on August 14, 2020,<sup>2</sup> the requirements for implementation, and whether the Biden/Harris administration will leave them in place or revoke them pursuant to the Administrative Procedures Act (the latter being the more common prediction). As such, this paper will focus on the specific developments relative to the investigation and fact-finding portions of Title IX investigations, particularly those that implicate race and gender.

As a preliminary matter, it is important for investigators to understand the definition of prohibited conduct when conducting a sexual harassment investigation pursuant to Title IX. Under the final 2020 Title IX Regulations, any of the following conduct based on sex constitutes sexual harassment:

- A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called "quid pro quo" harassment);
- 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 school's education program or activity; or
- Sexual assault, dating violence, domestic violence, or stalking (as those offenses are defined in the Clery Act, 20 U.S.C. § 1092(f), and the Violence Against Women Act, 34 U.S.C. § 12291(a)).

It is also important for investigators to understand the scope of the required response to a report or concern of prohibited misconduct. Under the 2020 Title IX Regulations, using the above definition, a school must respond when:

- The school has actual knowledge of sexual harassment;
- That occurred within the school's education program or activity;
- Against a person in the United States.

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<sup>2</sup> Final 2020 Title IX Regulations available at: <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>



The 2020 Title IX Regulations define “actual knowledge” to include notice to any elementary or secondary school employee, and state that any person (e.g., the alleged victim or any third party) may report to a Title IX Coordinator in person or by e-mail, phone, or mail.

With respect to the geographic scope of the response, in addition to limiting the institution’s obligation to respond to conduct occurring in the United States, the 2020 Title IX Regulations also specify that a school’s “education program or activity” includes situations over which the school exercised substantial control, and also buildings owned or controlled by student organizations officially recognized by a postsecondary institution, such as many fraternity and sorority houses.

As set forth in the 2020 Title IX Regulations, schools must investigate every formal complaint (which may be filed by a complainant or by a school’s Title IX Coordinator). If the alleged conduct does not fall under Title IX, then a school may address the allegations under the school’s own code of conduct (and indeed must generally do so under state and federal employment laws, including Title VII, and state laws prohibiting sexual harassment of students).

As described by the Department of Education in its summary of the 2020 Title IX Regulations, the final 2020 Title IX Regulations require “schools to investigate and adjudicate formal complaints of sexual harassment using a grievance process that incorporates due process principles, treats all parties fairly, and reaches reliable responsibility determinations.”<sup>3</sup>

Under the 2020 Title IX Regulations, an institution’s grievance process must:

- Give both parties written notice of the allegations, an equal opportunity to select an advisor of the party’s choice (who may be, but does not need to be, an attorney), and an equal opportunity to submit and review evidence throughout the investigation;
- Use trained Title IX personnel to objectively evaluate all relevant evidence without prejudice of the facts at issue and free from conflicts of interest or bias for or against either party;
- Protect parties’ privacy by requiring a party’s written consent before using the party’s medical, psychological, or similar treatment records during a grievance process;

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<sup>3</sup> <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf>



- Obtain the parties' voluntary, written consent before using any kind of "informal resolution" process, such as mediation or restorative justice, and not use an informal process where an employee allegedly sexually harassed a student;
- Apply a presumption that the respondent is not responsible during the grievance process (often called a "presumption of innocence"), so that the school bears the burden of proof and the standard of evidence is applied correctly;
- Use either the preponderance of the evidence standard or the clear and convincing evidence standard (and use the same standard for formal complaints against students as for formal complaints against employees);
- Ensure the decision-maker is not the same person as the investigator or the Title IX Coordinator (i.e., no "single investigator models");
- For postsecondary institutions, hold a live hearing and allow cross-examination by party advisors (not by the parties personally); K-12 schools do not need to hold a hearing, but parties may submit written questions for the other parties and witnesses to answer;
- Protect all complainants from inappropriately being asked about prior sexual history ("rape shield" protections);
- Send both parties a written determination regarding responsibility explaining how and why the decisionmaker reached conclusions;
- Effectively implement remedies for a complainant if a respondent is found responsible for sexual harassment;
- Offer both parties an equal opportunity to appeal;
- Protect any individual, including complainants, respondents, and witnesses, from retaliation for reporting sexual harassment or participating (or refusing to participate) in any Title IX grievance process;
- Make all materials used to train Title IX personnel publicly available on the school's website or, if the school does not maintain a



website, make these materials available upon request for inspection by members of the public; and

- Document and keep records of all sexual harassment reports and investigations.<sup>4</sup>

#### **b. Relevant Case Law (Post-Secondary)**

Although many predict that the 2020 Title IX Regulations may be rescinded pursuant to the Administrative Procedures Act by the Biden/Harris administration, even if that were to occur, investigators must be familiar with the relevant case law in their institution's jurisdiction(s), which may establish some of the same procedural elements,<sup>5</sup> particularly as it relates to cross examination and live hearings.

In general, the procedural requirements have developed as follows over the past several years:

#### **Pre-2016: in general, no requirement to provide opportunity to cross-examine and no need to hold hearings**

- “[A] full trial-like proceeding with the right of cross-examination is not necessary for administrative proceedings.” *Doe v. University of Southern California*, 246 Cal. App. 4th 221, 248 (2016)

#### **2016-2017: contemporaneous introduction of cross-examination and hearing requirements**

- “[I]n the instant matter, where the Panel’s findings are likely to turn on the credibility of the complainant, and respondent faces very severe consequences if he is found to have violated school rules, we determine that a fair procedure requires a process by which the respondent may question, if even indirectly, the complainant.” *Doe v. Regents of University of California*, 5 Cal. App. 5th 1055, 1084 (2016).

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<sup>4</sup> This summary is largely excerpted from the Department’s own summary, available at: <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf>

<sup>5</sup> In addition, postsecondary institutions must remain mindful of their existing obligations under the 2013 Clery Amendments and the corresponding 2015 implementing regulations. In 2013, Congress passed the Violence Against Women Reauthorization Act, which included additional amendments to the Clery Act. The Clery Amendments added requirements for institutions of higher education regarding their policies and programs related to dating violence, domestic violence, sexual assault, and stalking, among other changes. The ED published final regulations to implement these changes on October 20, 2014 which have been effective since July 1, 2015. With respect to dating violence, domestic violence, stalking and sexual assault, the final Clery regulations require institutions to provide for a prompt, fair, and impartial disciplinary proceeding.





- “A student’s opportunity to share his version of events must occur at some kind of hearing.” *Doe v. University of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017). Still, it found only that the institution was required to “provide a means for the [student discipline] panel to evaluate an alleged victim’s credibility, not for the accused to physically confront his accuser.” *Id.* at 406.

### **2018-2019: solidification of cross-examination and hearing requirements**

- “[I]f a university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.” *Doe v. Baum* 903 F.3d 575, 578 (6th Cir. 2018).
- “[W]e hold that when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (e.g., by videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments.” *Doe v. Kegan Allee*, 30 Cal. App. 5th 1036 (2019).

Other jurisdictions have held that a live hearing and cross-examination (whether directly or indirectly) are not necessary for a procedurally complete investigation. These rulings must be analyzed in the investigator’s jurisdiction and reconciled with the requirements of the current 2020 Title IX Regulations, as discussed above. This reconciliation is important if the 2020 Title IX Regulations are rescinded or if the investigation exceeds the scope of that contemplated by the 2020 Title IX Regulations and is thus conducted pursuant to a student or employee code of conduct or similar policy.

### **III. Intersection of Race and Gender in Title IX Investigations & Hearings**

While the above legal developments may seem procedural in nature, it is important for investigators to understand how the application of these procedural requirements to investigations also implicate issues of race and gender and other demographic characteristics, both explicitly and implicitly.



## **A. Explicit Consideration of Demeanor Evidence by Decision-Makers**

As noted above, the 2020 Title IX Regulations and various courts favor the use of cross-examination for the purpose of testing the credibility of witnesses. Indeed, as noted by the California Supreme Court:

Oral testimony of witnesses given in the presence of the trier of fact is valued for its probative worth on the issue of credibility, because such testimony affords the trier of fact an opportunity to observe the demeanor of witnesses.

*Elkins v. Superior Court*, 41 Cal. 4th 1337, 1358 (2007).

This paper does not dispute the probative value of live testimony. However, investigators and decision-makers must take care that their assessment of demeanor, as contemplated by the 2020 Title IX Regulations and the courts, does not rest on cultural, racial, gendered, or other identity-based stereotypes. Eye contact is often cited as an indicator of trustworthiness or reliability. However, this assumption only holds true in certain cultures, and even so, as sophisticated investigators, one would never ascribe any indicia of credibility or lack thereof based on membership in a culture that does view eye contact in this way. Each individual witness must be tested based on prior statements, evidence gathered during the course of the investigation, including any available corroborating or circumstantial evidence. Implicit assumptions based on observations of physical demeanor are unreliable and therefore should not be used as a basis for determining credibility.<sup>6</sup> (Even changes in demeanor are unreliable without a basis for comparison.) Investigators and decision-makers must also take care to guard against confirmation bias.

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<sup>6</sup> The authors recommend further reading for all investigators and wish to thank Ashley Palermo and Darren Gibson for the following recommendations made in their March 2017 paper for the National Association of College & University Attorneys: *You're Not Doing Anyone Any Favors – Bias, Credibility and Other Investigation Challenges and Pitfalls*. As Palermo and Gibson noted: "There are numerous studies and articles addressing implicit bias and cognitive biases and their impact on investigations and adjudication ... We recommend the following to get started: Mahzarin R. Banaji and Anthony G. Greenwald, *Blind Spot: Hidden Biases of Good People* (2016). Guthrie, Chris; Rachlinski, Jeffrey J.; and Wistrich, Andrew J., "Blinking on the Bench: How Judges Decide Cases," 93 Cornell L. Rev. 1 (2007). Zack G., "Implicit Bias — The Hidden Investigation Killer," Law360 (Dec. 8, 2015). Lane, Kristin A. et al., *Implicit Social Cognition and Law*, 3 Ann. Rev. L. Soc. Sci. 427, 431 (2007)."



## **B. Bias by Parties and Witnesses**

In addition to guarding against stereotyping, inherent bias and confirmation bias when evaluating demeanor evidence, investigators and decision-makers must affirmatively recognize and identify when parties and witnesses are making statements that rely upon stereotyping or bias. Investigators and decision-makers must be prepared to question and challenge statements that appear to be made on the basis of such stereotypes or bias.

## **IV. Conclusion**

Conducting investigations pursuant to the 2020 Title IX Regulations and relevant case law is challenging. Investigators must ensure that they are operating within strict procedural requirements. When doing so, they must not forget that issues of race, gender, and identity are always present in ways that can impact the fact-finding process. They must ensure that they have cultural competency, are aware of their own tendencies for inherent and confirmation bias and be prepared to challenge biases and stereotypes being asserted by witnesses and parties, while maintaining an atmosphere that encourages information-sharing.

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# ***The Latest Developments in Title IX Investigations, Including Navigating the Intersection of Race & Gender***

January 29, 2021

**Natasha Baker**, Managing Attorney, Novus Law  
Firm, Inc.

**Nyoki Sacramento**<sup>1</sup>, Assistant Vice Chancellor,  
Title IX Officer, EEO Officer & ADA Coordinator,  
University of California, San Francisco

**Vida Thomas**, Partner  
Oppenheimer Investigations Group LLP

# 2020: A Watershed Year?



# 2020: So Much Happened!

- COVID, COVID, COVID!
- Working from home
- Virtual learning
- Rollout of new Title IX regulations
- Black Lives Matter and the racial justice movement
- California wildfires
- The impeachment & trial
- The 2020 campaigns, elections & the fallout

# The Result?

- Increased food insecurity
- Increased housing insecurity
- New barriers to:
  - Reporting behavior
  - Accessing support services
- Increased alcohol and substance abuse
- Isolation from peers, family, support systems
- Blurred boundaries between work/classroom/home life
- Unrelenting stress & anxiety for students, faculty, employees and managers
- Have colleges and universities experienced an increase in employee and student complaints?
  - More complaints about cyber-stalking?
  - Social media bullying?
  - Invasions of privacy?
  - Increase in allegations of racial discrimination and “microaggressions”
- Claims are more complex and sophisticated (e.g., intersectionality)

# The Latest in Title IX Investigations





## Procedural Changes in the Fact-Finding Process that are Relevant to the Intersection of Race and Gender

- Filing of a Formal Complaint
- Investigator gathers information
- Hearing officer/panel engages in fact-finding and credibility assessments
- Requires parties and witnesses to submit to cross-examination
- Active participation by advisors, including attorneys, in cross-examination

# How Do Race and Gender Issues Arise In a Title IX Process?

## What:

- Explicit Bias
- Implicit Bias

## Where:

- Filing of a Formal Complaint
- Investigator gathers information
- Hearing officer/panel engages in fact-finding that requires parties and witnesses to submit to cross-examination
- Hearing preparation and cross-examination by advisors
- Sanctioning

# How Do Race and Gender Issues Arise In a Title IX Process?

## – Filing of a Formal Complaint

- More claims based on awareness?
- Claims based on stereotypes or implicit bias?
- Failing to file a Formal Complaint?
- Parallels to the criminal justice system?

## How Do Race and Gender Issues Arise In a Title IX Process?

- Investigator gathers information
- Hearing officer/panel engages in fact-finding and requires parties and witnesses to submit to cross-examination
  - Investigator or decision-maker's own bias
  - Bias of the parties towards each other
  - Bias of the witnesses

# How Do Race and Gender Issues Arise In a Title IX Process?

## – Hearing Preparation and the Role of Advisors

- Access to legal counsel
- Bias of the advisor
- Strategy of the advisor

# How Do Race and Gender Issues Arise In a Title IX Process?

## – Sanctioning

- Disparate impact depending on race/gender?

# Impact of the Racial Justice Movement

## Increased Awareness

- Inspired more students and employees to come forward
- Have Title IX demands for equity influenced racial justice movement?
- Use trauma informed approach for race claims?



# The View from the Trenches: Investigation Trends at the University Level

# Investigatory Environment

- **Dramatic increases in race-based claims -- reminiscent of #MeToo movement**
- **Student, staff, and faculty are engaging in conversations about intersectionality and systemic racism**
- **Allies are speaking up and bystander intervention is on the rise**
- **Students, staff, and even faculty are demanding immediate action and transparency regarding investigations implicating Title IX, Title VI, and Title VII**
- **Increased institutional awareness and workgroup discussions regarding policies, practices, and procedures that may contribute to gender and racial disparities**

## Moving Forward: Awareness and Vigilance

- **Investigators can no longer solely rely on legal training or work experience--need to be aware of nuances surrounding intersectionality**
- **Investigators must guard against unconscious bias (e.g., provide same level of empathy across gender, gender identity, race, national origin, etc.)**
- **Title IX Officers/EEO Officers must closely review investigation plans and draft investigation reports to prevent unconscious bias**
- **Title IX Officers/EEO Officers should look at trends to ensure there are not intersectional disparities in investigation results and disciplinary decisions**

# Inherent Bias Awareness: More Important Than Ever

# It's Hard Work!

- To excel at conducting investigations, you must do the work.
- Identify your own inherent biases.
- Explore ways to reduce your biases.
- This requires humility.
- It is a life-long journey!

# Inherent Bias: A Review

Inherent bias: a normal cognitive process that operates without conscious intent

- Often hidden from one's own conscious awareness
- Most people have an implicit/unconscious bias against members of traditionally disadvantaged groups
- Stereotypes
- Implicit Associations – Harvard Implicit Association Test (IAT)
- Confirmation Bias
- Observer Effects and Priming
- Anchoring
- The Halo Effect
- Conformity Effects
- Deliberation vs. Intuition

# Microaggressions

Oxford Dictionary: *A statement, action, or incident regarded as an instance of indirect, subtle, or unintentional discrimination against members of a marginalized group such as a racial or ethnic minority.*

- Calling women “honey,” “sweetheart,” or “dear.”
- Telling an African American: “You’re so articulate.”
- Complimenting someone of Asian descent: “You speak English so well!” even though English is their first language.
- Mistaking the only two African/Asian Americans for each other.
- Telling a transgender colleague they don’t “look” transgender.
- A co-worker dismissing a female employee’s upset as “being hormonal.”
- Over-explaining technology to an an older employee.
- Speaking more slowly to an older person.
- In a meeting, the men constantly talk over and interrupt the women.

# Microaggressions: “A Thousand Paper Cuts”

- Each microaggression, by itself, inflicts little pain.
- But daily microaggressions over the life of a career, can have a very painful effect.
- Why?
  - Because it is an aggression based on gender, race, etc., the recipient knows it is wrong. Because it is “micro,” the recipient may feel pressured to dismiss it, or risk being labeled “hyper-sensitive.”
  - Because these daily injuries are never addressed or resolved, their cumulative effect is magnified.



# Intersectionality & Its Impact on Investigations

# Definition

## Intersectionality is...

the complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or intersect especially in the experiences of marginalized individuals or groups. (Merriam Webster)

# Definition

## Intersectionality is...

the idea that categories like gender, race, and class are best understood as overlapping and mutually constitutive rather than isolated and distinct. (Adia Harvey Wingfield)

# Kimberlé Crenshaw

## Intersectionality is...

- The recognition that, because of systems designed to respond to one *or* the other, women of color are marginalized within both feminism and antiracism
- An analysis of how the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately

*Mapping the Margins* (1991)

# Intersectionality is not...

- Checking every box on a complaint form
- “Oppression Olympics”
  - i.e. I am worse off and more oppressed than you are because of my race, gender, socioeconomic status, or disability.
- Multiple complaints against one respondent based on different protected categories
- Cross-complaints based on different protected categories

# Intersectional Discrimination Examples

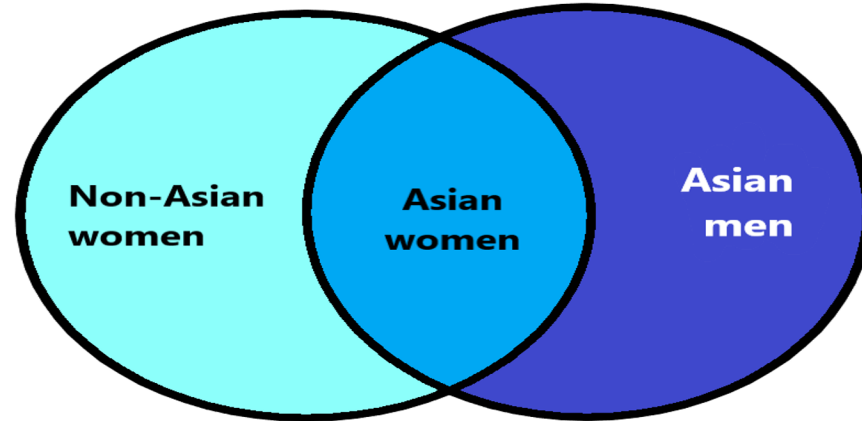
## *Lam v. University of Hawaii* (9th Cir. 1994)

- Asian-American woman professor sued for discrimination based on race, sex, and national origin
- Lower court ruled for defendants because the hiring committee had supported an Asian man and a white woman
- Ninth Circuit reversed, recognizing that “Asian women are subjected to a set of stereotypes and assumptions shared neither by Asian men nor by white women. In consequence, they may be targeted for discrimination even in the absence of discrimination against Asian men or white women.

# *Lam v. University of Hawaii* (9th Cir. 1994)

WOMEN

ASIAN PEOPLE



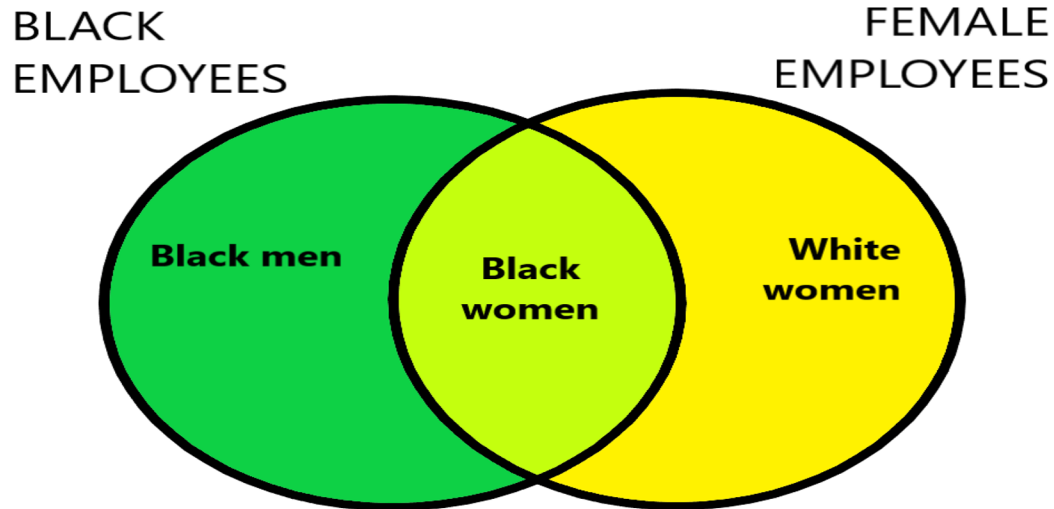
# Intersectional Discrimination Examples

## *DeGraffenreid v. General Motors (1976)*

- Several Black women factory workers sued G.M. for employment discrimination
- District Court tossed out their claim because:
  - The company employed significant numbers of Black men in factories, so it could not be discriminating based on race
  - The company employed a number of white women as secretaries, so it could not be discriminating based on gender



# DeGraffenreid v. General Motors (1976)



# Intersectionality Issues In Case Intake

# Case Intake

What should we be looking for in order to identify issues of intersectionality during intake?

- How is the client defining the complaint?
- How does the employee describe themselves?
- How does the employee describe the reason for the alleged discrimination?

## TAKEAWAY

The client, departmental partner, or decision-maker may not always be able to identify issues of intersectionality at intake. The investigator may have to identify the issues and assist with framing the investigation properly.

# Addressing Intersectionality During Interviews

# The Interview Process

- As investigators, our brains are wired to categorize complaints
- However, we have to keep an open mind – not all complaints can be boxed into single categories

## Takeaways:

As the investigation unfolds through the interview process, questions regarding intersectionality may arise, requiring a reframing of the issues or a more nuanced approach to interviewing.

Interviewees may also have to be educated regarding the nuances of the allegations.

# Addressing Intersectionality In Reports/Hearings



# Intersectionality: Witness Credibility Analysis

- Most cases are “word against word”
- Assessment of witness credibility is critical
- Investigator bias: how does the race/gender of the victim affect credibility?
  - Victim = woman of color vs. white woman vs. male
  - Respondent = person of color vs. white

# Intersectionality In Findings

## Common Pitfalls

- Where the respondent shares some aspect of identity with the complainant
- Where other members of that group were not treated the same way

## Takeaway:

An investigator's findings should acknowledge and discuss the intersectional elements to the complainant's allegations and make findings that address both elements, not just one or the other.

# Resources

## Articles to read:

- ["America's Racial Contract Is Killing Us" by Adam Serwer | Atlantic \(May 8, 2020\)](#)
- [Ella Baker and the Black Freedom Movement \(Mentoring a New Generation of Activists\)](#)
- ["My Life as an Undocumented Immigrant" by Jose Antonio Vargas | NYT Mag \(June 22, 2011\)](#)
- [The 1619 Project \(all the articles\) | The New York Times Magazine](#)
- [The Combahee River Collective Statement](#)
- ["The Intersectionality Wars" by Jane Coaston | Vox \(May 28, 2019\)](#)
- [Tips for Creating Effective White Caucus Groups developed by Craig Elliott PhD](#)
- ["Where do I donate? Why is the uprising violent? Should I go protest?" by Courtney Martin \(June 1, 2020\)](#)
- ["White Privilege: Unpacking the Invisible Knapsack" by Knapsack Peggy McIntosh](#)
- ["Who Gets to Be Afraid in America?" by Dr. Ibram X. Kendi | Atlantic \(May 12, 2020\)](#)

# Resources

## Podcasts to subscribe to:

- [1619 \(New York Times\)](#)
- [About Race](#)
- [Code Switch \(NPR\)](#)
- [Intersectionality Matters! hosted by Kimberlé Crenshaw](#)
- [Momentum: A Race Forward Podcast](#)
- [Pod For The Cause \(from The Leadership Conference on Civil & Human Rights\)](#)
- [Pod Save the People \(Crooked Media\)](#)
- [Seeing White](#)

# Resources

## Books to read:

- [The New Jim Crow: Mass Incarceration in the Age of Colorblindness](#) by Michelle Alexander
- [Black Feminist Thought](#) by Patricia Hill Collins
- [Eloquent Rage: A Black Feminist Discovers Her Superpower](#) by Dr. Brittney Cooper
- [How To Be An Antiracist](#) by Dr. Ibram X. Kendi
- [Invisible No More: Police Violence Against Black Women and Women of Color](#) by Andrea J. Ritchie
- [Just Mercy](#) by Bryan Stevenson
- [Me and White Supremacy](#) by Layla F. Saad
- [Raising Our Hands](#) by Jenna Arnold
- [Redefining Realness](#) by Janet Mock
- [Sister Outsider](#) by Audre Lorde
- [So You Want to Talk About Race](#) by Ijeoma Oluo
- [The Next American Revolution: Sustainable Activism for the Twenty-First Century](#) by Grace Lee Boggs
- [When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America](#) by Ira Katznelson

# Resources

## Films and TV series to watch:

- 13th (Ava DuVernay)
- American Son (Kenny Leon)
- Black Power Mixtape: 1967-1975
- Blindspotting (Carlos López Estrada)
- Clemency (Chinonye Chukwu)
- Dear White People (Justin Simien)
- Fruitvale Station (Ryan Coogler)
- I Am Not Your Negro (James Baldwin documentary)
- If Beale Street Could Talk (Barry Jenkins)
- King In The Wilderness — HBO
- See You Yesterday (Stefon Bristol)
- Selma (Ava DuVernay)
- The Black Panthers: Vanguard of the Revolution
- The Hate U Give (George Tillman Jr.)
- When They See Us (Ava DuVernay)

# THANK YOU!!

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# **Workshop B: Title IX at K-12 Schools**

May 28, 2020

## K-12 Schools And Title IX: New Regulations Require Immediate Attention And Action

Kelley Hodge

Fox Rothschild LLP

+ Follow

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Months before the U.S. Department of Education released [new final Title IX Regulations](#) on May 6, 2020, schools that receive federal funding were expecting changes to how the Department requires them to address issues of sexual harassment in school activities and programs. In February, Education Secretary Betsy DeVos announced, in a Department [press release](#), that she was directing the Office of Civil Rights to “tackle the tragic rise of sexual misconduct complaints in our nation’s K-12 campuses head on” through compliance reviews and “raising public awareness about what’s actually happening in too many of our nation’s schools.”

The secretary’s February statement served as a prelude to the new final regulations issued, not as guidance, but with the full force of law. Amid the COVID-19 pandemic, as school districts confront fundamentally difficult questions such as how to safely reopen their school buildings in the fall, superintendents, principals, school boards and other administrative leadership must also focus on complying with new Title IX regulations, which take effect Aug. 14, 2020.

Title IX prohibits sex discrimination in a school’s activities and programs and requires all schools, from K-12 to post-secondary institutions, to take appropriate steps to prevent and redress issues of sex discrimination. For many years, while the public’s focus has been drawn to Title IX at institutions of higher education, Title IX

has always been and remains equally applicable to K-12 schools. Now, the initial question for many K-12 schools, is “What do the new final regulations mean for us?” For districts that have a Title IX policy in place, this question will prompt a series of other questions that will need to be asked and answered, such as:

- Do we have an identified Title IX coordinator?
- Is our Title IX coordinator and their contact information identified on our district website?
- Are the current Title IX policy and procedures available on our district website?
- How are our district personnel trained in Title IX?
- Do we consistently offer supportive measures and what are those options?
- How do we document an incident, notify the parties and parents or guardians, conduct an investigation and inform the appropriate and necessary people about the final outcome?

The above questions offer K-12 schools a small sample of what the final regulations direct districts to incorporate in their new or revised policy and procedures. As states across the country are debating budgets, school funding and all the direct and collateral consequences of the pandemic, K-12 schools cannot ignore and must take the immediate step of addressing how to implement the new Title IX regulations. After taking the preliminary step of reading the regulations and the Department's [summary](#), school district administrators and leadership should consider the following steps as an outline of some of the things that will need to be done:

- Review their current Title IX policy and identify who is currently responsible for implementing Title IX and responding to incidents in their district
- Revise an existing or draft a new Title IX policy that is compliant with Department directives

- Identify a Title IX Coordinator and clearly define their role
- Identify what other personnel may be needed to effectively implement and support their Title IX policy and procedures which could prompt hiring considerations or shifts in existing personnel and their roles
- Notify all parents or guardians of students, students and employees about the Title IX Coordinator and how to report an incident of sex discrimination in a program or activity it operates
- Understand what the Department defines as *actual* knowledge of a Title IX incident that triggers K-12 personnel's duty to report to the district Title IX Coordinator
- Distribute and conspicuously post information and conduct training regarding the district's approved Title IX policy and procedures
- Provide training that is comprehensive and continuous for all Title IX or Title IX-related personnel to ensure they are knowledgeable about Title IX policy and procedures and are able to perform their roles free from any conflict of interests or bias
- Ensure a prompt and equitable grievance process that is compliant with all Department directives
- Ensure effective documentation procedures are in place for how the district receives and maintains information
- Determine how to allocate the funding needed, within the district's budget, to implement the Department's directives

The Department expects compliance. Parents, students and the school community expect safety and learning. A [decision](#) delivered on May 22, 2020 in federal court in the Eastern District of Pennsylvania offers timely insight into the importance of this subject in K-12 schools. The ability to be effective in the implementation of a new Title IX policy will rely heavily on how effective the lines of communication are with

educating and responding to any concern that suggest a student's safety or access to an educational opportunity is infringed upon based on sex.

## Additional Information

- [Final Title IX Regulations](#)
- [Press Release: Secretary DeVos Announces New Civil Rights Initiative to Combat Sexual Assault in K-12 Public Schools](#)
- [Department of Education Summary of Major Provisions of Final Title IX Regulations](#)
- [Decision: Roussaw V. Mastery Charter High School, Et Al.](#)

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# Blurred Lines: The Intersection of Title IX and Title VII

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## Blurred Lines: The Intersection of Title IX and Title VII

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As a result of the increase in campus sexual violence reports and student disciplinary proceedings, male students who were found responsible for sexual violence began filing lawsuits claiming that they were victims of anti-male bias. Attorneys like [Andrew Miltenberg](#) found a calling: addressing what he saw as a crisis in campus Title IX processes, as universities around the country, he felt, overcorrected after decades of failing to take student sexual violence seriously enough.

However, last year Miltenberg agreed to represent a survivor of sexual assault in what his law partner called an act of career suicide. Miltenberg had started thinking that instead of being withdrawn, the 2011 Dear Colleague Letter merely need[s] to be amended. He also acknowledged that if the process is broken, it's broken as much for Title IX complainants as for respondents. As he worked on a complainant's case and the public focus turned to due process in Title IX complaints, he realized that he was one of the people for better or worse who had helped shift that focus.

### Title VII and Title IX on Higher-Ed Campuses

Getting the disciplinary process right for Title IX complaints may now have implications not just for students, but for employee complaints under Title VII and Title IX as well. Harvard law professor Jeannie Suk Gersen [warns](#) that Along with the expected uptick in firings for sexual harassment, we could see an increase in wrongful termination claims by men arguing that their firing was discriminatory against males, in violation of Title VII, even if the decision was driven by the desire to eradicate discrimination against females.

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For example, in a 2009 case the U.S. Court of Appeals for the Second Circuit refused to dismiss a male employee's Title VII sex discrimination lawsuit. A female co-worker had accused him of sexually harassing and stalking her. The accused male employee said he was pressured to resign after his supervisor told him you probably did what [she] said you did because you're male. Because the employer didn't properly investigate the accusation, the court found that a reasonable jury could infer discrimination based on sex stereotyping. [Sassaman v. Gamache (2nd Cir. 2009) 566 F.3d 307]



So, the question is whether employers can learn from higher education's student discipline and [Title IX training](#) experiences to deal with the expected rise in employee reports of [workplace sexual harassment](#). This issue takes on increased importance when we look at the scope of Title IX's reach. With much of the focus on Title IX centered around addressing campus sexual assault against students, we often overlook the fact that Title IX also protects employees of educational institutions, programs, and activities against sex discrimination and harassment. Just to emphasize this last point, [Title IX protects employees](#) of an education program or activity even if it's not offered or sponsored by an educational institution.

Last year, a [federal appeals court decision](#) reminded us that Congress used broad language to define education programs and activities covered by Title IX in a case involving sexual harassment claims by a medical resident against the director of a residency program. The U.S. Court of Appeals for the Third Circuit found that:

- Title VII and Title IX both protect employees against workplace discrimination
- Students and employees have the right to file a lawsuit for damages under Title IX
- Employees of federally funded education programs may sue for retaliation under Title IX

[*Jane Doe v. Mercy Catholic Medical Center* (3d Cir. 2017) No. 16-1247]

The court also found that under Title IX, an "education program or activity" means "all of the operations of an entity any part of which receives federal funding, including not only public and private postsecondary institutions, but also corporations, partnerships, sole proprietorships, and other organizations engaged in the business of providing education, healthcare, housing, social services, or parks and recreation.

To decide if a program or activity is educational, the court looked at whether:

- It's a particular part- or full-time course of study or training
- Participants may earn a degree or diploma, qualify for certification or certification examination, or pursue a specific occupation or trade
- It provides instructors, examination, an evaluation process or grades, or accepts tuition
- The entities hold themselves out as educational in nature

## Title IX Can Inform Title VII Policies

In its formative years, Title IX looked to Title VII of the Civil Rights Act for the legal definition of sexual harassment. However, just as social media created a platform for the Title IX movement, [#MeToo](#) has exposed the magnitude of [workplace sexual harassment](#). This may require employers covered by Title VII to learn how to conduct a thorough and impartial investigation of sexual harassment allegations by looking to the Title IX experience and avoiding the problems that higher education has encountered in navigating these complex cases.

With the bright light on sexual harassment claims, and administrative transitions occurring within the U.S. Department of Education, private lawsuits by both complainants and respondents may become more common to enforce Title IX rights and responsibilities. The best prevention for avoiding lawsuits is to regularly review [Title IX training](#), disciplinary policies, and procedures for students and employees. When the process is fair and unbiased and goes hand-in-hand with effective prevention programs, it encourages reporting, increases accountability, improves campus culture, and gives survivors choices on how to proceed in a way that helps them heal.

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# TITLE VII, TITLE IX, OR BOTH?

*Kendyl L. Green* \*

*Currently, there is a circuit split regarding whether to apply Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, or both, when an individual alleges discrimination and is an employee and a student at a federally funded institution. After the recent case, Doe v. Mercy Catholic Medical Center, the First, Third, and Fourth Circuits correctly held that both Title VII of the Civil Right Act of 1964 and Title IX of the Education Amendments of 1972 apply, but the Fifth and Seventh Circuits found Title VII to preempt Title IX. Title IX varies considerably from Title VII. Title IX does not require a claimant to exhaust the administrative remedies first and there is no damages cap. Also, if a violation of Title IX is found, federal agencies have a right to withdraw federal funding to the educational institution. Therefore, an individual should not be denied the right to bring an independent claim under both statutes. In order to end the circuit split, the Supreme Court of the United States should resolve the issue by allowing a plaintiff to bring a discrimination claim with employment and educational attributes under both Title VII and Title IX.*

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## I. INTRODUCTION

Imagine working on your medical residency and being sexually harassed by the director of the residency program at a federally funded hospital. In this situation, you are both an employee of the hospital and a student completing your education. Does Title VII of the Civil Rights Act of 1964 (Title VII) apply, does Title IX of the Education Amendments of 1972 (Title IX) apply, or do both apply?<sup>1</sup>

Many individuals bring only Title IX claims because they hope to surpass Title VII.<sup>2</sup> Title VII was created with more of a compensatory purpose in mind, whereas Title IX was created with the goal to prevent federal funding of discriminatory institutions.<sup>3</sup> Title VII contains “an express cause of action, provides for [specific] compensatory damages, and does not rely on a contractual framework.”<sup>4</sup> Title VII also requires an individual to exhaust all the administrative remedies in an administrative forum first before seeking judicial relief.<sup>5</sup> Conversely, Title IX does not require a claimant to exhaust the administrative remedies first, there is no damages cap, and if a violation of Title IX is found, federal agencies have a right to withdraw their federal funding to the educational institution.<sup>6</sup> For many years, there has been a circuit split on this issue.<sup>7</sup> The Court of Appeals for the Fifth and Seventh Circuits held that Title VII provides the exclusive remedy for employees alleging discrimination on the basis of sex in federally funded educational institutions.<sup>8</sup> However, the First, Fourth, and Third Circuits found that Title IX rights were deemed independent of and not preempted by Title VII.<sup>9</sup>

In Part II, Title VII and Title IX are examined. Section “a” discusses Title VII, Section “b” analyzes Title IX, and Section “c” explains the differences between the statutes. In Part III, the circuit split is depicted through the Fifth and Seventh Circuit’s *Lakoski v. James* and *Waid v.*

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<sup>1</sup> 20 U.S.C. § 1681 (2012); 42 U.S.C.A. § 2000e-2 (2012).

<sup>2</sup> See *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857 (7th Cir. 1996); *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995).

<sup>3</sup> Hayley Macon, Lisa Mottet, Julia Mujal, & Lara Cartwright-Smith, *Introduction to Title IX*, 1 GEO. J. GENDER & L. 424 (2000).

<sup>4</sup> *Id.*

<sup>5</sup> See *Waid*, 91 F.3d at 857; *Lakoski*, 66 F.3d at 751.

<sup>6</sup> See *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545 (3d Cir. 2017). The ability for a federal agency to withdraw their funding under Title IX is seen as a contract. It is understood from the statute that when an educational institution accepts federal funding, any violation of Title IX will result in a loss of the funding.

<sup>7</sup> See *Waid*, 91 F.3d at 857; *Lakoski*, 66 F.3d at 751; *Preston v. Com. of Va. Ex Rel. New River Com. Col.*, 31 F.3d 203 (4th Cir. 1994); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

<sup>8</sup> *Waid*, 91 F.3d at 857; *Lakoski*, 66 F.3d at 751.

<sup>9</sup> *Doe*, 850 F.3d at 545; *Preston*, 31 F.3d at 203; *Lipsett*, 864 F.2d at 881.

*Merrill Area Pub. Schs.*, as well as the First, Third and Fourth Circuit's *Lipsett v. University of Puerto Rico*, *Doe v. Mercy Catholic Medical Center*, and *Preston v. Com. of Va. ex rel. New River Com. Col.*<sup>10</sup> Finally, Part IV is the conclusion, which discusses the issue and where the courts should go from here.

## II. TITLE VII AND TITLE IX GENERALLY

Title VII and Title IX are laws used to combat discrimination.<sup>11</sup> Title VII protects individuals in the workplace and Title IX covers educational activities and institutions.<sup>12</sup> Below, is a discussion of both Title VII and Title IX in the context of this circuit split.

### A. Title VII History and Rule of Law

Title VII, or 42 U.S.C.A. § 2000e, was introduced following racial oppression and discrimination.<sup>13</sup> Because skilled African Americans threatened the economic well-being of Caucasians, many regulations, including “Black Codes,” were implemented to eliminate opportunities for African Americans to use their skills or acquire new ones.<sup>14</sup> Even as late as 1961, African Americans were trained for jobs that were specifically regulated for a segregated employment market.<sup>15</sup> The purpose of Title VII is to “achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”<sup>16</sup> Specifically, Section 703 of the Civil Rights Act of 1964, which is amended by Section 107 in 1991, states, “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice.”<sup>17</sup>

To further reinforce the purpose of Title VII, the Supreme Court in *Griggs v. Duke Power Co.* declared that the objective was to achieve equal employment opportunities by eliminating barriers that favor white

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<sup>10</sup> *Doe*, 850 F.3d at 545; *Waid*, 91 F.3d at 857; *Lakoski*, 66 F.3d at 751; *Preston*, 31 F.3d at 203; *Lipsett*, 864 F.2d at 881.

<sup>11</sup> 20 U.S.C. § 1681; 42 U.S.C.A. § 2000e-2 (2012).

<sup>12</sup> *Id.*

<sup>13</sup> Julius L. Chambers & Barry Goldstein, *Title VII: The Continuing Challenge of Establishing Fair Employment Practice*, 49 LAW & CONTEMP. PROBS. 9, 10 (1986).

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.*

<sup>16</sup> Douglas P. Ruth, *Title VII & Title IX=?: Is Title IX the Exclusive Remedy for Employment Discrimination in the Educational Sector?*, 5 CORNELL J. L. & PUB. POL'Y 185, 188 (1996).

<sup>17</sup> The Civil Rights Act of 1964, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991).

employees.<sup>18</sup> This is known as disparate impact, which occurs if “neutral policies or practices ha[ve] a disproportionate, adverse impact on any protected class, usually minorities or women,” and that impact cannot be justified by a legitimate business consideration.<sup>19</sup> Unlike disparate impact, disparate treatment is when “an employer impermissibly differentiates among employees or applicants based on their race, color, religion, sex, or national origin.”<sup>20</sup> Disparate treatment requires intent, but disparate impact does not.<sup>21</sup> Under Title VII, “practices, procedures, or tests neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”<sup>22</sup> Congress directed the thrust of the act “to the consequences of employment practices, not simply the motivation.”<sup>23</sup> Moreover, Congress has placed the burden on the employer to show “that any given requirement must have a manifest relationship to the employment in question.”<sup>24</sup> This disparate impact cause of action that the Supreme Court established, and which was codified in Title VII, eliminated unnecessary non-job-related barriers to equal employment opportunity.<sup>25</sup> Congress intended “to ensure equal employment opportunities for all people by prohibiting policies and practices that are prejudicial to historically mistreated groups.”<sup>26</sup>

A prerequisite to filing a Title VII claim in federal district court is the exhaustion of administrative remedies.<sup>27</sup> Proceedings can be initiated by either “‘a person claiming to be aggrieved’ or by a member of the Equal Employment Opportunity Commission (“EEOC”).”<sup>28</sup> A “claimant may pursue federal remedies by filing a complaint with the [EEOC].”<sup>29</sup> The EEOC investigates the claim and “if the EEOC finds reasonable cause to believe the complaint is true it must pursue informal efforts to resolve the

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<sup>18</sup> Chambers & Goldstein, *supra* note 13 at 16.

<sup>19</sup> *Shaping Employment Discrimination Law*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html>.

<sup>20</sup> Gerald S. Hartman & Richard H. Schnadig, 1 *Personnel Handbook* 36 (1989).

<sup>21</sup> *See id.*

<sup>22</sup> Chambers & Goldstein, *supra* note 13 at 16 (internal citation omitted).

<sup>23</sup> Hartman & Schnadig, *supra* note 20 at 37 (internal citation omitted).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Mark R. Bandsuch, *Dressing Up Title VII’s Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287, 288 (2008–09).

<sup>27</sup> *See* Donald W. Nierling, *The Role of Preclusion Rules in Title VII: An Analysis of Congressional Intent Notes*, 71 IOWA L. REV. 1473 (1986).

<sup>28</sup> George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 691 (1980) (internal citation omitted).

<sup>29</sup> Nierling, *supra* note 27 at 1473 (discussing EEOC procedure to investigate Title VII claims).



complaint.”<sup>30</sup> The “investigation of an EEOC charge should be reasonable and seek the root source of discrimination.”<sup>31</sup> If no resolution is reached, the EEOC may bring a civil action to have the court enforce its ruling.<sup>32</sup> “If the EEOC fails to find probable cause to believe the complaint is true or decides not to bring an action to enforce its judgment, the EEOC must issue a right-to-sue letter, entitling the claimant to bring a civil action in federal district court.”<sup>33</sup> If the EEOC fails “to resolve the complaint under its administrative procedures, or if no action is taken by the EEOC within 180 days of filing, the individual may bring suit in federal district court.”<sup>34</sup>

Alternatively, a person may bring a discrimination claim with a state or local authority.<sup>35</sup> If an individual is denied relief, he or she may bring a claim under Title VII.<sup>36</sup> “[T]he Supreme Court held that a state administrative finding of non-discrimination does not preclude a Title VII suit on the claim where the claimant does not appeal the administrative body’s decisions through the state court system.”<sup>37</sup> Therefore, in both situations, a claimant may bring suit in federal court to obtain damages and equitable relief.

#### B. Title IX Rule of Law

Furthermore, Congress enacted Title IX, or 20 U.S.C. § 1681(a), as a reaction to sex discrimination in educational programs.<sup>38</sup> Title IX is enforced primarily by the Department of Education’s Office for Civil Rights (“OCR”).<sup>39</sup> “It was passed as part of the Education Laws in 1972 after a thorough investigation showed a distinct pattern of sex discrimination.”<sup>40</sup> Title IX states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>41</sup> The law covers “pre-school, elementary and secondary schools, colleges and universities, vocational and technical schools, community and junior colleges, and

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<sup>30</sup> *Id.*

<sup>31</sup> Bradley M. Jones, *The Permissible Scope of Title VII Actions*, 8 SETON HALL L. REV. 493, 502 (1977) (internal quotations omitted).

<sup>32</sup> Nierling, *supra* note 27 at 1473.

<sup>33</sup> *Id.* (internal citation omitted).

<sup>34</sup> Hartman & Schnadig, *supra* note 20 at 40–41.

<sup>35</sup> *Id.* at 41.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> 20 U.S.C. §§ 1681–88 (2012).

<sup>39</sup> Macon, et al., *supra* note 3 at 417.

<sup>40</sup> Clark C. Griffith, *Comments on Title IX*, 14 MARQ. SPORTS L. REV. 57 (2003).

<sup>41</sup> 20 U.S.C. §1681(a) (2012).

graduate and professional schools.”<sup>42</sup> Furthermore, “Individuals who wish to bring a claim under Title IX must prove that they were subjected to exclusion from participation in, denial of educational benefits of, or discrimination ‘under any education program or activity receiving Federal financial assistance.’”<sup>43</sup> Three elements to establish jurisdiction under Title IX include: “(1) allegations of discrimination based on sex, (2) within an education program, (3) which ‘receiv[ed] Federal financial assistance.’”<sup>44</sup> The second and third issues have raised a number of legal issues.<sup>45</sup> For example, some individuals argue how broad “an education program” may extend and, also, whether being a “[recipient of] Federal financial ‘assistance’ means that the presence of a dollar of Federal money anywhere . . . is sufficient to trigger Title IX jurisdiction.”<sup>46</sup> Three methods of enforcing Title IX are making an in-house complaint, filing a complaint within 180 days of the alleged discrimination with the OCR, or pursuing a lawsuit in federal district court.<sup>47</sup>

Both public and private enforcement is available to remedy a situation. “Within Title IX, Congress created a public remedy that permits the termination of federal funds when an institution providing educational programs discriminates against an individual on the basis of sex.”<sup>48</sup> Title IX is thought of as a contract, where federal agencies agree to fund an educational institution so long as the institution does not violate the statute.<sup>49</sup> If the institution does violate the statute, the agency may revoke its funding.<sup>50</sup> After Title IX’s creation, the Supreme Court created a private right of action in *Cannon v. University of Chicago*.<sup>51</sup> In 1992, “[T]he U.S. Supreme Court ruled that schools that failed to comply with Title IX could be sued for compensatory and punitive damages.”<sup>52</sup>

### C. Differences Between Title VII and Title IX

Title VII and Title IX are similar, yet different from each other. As seen in this circuit split, courts have ruled Title VII preempts Title IX.<sup>53</sup> Courts have decided that Title VII guides Title IX claims because it

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<sup>42</sup> Katherine Levitan, *Interrogatories*, 25 NASSAU LAW 376 (1978).

<sup>43</sup> Macon, et al., *supra* note 3 at 420.

<sup>44</sup> Linda Jean Carpenter & R. Vivian Acosta, *Title IX- Two for One: A Starter Kit of the Law and a Snapshot of Title IX’s Impact*, 55 CLEV. ST. L. REV. 503 (2007).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 504.

<sup>47</sup> *Id.* at 505–06.

<sup>48</sup> Macon, et al., *supra* note 3 at 419.

<sup>49</sup> *See Doe*, 850 F.3d at 545.

<sup>50</sup> *See id.*

<sup>51</sup> *Id.*; *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979).

<sup>52</sup> Florencio Ramirez, *Title IX*, 27 GPSOLO 16, 18 (2010).

<sup>53</sup> Macon, et al., *supra* note 3 at 423–24.

provides case law dictating the prohibition of sex discrimination.<sup>54</sup> Unlike “Title IX[, which] was enacted to prevent federal funding of discriminatory actions pursuant to Congress’s spending power, Title VII was enacted with a compensatory scheme in mind.”<sup>55</sup> Even though individuals employed by educational institutions are covered by the terms of Title IX, many claims have been filed under Title VII.<sup>56</sup> This is because “Title VII contains an express cause of action, provides for [specific] compensatory damages, and does not rely on a contractual framework.”<sup>57</sup> On the other hand, certain features make an action under Title IX more attractive. Plaintiffs under Title IX need not exhaust administrative remedies or receive a “right to sue” letter from an administrative agency.<sup>58</sup> Also, Title IX damages vary from Title VII’s. Unlike Title VII, Title IX has no damages cap.<sup>59</sup> Lastly, federal agencies may withdraw their federal funding under Title IX, but this is not the case under Title VII.<sup>60</sup> Title IX was enacted under the Spending Clause powers, “making it in the nature of a contract: In accepting federal funds, States agree to comply with its mandate.”<sup>61</sup> Therefore, if an entity agrees to accept federal funds for its educational program or activity, the federal funds may be revoked if there is a violation of Title IX.<sup>62</sup> Consequently, advantages and disadvantages exist within both statutes, so an individual should not be barred from bringing a Title IX claim independently from a Title VII.

### III. CIRCUIT SPLIT REGARDING TITLE VII AND TITLE IX IN EDUCATIONAL SETTINGS THAT ARE PRIVATE INSTITUTIONS

For years, there has been a circuit split concerning when an individual wanted to bring both a Title VII and Title IX claim.<sup>63</sup> The Fifth and Seventh Circuits held that Title VII and Title IX claims were not independent and Title VII preempted Title IX.<sup>64</sup> In March 2017, the Third Circuit joined the First and Fourth Circuits in holding that “Title IX rights

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 424.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 424–25.

<sup>59</sup> Macon, et al., *supra* note 3 at 425.

<sup>60</sup> *See Doe*, 850 F.3d at 552.

<sup>61</sup> *Id.* (explaining that the nature of Title IX is contractual because federal agencies may withdraw federal funding if there is a violation).

<sup>62</sup> *Id.*

<sup>63</sup> John P. Barry & Edna D. Guerrasio, *Third Circuit Endorses Title IX and Title VII Claims of Medical Resident*, *Publications*, PROSKAUER (Mar. 21, 2017), <http://www.proskauer.com/publications/client-alert/third-circuit-recognizes-title-ix-and-title-vii-claims-of-medical-resident/>.

<sup>64</sup> *Id.*

[are] deemed independent of and not preempted by Title VII.”<sup>65</sup> Now, the issue is ripe for consideration by the Supreme Court.<sup>66</sup>

In the Fifth Circuit case, *Lakoski v. James*, Professor Dr. Joan Lakoski, brought a sex discrimination action against the University of Texas Medical Branch (“the University”) under Title IX when she was denied tenure.<sup>67</sup> Dr. Lakoski was hired as a tenure-track assistant professor, in the Department of Pharmacology, where she subsequently sought and was denied a promotion three times.<sup>68</sup> The department’s tenure committee recommended that she not be considered for tenure in the future. The departmental chairman informed her that the upcoming appointment would be her last.<sup>69</sup> Dr. Lakoski sued the University and three University officials “alleging that the denial of tenure and her termination constituted intentional sex discrimination in violation of Title IX[.]”<sup>70</sup>

The court held that “Title IX did not provide [the] direct private right of action to individuals seeking money damages for alleged sex discrimination by federally funded educational institution[s].”<sup>71</sup> The court explained that Title VII is the exclusive remedy for individuals seeking employment discrimination on the basis of sex in federally funded educational institutions.<sup>72</sup> The Fifth Circuit emphasized its unwillingness to find an implied private right of action for damages under Title IX for employment discrimination because “doing so would disrupt a carefully balanced remedial scheme for redressing employment discrimination by employers” under Title VII.<sup>73</sup> The court limited its holding to only individuals seeking money damages under Title IX and held that Title IX does not offer a remedial bypass of Title VII.<sup>74</sup> Therefore, because Ms. Lakoski did not bring a Title VII claim, she was precluded from bring a Title IX claim.<sup>75</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Lakoski*, 66 F.3d at 751 (discussing claims where Title VII preempts Title IX when there is strong Title VII claim).

<sup>68</sup> *Id.* at 752.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 751.

<sup>71</sup> *Id.* at 758 (explaining Fifth Circuit’s viewpoint that Title VII preempts Title IX when there is alleged discrimination for federally funded educational institutions).

<sup>72</sup> *Lakoski*, 66 F.3d at 753.

<sup>73</sup> *Id.* at 754 (describing court’s viewpoint of bringing a claim under Title IX as “violence” that would create a disruption to a “carefully balanced remedial scheme”).

<sup>74</sup> *Id.* at 754 (discussing Fifth Circuit’s opinion that Title VII preempts Title IX in educational employment discrimination cases).

<sup>75</sup> *Id.*

Similarly, in the Seventh Circuit's *Waid v. Merrill Area Pub. Schs.*, Tana Waid, a long-term substitute junior high school teacher, alleged Merrill Area Public Schools denied her a full-time teaching position because of her sex in violation of Title IX.<sup>76</sup> After Ms. Waid was appointed, a member of the faculty died and Ms. Waid assumed his duties for the rest of the school year.<sup>77</sup> Subsequently, the school sought a permanent replacement for the deceased teacher.<sup>78</sup> Ms. Waid applied for the position, but Richard Bonnell was hired instead.<sup>79</sup>

As a result, Ms. Waid brought an employment discrimination claim with a state agency charged with the exclusive power to enforce Wisconsin's fair employment law.<sup>80</sup> The agency ruled in her favor and granted her all the remedies available under state law.<sup>81</sup> However, these remedies are not as extensive as those under federal law.<sup>82</sup> She sought these additional remedies and filed a lawsuit in federal court.<sup>83</sup> The federal district court concluded that Ms. "Waid's pursuit of administrative relief under state law prevented her from pursuing any of the federal claims."<sup>84</sup> On appeal, the Seventh Circuit reviewed the district court's ruling and believed the legal ground for the ruling was unclear.<sup>85</sup> It stated that the "essence of the [district court's] holding seems to be that Waid's choice of a state administrative forum was, in effect, an election of remedies and that her success in that forum precluded her pursuit of compensatory and punitive damages under federal law in federal court."<sup>86</sup> The decision related primarily to issue preclusion and issue preemption.<sup>87</sup>

The court recognized that the Wisconsin state law provided a statutory right against sex discrimination in employment, which ran parallel to the federal statute, Title VII.<sup>88</sup> Title VII requires a claimant to first seek administrative remedies in an administrative forum before pursuing the rights in court.<sup>89</sup> The EEOC may provide this administrative

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<sup>76</sup> *Waid*, 91 F.3d at 857 (holding Title VII preempts Title IX and are dependent claims where individuals are in workplace and educational environment).

<sup>77</sup> *Id.* at 859.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 860.

<sup>80</sup> *Id.* at 859 (state agency is referred to as the Equal Rights Division in this case).

<sup>81</sup> *Id.*

<sup>82</sup> *Waid*, 91 F.3d at 859.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 759.

<sup>85</sup> *Id.* at 860.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (discussing district court's decision referencing issue preclusion but appellate court believed district court's reasoning implied claim preclusion too).

<sup>88</sup> *Waid*, 91 F.3d at 861.

<sup>89</sup> *Id.*

forum, but if a state agency stands as the local equivalent, a plaintiff with Title VII claims may have to first seek relief from state administrators who act under state law.<sup>90</sup> Thus, Title VII is a remedy for “victims of employment discrimination who cannot obtain complete redress for their injuries in an administrative forum, whether the agency providing administrative redress is a creature of state or federal government.”<sup>91</sup> Additionally, Title IX provides that an educational institution or activity may lose funds provided by federal agencies if there is a violation of Title IX.<sup>92</sup> The court recognized that Ms. Waid was an employee of an educational institution receiving federal funds, which gave her a private right of action under Title IX.<sup>93</sup>

However, the Seventh Circuit examined “whether Waid’s choice to bring claims in a state administrative forum that could not consider Title IX claims preclude[d] her from raising those claims in a judicial forum.”<sup>94</sup> The court believed, according to the Second Restatement of Judgments, the plaintiff must assert her “claims initially in the forum with the broadest possible jurisdiction.”<sup>95</sup> If a plaintiff has an unconstrained choice to bring all her claims in a forum of limited or broad jurisdiction and she chooses the limited venue, this “precludes her from bringing the unlitigated claims in a subsequent proceeding.”<sup>96</sup> However, the Equal Rights Division’s exclusive jurisdiction over Waid’s state claims made it evident that she could not have consolidated her claims in a single lawsuit.<sup>97</sup> Therefore, “the decision of her state administrative proceeding does not [alone] preclude her claims arising under federal law.”<sup>98</sup> The court further noted that “Wisconsin requires that its courts consider a variety of factors when determining whether to give issue preclusion effect to the unreviewed decision of a state administrative agency.”<sup>99</sup>

Those factors include the following: (1) the ability of the party against whom preclusion is sought to obtain judicial review of the decision; (2) differences in the quality or extensiveness of the procedures followed by the agency and the court; (3) differences in the standards of

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (discussing purpose of bringing Title VII claims in federal court).

<sup>92</sup> *Id.* at 862. (“The creation of this incentive indicates that Congress intended to place the burden of compliance with civil rights law on the educational institutions themselves, not on the individual officials associated with those institutions.”).

<sup>93</sup> *Id.* at 861.

<sup>94</sup> *Waid*, 91 F.3d at 863.

<sup>95</sup> *Id.* at 865 (explaining plaintiff must initially bring all claims in broad forum when she has a choice).

<sup>96</sup> *Id.* at 864–65.

<sup>97</sup> *Id.* at 865.

<sup>98</sup> *Id.* at 866.

<sup>99</sup> *Id.*

proof required by the agency and the court; (4) policy considerations that would make the application of issue preclusion fundamentally unfair.<sup>100</sup>

After the court evaluated these factors, it found that the “Equal Rights Division’s factfinding on the issue of discrimination should preclude the relitigation of the issue, [whether Ms. Waid was discriminated against,] because the school system had the opportunity to seek judicial review of the agency’s decision, but it declined to do so.”<sup>101</sup> Subsequently, the Seventh Circuit held that the Equal Rights Division’s decision precluded the question of whether there was discrimination, but not whether it intended to discriminate against Ms. Waid.<sup>102</sup> It also believed that Congress intended Title VII to be the exclusive way to vindicate a right and, therefore, Title VII preempted Title IX.<sup>103</sup>

Conversely, in the Fourth Circuit case, *Preston v. Com. of Va. ex rel. New River Com. Col.*, Susan Preston, the community college student support services counselor, brought action against New River Community College alleging that it violated Title VII and Title IX because it retaliated against her for filing an employment discrimination claim based on gender and race.<sup>104</sup> She alleged the college failed to award her the positions of counselor for student development and activities counselor due to her previous discrimination charge with the EEOC.<sup>105</sup> However, a jury had concluded that “Preston would not have received the position even if the college had not discriminated against her.”<sup>106</sup> The Fourth Circuit held that the determination by the jury that she would not have been awarded the position of activities counselor in the absence of the College’s retaliation did not foreclose Preston from being entitled to pursue relief under Title IX.<sup>107</sup> Subsequently, the court examined “whether [it] should construe Title IX as Title VII was construed at the time the events underlying this action occurred or whether [it] should construe [Title IX] in accordance with the way Title VII has been amended by Congress in the interim.”<sup>108</sup> The Fourth Circuit found that “applying an interpretation of Title IX in

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<sup>100</sup> *Waid*, 91 F.3d at 866 (declaring Wisconsin rules for determining whether issue preclusion should give effect to unreviewed decision of state administrative agency).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 867.

<sup>103</sup> *Id.* at 862. This case was abrogated, but is still used for the Title VII and Title IX circuit split.

<sup>104</sup> *Preston*, 31 F.3d at 203–04 (discussing discrimination claims where Title VII does not preempt Title IX because the claims are independent).

<sup>105</sup> *Id.* (discussing alleged retaliatory discrimination when College failed to hire Ms. Preston because of her previous discrimination claims).

<sup>106</sup> *Id.* at 205.

<sup>107</sup> *Id.* at 208–09.

<sup>108</sup> *Id.* at 207 (discussing whether Title IX should be construed according to VII at the time of the events or by the way Title VII has been amended by Congress in interim).

accordance with Title VII as amended by the [Civil Rights Act of 1991] (“CRA”) to conduct occurring before the effective date of the amendment would amount to an impermissible retroactive application.”<sup>109</sup> Therefore, even though there was not a settled interpretation by the Supreme Court at the time the conduct occurred, the court of appeals believed that a Title IX employment discrimination claim should be interpreted in accordance with the principles governing Title VII.<sup>110</sup> However, the court noted that these claims are still independent from each other.<sup>111</sup> Nevertheless, the court concluded that since Ms. Preston would not have received the position of activities counselor even if she had not filed the discrimination claim in 1984, the college did not ultimately violate Title IX.<sup>112</sup>

Additionally, in *Lipsett v. University of Puerto Rico*, the First Circuit found that Annabelle Lipsett, a resident in the General Surgery Residency Training Program, made a *prima facie* case of hostile work environment, *quid pro quo* sexual harassment, and discriminatory discharge.<sup>113</sup> The residency program integrated the surgical training programs of San Juan Veterans Administration Hospital and the Hospital at the University of Puerto Rico.<sup>114</sup> Ms. Lipsett claimed “that the predominant professional view of surgery [was] . . . a medical field appropriate only for men[, which] made it difficult, and at times impossible, for her to gain acceptance and respect in the [p]rogram.”<sup>115</sup> Also, the residents made sexual comments towards Ms. Lipsett, and nicknamed her “Selastraga,” meaning “she swallows them.”<sup>116</sup> Two supervisory residents filed complaints against Ms. Lipsett, accusing her of admitting patients to her ward without first consulting the senior resident, creating friction among the residents, failing to inform her superiors of the results of analyses performed on patients, being late, and having unauthorized absences.<sup>117</sup> Shortly after, Ms. Lipsett was dismissed from the program.<sup>118</sup>

The First Circuit analyzed whether “the Title VII standard [of disparate treatment, which proves discrimination,] . . . should apply as

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<sup>109</sup> *Id.* at 208.

<sup>110</sup> *Preston*, 31 F.3d at 206.

<sup>111</sup> *Id.* at 205 (holding Title IX is independent from Title VII and Title VII does not preempt Title IX).

<sup>112</sup> *Id.* at 208.

<sup>113</sup> *Lipsett*, 864 F.2d at 881.

<sup>114</sup> *Id.* at 886. This case discusses the court’s decision that Title VII does not preempt Title IX. The court found the claims to be independent.

<sup>115</sup> *Id.* (illustrating sex discrimination under Title VII and Title IX when women were treated inferior and threatened with dismissal).

<sup>116</sup> *Id.* at 888 (discussing sexual harassment and hostile work environment under Title VII and Title IX when Ms. Lipsett was sexually harassed during her residency).

<sup>117</sup> *Id.* at 891.

<sup>118</sup> *Id.* at 892.



well to claims of sex discrimination arising under Title IX.”<sup>119</sup> The court agreed with the Tenth Circuit that since “‘Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination,’ it would regard Title VII ‘as the most appropriate analogue when defining Title IX’s substantive standards.’”<sup>120</sup> Therefore, Title VII case law may be used for Title IX claims.<sup>121</sup> A prima facie case of quid pro quo harassment under Title IX consists of a showing that “(1) [the plaintiff] was subject to unwelcome sexual advances by a supervisor or teacher and (2) that his or her reaction to these advances affected tangible aspects of his or her compensation, terms, conditions, or privileges of employment or educational training.”<sup>122</sup> Additionally, to make out a prima facie case of hostile environment, the plaintiff must show that he or she was subjected to unwelcome sexual advances “sufficiently ‘severe or pervasive’ that [they] altered his or her working or educational environment.”<sup>123</sup> To have a cause of action for sexual harassment under Title IX, “an educational institution is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees *if* an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment’s occurrence, *unless* that official can show that he or she took appropriate steps to halt it.”<sup>124</sup>

The First Circuit found that surgery residents, who were not named as defendants, committed most, if not all, of the alleged acts of harassment and discrimination.<sup>125</sup> Consequently, the court examined to what extent may the named defendants be held liable for the acts of others under 42 U.S.C. § 1983.<sup>126</sup> The First Circuit rejected the district court’s finding that no affirmative link existed among the participants in the alleged wrongdoing and the defendants who did not partake in the incident.<sup>127</sup> First, the doctors’ failure to “investigate and put a stop to the harassment directed against the plaintiff[,] constituted ‘gross negligence amounting to

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<sup>119</sup> *Lipsett*, 864 F.2d at 896.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 897 (discussing their reliance on the EEOC’s guideline called the “Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance”).

<sup>122</sup> *Id.* at 898.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 901 (finding employer liable for hostile environment sexual harassment under Title IX “if the employer knew or should have known of the harassment, and took no effectual action to correct the situation”).

<sup>125</sup> *Lipsett*, 864 F.2d at 899.

<sup>126</sup> 42 U.S.C. § 1983 (2012).

<sup>127</sup> *Lipsett*, 864 F.2d at 902.

deliberate indifference.”<sup>128</sup> Second, it found “that the complaints directed against the plaintiff by the male residents were so infused with discriminatory bias as to render them pretextual,” and that the doctors had reason to “suspect this pretext but[,] nevertheless[,] used these complaints as a basis for discharging her from the [p]rogram.”<sup>129</sup>

The appellate court found “that there was sufficient evidence in the record from which it could be inferred that the atmosphere described by the plaintiff was so blatant as to put the defendants on constructive notice that sex discrimination permeated the [p]rogram.”<sup>130</sup> One of the doctors admitted in his deposition that he heard residents and attendings make remarks that “women should not be general surgeons.”<sup>131</sup> Also, the plaintiff spoke with the lead doctors about the dynamics of the program including hostility from the male residents toward the women becoming doctors.<sup>132</sup> Ms. Lipsett further described that the male residents treated her with animosity due to her refusal to succumb to their sexual advances.<sup>133</sup> Additionally, Ms. Lipsett told the lead doctor about the harassment.<sup>134</sup> When she was dismissed, this lead doctor even stated that “there was some type of behavior that made . . . [Ms. Lipsett] uncomfortable.”<sup>135</sup>

The court reasoned that “[b]elittling comments about a person’s ability to perform on the basis of that person’s sex, are not funny.”<sup>136</sup> Despite the plaintiff’s allegations, the doctors did not take any steps to investigate the allegations or resolve them.<sup>137</sup> The doctors’ “reliance could be characterized as an act of complicity amounting to the ‘supervisory encouragement or condonation of or acquiescence in the residents’ discriminatory behavior.”<sup>138</sup> Therefore, the First Circuit found that these facts were true and that the defendants failed to stop or investigate the sexual harassment against the plaintiff.<sup>139</sup> Ultimately, the First Circuit held that there was a prima facie case of a hostile work environment, quid

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<sup>128</sup> *Id.* at 903 (discussing sexual harassment including threats, sexual advances, degrading pinups, and hostile behavior where the doctors failed to investigate or stop these occurrences).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 906.

<sup>131</sup> *Id.* (explaining offensive atmosphere where male residents attacked plaintiff on her capabilities because she was a woman) (internal quotations omitted).

<sup>132</sup> *Id.* at 907.

<sup>133</sup> *Lipsett*, 864 F.2d at 907.

<sup>134</sup> *Id.* (discussing instance where Ms. Lipsett told lead doctor she was experiencing harassment and lead doctor did not resolve or investigate situation).

<sup>135</sup> *Id.* at 906 (internal quotations omitted).

<sup>136</sup> *Id.* at 907 (displaying First Circuit’s strong opinion regarding Ms. Lipsett’s sexual harassment claims).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 911 (internal quotation marks omitted).

<sup>139</sup> *Lipsett*, 864 F.2d at 914.

pro quo sexual harassment, actual and constructive knowledge of the plaintiff's allegation of harassment, and a claim of discriminatory discharge that could be viewed independently under both Title VII and Title IX.<sup>140</sup>

The Third Circuit ended the even split and ruled, along with the First and Fourth Circuits, that rights under Title VII and Title IX are independent from each other and Title IX is not preempted by Title VII.<sup>141</sup> In the Third Circuit, “the [district] courts held conflicting decisions.<sup>142</sup> *Doe v. Mercy Catholic Medical Center*, which discussed whether a medical resident alleging sexual harassment and retaliation should be treated as: “(i) an employee who can seek relief under Title VII; (ii) a student who can seek relief under Title IX; or (iii) both,” resolved the conflict.<sup>143</sup> Aligning the Third Circuit with the First and Fourth Circuits, the court in *Doe* decided that sexual harassment and retaliation should be viewed separately through both Title VII and Title IX.<sup>144</sup>

In *Doe v. Mercy Catholic Med. Ctr.*, the court decided “whether an ex-resident . . . can bring private causes of action for sex discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, against Mercy Catholic Medical Center, a private teaching hospital operating a residency program.”<sup>145</sup> A residency program is “a period of clinical didactic and clinical instruction in a medical specialty during which physicians prepare for independent practice after graduating from medical school.”<sup>146</sup> *Doe* alleged that the director of Mercy's residency program, Dr. James Roe, sexually harassed her and retaliated against her because she complained about his behavior, which resulted in her dismissal.<sup>147</sup> *Doe* sued Mercy in the district court under Title IX for retaliation, quid pro quo harassment, and hostile environment.<sup>148</sup> She conceded she never filed a charge under Title VII of the Civil Rights Act of 1964 with the EEOC.<sup>149</sup> The district court held that Title IX does not apply to Mercy because it is not an educational program or activity under

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<sup>140</sup> *Id.* at 914–15.

<sup>141</sup> Barry & Guerrasio, *supra* note 63.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Doe*, 850 F.3d at 545 (discussing resident who is employed for educational program where Title VII does not preempt Title IX and the issues are independent claims).

<sup>146</sup> *Id.* at 550 (illustrating *Doe* is both student and employee because she is working at a hospital for her education).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 552.

<sup>149</sup> *Id.*

20 U.S.C. § 1681(a).<sup>150</sup> Even if Title IX did apply, the court did not believe it could use Title IX to circumvent Title VII's administrative requirements.<sup>151</sup>

On appeal, the Third Circuit examined “whether Title IX applies to Mercy [and] whether Doe’s private causes of action are cognizable under Title IX.”<sup>152</sup> First, the Third Circuit considered whether Mercy’s resident program made the hospital an “‘educational program or activity’ under Title IX.”<sup>153</sup> The court discussed that Title IX was enacted under the Spending Clause and, therefore, operates like a contract. Specifically, when states accept federal funds, they agree to comply with Title IX’s mandate.<sup>154</sup> Consequently, if an entity agrees to accept federal funds for its educational program or activity, the federal funds may be revoked if there is a violation of Title IX.<sup>155</sup> The court explained that “Title IX’s . . . (express) enforcement mechanism is through agencies’ regulation of federal funding.”<sup>156</sup> Unlike the district court which differentiated Mercy from an educational program or activity because “residents already have a degree, don’t pay tuition, and are paid for their services and protected by labor laws,” the court of appeals believed Mercy did qualify.<sup>157</sup> Because Congress “expressly exempted specific kinds of programs from Title IX’s reach[,] . . . [the court was] hesitant to impose further restrictions without strong justification from Title IX’s text.”<sup>158</sup> An entity qualifies for federal funding so long as “one can reasonably consider its mission to be, at least in part, educational.”<sup>159</sup> Because Mercy’s residence program was affiliated with Drexel Medicine, a university program, the court found it reasonable that Mercy’s mission was educational under Title IX.<sup>160</sup>

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<sup>150</sup> *Id.* The district court used the Federal Rule of Civil Procedure 12(b)(6) to dismiss this claim.

<sup>151</sup> *Doe*, 850 F.3d at 552. Regardless, the district court had dismissed all of Ms. Doe’s Title IX claims.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* (explaining requirement to seek relief under Title IX where Mercy must be educational program or activity).

<sup>154</sup> *Id.* (discussing Title IX where the nature of statute is contract because federal agencies may withdraw federal funding if there is a violation).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Doe*, 850 F.3d at 554 (discussing district court’s belief that Mercy is not an educational program or activity where residents have degree, do not pay tuition, and are paid for services and protected by labor laws).

<sup>158</sup> *Id.* at 555.

<sup>159</sup> *Id.* at 557; *See, e.g.*, 15 U.S.C. § 37b(b)(1)(B)(i) (“A ‘graduate medical education program’ is a ‘residency program’ for ‘medical education and training.’”).

<sup>160</sup> *Id.* at 556.

Furthermore, the court considered whether Doe's private causes of action were cognizable under Title IX. "Title VII's concurrent applicability does not bar Doe's private causes of action for retaliation and *quid pro quo* harassment under Title IX."<sup>161</sup> The court of appeals derived four guiding principles including (1) "private-sector employees aren't 'limited to Title VII' in their search for relief from workplace discrimination;" (2) "it is a matter of 'policy' left for Congress's constitutional purview whether an alternative avenue of relief from employment discrimination might undesirably allow circumvention of Title VII's administrative requirements;" (3) "the provision implying Title IX's private cause of action, 20 U.S.C. § 1681(a), encompasses employees, not just students;" and (4) "Title IX's implied private cause of action extends explicitly to *employees* of federally-funded education programs who allege sex-based *retaliation* claims under Title IX."<sup>162</sup> Therefore, Doe has a private retaliation claim under Title IX because a federal funded recipient, an employee of the residency program, retaliated against her for making accusations of sex discrimination.<sup>163</sup> "Whether . . . [Doe] could also proceed under Title VII is of no moment" because Congress created different remedies that overlap to eradicate private sector employment discrimination.<sup>164</sup> Therefore, Doe could have also proceeded under Title IX for her *quid pro quo* sexual harassment claim.<sup>165</sup>

The court ultimately held that Doe's medical residency program at the Mercy Catholic Medical Center hospital, which accepted federal funding through Medicare and was affiliated with Drexel University Medical Center, qualified as an educational program or activity under Title IX.<sup>166</sup> Additionally, Doe's concurrent employee status, which fell under Title VII, did not preclude her from bringing a private cause of action under Title IX.<sup>167</sup> Therefore, the Third Circuit's holding aligns with the First and Fourth Circuit's decisions that Title VII does not preempt Title IX and these claims may be considered independently.

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<sup>161</sup> *Id.* at 560.

<sup>162</sup> *Id.* at 562.

<sup>163</sup> *See Doe*, 850 F.3d at 563–64. The court discusses the definition of intentional discrimination where a "funding recipient retaliates against a 'person,' including an employee, because she complains of sex discrimination."

<sup>164</sup> *Id.* at 564 (discussing plaintiff's right to bring Title VII and Title IX claim independently where Congress intentionally created different remedies).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 549.

<sup>167</sup> *Id.*

## IV. CONCLUSION

For decades, there has been a circuit split when a situation with alleged discrimination involves education and employment. After *Doe v. Mercy Catholic Medical Center*, the First, Third, and Fourth Circuits correctly held that both Title VII of the Civil Right Act of 1964 and Title IX of the Education Amendments of 1972 apply, but the Fifth and Seventh Circuits found Title VII to preempt Title IX.<sup>168</sup> Title IX is substantially different from Title VII.<sup>169</sup> Title IX does not require a claimant to exhaust the administrative remedies first, there is no damages cap, and if a violation of Title IX is found, federal agencies have a right to withdraw their federal funding to the educational institution.<sup>170</sup> Consequently, an individual should not be denied the right to bring an independent claim under both statutes.<sup>171</sup> In order to end the circuit split, the Supreme Court of the United States should resolve the issue by allowing a plaintiff to bring a discrimination claim with employment and educational attributes under both Title VII and Title IX.<sup>172</sup> Hopefully, the recent *Doe* ruling is indicative of a new trend and will foster enough conversation to bring this issue to the Supreme Court.<sup>173</sup>

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<sup>168</sup> *Doe*, 850 F.3d at 545; *Waid*, 91 F.3d at 857; *Lakoski*, 66 F.3d at 751; *Preston*, 31 F.3d at 203; *Lipsett*, 864 F.2d at 881.

<sup>169</sup> *See Doe*, 850 F.3d at 545.

<sup>170</sup> *Id.* (discussing differences between Title VII and Title IX where an individual should have a right to bring both claims separately).

<sup>171</sup> *See id.*

<sup>172</sup> 20 U.S.C. § 1681; 42 U.S.C.A. § 2000e-2.

<sup>173</sup> *Doe*, 850 F.3d at 545.

# Making employers accountable for sexual predators who act outside the workplace

By Jayme L. Walker and Brittany Smith

## Introduction

The #MeToo movement recognized the importance of holding a predator accountable for their actions and ushered in an era of unprecedented visibility of sexual assault in the media. Although society appears more willing than ever to recognize this pervasive problem, the court of public opinion is often the only means to adjudicate these matters, as the actual courts are slow or hesitant to right past decisions.

Despite this new #MeToo era, sexual predators are no less dissuaded. In a 2018 survey, 81 percent of women and 43 percent of men reported that they had experienced some form of sexual harassment during their lifetime. However, sexual harassment is widely underreported, so the true statistics are unknown. Despite increased visibility for sexual harassment, many predators still maintain their perfect hunting ground – the workplace. This easily-accessible, “vulnerable and defenseless” pool of victims is too afraid to speak out, particularly because of the damage that it could do to their careers, wondering, “Will my employer believe me? Will my employer fire me, demote me,

label me a troublemaker, or transfer me to a position with no future?” (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1048.)

When a supervisor sexually harasses or assaults a subordinate employee, more often than not the employer should be held accountable under anti-discrimination and sexual harassment laws. When the supervisor takes advantage of their position of power outside of work hours and outside the workplace, the employer is strictly liable for that conduct and the harm it inflicts on victims when the context in which the harassment or assault occurs is connected to work or is work-related. Despite this lower standard for accountability mandated by the Fair Employment and Housing Act (FEHA), case law has sometimes still applied the higher standard usually required by common law agency principles. This case law, discussed below, uses an outdated notion of what constitutes coercion and harassment in order to exculpate the employer from liability. Some employers still hold fast to this outdated case law as a means to avoid responsibility for the conduct of persons they place in positions of power. Don’t let them get away with it.

## The work-related standard

Under the FEHA, an employer is liable for sexual harassment under two distinct theories, depending on whether the harasser is the victim’s supervisor or a non-supervisory employee. When the harasser is the victim’s supervisor, an employer is strictly liable for the harasser’s conduct. However, if the harasser is a non-supervisory employee, traditional principles of agency law apply, and an employer is liable for sexual harassment “only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action.” (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1419–20 (citing Gov. Code § 12940(j)(1)).)

In enacting the FEHA, the Legislature “indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard ... and that agency principles come into play only when the harasser is not a supervisor.” (*Health Services, supra*, 31 Cal.4th at 1041, emphasis removed.) The purpose of the FEHA “is to ensure that all employers maintain their worksites free from prohibited sexual harassment, regardless of the lack of foreseeability of such harassment in their particular enterprises.” (*Myers, supra*, 148 Cal.App.4th at 1422.) Thus, the FEHA establishes a standard for supervisory liability that is distinct from, and a lower standard than, agency law. The standard can be coined the “work-related” standard. It is aptly described (but then not followed) in *Capitol City Foods, Inc. v. Superior Court* (1992) 5 Cal.App.4th 1042 as follows:



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Victims of sexual harassment by a supervisor are uniquely vulnerable and defenseless. ... The experience is an obvious nightmare and a Catch-22 – not reporting it can mean further subjection to harassment, but reporting it can have serious implications on a victim’s career and life.

coercion when Mary entered the bedroom. The fact that this was even stated by the court as part of its reasoning shines a light on the outdated notion that once a woman enters a bedroom, she’s fair game. Had the case been evaluated using a more modern understanding of coercion and using the appropriate “work-related” standard, a different result would have been reached.

Four years after *Capitol City Foods, Inc., Doe v. Capital Cities* (1996) 50 Cal. App.4th 1038 was decided using the appropriate “work-related” standard. There, an actor was drugged and gang raped by the associate director of casting and talent of Capital Cities and four unaffiliated men, after being invited to a Sunday brunch at the casting director’s home. (*Id.* at 1042–03.) Although he was never told that the brunch was related to work, Doe believed by going, he would advance his acting career. (*Id.*) Following the rape, Doe filed a claim for sexual harassment under a theory of hostile work environment. (*Id.* at 1045.) The court first set forth the principle that employer liability under FEHA for “an act of sexual harassment committed by a supervisor or agent is broader than the liability created by the common law principle of respondeat superior.” (*Id.*, emphasis in original.) The court also found that the casting director was acting in a supervisory role and an agent of Capital Cities. (*Id.* at 1046.) The court held that the plaintiff’s reasonable belief that attending a social function with the casting director would advance his acting career made the conduct sufficiently connected to work such that Capital Cities was subject to strict liability for the sexual harassment and assault that Doe endured. (*Id.* at 1049–50.)

[W]hile the offending conduct may and often does occur at the place of work, it need not. Unwelcome sexual conduct perpetrated by an agent, supervisor, or co-worker, which occurs elsewhere but is in some fashion work-related also constitutes sexual harassment within the meaning of the Act.

(*Id.* at 1048–49.)

In *Capitol City Foods*, the plaintiff, Mary, a trainee at Burger King (a subsidiary of Capitol City Foods), and her co-worker asked Vernon Johnson, the night shift supervisor, out for drinks. (*Id.* at 1044.) After rescheduling, Mary and Johnson ended up going out one night alone after Mary’s co-worker failed to show up. (*Id.*) That night, Johnson picked up Mary in her Burger King uniform. Johnson called Burger King and told the manager on duty that Mary would not be coming to work. He then took Mary back to his home and raped her. (*Id.*) While he was raping her, he told her that her job depended on her submitting to his advances. (*Id.* at

1049). Rather than evaluate this under the work-related standard, the court evaluated Johnson’s conduct under common law agency principles to hold that Capitol City Foods was not liable for Mary’s off-site and after work rape by Johnson. (*Id.* at 1047, 1050.) The court looked at whether a sufficient “nexus between Johnson’s conduct and his employment [so as] to permit the inference that his conduct arose in the course of his employment.” (*Id.* at 1048.) This is traditionally an agency analysis rather than the appropriate “work-related” analysis. The court sided with Capitol City Foods’ narrative that this was simply co-workers going on a date and then engaging in consensual sex, apparently based on an absence of physical or verbal force or coercion to get Mary into Johnson’s bedroom. (*Id.* at 1050.) That Johnson was one of Mary’s supervisors was seemingly incidental to the court. That he told her that her job depended on submitting to his advances was also unconvincing to the court. The court noted that there was no



## Updating our understanding of employer liability and what it means to be work-related

With twenty-seven years of hindsight, new precedent and case law, and in the age of #MeToo, it is clear that the *Capitol City Foods* court reached the incorrect conclusion. Since *Capitol City Foods*, the California courts have recognized that agency principles should not be applied to incidents of sexual harassment committed by supervisors. Rather, modern case law recognizes the Legislature's intent in enacting the FEHA and properly finds that an employer is strictly liable for acts of sexual harassment committed by a supervisor if the conduct occurred in a context that was "work-related."

The California Supreme Court declared in *Health Services* that an employer is only exempt from liability for sexual harassment outside the workplace when the conduct is the result of "a completely private relationship unconnected with the employment and not occurring at the workplace or during normal working hours." (*Health*

*Services*, *supra*, 31 Cal.4th at 1041, fn. 3.) The court noted that exemption from liability would be the exception rather than the rule when it said that "instances of such harassment [unconnected to work] must be rare." (*Id.*)

This broad principle necessarily includes instances of off-site, off-work conduct, which courts have already recognized. In *Myers*, the court found the employer was strictly liable even when "the incidents took place outside the workplace, were not work-related, and [the supervisor] was acting for his own personal interests rather than [the employer's] interests." (*Myers*, *supra*, 148 Cal.App.4th at 1420.) The court determined that there was no "completely private relationship unconnected with the employment" when the employee and her supervisor were not dating and the activity occurred when the two were engaged in activities that were not sanctioned by the employer, but for which the employer clearly derived a benefit and did not stop. (*Id.* at 1412.)

Moreover, post-*Capitol City Foods* cases recognize the real-world application of legal principles. The *Capitol City Foods* court made it clear that, because Mary never explicitly said "No," and did not fight back, she consented to the rape. The court failed to recognize what the California Supreme Court did: that victims of sexual harassment by a supervisor are uniquely vulnerable and defenseless, and that the experience is an obvious nightmare and a Catch-22 – not reporting it can mean further subjection to harassment, but reporting it can have serious implications on a victim's career and life. (*Health Services*, *supra*, 31 Cal.4th at 1048.)

Since *Capitol City Foods*, courts have viewed employer liability and the foreseeability of conduct that occurs outside the workplace much more expansively. Although not a FEHA case, *Purton v. Marriott International, Inc.* (2013) 218 Cal.App.4th 499 is illustrative. In *Purton*, the court found the employer liable for vehicular manslaughter when an employee became intoxicated at a work party, left the party and went home, then left his residence and caused an automobile accident that resulted in death. (*Id.*) Although co-workers socializing off-site and during off-work hours may not have been sanctioned by *Capitol City Foods*, it is common for co-workers in any industry

to socialize outside of work. Such conduct would, under less nefarious circumstances, be viewed as benefitting the company, strengthening workplace bonds, generating new ideas, and the like outside the confines of the office. (See *Purton* at 507, noting that an office party was a company

Since *Capitol City Foods*, courts have viewed employer liability and the foreseeability of conduct that occurs outside the workplace much more expansively.

activity "that benefited the company by fostering company camaraderie and the discussion of company business" [internal citation omitted].) Socializing outside of work can even be considered an unspoken necessity of employment – if your co-workers are going out with the boss and you decline, you miss out on "facetime" with the boss, which can cost you opportunities and promotions. This can even be seen in the legal field, where networking is essential to your career advancement.

## Conclusion

In a world where individuals spend most of their life working, it is a sobering, yet unchangeable fact that supervisors hold immense power over their employees. (See, e.g., Gov. Code § 12926(t).) Often, this power is unchecked due to an employer's inadequate, or nonexistent, policies, training, and compliance procedures. Regardless of whether these safeguards are in place, employers must be held liable for the actions of their supervisor-employees, as employers have chosen to impart them with such power. When a supervisor takes advantage of that position of power to sexually harass or assault an employee, using a work-related standard, rather than agency principles, mandates that most employers be held accountable for providing the predator access to, and power over, their victim. Recognizing this is the best, and perhaps only, way to protect employees from the trauma of sexual harassment, it is imperative that courts rethink existing, and technically precedential, case law. ■

January 30, 2019

The Honorable Betsy DeVos  
Secretary  
U.S. Department of Education  
400 Maryland Avenue, S.W.  
Washington, DC 20202

*Submitted electronically*

**Re: National Employment Lawyers Association's Comments On NPRM Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: [RIN 1870-AA14](#), Docket ID ED-2018-OCR-0064**

**Application of Proposed Regulations to Sexual Harassment of Employees**

Dear Secretary DeVos:

The National Employment Lawyers Association (NELA) respectfully submits the following comments opposing issuance of the Department of Education's (DOE's) Proposed Regulation referenced above.

NELA is the largest professional membership organization in the country of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. Ending discrimination and ensuring adequate remedies for individuals who face discrimination in the workplace are NELA priorities.

NELA's members litigate workplace harassment cases all across the country in all kinds of employment sectors. Many of our members represent employees of public and private educational institutions. Their years of work provide them, and NELA, with first-hand knowledge and expertise with respect to how these situations play out on the ground and in litigation. Thus, NELA has both extensive expertise and a strong interest in the proposed rule.

In the Notice of Proposed Rule Making (NPRM) accompanying the proposed amendments to the Title IX regulations, the DOE specifically requested comments on the application of the proposed amendments to employees. 83 Fed. Reg. 61483. This comment addresses the problems created by the proposed regulation in the context of a complaint that an employee of recipient was sexually harassed by another employee. In that context, the proposed

regulation would be in various respects unworkable, inconsistent with other regulations, and/or unacceptably confusing to recipients, complainants and respondents alike.

Although the primary focus of the regulations, as articulated in the NPRM, is on harassment of students, particularly student-on-student harassment, the regulations would also apply to sexual harassment of employees, which, in almost all cases, involves situations of harassment of one employee by another employee. Title IX applies to employees of recipients as well as to students at those institutions. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). There are more than eight million employees in primary and secondary schools, and more than four million employees at institutions of higher education. At some institutions of higher education, the number of employees is comparable to or greater than the number of students. Johns Hopkins University, for example, has more than 50,000 employees, but only about 20,000 students.

Some difficulties in applying the regulations to sexual harassment of employees would arise because the wording of a number of sections, written to address the problem of harassment of students, make little sense with regard to the problem of harassment of employees. Sexual harassment of employees is covered by Title VII as well as Title IX, and several key provisions of the proposed regulations are inconsistent with Title VII standards. When DOE receives a Title IX complaint regarding employment discrimination, it is obligated by the Department of Justice (DOJ) coordinating regulations to consider Title VII standards. Although the proposed regulations are largely framed to establish the manner in which DOE would respond to a sexual harassment complaint involving harassment of a student, if the sexual harassment victim is an employee, the primary administrative responsibility for investigating and evaluating the complaint lies with the EEOC, not DOE.

The existing regulations contain a provision<sup>1</sup> addressing the relationship between the DOE regulations and Title VII. The proposed regulations would add a second such provision.<sup>2</sup> As explained below, however, neither of these provisions solves the problems that would arise if the regulations were applied to sexual harassment of employees. At best these two provisions increase the uncertainty and confusion that would arise if the proposed regulations were applied to sexual harassment claims by employees.

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<sup>1</sup> Section 106.6(a) provides:

*Effect on other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by . . . Title VII of the Civil Rights Act of 1964.

<sup>2</sup> Proposed section 106.6(f) would provide:

*Title VII of the Civil Rights Act of 1964.* Nothing in this part shall be read in derogation of an employee's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.

## (1) *The Coordinating Regulations*

Title IX provides in part that any regulation issued to effectuate Title IX must be approved by the President. The President has delegated that authority, at least in part, to the Attorney General of the United States, who has issued a number of regulations designed to coordinate enforcement by the various federal agencies of a number of overlapping anti-discrimination statutes. Those coordinating regulations address, *inter alia*, the handling of employment discrimination complaints under Title IX, Title VII, and other federal laws that prohibit discrimination by recipients of federal financial assistance. 28 C.F.R. §§ 42.601 *et seq.*

The coordinating regulations refer to a Title IX complaint that alleges employment discrimination as a “joint complaint,” because employment discrimination would violate both Title IX (which would usually be enforced by the agency providing federal financial assistance) and Title VII (which is usually enforced by the EEOC).<sup>3</sup> If the DOE receives a Title IX complaint that asserts *only* employment discrimination, it is required by the coordinating regulation to refer that complaint to the EEOC. “An agency shall refer to EEOC all joint complaints solely alleging employment discrimination against an individual.” 28 C.F.R. § 42.605(e). Such referral constitutes “delegat[ion] to EEOC [of the agency’s] investigatory authority . . . under Title IX.” 28 C.F.R. § 42.605(h). The EEOC then treats the referred complaint as a Title VII charge.

A complaint of employment discrimination filed with an agency, which is . . . referred to EEOC under this regulation, shall be deemed a charge received by EEOC. For all purposes under Title VII . . . , the date such complaint was received by an agency shall be deemed the date it was received by EEOC. 28 C.F.R. § 42.606(a).

The EEOC investigates the complaint, applies Title VII legal standards, and then makes a determination as to whether “reasonable cause exists to believe that Title VII has been violated.” 28 C.F.R. § 42.609(a). If the EEOC concludes that there is reasonable cause to believe that the sexual harassment violated Title VII, it attempts to resolve the violation through a settlement with the recipient. If the EEOC resolves the complaint through conciliation, that settlement is binding on the agency providing federal financial assistance. 28 C.F.R. § 42.611.

If the EEOC, following a determination of reasonable cause, is unable to conciliate the case, it takes two inter-related actions. First, the EEOC is required to send the complainant “a notice of right to sue under Title VII.” 28 C.F.R. § 42.609(b)(3).<sup>4</sup> A complainant has 90 days from receipt of such a notice of right to sue within which to file a Title VII suit. Second, the EEOC must “[t]ransmit to the referring agency a copy of EEOC’s investigative file, including its Letter of Determination and notice of failure of conciliation” 28 C.F.R. § 42.609(b)(2). The

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<sup>3</sup> In some circumstances enforcement of Title VII is the responsibility of the Department of Justice.

<sup>4</sup> Under some circumstances the right to sue notice would be sent to the complainant by the Attorney General. 28 C.F.R. § 42.609(b)(4).

referring agency in turn must, within thirty days, determine whether the recipient violated the civil rights provision which is has responsibility to enforce. 28 C.F.R. § 42.610(a). Thus, if the EEOC were to conclude that a complainant was the victim of sexual harassment in violation of Title VII, and following a failure of conciliation transmitted the file to DOE, the Department would have only thirty days to determine whether the harassment constituted a Title IX violation.

Under the coordinating regulations, DOE's resolution of a referred-back claim under Title IX would be shaped in two important ways by Title VII and by the EEOC's determination. First, "[i]n any investigation, compliance review, hearing or other proceeding, agencies *shall consider* Title VII case law. . . , unless inapplicable, in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice." 28 C.F.R. § 42.604 (emphasis added). This "shall consider" clause constrains DOE's ability to establish legal standards that might be inconsistent with Title VII case law. If DOE were to issue a regulation that squarely conflicted with Title VII case law, the regulation would have the effect of precluding the Department from "consider[ing] Title VII case law" in subsequent investigations, compliance reviews, hearings and other proceedings to which the regulation applied, in clear violation of section 42.6054.

Second, under the coordinating regulations "[t]he referring agency shall give *due weight* to the EEOC's determination that reasonable cause exists to believe that Title VII has been violated." 28 C.F.R. § 42.610(a) (emphasis added). In making that reasonable cause determination, the EEOC would, of course, apply Title VII standards. The due-weight clause thus constrains the Department's assessment of the legal and the factual issues of a particular case. Because DOE would have to act within 30 days of receiving the EEOC file and reasonable cause determination, DOE, as a practical matter, could not conduct any significant investigation of its own, and would effectively be limited to reviewing the issues addressed by the EEOC cause determination on the record created by the Commission.

## *(2) The Proposed Regulations Are Inconsistent With Title VII Standards*

Under the proposed regulations, with certain limited exceptions<sup>5</sup>, sexual harassment is defined as and limited to "[u]nwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." Section 106.30. That is fundamentally different from and decidedly narrower than the definition of unlawful sexual harassment under Title VII case law.

The touchstone of illegality under Title VII is not whether the harassment limits "access" to anything, but whether the harassment creates a hostile work environment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) ("sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment"); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993) ("so severe or pervasive that it created a work environment abusive to employees because of their . . .gender. . ."; "so long as the environment would reasonably be perceived, and is perceived, as hostile or abusive."). The EEOC regulations,

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<sup>5</sup> The exceptions are quid pro quo demands and sexual assaults as defined in 34 C.F.R. 668.46(a). Section 106.30.

in relevant part, correctly summarize Title VII case law as turning on whether the harassment “has the purpose or effect or unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.” 28 C.F.R. § 1604.11(a).<sup>6</sup> Although the proposed regulation requires that the harassment be severe “and” pervasive, the Title VII standard requires only that the harassment be sufficiently severe “or” pervasive to create a hostile work environment.

The definition of sexual harassment in the proposed regulation makes little sense in the context of sexual harassment of employees. The reference to harassment that “denies a person equal access to the recipient’s education program or activity” is from the discussion of student-on-student harassment in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). In that decision, denial of access referred to the fact that the harassment was alleged to have had a “negative effect on [the victim’s] ability to receive an education.” 526 U.S. at 654. But in a case of sexual harassment of an employee, ability to receive an education is irrelevant, and access to the workplace is rarely an issue. The victim is usually able to come to work and to do his or her job; the injury at issue is not unequal access to the workplace but the emotional harm caused by the harassment that occurs when the plaintiff is there. Although evidence that sexual harassment affected a victim’s job performance might lend support to a Title VII sexual harassment claim, it clearly is not required.<sup>7</sup> Even impaired job performance would not involve a lesser “access” to the recipient’s program or activity, except in the highly unusual case in which the victim’s performance declined so greatly that the worker was demoted or fired. The NPRM itself explains that the regulation permits putting a respondent employee on administrative leave, so long as the respondent is not also an employee, precisely because being on administrative leave would not affect the non-student employee’s access to the recipient’s education program or activity.<sup>8</sup> In DOE’s account, “access” refers to a complainant’s access to an education, an interpretation which would render the equal access clause (and that aspect of the definition of the section 106.30 sexual harassment) virtually inapplicable to a non-student employee.

Sexual harassment is expressly outside the scope and protection of the proposed regulations if the harassment did not occur “in [the recipient’s] education program or activity.” Section 106.44(a) and 106.44(b)(4). Although the meaning of this proposed limitation is unclear, the apparent intent of DOE is to do away with the standard established by OCR policy guidances

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<sup>6</sup> Section 1604.11(a) provides:

Harassment on the basis of sex is a violation of section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect or unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.

<sup>7</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

<sup>8</sup> 83 Fed. Reg. 61471 (“placing a non-student respondent on administrative leave does not implicate access to the recipient’s education programs and activities in the same way that other respondent-focused measures might”).

dating back to 1997, under which sexual harassment off campus (and otherwise outside the education program or activity) would give rise to a Title IX violation if it led to a hostile environment in the program itself. But under Title VII, the existence or lack thereof of a hostile environment remains the standard of illegality.

Under the proposed regulations, a recipient would have no responsibility for sexual harassment unless the recipient responded to allegations of such harassment in a manner that was “clearly unreasonable.” Section 106.44(a) and 106.44(b)(4). Under Title VII, the standard of employer responsibility is completely different. If an employee is sexually harassed by his or her supervisor, the employer is ordinarily strictly liable.<sup>9</sup> The employer may be able to establish an affirmative defense if it can show that it took reasonable care to prevent sexual harassment and reasonable care to correct sexual harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Under these Supreme Court decisions, the employer’s responses must be reasonable; an employer would be liable under Title VII if its actions were unreasonable, even if those actions were not (as under the proposed regulation) *clearly* unreasonable. Moreover, once a harassment victim herself or himself complains, an employer is strictly liable under Title VII for any subsequent harassment, no matter how reasonable the employer’s response to that complaint. The affirmative defense requires proof that the victim unreasonably failed to complain, so an actual complaint bars that defense as to any subsequent harassment. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

The proposed regulation creates several “safe harbors,” which preclude even an inquiry as to whether the recipient was clearly unreasonable. Sections 106.44(b)(2) and 106.44(b)(3). An employer whose actions falls within those provisions is guaranteed immunity from responsibility if a complaint is filed with DOE. But if a sexual harassment complaint were filed by an employee, the EEOC, applying Title VII standards, would not recognize any such safe harbors, and the Department could not do so without violating the requirements of the coordinating regulations.

Under the proposed regulations, if a recipient concludes that a complainant has been the victim of sexual harassment, the only required remedy it is “to restore or preserve access to the recipient’s education program or activity.” Section 106.45(b)(1)(i). But if the complainant were a sexually harassed employee, an employer under that regulation would usually not have to take any remedial steps at all, because harassment of an employee rarely has any impact on access to the job. Title VII, however, requires that an employer take steps to end the harassment that created a hostile work environment, and to eliminate that unlawful environment.

Section 106.30 defines a “formal complaint” as “a document signed by a complainant . . . alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the recipient’s grievance procedures . . .” In the absence of such a signed document, none of the procedures in section 106.45 would be required. The NPRM

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<sup>9</sup> Liability under Title VII for harassment by co-workers and certain supervisors is governed by a negligence standard. *Faragher*, 524 U.S. at 799. Negligence can be established by a showing of a lack of reasonable care, and does not require proof (as does the proposed regulation) of *clearly* unreasonable conduct.

advises recipients that they are only required to investigate a report of sexual harassment if there is such a formal complaint.<sup>10</sup> In Title VII cases, on the other hand, the courts have repeatedly held that an employer acts unreasonably, and is strictly liable for sexual harassment, if it fails to investigate or correct sexual harassment on the ground that the plaintiff (or an earlier victim), who in fact complained to the employer, had failed to do so in a sufficiently formal manner. *Agusty-Reyes v. Dep't of Educ. of Puerto Rico*, 601 F.3d 45, 56 (1st Cir. 2010); *Freytes-Torres v. City of Sanford*, 270 Fed. Appx. 885, 8992 (11th Cir. 2008).<sup>11</sup>

Although the regulations include two provisions (one existing, one proposed) regarding Title VII, it is not clear whether either would override the specific terms of the regulations to the extent that they differ from Title VII standards. But even if those provisions did so, that would not solve the problem created by the proposed regulations, because it would be unclear to recipients which regulations were and were not applicable to an employee's claim of sexual harassment. The express purpose of the proposed regulations is to provide recipients with reasonably specific guidance as to the manner in which DOE will handle a sexual harassment complaint. That purpose would be completely frustrated if one or both of the disclaimers, to assure compliance with the coordinating regulations, were construed to mean "With regard to sexual harassment of an employee, the Secretary will not enforce any provision of this part that is different than the requirements of Title VII, but will instead apply Title VII standards." That would force recipients to guess which of the proposed regulations would and would not be applied to an employee's complaint of sexual harassment. To resolve this, DOE should either spell out which provisions of the proposed regulations it will and will not apply to sexual harassment claims by employees, or exclude employee claims entirely from the scope of the regulations.

### *(3) The Proposed Regulations Require Recipients to Act in a Manner That Would Vitate An Affirmative Defense Under Faragher and Ellerth*

Under *Faragher* and *Ellerth*, an employer is strictly liable if an employee is sexually harassed by his or her supervisor, unless (in addition to several other requirements) the employer can establish an affirmative defense by showing that it took reasonable care to prevent sexual harassment and reasonable care to correct sexual harassment. The proposed regulations require employers, as a condition of receiving federal funds, to take a number of steps which a trier of fact could conclude demonstrated a lack of such reasonable care.

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<sup>10</sup> 83 Fed. Reg. 61487 ("The proposed regulations require recipients to conduct an investigation only in the event of a formal complaint of sexual harassment. . . . [W]e estimate that the requirement to investigate only in the event of formal complaints would result in a reduction in the average number of investigations . . .").

<sup>11</sup> See EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, part V-C-1 ("When an employee complaints to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it conforms to a particular format or is made in writing."), available at <https://www.eeoc.gov/policy/docs/harassmnet.html>



Section 106.45(b)(4)(1) requires a recipient, in certain circumstances, to apply a heightened clear and convincing evidence standard. In such a situation, even though the recipient believed that a preponderance of the evidence showed that sexual harassment had occurred, the recipient would have to exonerate the respondent and would be barred from taking any disciplinary action. A trier of fact could conclude that an employer that chose to use such a heightened standard was not exercising reasonable care to correct harassment. Employers virtually never utilize that standard to resolve allegations of abusive treatment of employees, and such a heightened standard in sexual harassment cases would significantly increase the risk of a mistaken conclusion that the harassment alleged did not occur. Sexual harassment complaints usually require an employer to resolve conflicting first-hand accounts of what occurred. A clear and convincing standard tilts the scale in favor of disbelieving the complainant. A trier of fact could fairly conclude that doing so was inconsistent with reasonable care to accurately determine whether the complainant had been sexually harassed and reasonable care to correct any such harassment.

Under section 106.45(b)(3), if an employee alleged harassment that met the Title VII sexual harassment standard, but did not meet the section 106.30 definition of sexual harassment, a recipient would have to dismiss that employee's formal complaint. Many, if not most employee complaints would not involve a denial of equal access. If the employer was nonetheless willing to assess the employee's allegation using the Title VII standard, it would have to restart the grievance process, but now advising the complainant *not* to submit a signed complaint, because doing so would constitute a formal complaint subject to again being dismissed under section 106.45(b)(3). A trier of fact could easily conclude that an employer which chose to use such a pointlessly burdensome and time-consuming process was not exercising reasonable care.

Section 106.45 imposes on recipients a detailed grievance process which would normally take several months to complete. The NPRM objects to a previous guidelines suggesting that the resolution of a sexual harassment complaint should be completed within 60 days.<sup>12</sup> Employers usually resolve a sexual harassment complaint in far shorter period of time. That delay might not itself be fatal to the affirmative defense under *Faragher* and *Ellerth* if, during the weeks or months the grievance was pending, the employer were to take prompt and effective action to protect the complainant from further harassment and to end the hostile environment. The explanation in the NPRM of several provisions, however, suggests that DOE intends to construe the regulations to bar most interim protective measures. Under section 106.44(c) an employer could exclude a respondent from the workplace if there were an immediate threat to health or safety, but it is unclear whether that would apply to most sexual harassers. Under section 106.44(d) a school could put a non-student employee on administrative leave. That may preclude a school from putting on leave a graduate teaching assistant or research assistant who is sexually harassing other employees. It would not be practicable to put a faculty member on leave in the middle of a semester-long or year-long course, or while he or she was the principal investigator on a large multi-year grant. Sections 106.44(c) and 106.44(d) do not approve the other types of interim measures that would at times be the only practicable protective steps a school could take during the pendency of a grievance process.

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<sup>12</sup> 83 Fed. Reg. 61473.

Section 106.45(b)(3)(vii) requires, in the case of institutions of higher education, that the grievance procedure must provide for a live hearing, and must permit the advisor of the respondent to cross-examine the complainant. That section appears to force the recipient to permit the advisor to ask any question that is relevant and outside the rape-shield provision in the regulation, thus allowing a wide range of cross-examination questions that would not be permitted at a civil trial. A substantial body of practical experience strongly indicates that this sort of cross-examination carries such a considerable risk of abuse, and would thus deter victims of sexual harassment from filing or pursuing a complaint. The risk is particularly great when the harassment involves rape or other serious physical abuse. In the past, the vast majority of schools and virtually all other employers have avoided this practice, often because of the danger that fear of abusive cross-examination would deter legitimate complaints and thus fatally undermine their effort to detect and correct sexual harassment. Under *Faragher* and *Ellerth*, an employer must as part of its affirmative defense demonstrate that the complainant unreasonably failed to utilize the employer's internal corrective mechanism. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. If a recipient were to implement the procedure set out in section 106.45(b)(3)(vii), a Title VII plaintiff could credibly urge that it was reasonable to refuse to be subjected to that procedure<sup>13</sup>, and could seek to make a factual showing that the procedure was indeed deterring sexual harassment complaints, or had in fact resulted in abusive treatment of complainants.

If restrictions of this sort on a school's response to sexual harassment allegations were mandated by Congress, compliance with such a statute might justify actions that were otherwise inconsistent with reasonable care under *Faragher* and *Ellerth*. But the regulations do not and could not *require* schools to engage in any practices. Rather, the regulation, like Title IX itself, only delineates the contractual obligations which a recipient would voluntarily assume in return for federal funding. Federal law does not require any institution to take the money and thus assume the attendant conditions. Voluntarily agreeing to the conditions that come with a federal grant is no different than agreeing to the conditions that might be attached to a grant from a private foundation or an individual donor. If accepting federal funds and complying with the appurtenant conditions might expose a school to liability under other laws, that is a risk a school must consider in determining whether to take the money. To the extent that the regulations impose funding conditions which, if complied with, would be inconsistent with reasonable care to prevent or correct sexual harassment, or would justify a victim in not utilizing the recipient's internal corrective mechanisms, a school simply has to choose between forsaking the funds or forsaking the *Faragher* and *Ellerth* affirmative defense.

Neither of the Title IX regulations regarding Title VII would solve these problems. The standards in *Faragher* and *Ellerth* concern an employer's affirmative defense to a sexual harassment claim, and are distinct from the Title VII prohibitions against harassment that would

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<sup>13</sup> See EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, part V-D-1 ("if the process entailed . . . unnecessarily intimidating or burdensome requirements, failure to invoke it on such a basis would be reasonable"), available at <https://www.eeoc.gov/policy/docs/harassmnet.html>

constitute “discriminat[ion] on the basis of sex.” Section 106.6(f). Similarly, these regulations may be in derogation of the employer’s ability to defend a Title VII sexual harassment case, but they are not in “derogation of an employee’s rights under Title VII.” Section 106.6(f).

*(4) Proposed Section 106.44(b)(5) Conflicts With Section 42.610(a) of the Coordinating Regulations*

Under the grievance procedure mandated by proposed section 106.45, a recipient’s decision-maker will make a “determination regarding responsibility,” including a factual determination of what occurred. Section 106.45(b)(4). The factual determination will usually be critical to the disposition of the complaint. Under proposed section 106.44(b)(5), the Department will treat as conclusive the recipient’s determination of whether the alleged sexual harassment occurred.

The Assistant Secretary will not deem a recipient’s determination regarding responsibility to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary reaches a different determination based on an independent weighing of the evidence.

So if a complainant asserts that the respondent repeatedly touched her in a sexual manner, and made lewd remarks, but the school concludes the respondent did not do so, DOE, under section 106.44(b)(5) will ordinarily accept the school’s factual determination.

But applying section 106.44(b)(5) to a sexual harassment claim by an employee would be squarely inconsistent with the coordinating regulations. If the employee were to file a complaint with the Department, that complaint would have to be referred to the EEOC for investigation and initial evaluation. The EEOC would never defer to an employer’s conclusion that its officials did nothing wrong; if the Commission did so, every employer could avoid a finding of reasonable cause merely by conducting an exculpatory internal investigation. The EEOC conducts its own investigation, and makes an independent assessment of the facts. In a sexual harassment case, a Commission finding of reasonable cause necessarily entails a factual finding that sexual harassment indeed occurred. Section 42.610(a) requires the Department to “give due weight to EEOC’s determination that reasonable cause exists to believe that Title VII has been violated.” DOE could not give “due weight” to the EEOC’s determination regarding the relevant facts if, under section 106.44(b)(5) the Department instead gave conclusive weight to the recipient’s contrary determination regarding the same factual issues.

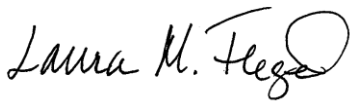
Existing section 106.6(a) does not solve this problem, which does not concern the nature of an employer’s “obligations not to discriminate,” but instead addresses who is to decide the facts related to a discrimination claim. Whether proposed section 106.6(f) would resolve this problem would turn on whether the coordinating regulations constitute regulations “promulgated [ ]under” Title VII. At best, a recipient would not know whether DOE, in resolving a sexual harassment claim by an employee, would apply section 42.610(a) of the coordinating regulations or proposed section 106.44(b)(5).

\* \* \*

NELA strongly urges DOE to withdraw the proposed regulations. If DOE at some future date decides to issue regulations regarding sexual harassment under Title IX, the provisions of that proposal regarding sexual harassment of employees must be consistent with the standards in Title VII and with the requirements of the coordinating regulations.



Terry O'Neill  
Executive Director,  
National Employment Lawyers Association



Laura M. Flegel  
Legislative & Public Policy Director  
National Employment Lawyers Association

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

**VICTIM RIGHTS LAW CENTER**

115 Broad Street, 3rd Floor  
Boston, MA 02110,

**EQUAL RIGHTS ADVOCATES**

1170 Market Street, Suite 700  
San Francisco, CA 94102,

**LEGAL VOICE**

907 Pine Street, Suite 500  
Seattle, WA 98101,

**CHICAGO ALLIANCE AGAINST SEXUAL  
EXPLOITATION**

307 N. Michigan Ave., Suite 1818  
Chicago, IL 60601,

Plaintiffs,

v.

**ELISABETH D. DEVOS**, in her official  
capacity as Secretary of Education,  
400 Maryland Avenue SW  
Washington, DC 20202,

**KENNETH L. MARCUS**, in his official  
capacity as Assistant Secretary for Civil Rights,  
400 Maryland Avenue SW  
Washington, DC 20202,

**U.S. DEPARTMENT OF EDUCATION**,  
400 Maryland Avenue SW  
Washington, DC 20202,

Defendants.

Case Number: \_\_\_\_\_

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

## INTRODUCTION

1. Plaintiffs Equal Rights Advocates, Victim Rights Law Center, Legal Voice, and Chicago Alliance Against Sexual Exploitation bring this action against Defendants U.S. Department of Education (“the Department” or “the Agency”), Secretary Elisabeth DeVos, and Assistant Secretary for Civil Rights Kenneth Marcus seeking vacatur of the Department’s final regulations implementing Title IX of the Education Amendments of 1972 (the “Final Rule”), as published in the Federal Register on May 19, 2020.<sup>1</sup>
2. The Final Rule will reverse decades of efforts by Congress, the Executive Branch, and state and local governments, to combat the effects of sex-based harassment<sup>2</sup> on equal access to education. Without adequate justification or explanation, the Final Rule not only removes protections against sex-based harassment and imposes disproportionate burdens on survivors, but also reduces schools’ responsibility to respond to sex-based harassment—in some cases requiring schools not to respond at all. Furthermore, these changes are motivated by discriminatory sex-based stereotypes, in direct violation of Title IX’s mandate to prevent and remedy sex discrimination and the U.S. Constitution’s Equal Protection guarantee. The Final Rule should be declared invalid.
3. Over 45 years ago, Congress enacted Title IX, 20 U.S.C. § 1681, *et seq.*, to prohibit discrimination on the basis of sex in education programs and activities receiving federal

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<sup>1</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020).

<sup>2</sup> Unless otherwise stated, this Complaint uses the term “sex-based harassment” to refer to sexual harassment as well as other forms of unwelcome sex-based conduct, such as dating violence, domestic violence, and stalking. Per the Department’s 2001 Guidance, “sexual harassment” is defined as “unwelcome conduct of a sexual nature,” which includes, but is not limited to, unwelcome physical, verbal or nonverbal conduct of a sexual nature, including sexual advances, requests for sex, and other conduct of a sexual nature that targets someone because of their sex. 2001 Guidance at 2. See 66 Fed. Reg. 5512 (Jan. 19, 2001).

financial assistance (“educational institutions” or “recipients”). As the primary federal agency that administratively enforces Title IX, the Department is “directed to effectuate” Title IX “by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives” of Title IX.<sup>3</sup>

4. This landmark civil rights law has helped fight sex discrimination and promote equal access to educational benefits, opportunities, and resources for all students, and especially girls and women, from the classroom to the playing field. Title IX’s protections against sex discrimination include protection against sex-based harassment.
5. Many students harmed by sex-based harassment suffer a loss of educational opportunity, often because their schools fail to respond appropriately. Although progress has been made by many institutions to address sex-based harassment, students are still victimized at high rates, reporting remains very low, and investigating lower still. With low reporting, few investigations, and inadequate—and sometimes harmful—responses by schools, students who experience sex-based harassment are more likely to drop out of school because they do not feel safe. Some are even punished for reporting the harassment or expelled for lower grades in the wake of their trauma.
6. In 1997, with the understanding that Title IX’s prohibition against sex discrimination is hollow if a student can be subjected to sex-based harassment with impunity, the Department issued its first guidance to educational institutions on the standards that govern their response to sex-based harassment. The Department stated that a school will be liable under Title IX if student-on-student sexual harassment creates a hostile educational

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<sup>3</sup> 20 U.S.C. § 1682.

environment, the school knows or should have known of the harassment, and the school fails to take immediate and appropriate corrective action.<sup>4</sup>

7. In 1998 and 1999, the U.S. Supreme Court issued two decisions articulating stringent liability standards for private Title IX lawsuits seeking money damages regarding sex-based harassment.<sup>5</sup> The Court, however, explained that even if a recipient's actions in response to sex-based harassment do not meet the stringent standards for *monetary liability* in private Title IX lawsuits, the Department can *administratively enforce* Title IX against a recipient for failing to adequately address sex-based harassment as part of its "authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate."<sup>6</sup>
8. Subsequently, the Department carefully reviewed the Supreme Court's decisions—in particular whether to apply the Court's stringent standards to the Department's administrative enforcement of Title IX. The Department underwent a notice and comment process before issuing revised guidance in 2001, ultimately deciding that "the administrative enforcement standards reflected in the 1997 guidance remain valid in [the Department's Office for Civil Rights ("OCR")] enforcement actions."<sup>7</sup>
9. Through the 2001 Guidance and successive guidance materials, the Department has maintained these standards for its administrative enforcement of Title IX, reaffirming that Title IX prohibits sex-based harassment, which includes sexual harassment. The

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<sup>4</sup> 62 Fed. Reg. 12,034 (Mar. 13, 1997) ("1997 Guidance").

<sup>5</sup> See *Davis v. Monroe Cty Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

<sup>6</sup> *Gebser*, 524 U.S. at 292.

<sup>7</sup> See U.S. Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance; Harassment of Students by School Employees, Other Students, or Third Parties*, at iv (2001) ("2001 Guidance").



Department has consistently defined sexual harassment as “unwelcome conduct of a sexual nature” and has consistently stated that a school violates Title IX if it “knew, or in the exercise of reasonable care should have known” about *sex-based* harassment of a student by another student, an employee, or a third party but failed to take “prompt and effective action to end the harassment, prevent it from recurring, and remedy its effects.”<sup>8</sup>

10. These guidance materials recognize that students who experience sex-based harassment suffer not only physically and emotionally, but also in their ability to participate in and benefit from educational opportunities. The Department’s longstanding guidance led to greater and more meaningful action by recipients to address sex-based harassment and support victims, an increase in reporting by victims to their schools and the Department, more transparency in how recipients responded, and greater accountability when institutions failed to comply with Title IX.
11. After extensive consultation with recipient schools across the country, the Department published a Dear Colleague Letter, a significant guidance document, in 2011, clarifying the obligations of schools to prevent and address sexual harassment and eliminate hostile environments that act as barriers to equal access to educational obligations. The Department followed this Guidance with a series of Questions and Answers in 2014.
12. The Department’s reaffirmation of Title IX’s protections continued until September 2017, when it formally rescinded sexual violence guidance documents issued in 2011 and 2014—purportedly because they were issued without notice and comment—and issued policies

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<sup>8</sup> See generally 2001 Guidance.

and interim guidance to educational institutions that significantly weakened protections for victims of sex-based harassment.

13. Going even further, on November 29, 2018, the Department issued a Notice of Proposed Rulemaking (“Proposed Rule”) seeking to formally amend the rules implementing Title IX and departing from decades of Department guidance as to Title IX’s requirements.<sup>9</sup> The Proposed Rule allowed—and, in some cases, required—schools to dismiss many reports of sex-based harassment and use unfair and retraumatizing procedures in investigations of sex-based harassment that are not required in investigations of other types of staff or student misconduct.
14. In just over two months, the Department received over 124,000 comments on the Proposed Rule—the overwhelming majority in opposition. Numerous commenters reiterated that sex-based harassment in education remains highly prevalent yet continues to be vastly underreported and under-investigated, and underscored that many victims are ignored or punished by their schools instead of receiving the help they need to ensure equal educational access. Many commenters, including Plaintiffs, expressed deep concern that the Proposed Rule would exacerbate these existing inequities and encourage a climate where significant sex-based harassment goes unchecked.
15. On May 19, 2020, in the midst of the emergency situation created by the COVID-19 pandemic, the Department released its Final Rule, which contains additional harmful provisions not included in the Proposed Rule and is accompanied by a preamble of over 2,000 pages containing confusing and unclear guidance. The Final Rule requires schools

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<sup>9</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (Nov. 29, 2018).

to amend their policies and procedures as necessary to comply in less than 3 months, by August 14, 2020, at a time when schools and students are struggling to adapt to virtual teaching and learning.

16. The Final Rule will worsen the devastating effects of sex-based harassment in schools, and will further prevent and discourage victims from reporting sex-based harassment because, among other things, it narrows the definition of sexual harassment to which schools may respond; constricts the universe of those school officials whose knowledge of harassment obligates the school to respond; and in numerous respects unfairly tilts the grievance processes against students who report sex-based harassment (“complainants”) and in favor of those who are reported harassers and assailants (“respondents”), which makes the process more intimidating and traumatizing for victims and puts in place new barriers to accurate fact-finding and adjudication of complaints.
17. For example, the Final Rule (i) requires schools to dismiss all reports of sexual harassment that fall short of an inappropriately narrow definition; (ii) allows schools to ignore sex-based harassment unless there is actual knowledge of an incident by a preK-12 employee or by a narrow—and unclear—category of high-ranking employees in institutions of higher education; (iii) requires schools to dismiss reports of sex-based harassment that occur outside of a school’s narrowly-defined activity or program, even when perpetrated by a school employee or student; (iv) requires schools to dismiss complaints by victims who have transferred, graduated, or dropped out by the time they file a complaint, even if they were pushed out of school because of the harassment they faced; (v) allows schools to dismiss complaints at any time if the respondent is no longer a student or employee at the

school, even if an investigation is ongoing; and (vi) allows schools to unreasonably delay investigations.

18. The Final Rule also reduces the risk of liability for schools that fail to comply with Title IX. For example, contrary to longstanding Department policy, the Final Rule adopts for its *administrative enforcement* scheme the “deliberate indifference” standard, which has, until now, been used only in *private litigation for monetary damages*. Now, the Department will not consider a recipient to have violated Title IX unless its response to sex-based harassment, of which it has actual knowledge, is “clearly unreasonable in light of the known circumstances.”<sup>10</sup> The Final Rule also prohibits schools from providing victims with supportive measures that might be considered “punitive” or “disciplinary” to the respondent, even if such measures are provided to victims of other types of student misconduct.
19. Although the Department has historically applied the same standard to harassment based on race, color, national origin, and disability,<sup>11</sup> the Final Rule often requires schools to use a uniquely burdensome and unfair set of procedures in investigations of sex-based harassment that are not required in investigations of other types of staff or student misconduct, such as harassment on the basis of race or disability.
20. Further, the Department essentially requires schools to conduct mini-trials when they receive sex-based harassment complaints, but it arbitrarily picks and chooses which

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<sup>10</sup> 85 Fed. Reg. at 30, 574.

<sup>11</sup> Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. 11,448, 11,450 (Mar. 10, 1994) (“1994 Racial Harassment Guidance”); U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter on Prohibited Disability Harassment* (July 25, 2000) (“2000 Disability Harassment Guidance”), <https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>; *see also* U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010) (“2010 Guidance”), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

elements of a trial a school may use. For example, the Final Rule (i) requires schools to presume that reported sex-based harassment did not occur, thereby favoring the respondent; (ii) removes all discretion from schools regarding whether to require parties and witnesses in higher education investigations to submit to direct cross-examination by the other party's "advisor of choice;"; (iii) requires exclusion of all oral and written statements of a witness or party if the individual refuses to (or is unable to) answer a single question during cross-examination, while refusing to provide basic procedural protections to ensure that cross-examination questions are clear, have a proper foundation, and are not harassing; (iv) imposes unprecedentedly broad exclusionary rules for evidence where a witness does not testify at the live hearing, excluding video evidence, text messages, blog posts, police reports, medical reports and other highly relevant and reliable materials; (v) forces schools in certain circumstances to use the higher "clear and convincing" standard in investigations of sex-based harassment rather than the equitable "preponderance of the evidence" standard used in all civil rights cases; and (vi) allows schools to unnecessarily delay their Title IX investigation if there is a parallel criminal investigation.

21. Contrary to the unequivocal purpose of Title IX, to prevent and redress sex-based discrimination in education, the Department's Final Rule will significantly reduce the number of investigations of sex-based harassment that schools conduct. Although the Department trumpets that the Final Rule will save schools about \$179 million each year by drastically reducing the number of sex-based harassment investigations that schools conduct, it acknowledges that the Department "does not have evidence to support the claim that the final regulations will have an effect on the *underlying number* of incidents of sexual harassment." Thus, the Department admits the Final Rule will leave many victims of sex-

based harassment without redress for the discrimination they face in their educational environment.<sup>12</sup>

22. Although the Department claims the net cost of the Final Rule will be \$48.6 million to \$62.2 million over the next ten years, the actual net cost will be much higher, given that the Department entirely failed to account for the tremendous costs of the Final Rule to students who experience sex-based harassment but will no longer be able to report it, obtain fair investigations and outcomes, and/or receive necessary remedies. This failure is particularly inexcusable given that the harms of sex discrimination are precisely those that Title IX seeks to prevent.
23. In recent years, institutions from workplaces to schools have recognized the need to address sex-based harassment before it escalates and leads to more harm for the victim and liability for the institution. Schools have invested in trainings and changed their policies to proactively prevent sex-based harassment and immediately take action to protect a student's safety and ability to learn. The Final Rule turns this positive trend on its head, reversing decades of Title IX interpretation and progress made by schools. Instead, the Final Rule encourages—and in some instances, requires—schools to bury their heads in the sand in the face of sexual harassment and prevents schools from taking affirmative steps to prevent and address sexual harm.
24. For example, under the Final Rule, a teacher who observes an elementary school boy inappropriately touching a girl—as was the case in the Supreme Court's landmark Title IX decision, *Davis v. Monroe County Board of Education*<sup>13</sup>—will not be permitted to take any

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<sup>12</sup> 85 Fed. Reg. at 30,539.

<sup>13</sup> 526 U.S. 629 (1999).

action that could be considered “disciplinary.” If the teacher wants to give the boy detention, or ask him to spend recess inside the classroom, the Final Rule will require a formal investigation lasting at least 20 days, and any questioning involved will require the students to either submit written follow-up questions to each other or participate in a live, trial-type adversarial hearing. Further, it is not even clear that such inappropriate touching will be actionable under the Final Rule, because it will not meet the definition of “sexual assault” unless it was done for the purpose of sexual gratification rather than some other purpose (such as bullying), and the touching alone may not meet the standard of being severe, pervasive, and objectively offensive enough to interfere with the child’s education. Even if the school concludes that the conduct constitutes sex-based harassment, and investigates it under the Final Rule, the boy will be presumed not responsible. And the girl, no matter her age, could be subject to live, direct cross-examination and will face procedural rules and standards that are more stringent, biased, and traumatizing than those her teacher would face if she were the one bringing a sex-based harassment complaint against another teacher.

25. The standards set forth in the Final Rule do not apply to complaints or investigations of any other type of student or staff misconduct or any other type of discrimination. The Department’s decision to reverse decades of guidance and single out victims of sex-based harassment for uniquely burdensome and inequitable procedures relies on and reinforces the toxic sex stereotype and unfounded generalization that people who report sex-based harassment most often—women and girls—are uniquely less credible than people who report other types of wrongdoing. In fact, the rates of false reporting of sex-based

harassment are no greater than the rates for any other crimes.<sup>14</sup> The statements and actions of the Department's own leadership reveal this discriminatory viewpoint.

26. The Final Rule disproportionately and inappropriately burdens potential complainants at every stage of the Title IX complaint and investigation process such that the cumulative impact of the Final Rule will be a chilling effect on future complaints of sex-based harassment, in an environment where such harassment is already dramatically underreported.
27. The Final Rule violates the Administrative Procedure Act ("APA") and the Equal Protection guarantee of the Fifth Amendment. First, the Final Rule is not in accordance with law because it eliminates protections for survivors of sex-based harassment and imposes procedural requirements that will chill reporting of harassment, contrary to Title IX's animating purpose. Second, the Final Rule is arbitrary and capricious because the Department's stated rationale for the Rule is contrary to the evidence before it and the Department failed to provide an adequate justification for departing from decades of consistent Department policy and importing private law standards into an administrative enforcement scheme. Third, the Final Rule exceeds the Department's statutory jurisdiction because the Final Rule requires schools to implement policies that frustrate Title IX's purpose, while the Department simultaneously attempts to abdicate its own enforcement responsibilities. Fourth, the Department violated the APA's procedural requirements by including in the Final Rule provisions that were never submitted for public comment.

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<sup>14</sup> David Lisak, et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, Violence Against Women (2010) ("Cumulatively, these findings contradict the still widely promulgated stereotype that false rape allegations are a common occurrence."); see Emily Moon, *False Reports of Sexual Assault are Rare, But Why Is There So Little Reliable Data About Them?*, Pac. Standard (Oct. 5, 2018), <https://psmag.com/news/false-reports-of-sexual-assault-are-rare-but-why-is-there-so-little-reliable-data-about-them>.



Finally, the Final Rule's removal of long-standing protections against sexual harassment and active obstruction of schools' ability to address sex-based harassment are changes motivated by discriminatory sex-based stereotypes that violate the Equal Protection guarantee of the Fifth Amendment.

### **JURISDICTION AND VENUE**

28. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701-706 and 28 U.S.C. § 1331.
29. Venue is proper under 28 U.S.C. § 1391 because Victim Rights Law Center, a plaintiff, resides in Boston, Massachusetts.

### **PARTIES**

30. **Plaintiff Victim Rights Law Center** ("VRLC") is a non-profit organization with locations in Oregon and Massachusetts dedicated solely to serving the legal needs of victims of rape and sexual violence. VRLC's mission is to provide legal representation to such victims to help rebuild their lives and to promote a national movement committed to seeking justice for every victim.
31. **Plaintiff Equal Rights Advocates** ("ERA") is a national non-profit civil rights organization based in San Francisco, California. Founded in 1974, ERA is dedicated to protecting and expanding economic educational access and opportunities for women and girls.
32. **Plaintiff Legal Voice** ("Legal Voice") is a Seattle-based non-profit public interest organization dedicated to protecting the rights of women, girls, and LGBTQ people. Legal Voice's work includes decades of advocacy to enact and enforce antidiscrimination laws and to eradicate sex-based discrimination in every area where it is present.

33. **Plaintiff Chicago Alliance Against Sexual Exploitation** (“CAASE”) is a Chicago-based non-profit, public interest organization dedicated to addressing the culture, institutions, and individuals that perpetrate, profit from, or support sexual exploitation.
34. **Defendant U.S. Department of Education** (the “Department” or “Agency”) is a federal agency headquartered in Washington, D.C. The Department implements Title IX through issuing regulations and guidance documents and is tasked with administrative enforcement of Title IX, 20 U.S.C. § 1682. As a federal agency, the Department is subject to the requirements of the Administrative Procedure Act and the United States Constitution.
35. **Defendant Elisabeth D. DeVos** is the United States Secretary of Education. She is sued in her official capacity.
36. **Defendant Kenneth L. Marcus** is the Assistant Secretary for Civil Rights. He is sued in his official capacity.

## **BACKGROUND**

### **Sex-Based Harassment in Schools Is Prevalent, Underreported, Under-Investigated, and Impedes Equal Access to Education**

37. Sex-based harassment, which includes sexual assault and other forms of sexual harassment, is widespread in schools across the country, including in institutions of higher education. Sex-based harassment affects all students, but disproportionately affects women, girls, LGBTQ students, and students with disabilities. A 2019 study found that about one in four women, 1 in 4 transgender or gender-nonconforming students, and 1 in 15 men experience sexual assault while in college.<sup>15</sup> In 2014, the White House Task Force to Protect Students

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<sup>15</sup> Ass’n of Am. Univ., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, at ix (Oct. 15, 2019), <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>.

from Sexual Assault concluded: “More than 1 in 4 transgender students and more than 1 in 3 of bisexual students experience sexual assault while in college.”<sup>16</sup> Similarly, about 1 in 3 college women and 1 in 6 college men are survivors of dating violence or domestic violence,<sup>17</sup> and 1 in 6 women and 1 in 19 men have experienced stalking.<sup>18</sup>

38. Although sex-based harassment on college campuses is more widely acknowledged, students of all ages are impacted. A nationally representative survey of students in grades 7 through 12 concluded that 56 percent of girls and 40 percent of boys surveyed experienced some form of sexual harassment in the 2011 school year (including online harassment), and the majority said that the experience had a negative effect on them.<sup>19</sup> More than 1 in 5 girls ages 14 to 18 are kissed or touched without their consent.<sup>20</sup> In addition, individuals who experience sexual violence are at heightened risk of repeat sexual violence—children who experience sexual violence are nearly 14 times more likely to experience rape or attempted rape in their first year of college, according to the National Center for Victims of Crime.<sup>21</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> Knowledge Networks, *2011 College Dating Violence and Abuse Poll* 15 (June 9, 2011), [http://www.loveisrespect.org/pdf/College\\_Dating\\_And\\_Abuse\\_Final\\_Study.pdf](http://www.loveisrespect.org/pdf/College_Dating_And_Abuse_Final_Study.pdf).

<sup>18</sup> Nat’l Center for Victims of Crime, *Stalking Fact Sheet* (2015), [https://victimsofcrime.org/docs/default-source/src/stalking-fact-sheet-2015\\_eng.pdf](https://victimsofcrime.org/docs/default-source/src/stalking-fact-sheet-2015_eng.pdf).

<sup>19</sup> Am. Ass’n of Univ. Women, *Crossing the Line: Sexual Harassment at School* 2 (2011), <https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

<sup>20</sup> Nat’l Women’s Law Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017) (“*Let Her Learn: Sexual Harassment and Violence*”), <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.

<sup>21</sup> Nat’l Center for Victims of Crime, *Child Sexual Abuse Statistics* (2011), <https://members.victimsofcrime.org/media/reporting-on-child-sexual-abuse/child-sexual-abuse-statistics>.

39. Despite its prevalence, sex-based harassment is vastly underreported. For example, only about 12 percent of college survivors report sexual assault to their schools,<sup>22</sup> and 2 percent of girls ages 14 to 18 who have been kissed or touched without their consent report the incident to their schools.<sup>23</sup>
40. Even when students do come forward, schools often choose not to investigate their reports of sex-based harassment. For example, according to a 2014 Senate report, 21 percent of the largest private institutions of higher education conducted fewer investigations of sexual assault than reports received, with some of these schools receiving more than 7 times more reports than investigations.<sup>24</sup>
41. Even worse, schools often punish survivors when they come forward instead of helping them. For example, students who report sex-based harassment have been disciplined for allegedly “lying” about the incident or engaging in “consensual” sexual activity,<sup>25</sup> for engaging in premarital sex,<sup>26</sup> for defending themselves against their harassers,<sup>27</sup> for missing school in the aftermath of harassment, or for merely talking about their assault with other

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<sup>22</sup> *Poll: One in 5 women say they have been sexually assaulted in college*, Wash. Post (June 12, 2015), <https://www.washingtonpost.com/graphics/local/sexual-assault-poll>.

<sup>23</sup> *Let Her Learn: Sexual Harassment and Violence* at 2.

<sup>24</sup> U.S. Senate Comm. On Homeland Sec. & Governmental Affairs, U.S. Senate Subcomm. On Fin. & Contracting Oversight, *Sexual Violence on Campus: How too many institutions of higher education are failing to protect students* 9 (July 9, 2014), <https://www.hsdl.org/?view&did=755709>.

<sup>25</sup> See, e.g., Brian Entin, *Miami Gardens 9<sup>th</sup>-grader says she was raped by 3 boys in school bathroom*, WSVN-TV (Feb. 8, 2018), <https://wsvn.com/news/local/miami-gardens-9th-grader-says-she-was-raped-by-3-boys-in-school-bathroom>; Nora Caplan-Bricker, “*My School Punished Me*”, Slate (Sept. 19, 2016), <https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html>; Aviva Stahl, “*This Is an Epidemic*”: *How NYC Public Schools Punish Girls for Being Raped*, Vice (June 8, 2016), [https://broadly.vice.com/en\\_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped](https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped).

<sup>26</sup> Sarah Brown, *BYU Is Under Fire, Again, for Punishing Sex-Assault Victims*, Chronicle of Higher Educ. (Aug. 6, 2018), <https://www.chronicle.com/article/BYU-Is-Under-Fire-Again-for/244164>.

<sup>27</sup> NAACP Legal Defense and Educ. Fund, Inc. & Nat’l Women’s Law Ctr., *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* 25 (2014), [https://nwlc.org/wp-content/uploads/2015/08/unlocking\\_opportunity\\_for\\_african\\_american\\_girls\\_report.pdf](https://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf).

students in violation of a “gag order” or nondisclosure agreement imposed by their school.<sup>28</sup> Students who report are also often pressured or forced to withdraw from school temporarily, transfer to another school, or enroll in an inferior or “alternative” education program that isolates them from their friends and from equal educational opportunities.

42. Schools are more likely to ignore, blame, and punish women and girls of color, especially Black women and girls, who report sex-based harassment, due to harmful race and sex stereotypes that label them as “promiscuous”<sup>29</sup> and less deserving of protection and care.<sup>30</sup> Similarly, students who are pregnant or parenting are more likely to be blamed for sex-based harassment than their peers, due in part to the stereotype that they are more “promiscuous” because they have engaged in sexual intercourse in the past. LGBTQ students are less likely to be believed and more likely to be blamed due to stereotypes that they are “hypersexual” or bring the “attention” upon themselves.<sup>31</sup> And students with disabilities are less likely to be believed because of stereotypes about people with disabilities being less credible<sup>32</sup> and because they may have greater difficulty describing or

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<sup>28</sup> See, e.g., Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, Huffington Post (Sept. 9, 2015), [https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment\\_us\\_55ada33de4b0caf721b3b61c](https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment_us_55ada33de4b0caf721b3b61c).

<sup>29</sup> E.g., Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 Harv. J.L. & Gender 1, 16, 24-29 (Winter 2018).

<sup>30</sup> Georgetown Law Center on Poverty and Inequality, *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, 1 (2018), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>.

<sup>31</sup> See, e.g., Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 Cardozo L. Rev. 2115, 2118 (2018), <http://cardozolawreview.com/heterosexism-rules-evidence>; Laura Dorwart, *The Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women*, Medium (Dec. 3, 2017), <https://medium.com/@lauramdorwart/the-hidden-metoo-epidemic-sexual-assault-against-bisexual-women-95fe76c3330a>.

<sup>32</sup> The Arc, *People with Intellectual Disabilities and Sexual Violence* 2 (Mar. 2011), <https://www.thearc.org/document.doc?id=3657>.

communicating the harassment they experienced, particularly if they have a cognitive or developmental disability.<sup>33</sup>

43. Sex-based harassment harms students physically, psychologically, and academically. Sexual assault survivors, for example, are three times more likely to suffer from depression, six times more likely to have Post Traumatic Stress Disorder, thirteen times more likely to abuse alcohol, twenty-six times more likely to abuse drugs, and four times more likely to contemplate suicide.<sup>34</sup>
44. Research shows that the effects of sex-based harassment in school have long-lasting consequences. For example, sexually victimized students are more likely to drop classes, change residences, and have lower GPAs, which negatively affects professional success and earning potential.<sup>35</sup> As a result, students who suffer sex-based harassment are deprived of equal access to an education.

### **Statutory and Regulatory History**

45. In recognition of the fact that “sex discrimination reaches into all facets of education,” Congress passed Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, which prohibits discrimination on the basis of sex under any federally funded education program or activity.<sup>36</sup> It is well-settled law that Title IX requires schools to address and remediate

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<sup>33</sup> See Nat’l Inst. of Justice, *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14-15 (2016), <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx>.

<sup>34</sup> Feminist Majority Foundation, *Fast facts - Sexual violence on campus* (2018), <http://feministcampus.org/wp-content/uploads/2018/11/Fast-Facts.pdf>.

<sup>35</sup> Cari Simon, “*On top of everything else, sexual assault hurts the survivors’ grades*” <https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think/>

<sup>36</sup> 118 Cong. Rec. 5804 (1972) (remarks of Sen. Bayh).

sex-based harassment.<sup>37</sup> When a recipient institution fails to comply with Title IX or take action to remedy its non-compliance, it can be subject to a range of enforcement actions by the Department, including the loss of federal funding.<sup>38</sup>

46. In 1975, the Department’s predecessor first promulgated regulations to effectuate Title IX.<sup>39</sup> As amended, the 1975 Regulations remain in effect today.<sup>40</sup> The regulations incorporate Title IX’s nondiscrimination mandate, identify specific actions that constitute discrimination, and require assurances from recipients of federal financial assistance that their programs and activities comply with regulatory requirements.<sup>41</sup> Educational institutions that have discriminated on the basis of sex must “take such remedial action as the Assistant Secretary [for Civil Rights] deems necessary to overcome the effects of such discrimination.”<sup>42</sup>
47. The 1975 Regulations require that educational institutions “adopt and publish grievance procedures providing for prompt and equitable resolution” of student and employee complaints of sex discrimination, including sex-based harassment.<sup>43</sup> Such grievance procedures are designed to facilitate the reporting and resolution of sex discrimination complaints to prevent and remedy hostile educational environments.
48. Further, each educational institution is required to “designate at least one employee”—commonly known as a Title IX coordinator—“to coordinate its efforts to comply with and

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<sup>37</sup> See, e.g., *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

<sup>38</sup> 20 U.S.C. § 1682.

<sup>39</sup> See 40 Fed. Reg. 24, 128 (June 4, 1975).

<sup>40</sup> See 34 C.F.R. pt. 106.

<sup>41</sup> See *id.* §§ 106.31(a), 106.31(b), 106.4(a).

<sup>42</sup> *Id.* § 106.3(a).

<sup>43</sup> *Id.* § 106.8(c).

carry out its responsibilities under [Title IX],” including any investigation of any complaint of sex discrimination, including sex-based harassment.<sup>44</sup>

49. In addition to promulgating Title IX’s implementing regulations, the Department has issued a series of guidance documents that explain educational institutions’ obligations under Title IX.
50. The first of such guidance documents about educational institutions’ obligations to address sex-based harassment was published in 1997 after a public notice-and-comment period and “extensive consultation with interested parties, [including] students, teachers, school administrators, and researchers.”<sup>45</sup> The 1997 Guidance explains the standards used by OCR to investigate student complaints of schools’ inadequate responses to sex-based harassment perpetuated by school employees, other students (peers), or third parties.
51. The 1997 Guidance informed schools how to address sex-based harassment in educational settings, and advised schools of their responsibility to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints and also to disseminate a policy against sex discrimination.<sup>46</sup>
52. The 1997 Guidance encouraged a school to take “interim measures” during the investigation of a complaint, such as placing the involved students in separate classrooms or employing alternative housing arrangements. The 1997 Guidance instructed a school to put in place “responsive measures” after a finding of responsibility to “minimize, as much as possible, the burden” on the complainant.<sup>47</sup> If the school determined that sex-based

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<sup>44</sup> *Id.* § 106.8(a).

<sup>45</sup> 61 Fed. Reg. 42,728 (Aug. 16, 1996), 61 Fed. Reg. 52,172 (Oct. 4, 1996), and 62 Fed. Reg. 12,034, 12,035 (Mar. 13, 1997) (“1997 Guidance”).

<sup>46</sup> 62 Fed. Reg. at 12,040.

<sup>47</sup> *Id.* at 12,034.



harassment did occur, the 1997 Guidance explained that schools may be “required to provide . . . other services to the [complainant] if necessary to address the effects of the harassment on the student,” such as grade changes, tutoring, tuition adjustments, and reimbursement for professional counseling.<sup>48</sup>

53. The Department issued revisions to the 1997 Guidance in 2001 after the Supreme Court issued two decisions articulating stringent liability standards for private Title IX sexual harassment cases seeking money damages. The 2001 Guidance explained that the liability standards articulated by the Supreme Court in those cases—that in order to recover money damages in a private Title IX lawsuit challenging sexual abuse by a teacher or student, a plaintiff must show that an appropriate official had actual notice of the abuse and that the school was deliberately indifferent to it—did not change the Department’s administrative enforcement standards.<sup>49</sup> Indeed, in setting the high standard for money damages, the Court highlighted the important difference between a private suit for damages and the Department’s administrative regulatory scheme of achieving voluntary compliance by schools.
54. After careful review of the implications of those decisions, including undergoing a notice and comment process before finalizing the Guidance in 2001, the Department decided to maintain the 1997 Guidance standards requiring schools to take prompt and effective action calculated to end sexual harassment, prevent its recurrence, and remedy its effects.<sup>50</sup> In the 2001 Guidance, the Department explained that the “liability standards established in those cases are limited to private actions for monetary damages” because the Supreme Court was

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<sup>48</sup> *Id.*

<sup>49</sup> *See* 2001 Guidance at iii–vi.

<sup>50</sup> *Id.*

concerned about “the possibility of a money damages award against a school for harassment about which it had not known,” which it contrasted against the administrative enforcement process that “requires enforcement agencies such as [the Department’s Office for Civil Rights] to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination.”<sup>51</sup> In fact, individual and institutional commenters “uniformly agreed” with this distinction between administrative enforcement and private litigation.<sup>52</sup>

55. The 2001 Guidance reaffirmed and reiterated many of the principles set forth in the 1997 Guidance, such as the requirement that educational institutions publish grievance procedures; disseminate a policy against sex discrimination; implement interim and responsive measures; and resolve complaints promptly and equitably.<sup>53</sup>

56. The 2001 Guidance stated that schools had notice of sex-based harassment against a student and were therefore responsible for addressing it if “a responsible employee ‘knew, or in the exercise of reasonable care should have known,’ about the harassment.” A “responsible employee” was broadly defined to “include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.”<sup>54</sup>

57. The 2001 Guidance stated that schools were also responsible for addressing sex-based harassment against a student if an employee who is acting (or who reasonably appears to

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<sup>51</sup> *Id.* at iii–iv.

<sup>52</sup> *Id.* at ii, iv.

<sup>53</sup> *Id.* at 14.

<sup>54</sup> *Id.* at 13.

be acting) “in the context of carrying out their day-to-day job responsibilities” to provide aid, benefits, and services to students engages in sex-based harassment, and the harassment “denies or limits a student’s ability to participate in or benefit from a school program on the basis of sex.” The Department clarified that schools were liable for addressing this type of employee-on-student misconduct “whether or not the recipient ha[d] ‘notice’ of the harassment.”<sup>55</sup> The Department assured recipients that under its administrative enforcement procedures, “recipients always receive notice and the opportunity to take appropriate corrective action before any finding of violation of possible loss of federal funds.”<sup>56</sup>

58. The 2001 Guidance reiterated the 1997 Guidance’s requirement that once on notice of harassment, a school was required to take immediate and appropriate steps to investigate, and then take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.
59. Additionally, the 2001 Guidance noted that both employees and students of public schools and universities are entitled to certain constitutional due process protections, and that the rights established under Title IX must be interpreted consistently with any such due process protections. The 2001 Guidance instructed, however, that recipients should ensure that “steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.”<sup>57</sup>

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<sup>55</sup> *Id.* at vi, 10.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 22.

60. The standards for sex-based harassment set forth in the 2001 Guidance were consistent with the Department’s 1994 guidance on harassment based on race, color, and national origin, and its 2000 guidance on disability harassment.<sup>58</sup>
61. Both the 1997 Guidance and 2001 Guidance were reaffirmed, elaborated upon, and clarified through the Department’s 2011 Dear Colleague Letter on Sexual Violence and a series of Questions and Answers issued in 2014.<sup>59</sup> These documents provided additional details and examples to help schools comply with their Title IX obligations when responding to sexual violence, including clarifying that schools were required to respond to a hostile educational environment caused by off-campus incidents. The 2011 and 2014 Guidances explained that schools must use a “preponderance of the evidence” standard—i.e., “more likely than not”—to decide whether sex-based harassment occurred.<sup>60</sup> This clarification was consistent with the Department’s policy of requiring schools to use the preponderance standard in Title IX investigations since as early as 1995 and throughout both Republican and Democratic administrations.<sup>61</sup> The Department itself uses the

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<sup>58</sup> See generally 1994 Racial Harassment Guidance; 2000 Disability Harassment Guidance.

<sup>59</sup> U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter* (Apr. 4, 2011) (“2011 Guidance”), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; U.S. Dep’t of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (2014) (“2014 Guidance”), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>60</sup> 2014 Guidance at 13, 26; 2011 Guidance at 10-11.

<sup>61</sup> See, e.g., U.S. Dep’t of Educ., Office for Civil Rights, Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University (Oct. 16, 2003) (“2003 OCR Letter to Georgetown University”), <http://www.ncherp.org/documents/202-GeorgetownUniversity--110302017Genster.pdf> (“in order for a recipient’s sexual harassment grievance procedures to be consistent with Title IX standards, the recipient must ... us[e] a preponderance of the evidence standard”); U.S. Dep’t of Educ., Office for Civil Rights, Letter from Gary Jackson, Regional Civil Rights Director, Region X, to Jane Jervis, President, The Evergreen State College (Apr. 4, 1995) (“1995 OCR letter to Evergreen College”), [http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed\\_ehd\\_1995.pdf](http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf) (explaining that Evergreen College’s use of the clear and convincing standard “adhere[d] to a heavier burden of proof than that which is required under Title IX” and that the College was “not in compliance with Title IX.”).

preponderance of the evidence standard in its own investigations of schools' responses to complaints of discrimination based on race, color, national origin, sex and disability.<sup>62</sup>

62. The 2014 Guidance also required institutions to take interim measures that minimized the burden on complainants while an investigation is pending in order "to ensure equal access to its education programs and activities and protect the complainant as necessary."<sup>63</sup>
63. Both the 1997 Guidance and 2001 Guidance were also reaffirmed through the Department's 2010 Guidance on bullying and harassment, which applied the same standards to harassment based on race, color, national origin, sex, and disability.<sup>64</sup>
64. Title IX is not the only law that governs sexual violence and other forms of sex-based harassment in schools. In 2013, Congress passed the Campus Sexual Violence Elimination Act ("Campus SaVE") as an amendment to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"), with implementing regulations that took effect on July 1, 2015. Under Campus SaVE, Congress better aligned the Clery Act with Title IX by taking a survivor-centered approach to addressing sexual assault, domestic violence, dating violence, and stalking by mandating that investigations and conduct hearings are to "promote victim safety and increase accountability."<sup>65</sup> The Clery Act encoded significant provisions of the 2011 Dear Colleague Letter.

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<sup>62</sup> U.S. Dep't of Educ., Office for Civil Rights, *Case Processing Manual* (Nov. 18, 2018) at 17, <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

<sup>63</sup> 2014 Guidance at 32–33; 2011 Guidance at 15–16.

<sup>64</sup> 2010 Guidance.

<sup>65</sup> Campus Sexual Violence, Domestic Violence, Dating Violence and Stalking Education and Prevention, Pub. L. No. 113-4 § 304, 127 Stat. 90 (2013).

### **The Trump Administration's Changes to Title IX**

65. Following his inauguration, President Trump nominated Secretary DeVos to lead the Department of Education.
66. To understand the confounding and unlawful provisions in the Final Rule, it is important context to note the longstanding stated views of the Trump Administration on the issue of sexual violence. President Trump and other relevant Trump Administration officials have repeatedly discounted the societal costs of sexual violence, have demeaned and even threatened survivors who have come forward, and have argued that the current system for responding to sexual violence is unfair to those named as harassers and assailants.
67. President Trump's actions and statements reveal his discriminatory and stereotyped views of women, and a pattern of discounting the veracity of allegations of women even in the face of strong evidentiary support. Then-candidate Trump dismissed the numerous women who reported being sexually harassed or assaulted by him as "phony accusers" who made such reports to get "some free fame." This discriminatory and stereotyped view of women and girls has become formal White House policy, as the White House Press Secretary has asserted in an official statement that at least 16 women who reported being sexually harassed by the President were lying.<sup>66</sup>
68. In questioning the veracity of allegations of violence against women, President Trump purports to appeal to his own notions of "due process." For example, following allegations supported by photographic evidence that a White House aide had engaged in domestic violence, he lashed out: "People's lives are being shattered and destroyed by a mere

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<sup>66</sup> John Wagner, *All of the Women Who Have Accused Trump of Sexual Harassment Are Lying, the White House Says*, Wash. Post, Oct. 27, 2017, <https://www.washingtonpost.com/news/post-politics/wp/2017/10/27/all-of-the-women-who-have-accused-trump-of-sexual-harassment-are-lying-the-white-house-says>.

allegation. Some are true and some are false. Some are old and some are new. There is no recovery for someone falsely accused - life and career are gone. Is there no such thing any longer as Due Process?"<sup>67</sup>

69. Secretary DeVos has repeatedly criticized the protections that Title IX affords to women and other survivors of sex-based harassment, at times appealing to equally misplaced notions of due process and unfairness. Importantly, Secretary DeVos conflates the criminal justice system's due process protections with fair and equitable procedures afforded students in school sex-based harassment disciplinary proceedings. These procedures are required to be impartial and equitable under the Campus SaVE Act already as a matter of federal law.
70. Secretary DeVos's criticism appears to be based on discriminatory stereotypes and unfounded generalizations about female college students in general and female victims of sexual violence in particular.
  - a. For example, in September 2017, Secretary DeVos gave a speech on campus sex-based harassment at George Mason University. In her remarks, she cited a number of misleading and/or untrue anecdotes to prop her unsupported claim that male respondents in sexual violence investigations are often treated unfairly by their schools. Secretary DeVos also mischaracterized the 2011 and 2014 Guidances as being responsible for schools treating respondents unfairly, when in fact it was some schools' failure to follow the previous guidances that resulted in unfair treatment of respondents.

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<sup>67</sup> Donald J. Trump (@realDonaldTrump), Twitter (Feb 10, 2018), <https://twitter.com/realDonaldTrump/status/962348831789797381?s=20>.

- b. Secretary DeVos's September 2017 speech presented as equally problematic the harm faced by sexual violence survivors and the harm faced by individuals who have been falsely accused, despite a lack of evidence that the latter is anything other than a rare occurrence, unlike the former.<sup>68</sup> Rather than recognizing that false accusations are rare,<sup>69</sup> Secretary DeVos presented the problem of false accusations as rampant.
- c. Secretary DeVos also asserted that the loss of due process protections for respondents is a widespread problem on school campuses, claiming "the system established by the prior administration" was responsible for creating "victims of a lack of due process,"<sup>70</sup> despite the fact that the 2011 and 2014 Guidances expressly recognized that schools must protect due process rights.<sup>71</sup>
- d. Secretary DeVos expressed doubt about the seriousness of sexual harassment claims, saying, "[I]f everything is harassment, then nothing is."<sup>72</sup> This statement, among other things, minimizes the full range of sex-based harassment and its impact on women and girls, including deprivation of their access to education.

71. Other politically appointed Department of Education officials have expressed similar doubts about the veracity of sex-based harassment claims. For example, the Department's previous Acting Assistant Secretary for Civil Rights, Candice Jackson, publicly stated that

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<sup>68</sup> See Elisabeth DeVos, Sec'y of the U.S. Dep't of Educ., Remarks on Title IX Enforcement at George Mason University (Sept. 7, 2017), <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement> ("DeVos Remarks").

<sup>69</sup> David Lisak, et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, VIOLENCE AGAINST WOMEN (2010) ("Cumulatively, these findings contradict the still widely promulgated stereotype that false rape allegations are a common occurrence.").

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*; 2014 Guidance at 13; 2011 Guidance at 12.

<sup>72</sup> *Id.*



for most sexual assault investigations, there is “not even an accusation that these accused students overrode the will of a young woman.” She further stated that “the accusations—90% of them fall into the category of ‘we were both drunk,’ ‘we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.’”<sup>73</sup>

72. These comments reflect regressive and discriminatory sex stereotypes of women and girls who report sex-based harassment as vengeful or deceitful.
73. In 2017, the Department, under DeVos’s leadership, issued an updated Dear Colleague Letter rescinding the 2011 and 2014 Guidance and weakening protections for students who experience sex-based harassment.<sup>74</sup>

#### **THE FINAL RULE**

74. The Department published a Notice of Proposed Rulemaking in the Federal Register on November 29, 2018, seeking to formalize many of the changes in the 2017 Guidance and otherwise erode Title IX’s protections.<sup>75</sup>
75. The Department claimed that the Proposed Rule was intended to and would reduce the number of Title IX investigations conducted by schools and accordingly would save schools \$99.2 million each year through that reduction.<sup>76</sup> Yet the Proposed Rule failed to explain why it was reasonable to seek to reduce the number of investigations of sex-based

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<sup>73</sup> Erica L. Green and Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as The Accused Get DeVos’ Ear*, N.Y. Times (July 12, 2017), <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html>.

<sup>74</sup> U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter* (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> (“2017 Guidance”).

<sup>75</sup> *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462 (Nov. 29, 2018) (the “Proposed Rule”).

<sup>76</sup> *Id.* at 61,490.

harassment given that Title IX requires schools to address this form of sex discrimination and given that it is so prevalent, underreported, and under-investigated.

76. The Department also estimated that the Proposed Rule would result in total net savings to schools of \$286.4 million to \$367.7 million over the next 10 years.<sup>77</sup> But that net savings estimate failed to take any account whatsoever of the costs the Proposed Rule would impose on victims and survivors or on schools.
77. The Department received over 124,000 comments on the Proposed Rule, including comments from states, schools, public interest organizations, educators, and individual citizens. The overwhelming majority of all comments opposed the Proposed Rule.
78. In particular, stakeholders—including students, education associations and institutions, legal experts, trauma experts, civil rights advocates, and government officials—voiced their opposition to some or all of the Proposed Rule, including:
  - a. Students, including: student survivors,<sup>78</sup> fraternity and sorority members,<sup>79</sup> and student body presidents at 76 colleges and universities in 32 states,<sup>80</sup>

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<sup>77</sup> *Id.* at 61,463, 61,484.

<sup>78</sup> See Letter from Know Your IX to Kenneth Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., (Jan. 30, 2019), [https://actionnetwork.org/user\\_files/user\\_files/000/029/219/original/Know\\_Your\\_IX\\_Comment\\_on\\_Proposed\\_Title\\_IX\\_Rule\\_\(1\).pdf](https://actionnetwork.org/user_files/user_files/000/029/219/original/Know_Your_IX_Comment_on_Proposed_Title_IX_Rule_(1).pdf); Letter from End Rape on Campus to Kenneth Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ. (Jan. 30, 2019), <https://nwlc.org/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf>.

<sup>79</sup> Letter from Asa Jungreis, President, Alpha Epsilon Pi Fraternity, University of California, Davis to Dep't of Educ. (Jan. 28, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11081>; Letter from A Sorority at the University of California Davis to Dep't of Educ. (Jan. 29, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11790>.

<sup>80</sup> Letter from 76 College and University Student Body Presidents to Betsy DeVos, Sec'y, Dep't of Educ., at 1 (Jan. 30, 2019), [https://assu.stanford.edu/sites/g/files/sbiybj6236/f/student\\_body\\_presidents\\_comment\\_on\\_title\\_ix\\_proposal\\_1.pdf](https://assu.stanford.edu/sites/g/files/sbiybj6236/f/student_body_presidents_comment_on_title_ix_proposal_1.pdf).

- b. Education associations, including: the American Federation of Teachers;<sup>81</sup> American Council on Education;<sup>82</sup> Association for Student Conduct Administration;<sup>83</sup> Association of American Universities;<sup>84</sup> Association of Title IX Administrators;<sup>85</sup> International Association of Campus Law Enforcement Administrators;<sup>86</sup> National Association of Secondary School Principals;<sup>87</sup> National Education Association;<sup>88</sup> AASA (The School Superintendents Association);<sup>89</sup>
- c. Nineteen state attorneys general;<sup>90</sup>
- d. School systems and individual educational institutions, including: the Association of Independent Colleges and Universities in Massachusetts;<sup>91</sup> Berkeley Unified

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<sup>81</sup> Letter from American Federation of Teachers to Brittany Bull, Dep't of Educ. (Jan. 30, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-9123>.

<sup>82</sup> Letter from American Council on Education on behalf of 61 Higher Education Associations to Betsy DeVos, Sec'y, Dept. of Educ., at 16 (Jan. 30, 2019), <https://www.acenet.edu/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf>.

<sup>83</sup> Letter from Five Student Affairs Associations to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., at 7 (Jan. 29, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11689>.

<sup>84</sup> Letter from Association of American Universities to Brittany Bull, Dep't of Educ. (Jan. 24, 2019), <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Higher-Education-Regulation/AAU-Title-IX-Comments-1-24-19.pdf>.

<sup>85</sup> Letter from Association of Title IX Administrators to Betsy DeVos, Sec'y, Dep't of Educ. (Jan. 28, 2019), [https://cdn.atixa.org/website-media/o\\_atixa/wp-content/uploads/2012/01/18120231/ATIXA-NPRM-Comments-Final.pdf](https://cdn.atixa.org/website-media/o_atixa/wp-content/uploads/2012/01/18120231/ATIXA-NPRM-Comments-Final.pdf).

<sup>86</sup> Letter from Int'l Ass'n of Campus Law Enforcement Administrators to Betsy DeVos, Sec'y, Dep't of Educ., at 4 (Jan. 28, 2019) ("International Association of Campus Law Enforcement Administrators' Comment"), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10515>.

<sup>87</sup> Letter from The National Association of Secondary School Principals to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., (Jan. 17, 2019), [https://www.nassp.org/wordpress/wp-content/uploads/2019/01/NASSP\\_Title\\_IX\\_Comments\\_-\\_1.17.19\\_V2.pdf](https://www.nassp.org/wordpress/wp-content/uploads/2019/01/NASSP_Title_IX_Comments_-_1.17.19_V2.pdf).

<sup>88</sup> Letter from National Education Association to Brittany Bull, Dep't of Educ., at 9 (Jan. 30, 2019) ("Letter from Nat'l Educ. Ass'n"), <http://www.nea.org/assets/docs/NEA%20Comment%20Letter%20RE%20ED-2018-OCR-0064.pdf>.

<sup>89</sup> Letter from The School Superintendents Association to Betsy DeVos, Sec'y, Dep't of Educ., at 5 (Jan. 22, 2019) ("Letter from School Superintendents"), [https://aasa.org/uploadedFiles/AASA\\_Blog\(1\)/AASA%20Title%20IX%20Comments%20Final.pdf](https://aasa.org/uploadedFiles/AASA_Blog(1)/AASA%20Title%20IX%20Comments%20Final.pdf).

<sup>90</sup> Letter from 20 Attorneys General to Betsy DeVos, Sec'y, Dep't of Educ., (July 19, 2017), <https://www.attorneygeneral.gov/taking-action/press-releases/20-ags-call-on-secretary-devos-to-maintain-protections-for-survivors-of-campus-sexual-assault>.

<sup>91</sup> Letter from Ass'n of Indep. Coll. and Univ. in Mass. to Betsy DeVos, Sec'y, Dep't of Educ., (Jan. 23, 2019), 23, 2019) ("Letter from 55 Massachusetts Institutions of Higher Education"), <http://aicum.org/wp->

Public Schools;<sup>92</sup> Boston University;<sup>93</sup> Georgetown University;<sup>94</sup> Howard University;<sup>95</sup> Northwestern University;<sup>96</sup> New York University;<sup>97</sup> Oregon University Presidents;<sup>98</sup> Oregon University Title IX Coordinators;<sup>99</sup> State University of New York (SUNY) system;<sup>100</sup> Trinity College;<sup>101</sup> University of California System, including Title IX Coordinators;<sup>102</sup> University of Colorado;<sup>103</sup>

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content/uploads/2019/01/AICUM-public-comments-on-Notice-of-Proposed-Rulemaking-%E2%80%9CNPRM%E2%80%9D-amending-regulations-implementing-Title-IX-of-the-Education-Amendments-of-1972-Title-IX%E2%80%9D-Docket-ID-ED-2018-OCR-0064.pdf.

<sup>92</sup> Letter from Berkeley Unified Sch. Dist. Bd. of Educ. to U.S. Dep't of Educ. (Jan. 24, 2019), <https://www.berkeleyschools.net/2019/01/school-board-writes-to-us-dept-of-education-proposed-title-ix-changes-could-undermine-student-safety>.

<sup>93</sup> Letter from Bos. Univ. to Betsy DeVos, Sec'y, Dep't of Educ. (Jan. 25, 2019), <https://www.bu.edu/federal/2019/01/25/bu-urges-department-of-education-to-rethink-title-ix-changes>.

<sup>94</sup> Letter from Georgetown Univ. to Betsy DeVos, Sec'y, Dep't of Educ. (Jan. 30, 2019), <https://georgetown.app.box.com/s/fw978e3oai8i5hpg0wqa70cq9iml2re>.

<sup>95</sup> Letter from Howard Univ. to Betsy DeVos, Sec'y, Dep't of Educ. (Jan. 30, 2019), <https://www2.howard.edu/sites/default/files/Title-IX-Comment-Letter-1-30-19.pdf>.

<sup>96</sup> Letter from Northwestern Univ. to Betsy DeVos, Sec'y, Dep't of Educ. (Jan. 29, 2019), <http://dradis.ur.northwestern.edu/multimedia/pdf/comments.pdf>.

<sup>97</sup> Letter from N.Y. Univ. to Betsy DeVos, Sec'y, Dep't of Educ. (Jan. 29, 2019), [https://www.nyu.edu/about/news-publications/news/2019/january/Title\\_IX\\_Concerns.html](https://www.nyu.edu/about/news-publications/news/2019/january/Title_IX_Concerns.html).

<sup>98</sup> Letter from the Presidents of the Seven Pub. Univ. in Or. to Betsy DeVos, Sec'y, Dep't of Educ. (Jan. 30, 2019), [https://gcr.uoregon.edu/sites/gcr2.uoregon.edu/files/final\\_letter\\_from\\_presidents\\_re\\_title\\_ix\\_nprm.pdf](https://gcr.uoregon.edu/sites/gcr2.uoregon.edu/files/final_letter_from_presidents_re_title_ix_nprm.pdf).

<sup>99</sup> Letter from the Title IX Coordinators of the Or. Pub. Univ. to Betsy DeVos, Sec'y, Dep't of Educ. (Jan. 30, 2019), [https://gcr.uoregon.edu/sites/gcr2.uoregon.edu/files/final\\_letter\\_from\\_title\\_ix\\_coordinators\\_re\\_title\\_ix\\_nprm.pdf](https://gcr.uoregon.edu/sites/gcr2.uoregon.edu/files/final_letter_from_title_ix_coordinators_re_title_ix_nprm.pdf).

<sup>100</sup> Letter from the State Univ. of N.Y. to Betsy DeVos, Sec'y, Dep't of Educ. (Jan. 29, 2019), <https://www.suny.edu/media/suny/content-assets/documents/chancellor/SUNY-Chancellor-Johnson-Comment-on-ED-Title-IX-Prop-Regs.pdf>.

<sup>101</sup> Letter from Trinity Coll. to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ. (Jan. 30, 2019), <https://www.trincoll.edu/president/wp-content/uploads/sites/10/2019/01/JBS.Title-IX-response.1.30.19.pdf>.

<sup>102</sup> Letter from Univ. of Cal. to Brittany Bull, Dep't of Educ. (Jan. 28, 2019), <https://sexualviolence.universityofcalifornia.edu/files/documents/uc-title-ix-letter.pdf>.

<sup>103</sup> Letter from Univ. of Colo. to Betsy DeVos, Sec'y, Dep't of Educ. (Jan. 30, 2019), <https://www.colorado.edu/today/letter-comment-proposed-rule-nondiscrimination-basis-sex-education-programs-or-activities-receiving>.

University of Iowa;<sup>104</sup> University of Washington;<sup>105</sup> and twenty-four private, liberal arts colleges and universities that filed a consolidated comment;<sup>106</sup>

- e. Legal experts, including seventy-three law professors in twenty-six states;<sup>107</sup>
- f. Experts in the effects of trauma caused by sex-based harassment also opposed the Propose Rule, including the American Psychological Association<sup>108</sup> and over 900 mental health professionals.<sup>109</sup>
- g. Civil rights advocates, including: Consortium for Citizens with Disabilities,<sup>110</sup> Human Rights Campaign,<sup>111</sup> Leadership Conference on Civil and Human Rights,<sup>112</sup> MALDEF,<sup>113</sup> NAACP,<sup>114</sup> National Center for Transgender Equality,<sup>115</sup> National

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<sup>104</sup> Letter from Univ. of Iowa to Betsy DeVos, Sec’y, Dep’t of Educ. (Jan. 30, 2019), <https://osmrc.uiowa.edu/university-iowa-submits-comments-new-proposed-title-ix-regulations-sexual-misconduct>.

<sup>105</sup> Letter from Univ. of Wash. to Betsy DeVos, Sec’y, Dep’t of Educ. (Jan. 28, 2019), <https://s3-us-west-2.amazonaws.com/uw-s3-cdn/wp-content/uploads/sites/96/2019/01/28174314/UWTIXCommentsJan2019.pdf>

<sup>106</sup> Letter from Pepper Hamilton, LLP, on behalf of Twenty-Four Liberal Arts Coll. and Univ. to Betsy DeVos, Sec’y, Dep’t of Educ., (Jan. 30, 2019) (“Letter from Twenty-Four Liberal Arts Institutions”), <https://www.pepperlaw.com/resource/35026/22G2>.

<sup>107</sup> Letter from 73 Law Professors to Dep’t of Educ. (Jan. 30, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11900>.

<sup>108</sup> Letter from the Am. Psychol. Ass’n to Brittany Bull, Dep’t of Educ. (Jan. 30, 2019), <https://www.apa.org/advocacy/interpersonal-violence/titleix-comments.pdf>.

<sup>109</sup> Letter from 902 Mental Health Professionals and Trauma Specialists to Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ. (Jan. 30, 2019) (“Letter from 902 Mental Health Professionals and Trauma Specialists”), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-104088>.

<sup>110</sup> Letter from Consortium for Citizens with Disabilities to Dep’t of Educ. (Jan. 30, 2019), <https://nacdd.org/wp-content/uploads/2019/01/Final-CCD-Title-IX-comments-1.30.19.pdf>.

<sup>111</sup> Letter from Human Rights Campaign to Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ. (Jan. 30, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11375>.

<sup>112</sup> 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) (“Letter from Leadership Conference on Civil and Human Rights”), <http://civilrightsdocs.info/pdf/policy/letters/2019/Joint-Comment-Title-IX-NPRM-01302019-Final.pdf>.

<sup>113</sup> Letter from MALDEF to Brittany Bull, Dep’t of Educ. (Jan. 30, 2019), <https://www.maldef.org/wp-content/uploads/2019/01/MALDEF-Title-IX-Comment.pdf>.

<sup>114</sup> Letter from Leadership Conference on Civil and Human Rights at 11.

<sup>115</sup> Letter from National Center for Transgender Equality to Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ. (Jan. 29, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11557>.

Employment Lawyers Association,<sup>116</sup> Southeast Asia Resource Action Center,<sup>117</sup> and Southern Poverty Law Center;<sup>118</sup>

- h. Government officials, including: 145 state legislators from forty-one states;<sup>119</sup> and 36 United States senators.<sup>120</sup>
79. Over seventeen months later—in the midst of a global pandemic causing schools to nearly universally shut down—the Department published the Final Rule in the Federal Register.<sup>121</sup> Despite receiving an overwhelming number of comments opposing the Proposed Rule and emphasizing the vast prevalence, under-reporting, and under-investigation of sex-based harassment, the Department chose to add *additional* harmful provisions to the Final Rule that require schools to dismiss many more survivors and to exclude broad swaths of relevant evidence from Title IX investigations.
80. In the weeks following its publication, in addition to Plaintiffs bringing the instant complaint, the Final Rule has been challenged by a coalition of 18 states,<sup>122</sup> the state of New York,<sup>123</sup> and multiple organizations whose missions are educating, supporting, advocating for, and providing services to students who have experienced sex-based harassment,<sup>124</sup> all of which argue that the Final Rule significantly weakens federal

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<sup>116</sup> Letter from National Employment Lawyers Association to Betsy DeVos, Sec’y, Dep’t of Educ. (Jan. 30, 2019), <https://www.nela.org/index.cfm?pg=83FedReg61483>.

<sup>117</sup> Letter from Leadership Conference on Civil and Human Rights at 11.

<sup>118</sup> *Id.*

<sup>119</sup> Letter from 145 State Legislators in 41 States to Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ. (Jan. 25, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-8535>.

<sup>120</sup> Letter from 36 U.S. Senators to Betsy DeVos, Sec’y, Dep’t of Educ., at 6-7 (Jan. 30, 2019), <https://www.help.senate.gov/imo/media/doc/013019%20Proposed%20Title%20IX%20reg%20caucus%20letter.pdf>.

<sup>121</sup> 85 Fed. Reg. 30,026 (May 19, 2020).

<sup>122</sup> *Pennsylvania v. DeVos*, No. 1:20-cv-01468 (D.D.C. filed June 4, 2020).

<sup>123</sup> *New York v. DeVos*, No. 1:20-cv-4260 (S.D.N.Y. filed June 4, 2020).

<sup>124</sup> *Know Your IX v. DeVos*, 1:20-cv-01224-RDB (D. Md. filed May 14, 2020).

protections for students from sex-based harassment in education. Additionally, multiple stakeholders who opposed the Proposed Rule also expressed their opposition to the Final Rule and the harm it would cause to students who suffer sex-based harassment: for example, the American Federation of Teachers,<sup>125</sup> American Council on Education<sup>126</sup> (the umbrella membership group for 1,700 college and university leaders), The School Superintendents Association,<sup>127</sup> and the American Psychological Association.<sup>128</sup>

81. The Final Rule will significantly weaken Title IX's protection against sex discrimination, narrowing the definition of sexual harassment such that schools may only address harassment when it has done its damage to students' educational opportunities and limiting the ability of educational institutions to craft policies that ensure equal access to educational opportunities. It also arbitrarily mandates uniquely complainant-hostile procedures that are only required for investigating complaints of sex-based harassment, but not other types of student or staff misconduct or other forms of harassment and discrimination which the Department regulates, thus perpetuating the discriminatory, toxic, and false message that allegations of sex-based harassment are uniquely unreliable.

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<sup>125</sup> Press Release, American Federation of Teachers, AFT's Randi Weingarten on Department of Education's Title IX Rule Changes (May 6, 2020), <https://www.aft.org/press-release/afts-randi-weingarten-department-educations-title-ix-rule-changes>.

<sup>126</sup> Press Release, American Council on Education, Statement by ACE President Ted Mitchell on Final Title IX Regulations (May 6, 2020), <https://www.acenet.edu/News-Room/Pages/Statement-by-ACE-President-Ted-Mitchell-on-Final-Title-IX-Regulations.aspx>.

<sup>127</sup> The School Superintendent Association, *AASA Analysis Of Title IX Regulation* (May 7, 2020), <https://aasa.org/policy-blogs.aspx?id=44694&blogid=84002>.

<sup>128</sup> Press Release, Am. Psychological Ass'n, More Difficult to File Claims of Campus Sexual Assault Under New Education Dept. Title IX Rule (May 6, 2020), [https://www.apa.org/news/press/releases/2020/05/campus-sexual-assault?utm\\_source=facebook&utm\\_medium=social&utm\\_campaign=apa-press-release&utm\\_content=title-ix-statement-may6](https://www.apa.org/news/press/releases/2020/05/campus-sexual-assault?utm_source=facebook&utm_medium=social&utm_campaign=apa-press-release&utm_content=title-ix-statement-may6).

82. The Department now claims that the Final Rule will even further reduce the number of investigations of sex-based harassment conducted by schools, amounting to \$178.8 million in savings to schools each year,<sup>129</sup> nearly double the estimated \$99.2 million in annual savings that were attributed to reduced investigations in the Proposed Rule.<sup>130</sup> Despite acknowledging comments that it “should be working to combat the problems of underreporting and under-investigation instead of trying to reduce the number of investigations,” the Department continues to provide no reasoned justifications for its opposite stance.<sup>131</sup>
83. Like the Proposed Rule, the Final Rule continues to exclude all costs to victims and survivors of sex-based harassment imposed by the Rule from its regulatory impact analysis. Numerous studies show that a single rape can cost a survivor more than \$240,000,<sup>132</sup> that the average lifetime cost of dating and domestic violence can exceed \$100,000 for women and \$23,000 for men,<sup>133</sup> and that the average lifetime cost of rape results in an annual national economic burden of \$263 billion and a population economic burden of nearly \$3.1 trillion over survivors’ lifetimes.<sup>134</sup> The cost to survivors is beyond financial. Survivors are three times more likely to suffer from depression, six times more likely to have post-

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<sup>129</sup> *Id.* at 30,507.

<sup>130</sup> 83 Fed. Reg. at 61,490.

<sup>131</sup> 85 Fed. Reg. at 30,549-30,550.

<sup>132</sup> White House Council on Women and Girls, *Rape and Sexual Assault: A Renewed Call to Action* 15 (Jan. 2014), [https://www.knowyourix.org/wp-content/uploads/2017/01/sexual\\_assault\\_report\\_1-21-14.pdf](https://www.knowyourix.org/wp-content/uploads/2017/01/sexual_assault_report_1-21-14.pdf).

<sup>133</sup> Inst. for Women’s Policy Research, *Dreams Deferred: A Survey on the Impact of Intimate Partner Violence on Survivors’ Education, Careers, and Economic Security* 8 (2018), [https://iwpr.org/wp-content/uploads/2018/10/C474\\_IWPR-Report-Dreams-Deferred.pdf](https://iwpr.org/wp-content/uploads/2018/10/C474_IWPR-Report-Dreams-Deferred.pdf).

<sup>134</sup> Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52(6) AM. J. PREV. MED. 691, 698, (2017), available at [https://stacks.cdc.gov/view/cdc/45804/cdc\\_45804\\_DS1.pdf](https://stacks.cdc.gov/view/cdc/45804/cdc_45804_DS1.pdf).



traumatic stress disorder, 13 times more likely to abuse alcohol, 26 times more likely to abuse drugs, and four times more likely to contemplate suicide.<sup>135</sup>

84. Students also face specific costs when they suffer sex-based harassment. Despite acknowledging that 8 percent of sexual assault survivors drop a class, 11 percent move residences, 22 percent seek psychological counseling,<sup>136</sup> and 34 percent drop out of college altogether,<sup>137</sup> the Department continues to exclude these costs in its Final Rule's regulatory impact analysis. The Final Rule also fails to account for medical costs for physical and mental injuries; lost tuition and lower educational completion and attainment for victims who are forced to change majors or drop out of school; lost scholarships for victims who receive lower grades as a result of the harassment or violence; and defaults on student loans as a result of losing tuition or scholarships.

85. Furthermore, the Clery Act requires that schools have an investigation and hearing process that "protects the safety of victims and promotes accountability."<sup>138</sup> The Final Rule fails to mention victim safety at all, and in fact requires colleges and universities to implement procedures that are hostile to complainants and will chill reporting. Nor does it mention accountability, the logical corollary to victim safety, not only for the particular victim, but for all students. Instead, by claiming that the Final Rule will save schools money by reducing the number of investigations they are required to conduct, the Department

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<sup>135</sup> Feminist Majority Foundation, *Fast facts - Sexual violence on campus* (2018), <http://feministcampus.org/wp-content/uploads/2018/11/Fast-Facts.pdf>.

<sup>136</sup> 83 Fed. Reg. at 61,487.

<sup>137</sup> *Id.*

<sup>138</sup> Campus Sexual Violence, Domestic Violence, Dating Violence and Stalking Education and Prevention, Pub. L. No. 113-4 § 304, 127 Stat. 90 (2013).

acknowledges that the Final Rule will not serve to increase accountability by respondents or recipients for sex-based harassment.

**The Final Rule Impermissibly Narrows the Definition of “Sexual Harassment”**

86. The Final Rule adopts a novel and narrow definition of “sexual harassment” that is inconsistent with Title IX’s purpose and precedents, and requires schools to dismiss any sexual harassment complaint that does not meet this new definition, thereby excluding various forms of sexual harassment that interferes with equal access to educational opportunities.<sup>139</sup> The Final Rule, through this narrow definition coupled with multiple barriers for complainants, also discourages the reporting of sexual harassment.<sup>140</sup>
87. Section 106.30 of the Final Rule redefines “sexual harassment” to mean the following when it occurs “on the basis of sex”:

- (1) An employee of the recipient condition[s] the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- (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; or

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<sup>139</sup> § 106.30(a).

<sup>140</sup> Although the Department has “clarified” that “dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient’s own code of conduct,” this so-called clarification creates even more confusion. *See* 85 Fed. Reg. at 30,037-38. Permitting the use of other grievance procedures under a school’s code of conduct creates uncertainty for complainants and respondents alike, as well as potential liability for schools if their classification of conduct as outside of the definition of sexual harassment is challenged.

(3) “Sexual assault” as defined in 20 U.S.C. § 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. § 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in U.S.C. § 12291(a)(30).<sup>141</sup>

88. This definition represents a dramatic departure from the standard for sexual harassment that schools have been successfully applying for nearly two decades—that sexual harassment is “unwelcome conduct of a sexual nature.”<sup>142</sup>
89. Under the Final Rule’s narrowed definition—that the conduct be so “severe, pervasive, *and* objectively offensive” that it denies a person equal access—students will be forced to endure repeated and escalating levels of abuse before their schools may take steps to investigate and stop the sexual harassment. That is, in the absence of *quid pro quo* harassment or sexual assault, domestic violence, dating violence, or stalking, a school is *required to dismiss* a student’s Title IX complaint if the sexual harassment has not yet advanced to a point where it is actively interfering with a student’s education.<sup>143</sup>
90. This definition will chill reporting of sexual harassment in both preK-12 schools and higher education. Evidence shows that, even before the Final Rule created this narrowed definition of sexual harassment, only a fraction of sexual harassment of students is reported to school authorities. Students often choose not to report because they think the harassment is not serious enough or that no one would do anything to help.<sup>144</sup> The Final Rule’s narrowed definition of “sexual harassment” will undoubtedly reduce reporting even further

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<sup>141</sup> § 106.30(a).

<sup>142</sup> See 2001 Guidance.

<sup>143</sup> §§ 106.30(a), 106.45(b)(3)(i).

<sup>144</sup> RAINN, *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence>.

as students reasonably fear that schools will not provide any meaningful response if they file a report.

91. The revised sexual harassment definition will also create inconsistent requirements for sexual harassment relative to other categories of student or staff misconduct. For example, the Department still requires schools to respond to harassment of students based on race, ethnicity, national origin, or disability under the more inclusive standard for creating a hostile educational environment, which is conduct that is “severe, pervasive, *or* persistent so as to *interfere with or limit* a student’s ability to participate in or benefit from the services.”<sup>145</sup> Further, sexual harassment of people protected under both Title IX and Title VII, including students who are employed by their schools and school employees in both prepreK-12 and higher education—will be subject to two conflicting standards given that employees, under Title VII standards, must only show that sexual harassment is severe *or* pervasive – not both as required by the Final Rule.<sup>146</sup>

**The Final Rule Requires School Action Only When the School Has “Actual Knowledge” of Sex-Based Harassment**

92. Sections 106.30 and 106.44(a) of the Final Rule provide that schools will only be responsible for addressing sex-based harassment when a preK-12 employee or one of a narrow set of higher education employees has “actual knowledge” of the harassment.<sup>147</sup> These sections reverse the Department’s previous positions, which required schools to address sex-based harassment if: (i) almost any school employee either “knew or should

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<sup>145</sup> 2010 Guidance at 2 (emphasis added); *see also* 2000 Disability Harassment Guidance; 1994 Racial Harassment Guidance.

<sup>146</sup> U.S. Equal Emp’t Opportunity Comm’n, *Harassment*, <https://www.eeoc.gov/harassment>. *See also Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (requiring “severe or pervasive” even in private litigation for money damages).

<sup>147</sup> 85 Fed. Reg. at 30,574.

reasonably have known” about (a) a student-on-student incident or (b) an employee-on-student incident that occurred *outside* the context of the employee’s provision of aid, benefits, and services to students; or (ii) an employee-on-student incident occurred *within* the context of the employee’s provision of aid, benefits, and services to students, “whether or not [the school] knew or should have known about it.”<sup>148</sup>

93. The “actual knowledge” requirement will undermine Title IX’s discrimination protections by reducing schools’ obligations to respond to sex discrimination in the form of sex-based harassment and making it harder to report sex-based harassment, including sexual assault.
94. The Final Rule also limits the range of employees whose actual knowledge of the sex-based harassment triggers the school’s Title IX obligations. Under the Final Rule, a post-secondary school need only act when a Title IX coordinator or an official who has “the authority to institute corrective measures” has actual knowledge of the sex-based harassment.<sup>149</sup> And, under the Final Rule, “the mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.”<sup>150</sup>
95. This reverses the Department’s previous position, which considered schools to have an obligation to respond to student-on-student sex-based harassment or to employee-on-student sex-based harassment outside the context of the employee’s provision of aid, benefits, or services to student— if a “responsible employee” had or should have had notice

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<sup>148</sup> 2001 Guidance at iv, 10–14.

<sup>149</sup> § 106.30(a) (defining “actual knowledge”).

<sup>150</sup> *Id.*

of the incident.<sup>151</sup> The term “responsible employee” broadly included “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sex-based harassment or any other misconduct by students or an individual who a student could reasonably believe has this authority or responsibility.”<sup>152</sup>

96. The Final Rule also reverses the Department’s previous position that schools are responsible for addressing employee-on-student sex-based harassment that occurs within the context of the employee’s provision of aid, benefits, and services to students, regardless of whether the school had notice.
97. Under the Final Rule, if a college or graduate student tells a professor, residential advisor, or teaching assistant that they were raped by another student, a professor, or other university employee, the college or university will have no obligation to help the student.
98. Because the Department has not defined which school officials have “the authority to institute corrective measures,” higher education students who want assistance or an investigation into their complaint will likely have to report sex-based harassment to the Title IX coordinator or an official with whom students often do not interact individually or have a relationship to comfortably approach about harassment, such as a College Dean or University Provost.
99. If the Final Rule had been in place earlier, institutions of higher education like Michigan State University would have had no responsibility to stop Larry Nassar—even though his

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<sup>151</sup> 2001 Guidance at 13.

<sup>152</sup> *Id.* (emphasis added).

victims reported their experiences to at least fourteen school employees over a twenty-year period—including athletic trainers, coaches, counselors, and therapists<sup>153</sup>—merely because those employees were not school officials with the “authority to institute corrective measures.” In fact, upon reports that the Department would heighten the notice provision before the Proposed Rule was published, 82 survivors from Ohio State University, Michigan State University, and the University of Southern California pleaded with Secretary DeVos to not make this change, claiming that their “schools could claim they had no responsibility to investigate Nassar, Tyndall, or Strauss, simply because [they] did not report our assaults to the “right” individuals, despite so many school employees knowing about the abuse.”<sup>154</sup>

100. School officials in higher education strongly opposed the requirement of “actual knowledge” by a narrow set of school employees when it was first described in the Proposed Rule. For example, a consortium of five student affairs and student conduct professionals—representing ACPA – College Student Educators International, Association for Student Conduct Administration, Association of College and University Housing Officers – International, NASPA – Student Affairs Administrators in Higher Education, and NIRSA: Leaders in Collegiate Recreation—warned the Department in a joint comment that the heightened notice provision could result in “fewer students reporting sexual

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<sup>153</sup> Julie Mack & Emily Lawler, *MSU doctor’s alleged victims talked for 20 years. Was anyone listening?*, MLIVE (Feb. 8, 2017), [https://www.mlive.com/news/index.ssf/page/msu\\_doctor\\_alleged\\_sexual\\_assault.html](https://www.mlive.com/news/index.ssf/page/msu_doctor_alleged_sexual_assault.html).

<sup>154</sup> Letter from Former Students and Survivors of Sexual Abuse Perpetrated by Larry Nassar at Michigan State University, George Tyndall at University of Southern California, and Richard Strauss at Ohio State University to Secretary DeVos and Assistant Secretary Marcus (Nov. 1, 2018), <https://www.publicjustice.net/wp-content/uploads/2018/11/November-1-Survivor-Letter-to-ED.pdf>.

assaults or harassment” and pointed specifically to the “terrible consequences of not reporting in cases like the Larry Nassar case.”<sup>155</sup>

101. Although the Department claims that the “authority to institute corrective measures” limitation will give victims in higher education more “autonomy” and “privacy” by allowing them to request help from certain school employees without automatically triggering a formal investigation, earlier Title IX guidances already instructed schools not to initiate an investigation without the victim’s consent and to honor their requests for confidentiality. For example, the earlier Guidances instructed schools to provide supportive measures without initiating an investigation if the victim requested, and to designate certain employees as confidential employees to whom students could disclose sex-based harassment without giving their school “notice” of the incident.<sup>156</sup> Moreover, despite claiming to protect survivors’ autonomy around whether to initiate an investigation, Section 106.30 of the Final Rule in fact allows schools to override students’ request not to initiate an investigation, and in doing so, will require an unwilling complainant’s identity be revealed to the respondent.<sup>157</sup> As a result, the Final Rule fails to protect confidentiality for victims who wish to report sex-based harassment. The Department therefore fails to provide a reasonable justification for narrowing the set of employees who can receive notice of sex-based harassment before a school is obligated to respond, which undercuts the purpose of Title IX.

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<sup>155</sup> Letter from Five Student Affairs Associations to Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ., at 7 (Jan. 29, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11689>.

<sup>156</sup> 2014 Guidance at 18-24; 2011 Guidance at 5; 2001 Guidance at 17, 18.

<sup>157</sup> § 106.30(a) (defining “formal complaint”). *See also* 85 Fed. Reg. at 30,122 n.547.



**The Final Rule Prohibits Schools from Investigating Sex-Based Harassment Occurring Outside Their Narrowly-Defined Programs or Activities Even When It Creates a Hostile Educational Environment**

102. Section 106.45(b)(3)(i) of the Final Rule require schools to dismiss reports of sex-based harassment that occur outside of the school’s program or activity, even when such reported incidents create a hostile educational environment within an educational program or activity.
103. The Final Rule narrowly defines “education program or activity” as including “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sex-based harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”<sup>158</sup> This definition ignores many incidents of sex-based harassment that occur in off-campus housing, in study abroad programs, online, or in other public and private spaces, even when such incidents result in a student being unable to fully participate in or benefit from a school’s education program.
104. This provision conflicts with the plain language of Title IX, which depends not on where the underlying conduct occurred, but whether the person is “denied the benefits of, or [is] subjected to discrimination under any education program or activity.”<sup>159</sup> Nor can the statute be reasonably read to *prohibit* schools from addressing any form of sex-based harassment, even if occurs in a study abroad program.
105. For almost two decades, the Department’s Guidances have agreed that schools are responsible for addressing sex-based harassment if it is “sufficiently serious to deny or

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<sup>158</sup> § 106.44(a).

<sup>159</sup> 20 U.S.C. § 1681(a).

limit a student’s ability to participate in or benefit from the education program,” regardless of where the incident occurs.<sup>160</sup> The Department’s previous Guidance was consistent with the fact that many students experience sex-based harassment in off-campus locations. For example, according to a 2014 U.S. Department of Justice report, 95 percent of sexual assaults of female students ages 18-24 occur outside of a school program or activity.<sup>161</sup> Yet this change in the Final Rule means that a student or teacher who sexually assaults a student after school and in a private location is almost certainly beyond the reach of institutional response, including a disciplinary response.

106. Representatives of preK-12 school leaders like AASA, The School Superintendents Association and the National Association of Secondary School Principals oppose mandatory dismissal of complaints alleging out-of-school harassment because these groups recognize that out-of-school conduct “often spill[s] over into the school day and school environment.” Campus professionals such as the Campus Advocacy and Prevention Professional Association (CAPPA) and Student Affairs Administrators in Higher Education (NASPA) have also raised concern about this change. CAPPA noted:

“[This change] highlights the Department’s fundamental misunderstanding of the interactions between students and their educational programs and activities. It is the year 2019, and with the proliferation of both mobile technology and social media, neither students nor employees are every fully separate from or outside of the programs or activities of their educational environment or workplace.”<sup>162</sup>

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<sup>160</sup> 2010 Guidance at 7.

<sup>161</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, *Rape and Sexual Assault Victimization Among College-Age Females*, 1995-2013 at 6 (Dec. 2014), <https://perma.cc/8VZL-H6F5>.

<sup>162</sup> Letter from Campus Advocacy and Prevention Professional Association to Betsy DeVos, Sec’y, Dep’t of Educ. (Jan. 28, 2019), <http://www.nationalcappa.org/cappa-letter-to-department-of-education-january-28-2019>.

In addition, these provisions will limit a recipient's ability to address sex-based harassment occurring on social media or outside of school, even if the conduct results in the victim becoming too afraid to attend class and face the victim's harasser, who could be another student or the instructor teaching the victim's class. This will have drastic consequences as nearly 9 in 10 college students live off campus,<sup>163</sup> including all community and junior college students, and 41 percent of college sexual assaults involve off-campus parties.<sup>164</sup> Moreover, nearly all teenagers are online and of individuals ages 12-17, about 20 to 40 percent have been cyber-bullied, which often includes sex-based harassment.<sup>165</sup> As the Association of Independent Colleges and Universities (AICUM) noted:

“Massachusetts has several areas where colleges/universities are clustered, particularly the high concentration of institutions in the small geographical area of Boston and its surrounding communities, as well as in Worcester, the greater Amherst area, and in Springfield. This geographic proximity means that students frequently come in contact with students from other campuses. Institutions should not be precluded from investigating and addressing the conduct of students and employees which may occur off-campus.”<sup>166</sup>

107. This change will also create inconsistent policies for sex-based harassment relative to other student misconduct, prohibiting schools from addressing off-campus sex-based harassment even as they address other forms of off-campus behavior that threatens to harm the educational environment, such as drug use or physical assault. Under the Final Rule, schools can continue to respond to underage alcohol consumption at an off-campus party, but will be prohibited from responding to a complaint of sex-based harassment that occurs

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<sup>163</sup> Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, N.Y. Times (Aug. 5, 2016), <https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html> (87 percent).

<sup>164</sup> United Educators, *Facts From United Educators' Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (2015), [https://www.ue.org/sexual\\_assault\\_claims\\_study](https://www.ue.org/sexual_assault_claims_study).

<sup>165</sup> Am. Ass'n of Univ. Women, *Crossing the Line: Sexual Harassment at School* 8 (2011), <https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

<sup>166</sup> Letter from 55 Massachusetts Institutions of Higher Education, *supra* note 91, at 12.

*at the same party.* As noted by AASA, which stated it was “shocked” by this provision in the Proposed Rule:

It is common practice for district administrators to discipline students for off-campus conduct whether it’s the use of drugs or alcohol at a house party, cyberbullying, hazing, physical assault, etc. . . . [The Proposed Rule] would unduly tie the hands of school leaders who believe every child deserves a safe and healthy learning environment.<sup>167</sup>

Similarly, the International Association of Campus Law Enforcement Administrators noted in their comment on the Proposed Rule:

[This provision] [u]nfairly and arbitrarily restricts schools’ response to sexual harassment in a manner inconsistent with all other disciplinary actions. Sexual assault would be the only crime response restricted in this manner by the federal government. If a student robbed someone, committed a hate crime, stole a car, sold drugs off-campus, or even committed murder, those actions would be covered under the institution’s disciplinary processes even though they happened outside the scope of the school’s programs or activities . . . No other criminal acts are protected from institutional response in such a manner.<sup>168</sup>

**The Final Rule Prohibits Schools from Investigating Many Complaints When the Victim Has Transferred, Graduated, or Dropped Out, and the Proposed Rule Failed to Give Notice That This Harmful Provision Was Being Considered.**

108. The Final Rule restricts who can file a formal sex-based harassment complaint with an educational institution. Section 106.30 provides, “[a]t 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.”<sup>169</sup> The Department’s justification for this restriction is to “ensure that a recipient is not required to expend resources investigating allegations in circumstances where the complainant has no

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<sup>167</sup> See Letter from School Superintendents, *supra* note 89, at 5.

<sup>168</sup> Int’l Ass’n of Campus Law Enforcement Administrators’ Comment, *supra* note 86, at 4.

<sup>169</sup> 85 Fed. Reg. at 30,574.

affiliation with the recipient, yet refrains from imposing a time limit on a complainant's decision to file a formal complaint."<sup>170</sup>

109. By limiting who can bring sex-based harassment complaints in this way, the Department will leave many victims without recourse, including students who have transferred to avoid their harassers, students who have dropped out due to the trauma of the harassment they suffered, students who have graduated, and high school students who are assaulted during a college admit weekend and decide to enroll at another institution. As a result, schools will not be permitted to address sex-based harassment even if the harasser's ongoing presence continues to threaten members of the school community. For example, Section 106.30 would produce the absurd result that former students abused by a teacher *still employed by the school* would be unable to file a formal sex-based harassment complaint asking the school to take action to prevent and redress harassment by the teacher.
110. This change disregards how frequently one perpetrator abuses multiple victims, with the result that not pursuing an investigation on the basis that a victim has left the school could lead to additional sex-based harassment against other students and leave the educational entity open to greater liability.
111. Further, Section 106.30 ignores the unequal power dynamic between students, on the one hand, and teachers, coaches, and administrators on the other. A student suffering from sexual harassment at the hands of a coach, for example, may be reluctant to file a formal complaint while the student remains a participant in the program led by the coach.

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<sup>170</sup> *Id.* at 30,127.

112. Section 106.30 also prohibits third parties from filing formal sex-based harassment complaints. The Department justifies this restriction on the ground that it protects the autonomy of post-secondary students who may not wish to file a formal complaint. The restriction is not limited to post-secondary students, however, and the blanket application to all students, including preK-12 students, will result in unreported sex-based harassment. For example, teachers, other students, or school employees will not be permitted to file a formal complaint seeking a school response to sex-based harassment, even if they personally observe sex-based harassment in the classroom, in school hallways, or on the playground.
113. Because this provision was not included in the Proposed Rule, stakeholders were unable to comment on the dangers of this change.

**The Final Rule Allows Schools to Dismiss Complaints If the Respondent Has Graduated, Transferred, or Retired, and the Proposed Rule Failed to Give Notice That This Harmful Provision Was Being Considered.**

114. The Final Rule, section 106.45(b)(3)(ii), allows schools to dismiss complaints—even during a pending investigation or hearing—because the respondent is no longer enrolled in or employed by their school.<sup>171</sup>
115. This means if a student graduates or transfers to another school after sexually assaulting another student, the school will no longer have to investigate or redress any resulting hostile educational environment. Similarly, if a teacher retires or resigns after sexually abusing many students over several years, the school will no longer have to investigate to determine the scope of the abuse, the impact of the abuse on students, whether other employees knew

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<sup>171</sup> § 106.45(b)(3)(ii).

about the abuse but ignored it, or whether school policies or practices facilitated the abuse. Without such an investigation, the school will no longer be required to remedy the hostile educational environment faced by the survivors and possibly the broader school community, such as by taking systemic action to prevent such abuse from happening again.

116. Because this provision was not included in the Proposed Rule, stakeholders were unable to comment on the dangers of this change.

**The Final Rule Adopts a Restrictive Deliberate Indifference Standard for a School’s Response to Known Sex-Based Harassment**

117. Under the Final Rule, a school’s response to a sex-based harassment complaint will escape scrutiny from the Department so long as it is not “deliberately indifferent.”<sup>172</sup>

118. A school’s response will be deliberately indifferent only if the “response to sexual harassment is *clearly unreasonable* in light of the known circumstances.”<sup>173</sup> This standard, established by the Supreme Court in the context of a private right of action against a school for monetary damages, is significantly more relaxed for institutions than the Department’s previous standard requiring a “reasonable response” and will substantially undercut schools’ responsibility to adhere to Title IX’s requirements.<sup>174</sup>

119. Title IX, like other anti-discrimination laws, imposes an obligation on funding recipients not to discriminate, which means that they must prevent discrimination, address discrimination when it occurs, and remedy its effects. That obligation is not met when institutions are held accountable only when they engage in egregious institutional misconduct.

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<sup>172</sup> § 106.44(a).

<sup>173</sup> *Id.*; 85 Fed. Reg. at 30,574 (emphasis added).

<sup>174</sup> 2001 Guidance at 15–16.

120. The Department has failed to explain adequately its change in position given the contrary evidence in the record.
121. The Department justifies changes to the definition of sexual harassment and notice standards, and requiring a recipient's deliberate indifference, on the ground that it believes that "the administrative standards governing recipients' responses to sexual harassment [should be] aligned with the standards developed by the Supreme Court" in cases assessing liability under Title IX for money damages in private litigation.<sup>175</sup> The Department also claims that the deliberate indifference standard "leave[s] recipients legitimate and necessary flexibility to make decisions regarding the supportive measures, remedies, and discipline that best address each sexual harassment incident."<sup>176</sup>
122. Yet no data supports the Department's underlying assumption that schools have been stymied by the Department's previous longstanding standard (i.e., schools must take prompt and immediate corrective action when they know or reasonably should have known about sex-based harassment) because it failed to offer enough flexibility.
123. Moreover, the Department itself has admitted that it is "not required to adopt the liability standards applied by the Supreme Court in private suits for money damages," acknowledging that as an administrative agency, it is authorized to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate, 20 U.S.C. §

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<sup>175</sup> 85 Fed. Reg. at 30,210.

<sup>176</sup> *Id.* at 30,044.



1682, even if those requirements do not purport to represent a definition of discrimination under the statute.”<sup>177</sup>

124. The liability standard for private damages is restrictive so as not to expose schools to financial consequences except in cases that meet this notoriously high legal requirement.<sup>178</sup> However, the Department of Education’s administrative mandate is not to hold schools financially liable, but rather to work with its recipient schools to achieve voluntary compliance with Title IX’s anti-sex discrimination protections. The adoption of a standard that schools should be non-deliberately indifferent—suggesting that being indifferent is fine as long as it is not deliberate—is inappropriately restrictive in the administrative enforcement context. The Department has not explained why it has now reversed its decades-long policy, which is also consistent with the Supreme Court opinions, by importing a liability standard for money damages into its administrative enforcement scheme.
125. When the Department first proposed importing the damages liability standard into the Proposed Rule, educators in preK-12 and higher education alike strongly opposed it. For example, AASA expressed concern that these provisions would “perversely” affect students, since “schools would be held to a far lesser standard in addressing the harassment of students—including minors—under its care than addressing harassment of adult employees.”<sup>179</sup> The National Education Association agreed, noting that this provision

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<sup>177</sup> Proposed Rule at 61,468, 61,469 (citing *Gebser*, 524 U.S. at 292); see also *Davis*, 526 U.S. at 639 (distinguishing “the scope of the behavior that Title IX proscribes” from behavior that “can support a private suit for money damage”).

<sup>178</sup> See Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 *Yale L. J.* 125, 2038 (May 2016).

<sup>179</sup> Letter from School Superintendents, *supra* note 89, at 4-5.

would “provide young students with less protection from harassment in schools than adults receive in their workplaces” and that they would create “confusion and absurdity” for student-employees, who “may be subject to differing levels of protection depending on whether they are classified as students or as employees.”<sup>180</sup>

### **The Final Rule Prohibits Many Supportive Measures for Victims of Sex-Based Harassment**

126. The Final Rule, § 106.30, defines “supportive measures” as “non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge, to the claimant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.”<sup>181</sup> Supportive measures are “designed to restore or preserve equal access to the recipient’s education program and activity, without unreasonably burdening the other party, including measures designed to protect the safety of all parties and the recipient’s educational environment, or deter sexual harassment.”<sup>182</sup>

127. Under the Final Rule, complainants will not be entitled to the full range of “supportive measures” necessary to ensure equal access to educational opportunities. The Final Rule will prohibit such measures on the grounds that the requested measures are “disciplinary,” “punitive,” or “unreasonably burden[] the other party.” For example, schools are likely to feel constrained from changing any of a respondent’s classes or housing and work assignments because such changes may be considered punitive or unreasonably burdensome toward the respondent, thereby forcing the complainant to change their own classes and housing and work assignments in order to avoid the respondent. This is a sharp

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<sup>180</sup> Letter from Nat’l Educ. Ass’n, *supra* note 88, at 9.

<sup>181</sup> § 106.30(a).

<sup>182</sup> *Id.* (emphasis added).

departure from the policy spanning the entire history of Title IX regulation: that schools were required to provide such measures that would enable a complainant to retain access to educational opportunities, not to prevent the respondent from being inconvenienced.

128. The Final Rule allows schools to provide supportive measures that harm rather than help a complainant. For example, schools are likely to refrain from issuing *one-way* no-contact orders against respondents and instead require complainants to agree to *mutual* no-contact orders because they believe one-way orders are punitive or unreasonably burdensome toward the respondent. However, decades of expert consensus establish that *mutual* no-contact orders are harmful to victims, because abusers often manipulate their victims into violating the mutual order, and will turn a measure that is intended to protect victims of sex-based harassment into a measure that punishes victims instead.<sup>183</sup> This rule is also a departure from longstanding practice under the 2001 Guidance, which instructed schools to “direct[] the harasser to have no further contact with the harassed student” but not vice-versa.<sup>184</sup>

129. Under the Final Rule, many victims will not be entitled to receive supportive measures. Schools will only be required to provide supportive measures to those students whose complaints meet the narrow definition of sexual harassment and survive dismissal under the many dismissal provisions of the Final Rule (schools are allowed, but not required, to provide supportive measures to those students whose claims have been dismissed). This means a student whose complaint is dismissed because the incident occurred outside of a narrowly-defined “school program or activity,” because the complainant is no longer

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<sup>183</sup> See Joan Zorza, *What Is Wrong with Mutual Orders of Protection?* 4(5) Domestic Violence Rep. 67 (1999).

<sup>184</sup> 2001 Guidance at 16.

participating or attempting to participate in the school's program or activity when they file a complaint, or because the respondent is no longer enrolled at or employed by the school at any time during an investigation, will not be entitled to supportive measures.

**The Final Rule Establishes an Unfair Presumption of Non-Responsibility by the Respondent**

130. Section 106.45(b)(1)(iv) will require schools to establish a presumption of non-responsibility for all complaints of sex-based harassment. That is, schools will be required to presume that the reported incident did not occur. The presumption of non-responsibility is based in sex discrimination and exacerbates the myth that women and girls often lie about sexual assault. This is one of the myths perpetuated by the Department's previous Acting Assistant Secretary for Civil Rights, Candice Jackson, who, as noted previously, publicly stated that for most sexual assault investigations, there is "not even an accusation that these accused students overrode the will of a young woman." She further stated that "the accusations—90% of them fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'"<sup>185</sup>

131. This presumption also conflicts with current Title IX regulations requiring "equitable" resolution of complaints;<sup>186</sup> a presumption in favor of one party against the other is plainly inequitable. Moreover, it conflicts with the Final Rule's own requirement that "credibility

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<sup>185</sup> Erica L. Green and Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as The Accused Get DeVos' Ear*, N.Y. Times (July 12, 2017), <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html>.

<sup>186</sup> § 106.8(c).

determinations may not be based on a person's status as a complainant, respondent, or witness."<sup>187</sup>

132. The presumption of innocence is a criminal law principle and inappropriately imported into this context. There is no such principle in civil or civil rights proceedings, such as Title IX proceedings. As the International Association of Campus Law Enforcement Administrators explained in its comment to the Proposed Rule:

“‘Presumption of innocence’ conflates criminal proceedings and criminal standards with a school disciplinary process. Disciplinary processes do not make a determination as to whether a person is ‘innocent’ or ‘guilty,’ they determine whether or not someone is responsible for a code violation.”<sup>188</sup>

Similarly, nineteen state attorneys general included in their comment a section titled “The Presumption of Non-Responsibility Improperly Tilts the Process in Favor of the Respondent”:

“[T]he grievance procedures are non-criminal in nature, so a criminal presumption by another name is not appropriate. Relatedly, but more fundamentally, the presumption contradicts the regulation’s stated goal of promoting impartiality by *inherently favoring the respondent’s denial* over the complainant’s allegation. Instead the allegation and the denial must be treated neutrally, as competing assertions of fact whose truth can only be determined after an investigation.”<sup>189</sup>

133. The Department also fails to adequately explain the factual basis for this provision. The Department claims that the presumption of non-responsibility “reinforces that the burden of proof remains on recipients (not on the respondent or the complainant) and reinforces correct application of the standard of evidence.”<sup>190</sup> But the Department fails entirely to explain how a presumption that favors the respondent is necessary to support either the

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<sup>187</sup> § 106.45(b)(1)(ii).

<sup>188</sup> Int’l Ass’n of Campus Law Enforcement Administrators’ Comment, *supra* note 86, at 6.

<sup>189</sup> Letter from 19 Attorneys General, *supra* note 90, at 35 (emphasis added).

<sup>190</sup> 85 Fed. Reg. at 30,103.

“clear and convincing evidence” standard or the “preponderance of the evidence” standard—or indeed, any standard of evidence.

134. Contrary to the Department’s claims that the presumption “reinforces correct application of the standard of evidence,” the attorneys general warned in their comment that, in fact, the opposite was true:

The problem [with the presumption requirement] would be even starker if any final regulation were to retain recipients’ ability to choose a “clear and convincing” evidence standard (which we contend is not appropriate). The presumption of non-responsibility and the “clear and convincing” standard of evidence likely would, in practice, compound one another and raise an exceedingly high bar to any finding of responsibility for sexual harassment.<sup>191</sup>

**The Final Rule Permits Schools to Unreasonably Delay Investigations**

135. Section 106.45(b)(1)(v) will require schools to conduct investigations within a “reasonably prompt timeframe,” but the only guidance the Department provides for what that phrase means is that an investigation must take at least 20 days (two 10-day timelines) per § 106.45(b)(5)(vi)-(vii). Moreover, the Final Rule will allow schools to create a “temporary delay” or “limited extension” of timeframes for “good cause,” where “good cause” may be “concurrent law enforcement activity.” In contrast, the 2011 and 2014 Guidance recommended that schools complete investigations within 60 days, and the 2001 Guidance prohibited schools from delaying a Title IX investigation merely because of a concurrent law enforcement investigation.
136. Title IX’s regulatory scheme has always recognized schools’ obligation and ability to respond promptly and equitably to instances of sexual harassment, which makes sense given shorter academic calendars and the need to ensure that students can continue to learn

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<sup>191</sup> *Id.*

free from sex discrimination. Even when there is a concurrent police investigation, a school should not be hampered in its response nor allowed to use a criminal investigation as an excuse for delaying its own investigation. The two investigations are completely separate proceedings that apply different standards of proof and serve different purposes. For example, only the school can implement measures to enable a student to maintain equal access to education such as schedule changes, housing and dining arrangements, and other academic adjustments.

137. Yet many schools may wrongly interpret § 106.45(b)(1)(v) to allow them to delay or suspend Title IX investigations indefinitely if there is any concurrent law enforcement activity. This is especially concerning for students in elementary and secondary schools, as well as adult students with developmental disabilities, whose reports of sexual abuse may automatically trigger a law enforcement investigation under state mandatory reporting laws. As a result, these students will have no way to secure a timely school investigation and resolution, as the mere act of reporting sexual assault can trigger an automatic delay.
138. These types of delays and suspensions create a safety risk not only to the victim who reported the initial incident but also to other students who may be victimized by the same respondent during the delay.<sup>192</sup> The Final Rule's provision allowing unlimited delay also creates a moral hazard in that if a school delays an investigation long enough for the complainant to graduate or drop out, the school would be required to dismiss the complaint.

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<sup>192</sup> ATIXA, *ATIXA Position Statement on the Proposed Legislation Entitled: Promoting Real Opportunity, Success, And Prosperity Through Education Reform (PROSPER) Act (Higher Education Act Reauthorization)* (Jan. 18, 2018), <https://atixa.org/wordpress/wp-content/uploads/2015/03/ATIXA-POSITION-STATEMENT-ON-PROSPER-ACT-Final.pdf>.

139. The provision allowing many types of delays was strongly opposed when it was first published in the Proposed Rule. Student survivors noted in their comments that many Title IX investigations are already exceedingly delayed, with some taking more than 180 days or even up to 519 days to resolve.<sup>193</sup> State attorneys general also pointed out that creating additional grounds for delay will only further “re-victimize” survivors “as the process drags on without resolution or relief.”<sup>194</sup>

**The Final Rule Removes Schools’ Discretion over Hearings and Imposes Sweeping Exclusionary Rules of Relevant Evidence and Testimony That Were Not Subject to Notice and Comment**

140. Although purporting to provide schools with flexibility in resolving Title IX cases, the Department has arbitrarily chosen elements of a full civil or criminal trial and imposed these strict requirements on schools. Section 106.45(b)(6)(i) will remove all discretion from colleges and graduate schools about whether to conduct a live hearing for sex-based harassment investigations, and will require parties and witnesses to submit to cross-examination by the other party’s “advisor of choice,” who may be an attorney, angry parent, close friend, teacher, coach, bitter ex-boyfriend of the complainant, or any other adult in a position of authority over the complainant or a witness. The Department asserts that cross-examination at a live hearing, in all circumstances involving sexual harassment at colleges at graduate schools, is necessary to defend the due process rights of respondents and serves each school’s duty to reach factually accurate determinations.<sup>195</sup> In conflating

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<sup>193</sup> See Letter from Know Your IX to Kenneth Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ., (Jan. 30, 2019), [https://actionnetwork.org/user\\_files/user\\_files/000/029/219/original/Know\\_Your\\_IX\\_Comment\\_on\\_Proposed\\_Title\\_IX\\_Rule\\_\(1\).pdf](https://actionnetwork.org/user_files/user_files/000/029/219/original/Know_Your_IX_Comment_on_Proposed_Title_IX_Rule_(1).pdf)

<sup>194</sup> Letter from 20 Attorneys General to Betsy DeVos, Sec’y, Dep’t of Educ., (July 19, 2017), <https://www.attorneygeneral.gov/taking-action/press-releases/20-ags-call-on-secretary-devos-to-maintain-protections-for-survivors-of-campus-sexual-assault>.

<sup>195</sup> 85 Fed. Reg. at 30,313–30,314



a criminal trial with a school adjudication, the Department makes a false equivalence between being found responsible for a civil rights violation at school and being found guilty of a crime for which one might face incarceration.

141. However the Final Rule goes well beyond requiring cross-examination and creates broad exclusionary rules and forbids basic procedural protections through new and bizarre provisions that were not subject to notice and comment. The evidentiary and procedural burdens imposed by the Final Rule will only serve to reduce the quantum of evidence that a school can consider under Title IX, discourage witnesses from participating in the Title IX process, impose complainant-hostile procedures that are not required in other student or employee misconduct investigations, and retraumatize victims.
142. Although the Final Rule does not require live cross-examination for children in preK-12 institutions, in part based on an acknowledgment that cross-examination is traumatizing and may not yield reliable results when minor children are involved, the Final Rule continues to require live cross-examination of minor children who are subject to sex-based harassment, if that misconduct occurs in the context of a post-secondary institution. Thus, for example, the Final Rule will require that minor children attending summer programs or athletic or academic programs at post-secondary institutions, high school children taking classes at higher educational facilities, and even toddlers in daycares at higher educational institutions, be forced to submit to live cross-examination if they complain of sexual abuse by an adult classmate, professor, or daycare provider. There is no rational reason why the location of the harassment or assault, rather than the age of the complainant, should mandate that direct, live cross-examination is required. The Department declined to include any exception to live cross-examination, even for minor children, though data shows that

hostile, leading questions are not effective methods of eliciting accurate testimony from children.<sup>196</sup>

143. The Final Rule also requires schools to disregard as evidence all oral and written statements of any party or witness who declines to testify at a live hearing or who declines to answer every single question they receive during cross-examination.<sup>197</sup> This provision, which permits no exceptions, represents a sweeping exclusion of relevant evidence, far above and beyond the Federal Rules of Evidence hearsay rules. Such mandatory evidentiary exclusions bear no relationship to the due process and truth-seeking goals that purport to animate them.

144. Moreover, this exclusionary rule appears for the first time in the Preamble to the Final Rule, and was not included in the Proposed Rule, which only stated that “statements” by witnesses who were not subject to cross-examination would not be considered. The Proposed Rule did not make clear that “statements” would include a broad swath of documents and evidence such as police reports, medical records, video tapes, public blog posts, social media posts, emails, text message and other relevant evidence, or that the Final

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<sup>196</sup> Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-Examination on Children’s Coached Reports*, 21 *Psychology, Pub. Policy, & L.* 10 (2015) (cross-examination led children to recant their initial true allegations of witnessing transgressive behavior and significantly reduced children’s testimonial accuracy for neutral events); Saskia Righarts et al., *Young Children’s Responses to Cross-Examination Style Questioning: The Effects of Delay and Subsequent Questioning*, 21(3) *Psychology, Crime & L.* 274 (2015) (cross-examination resulted in a “robust negative effect on children’s accuracy”; only 7% of children’s answers improved in accuracy); Fiona Jack and Rachel Zajac, *The Effect of Age and Reminders on Witnesses’ Responses to Cross-Examination-Style Questioning*, 3 *J. of Applied Research in Memory and Cognition* 1 (2014) (“adolescents’ accuracy was also significantly affected” by cross-examination-style questioning); Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-Examination on Children’s Reports of Neutral and Transgressive Events*, 19 *Legal & Crim. Psychology* 296 (2014) (cross-examination led children to provide significantly less accurate reports for neutral events and actually reduced the number of older children who provided truthful disclosures for transgressive events); Joyce Plotnikoff & Richard Woolfson, *‘Kicking and Screaming’: The Slow Road to Best Evidence*, in *Children and Cross-Examination: Time to Change the Rules?* 21, at 27 (John Spencer & Michael Lamb eds. 2012) (a hostile accusation that a child is lying “can cause a child to give inaccurate answers or to agree with the suggestion that they are lying simply to bring questioning to an end”).

<sup>197</sup> § 106.45(b)(6)(i).

Rule would require the consideration of this relevant evidence if the doctor, police officer, or other person who wrote down the information was unable or unwilling to testify at the live hearing. It could not have been plausible that the Department intended for such a broad exclusion of evidence, well beyond the Federal Rules of Evidence, when it put forth its Proposed Rule.

145. For example, under the sweeping exclusionary provisions of the Final Rule:

- If a complainant fails to answer a single question as part of lengthy cross-examination sessions, the school will be required to disregard all of the complainant's statements in the formal complaint, at the live hearing, and in all other written or oral evidence—even statements in a video or audio recording of the incident clearly indicating that the complainant said “no.”<sup>198</sup>
- If a police officer, nurse, or witness is unavailable for cross-examination, even if for a very justifiable reason that has no bearing on the truth of her or his testimony, the Final Rule will require that then none of that individual's previous written or oral statements can be considered as evidence by the school, even if recorded in a police report, medical record, or text or email message.<sup>199</sup>
- Even if a respondent admits to sex-based harassment in a guilty plea before a judge, the school will nonetheless be required to ignore that confession if the respondent refuses to be cross-examined at the school's live hearing.<sup>200</sup>

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<sup>198</sup> 85 Fed. Reg. at 30,346, 30,347, 30,349.

<sup>199</sup> *Id.* at 30,349.

<sup>200</sup> *Id.* at 30,344, 30,345.

- Even a blog post written by the respondent admitting to a sexual assault could not be considered as evidence if the respondent fails to testify, as the Department expressly declined to provide a hearsay exception for statements by a party that are against that party's interest.<sup>201</sup>

146. The Final Rule acknowledges that schools lack subpoena power, and further acknowledges that “witnesses also are not required to testify and may simply choose not to testify because the determination of responsibility usually does not directly impact, implicate or affect them.”<sup>202</sup> As a result, schools will frequently be forbidden from relying on relevant, probative evidence in sex-based harassment investigations as a result of the fact that witnesses choose not to testify. Thus, for example, if there is a video tape with a group of people admitting to a sexual assault, the Final Rule will permit a respondent to ask the other participants in the video to refuse to appear and fail to testify, thereby securing exclusion of the videotape. There is no provision in the Final Rules to prevent this type of deliberate conduct to exclude relevant evidence.

147. This prohibition on consideration of relevant, probative evidence is based in stereotypes of women and girls as not being credible on issues of sex-based harassment.<sup>203</sup>

148. The Final Rule also arbitrarily forbids schools from adopting well-established evidentiary rules that make in-school judicial proceedings workable, reliable, and equitable. For example, schools will be *prohibited* from excluding evidence or cross-examination

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 30,356.

<sup>203</sup> *Id.* at 30,348 (“Because party and witness statements so often raise credibility questions in the context of sexual harassment allegations, the decision-maker must consider only those statements that have benefited from the truth-seeking function of cross-examination”).

questions that are unduly prejudicial, misleading, or assume facts not in evidence.<sup>204</sup> This lack of procedural protections is particularly harmful because the Final Rule would exclude all testimony of a party or witness who failed to answer even a single question under cross-examination.<sup>205</sup> Importantly, the Final Rule permits cross-examination by people who are not lawyers and who may not be skilled in the art of asking clear questions. If a witness or party is unable to answer a single question, the entirety of their testimony will be excluded. This is a sweeping rule that has no rational basis.

149. Similarly, the Final Rule will require schools to apply an unusually narrow and confusing exclusion for prior sexual history evidence, which *prohibits* schools from excluding evidence or cross-examination questions that relate to a complainant’s “dating or romantic” history with other people who are not the respondent—as long as it does not explicitly refer to the complainant’s “sexual” history with other people.<sup>206</sup> The Final Rule therefore allows respondents to use sex stereotypes that shame and blame survivors for perceived promiscuity.

150. The Final Rule also allows for questioning of a complainant’s past “if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”<sup>207</sup> This means that a respondent can question the complainant about all past sexual encounters with the respondent in an attempt to discredit the complainant’s claim. Not only does this contradict directly all sexual

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<sup>204</sup> *Id.* at 30,248, 30,361.

<sup>205</sup> *Id.* at 30,349.

<sup>206</sup> *Id.* at 30,351; *see also id.* at 30,248 (explaining that schools may adopt additional evidentiary rules only if they fall “within these evidentiary parameters”).

<sup>207</sup> § 106.45(i)-(ii).

assault trainings teaching students that previous consent does not mean the person consented in any other situations, but it also contravenes protections afforded under federal and state rape shield laws.<sup>208</sup> These laws were passed to counteract precisely the presumption that once someone consents to sexual activity, they then are deemed to consent to any and all further activity. Victims and survivors of dating violence will be even less likely to seek justice because of this provision.

151. The Final Rule also ignores the potential harm to complainants who have to be subjected to hearing questions asked by the respondent's advisor *before* the decision-maker determines whether to exclude them. Having to listen to the respondent's advisor ask irrelevant questions that are aggressive, misleading, and/or based on rape myths and sex stereotypes, possibly over and over again before being excluded each time by the decision-maker, could be traumatic and triggering for the complainant.
152. Section 106.45(b)(6)(ii) permits elementary and secondary schools to use this direct, live cross-examination process, even though children and young adults are easily intimidated under hostile questioning by an adult.<sup>209</sup> In fact, data shows that children subject to cross-examination-style questioning are more likely to repudiate accurate statements and to reaffirm inaccurate ones.<sup>210</sup>

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<sup>208</sup> See e.g., Fed. R. Evid. 412 (prohibiting "evidence offered to prove that a victim engaged in other sexual behavior" or "evidence offered to prove a victim's sexual disposition"); Mass. R. Evid. 412 (prohibiting evidence "offered to prove that a victim engaged in other sexual behavior" or "evidence offered to prove a victim's sexual reputation").

<sup>209</sup> See, e.g., Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, Monographs of the Society for Research in Child Development, Serial no. 229, Vol. 57, No. 5, at 85 (1992).

<sup>210</sup> Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-Examination on Children's Coached Reports*, 21 *Psych., Pub. Policy & L.* 10 (2015).

153. The Final Rule forbids college and graduate schools from designing procedures for hearings that take into account the fact that the adversarial and contentious nature of cross-examination will further traumatize those who seek help through Title IX to address sex-based harassment and will discourage many students—both parties and witnesses—from participating in the Title IX grievance process. Over 900 mental health experts who specialize in trauma told the Department that subjecting a student survivor of sexual assault to cross-examination by their respondent’s advisor of choice was “almost guaranteed to aggravate their symptoms of post-traumatic stress,” and was “likely to cause serious to harm victims who complain and to deter even more victims from coming forward.”<sup>211</sup>
154. Contrary to the Department’s claims, the harm from this live, direct cross-examination requirement is not mitigated by the limited accommodations provided by the Final Rule. According to the president of the Association of Title IX Administrators, the requirement of live cross-examination by a respondent’s advisor of choice, “even with accommodations like questioning from a separate room[,] would lead to a 50 percent drop in the reporting of misconduct.”<sup>212</sup> After the Final Rule was published, the American Psychological Association expressed disappointment in the Final Rule, stating that it was “concerned that provisions in the final rule could lead to underreporting of sexual misconduct, revictimization and/or traumatization of all parties involved,” specifying that those provisions included those “creating an adversarial system of resolving complaints similar to legal proceedings.”<sup>213</sup> The APA added that the Final Rule “lacks the foundation of

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<sup>211</sup> Letter from 902 Mental Health Professionals and Trauma Specialists, *supra* note 109, at 4-5.

<sup>212</sup> Andrew Kreighbaum, *New Uncertainty on Title IX*, Inside Higher Education (Nov. 20, 2018).

<sup>213</sup> Press Release, Am. Psychological Ass’n, More Difficult to File Claims of Campus Sexual Assault Under New Education Dept. Title IX Rule (May 6, 2020), <https://www.apa.org/news/press/releases/2020/05/campus-sexual->

psychological research and science needed to address acts of sexual misconduct on college campuses.”<sup>214</sup>

155. The Final Rule’s flat prohibition of reliance on testimony by parties and witnesses who do not submit to live, direct cross-examination will require schools to disregard relevant evidence, even when such evidence bears other indicia of reliability.<sup>215</sup>
156. As Liberty University noted, this prohibition will force survivors to submit to a “Hobson’s choice” between being revictimized by their harasser or assailant’s advisor or having their testimony completely disregarded, and will prohibit schools from simply “factoring in the victim’s level of participation in [its] assessment of witness credibility.”<sup>216</sup>
157. In requiring institutions of higher education to conduct live, quasi-criminal trials with direct cross-examination to address formal complaints of sex-based harassment, when no such requirement exists for addressing any other form of student or employee misconduct at schools, including misconduct investigations over which the Department’s Office for Civil Rights has jurisdiction, the Final Rule reinforces the sex stereotype that students who report sexual assault and other forms of sex-based harassment—who are mostly women and girls—are more likely to lie than students who report physical assault or other types of harassment.
158. Neither the Constitution nor federal law requires cross-examination in public school proceedings and the majority of courts that have reached the issue have agreed that live

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assault?utm\_source=facebook&utm\_medium=social&utm\_campaign=apa-press-release&utm\_content=title-ix-statement-may6.

<sup>214</sup> *Id.*

<sup>215</sup> § 106.45(b)(6)(i).

<sup>216</sup> Letter from Liberty Univ. to Sec’y Elisabeth DeVos at 2 (Jan. 24, 2019), <http://www.liberty.edu/media/1617/2019/jan/Title-IX-Public-Comments.pdf>.



cross-examination is not required in public school disciplinary proceedings, as long as there is a meaningful opportunity to have questions posed by a hearing examiner or some other neutral third party. Indeed, the Department “acknowledges that constitutional due process does not require the specific procedures included in the § 106.45 grievance process.”<sup>217</sup> Requiring live cross-examination under its Title IX regulations is contrary to, and exceeds, Title IX’s mandate to prohibit sex discrimination in schools, including sex-based harassment.

159. Unsurprisingly, educational associations overwhelmingly opposed the live cross-examination provision when it was first announced in the Proposed Rule. For example, the Association of Independent Colleges and Universities (AICUM) noted that these requirements conflicted with well-settled Massachusetts and First Circuit law:

“Courts long have held that a fair process for students accused of violating institutional rules does not require such legalistic hearings, even at public institutions and even where sanctions can include expulsion. Requiring such hearings for private institutions would contravene a well-settled body of First Circuit and Massachusetts law that governs AICUM’s member institutions.”<sup>218</sup>

In addition, AICUM noted the Final Rule would be all but impossible for school officials to implement:

“[Requiring live cross-examination] will place institutional decision-makers in the difficult position of controlling overly zealous cross-examiners, making – and stating the basis for – evidentiary rulings in the moment (*a task not even required of judges*), and otherwise assuming a role akin to that of a federal or state court judge.”<sup>219</sup>

Furthermore, AICUM observed that well-established alternatives already exist both within and outside of the education context:

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<sup>217</sup> 85 Fed. Reg. at 30,053.

<sup>218</sup> Letter from 55 Massachusetts Institutions of Higher Education, *supra* note 91, at 4 (emphasis added).

<sup>219</sup> *Id.* at 9.

“Many private educational institutions, like most employers both public and private, have a long and successful history of using investigative models – without live hearings and cross-examination – to determine whether discrimination or harassment on the basis of race, national origin, age, disability, and other protected classifications has occurred. Such cases, like those involving discrimination or harassment on the basis of sex, frequently turn on the credibility of complainants, respondents, and other witnesses, and involve high stakes for all involved, including the termination of employment. *There is nothing inherently different about alleged discrimination or harassment on the basis of sex which requires a live hearing with cross-examination.*”<sup>220</sup>

160. Similarly, twenty-four private liberal arts institutions, many of which are in the First Circuit, commented that the live cross-examination provision “w[ould] most certainly turn classrooms into courtrooms” and force some schools to “hire judges or lawyers to oversee such proceedings.”<sup>221</sup>

161. The American Council on Education, on behalf of 61 associations representing thousands of public and private, two-and four-year institutions of higher education, also observed:

“It ... requires decision makers to provide an on-the-spot explanation for any decision to exclude a question or evidence—*something not even judges are required to do in a court of law*. To hold college administrators in student conduct proceedings to a standard that is higher than that required of judges in courts of law is *nonsensical*.”<sup>222</sup>

162. When the Final Rule was announced with further limitations on live cross-examination, the American Council on Education issued a follow-up statement that noted its dismay that the Final Rule “turns student disciplinary proceedings into legal tribunals that will tip the scales in favor of those who can afford to pay for high-priced legal pit bulls.”<sup>223</sup>

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<sup>220</sup> *Id.* at 5.

<sup>221</sup> Letter from Twenty-Four Liberal Arts Institutions, *supra* note 106, at 13-14.

<sup>222</sup> Letter from American Council on Education on behalf of 61 Higher Education Associations to Betsy DeVos, Sec’y, Dept. of Educ., at 16 (Jan. 30, 2019), <https://www.acenet.edu/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf> (emphasis added).

<sup>223</sup> Press Release, American Council on Education, Statement by ACE President Ted Mitchell on Final Title IX Regulations (May 6, 2020), <https://www.acenet.edu/News-Room/Pages/Statement-by-ACE-President-Ted-Mitchell-on-Final-Title-IX-Regulations.aspx>.

163. By requiring an extremely prescriptive and inflexible grievance process under § 106.45 for sex-based harassment complaints specifically, yet at the same time asserting that institutions need “flexibility” in responding to sex-based harassment to justify adopting the stringent deliberate indifference standard used in private litigation for money damages, the Department has acted arbitrarily and capriciously.
164. Sex-based harassment is already dramatically underreported. This underreporting, which significantly harms schools’ ability to create safe and inclusive learning environments, will only be exacerbated if any such reporting forces complainants into traumatic, burdensome, and unnecessary procedures. This selective requirement of live, direct cross-examination harms complainants and educational institutions and is contrary to the letter and purpose of Title IX to end discrimination in schools based on sex, including sex-based harassment.

**The Final Rule’s Standard of Proof Disparately Affects Victims of Sex-Based Harassment**

165. Section § 106.45(b)(1)(vii) permits “each recipient to select between one of two standards of evidence to use in resolving formal complaints” of sex-based harassment. Although the provision purports to give schools flexibility, in many cases it will require schools to use the more demanding “clear and convincing evidence” standard to resolve complaints of sex-based harassment, even if they use the equitable “preponderance of the evidence” standard for all other types of student misconduct. This is because the Final Rule requires schools to use the same standard of evidence for sex-based harassment complaints against students as for formal complaints against employees.
166. The Final Rule is a departure from at least twenty-five years of Department policy in both Republican and Democratic administrations requiring schools to use the preponderance

standard to determine whether sex-based harassment occurred.<sup>224</sup> It is also a departure from the use of the preponderance standard in campus sexual assault proceedings by the vast majority of educational institutions over the past two decades.<sup>225</sup>

167. The “clear and convincing evidence” standard, by definition, will tilt schools’ investigations of sex-based harassment in favor of respondents and against complainants, even though both parties have an equal interest and stake in obtaining an education.

168. In contrast, schools should be free to determine that the preponderance standard is the only standard consistent with Title IX’s “equitable” requirement because it places an equal burden on both parties, creates an equal risk of an erroneous decision, and “treat[s] all students with respect and fundamental fairness.”<sup>226</sup> As the Association for Title IX Administrators (ATIXA) put it:

“[A]ny standard higher than preponderance advantages those accused of sexual violence (mostly men) over those alleging sexual violence (mostly women). It makes it harder for women to prove they have been harmed by men. The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. *No other evidentiary standard is equitable.*”<sup>227</sup>

169. Similarly, the Leadership Conference on Civil and Human Rights, which represents more than 200 national civil and human rights organizations, stated in its comment opposing the

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<sup>224</sup> See, e.g., 2003 OCR Letter to Georgetown University, at 1; 1995 OCR letter to Evergreen College, at 8.

<sup>225</sup> Heather M. Karjane, et al., *Campus Sexual Assault: How America’s Institutions of Higher Education Respond* 120 (2002).

<sup>226</sup> 34 C.F.R. § 106.8(c). Chris Loschiavo & Jennifer L. Waller, Association for Student Conduct Administration, *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes*, <https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf>.

<sup>227</sup> ATIXA, *ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence* 4 (Feb. 17, 2017) (emphasis added).

Proposed Rule: “[T]he preponderance of the evidence standard is the only evidentiary standard that treats all students fairly and equally.”<sup>228</sup>

170. Moreover, the preponderance standard is the standard used by courts in civil rights litigation, including in Title IX litigation brought by *respondents* claiming they were wrongly suspended or expelled for sexual assault, and lawsuits alleging workplace discrimination in violation of Title VII of the 1964 Civil Rights Act.<sup>229</sup> The preponderance standard is also used in nearly all civil litigation, including in judicial proceedings to determine consequences far more serious than student discipline, such as enhancement of prison sentences and civil commitment of defendants acquitted by the insanity defense.<sup>230</sup> The Supreme Court has only required a standard of proof more burdensome than the preponderance standard in a narrow handful of civil cases with consequences far more severe than suspension or expulsion from school—such as deportation, civil commitment for mental illness, and juvenile delinquency with the possibility of institutional confinement.<sup>231</sup>
171. Yet, because collective bargaining agreements with employees of schools often require a school to use the clear and convincing standard in disciplining employees, some schools will be required to apply this standard of evidence to all complaints of sex-based harassment against both students and employees.

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<sup>228</sup> Letter from Leadership Conference on Civil and Human Rights at 7.

<sup>229</sup> Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 *BYU Educ. & L. J.* 143 (2013).

<sup>230</sup> *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986); *Jones v. United States*, 463 U.S. 354, 368 (1983).

<sup>231</sup> *Addington v. Texas*, 441 U.S. 418, 432 (1979); *In re Winship*, 397 U.S. 358, 367-68 (1970); *Woodby v. INS*, 385 U.S. 276, 286 (1966).

172. By allowing—and in some cases, requiring—schools to impose higher evidentiary standards in Title IX proceedings than in other student or staff misconduct proceedings, the Department targets those who have experienced sex-based harassment for disparate treatment.

173. This double standard relies on and reinforces the sex stereotype that students who report sexual assault and other forms of sex-based harassment—who are mostly women and girls—are more likely to lie than students who report physical assault or other types of harassment.

**The Final Rule Includes a Provision Inviting Retaliation Against Complainants, and the Proposed Rule Gave No Notice This Harmful Provision Was Being Considered.**

174. The Final Rule includes provisions governing retaliation, for the first time in the Department’s multi-year rulemaking. These provisions are inconsistent with earlier Department guidance and Supreme Court precedent, are likely to cause confusion for schools, and may ultimately undermine retaliation protections for survivors exercising their rights under Title IX.<sup>232</sup>

175. In 2005, the Supreme Court held that retaliation falls within Title IX’s prohibition of intentional discrimination on the basis of sex.<sup>233</sup> The Court stated that “[r]eporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX’s enforcement scheme would unravel.”<sup>234</sup>

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<sup>232</sup> § 106.71.

<sup>233</sup> *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

<sup>234</sup> *Id.* at 180.

176. Current and rescinded Department guidance addressed retaliation under Title IX, also focusing on protections for individuals reporting, speaking out against, or opposing sex discrimination. Those guidances recognized that complainants and witnesses often do not come forward because they are scared about their safety, public shaming, or counter-complaints or defamation lawsuits. Thus, the 2001 Guidance states that “a school should take steps to prevent any further harassment and to prevent any retaliation against the student who made the complaint (or was the subject of the harassment), against the person who filed a complaint on behalf of a student, or against those who provided information as witnesses.”<sup>235</sup> The 2011 and 2014 Guidances similarly emphasized protections for retaliation against the complainant or witnesses by the respondent or their associates.<sup>236</sup>
177. However, under Section 106.71(b)(1) of the Final Rule, the Department qualifies—and limits—retaliation protections for complainants, stating that “the exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.”
178. The Department claims it added this section to the Final Rule to quell “concerns of commenters who feared that speech protected under the First Amendment may be affected, if a recipient applies an anti-retaliation provision in an erroneous manner. . . [by] clarify[ing] that *the Department may not require a recipient to restrict rights protected under the First Amendment to prohibit retaliation.*”<sup>237</sup>
179. This section is inextricably tied to Section 106.45(b)(5)(iii), which provides that “[w]hen investigating a formal complaint and throughout the grievance process, a recipient must . . .

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<sup>235</sup> 2001 Guidance at 17.

<sup>236</sup> 2014 Guidance at 43; 2011 Guidance at 16.

<sup>237</sup> 85 Fed. Reg. at 30,537.

[n]ot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.”

180. By limiting the ability of institutions to place reasonable parameters around what complainants and respondents can and cannot say regarding ongoing proceedings, the Department compromises the integrity of the investigation and creates a clear disincentive to students considering raising formal complaints.
181. Although there are situations in which a student has a reasonable need to share allegations, such as obtaining legal advice, seeking counseling or emotional support, conducting an investigation, or identifying others harmed by a harassing behavior, the Department’s prohibition on any restriction on discussion of the allegations goes far beyond such situations.
182. Students will undoubtedly be swayed from filing formal complaints knowing respondents are effectively free to speak and write about anything and everything related to an investigation with impunity. The Final Rule thus provides harassers with clear incentives to undertake intimidation campaigns given that in the absence of a formal complaint, the Final Rule also prohibits schools from disciplining a harasser in any way.
183. Although the Department claims that “that the retaliation provision in these final regulations provides clearer, more robust protections than the recommendations in any of the Department’s past guidance documents,”<sup>238</sup> it instead does the opposite. This provision creates confusion because it is inconsistent with Supreme Court precedent in addressing retaliation and limits when schools can address retaliation against complainants and

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<sup>238</sup> *Id.*



witnesses. Given the totality of the Department’s changes to Title IX enforcement, which provide greater protections for respondents over complainants, schools will be less likely to address retaliatory intimidation or harassment campaigns from respondents and their friends out of fear of violating their First Amendment rights.

184. In addition, § 106.71(b)(2) allows schools to discipline survivors for making a “materially false statement in bad faith” without it being considered retaliation under Title IX, as long as the decision to discipline is not based solely on the outcome of an investigation.

185. The threat of discipline if a school determines an accusation is “false” will deter many survivors from coming forward to ask for help or initiate an investigation. This provision will especially harm women and girls of color (particularly Black girls who already face discriminatory discipline<sup>239</sup>), pregnant and parenting students, LGBTQ students, and students with disabilities, who are already more likely to be disbelieved and blamed due to rape myths and stereotypes that label them as more promiscuous, aggressive, and/or less credible.

186. The Department provided no indication in the Proposed Rule that it would create new Title IX provisions on retaliation and did not give the public adequate notice and opportunity to comment.

**The Final Rule Purports to Preempt State and Local Laws That Provide Greater Protections Against Sex-Based Harassment, and the Proposed Rule Gave No Notice That This Harmful Provision Was Being Considered.**

187. The Final Rule also includes for the first time a provision on preemption.<sup>240</sup>

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<sup>239</sup> U.S. Dep’t of Educ., Office for Civil Rights, 2015-16 Civil Rights Data Collection: School Climate and Safety Report (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

<sup>240</sup> § 106.6(h).

188. Under Section 106.6(h), the Final Rule preempts any state or local law to the extent that there is a conflict. This means that even if schools are required by state or local law to provide stronger protections for victims of sex-based harassment, they will be prohibited from doing so to the extent that such protections conflict with the Final Rule.
189. For example, state and local laws that require schools to investigate complaints of sex-based harassment that: (i) fall short of the Final Rule’s narrow definition of harassment, (ii) occur outside of a school program or activity or in a school program or activity outside of the United States, or (iii) are filed by a complainant who is no longer participating in the school’s program or activity are purportedly preempted by the Final Rule.
190. Even if a complainant is able to survive the Final Rule’s stringent dismissal rules and is able to initiate a Title IX investigation, their school will be prohibited from following state or local laws providing certain types of protections in investigation procedures. For example, schools will be prohibited from: (i) making no presumptions about the respondent’s responsibility, (ii) allowing parties in higher education to ask questions of each other through a neutral third party, (iii) allowing parties and witnesses in postsecondary proceedings to submit written or oral evidence without being subjected to cross-examination at a live hearing, (iv) excluding cross-examination questions that are misleading or unduly prejudicial or that relate to a complainant’s “dating or romantic” history, or (v) applying a preponderance of the evidence standard in student investigations where staff investigations are required by a collective bargaining agreement to use a more burdensome standard.
191. By creating a ceiling instead of a floor on what Title IX protections are available to students and employees against sex-based harassment, the Final Rule radically departs from the

longstanding interpretations of Title IX and other federal civil rights laws, as providing merely a floor upon which states and local governments are able to create additional protections.

192. The Department provided no indication that it would create a new Title IX provision on preemption and did not give the public, including schools, states, and local governments, adequate notice and opportunity to comment.

**THE CHALLENGED PROVISIONS WILL FRUSTRATE PLAINTIFFS' MISSIONS  
AND FORCE THE DIVERSION OF THEIR RESOURCES**

193. **VRLC** provides legal services to help restore victims' lives after experiencing sex-based violence, including sexual assault survivors who have experienced domestic violence, dating violence, and stalking. **VRLC's** services ensure that survivors can stay in school; protect their privileged and confidential mental health, medical and education records; preserve their employment; maintain their safe housing; secure their immigration status; and swiftly access victim compensation and other benefits. As part of its work, **VRLC** provides legal services and/or facilitates the provision of legal services to students who have experienced sexual violence. With almost 50% of **VRLC's** clients under the age of 24, a substantial portion of its practice is providing education-related legal consultation and representation. **VRLC** attorneys represent victims to communicate effectively with school administrators, acquire interim measures to secure their education while investigations are pending, prepare for and attend disciplinary hearings, file appeals, and if necessary, file complaints with OCR.
194. **VRLC** brings this action on its own behalf because, as detailed below, the Final Rule concretely frustrates its mission and purpose by (among other things) (i) requiring

resource-intensive efforts that impede its daily operations, (ii) impairing its mission of providing legal assistance to survivors of sex-based harassment, (iii) limiting the efficacy of available avenues of redress for the population it seeks to serve, and (iv) otherwise directly conflicting with, impairing, and frustrating VRLC's organizational mission and priorities.

195. The Final Rule also requires VRLC to divert its resources to combat the harmful effects of the Rule. For example, VRLC's staff attorneys have spent additional time advising survivors who anticipate their case will be dismissed if they wait to return to campus after the implementation of the Final Rule, and VRLC's staff attorneys have had to attend additional trainings provided by other organizations to understand the applicability of the rules. VRLC has also had to divert staff resources to update its public-facing materials, including training curricula and online guides. In addition, VRLC has specifically created materials to aid preK-12 student survivors and parents, school districts and education attorneys in maintaining as many trauma-informed practices as possible under the Final Rule.

196. VRLC has also had to increase the technical assistance it provides to campus administrators and education attorneys, including increasing the number of trainings to Massachusetts law enforcement, SARTs, SANE, and advocates on the Final Rule about the impact on campus sexual assault victims, and spending more time advising attorneys regarding the impact of the Final Rule on their cases. VRLC has also diverted staff resources on existing collaborations with higher education institutions to help them modify existing policies to comply with the Final Rule (this is in addition to VRLC staff time spent on the initial review of policies).

197. As a result of the Final Rule, VRLC anticipates it will take double the amount of preparation time for staff attorneys to prepare for an investigation that includes a lengthy live hearing and cross-examination, thus reducing the overall number of survivors VRLC can represent.

198. After the Department's issued interim guidance revising Title IX's sex-based harassment policy in 2017, VRLC saw immediate and detrimental impacts to its mission and operational activities. VRLC is confident it will experience the same, if not more drastic, consequences from the Department's haphazard changes. For example, as a result of the 2017 Guidance, victims of sexual assault and other sex-based harassment were less willing to report their experiences to school authorities, impairing VRLC's ability to achieve its mission. VRLC saw an immediate chilling effect evidenced by a decline in the number of victims willing to pursue their school's Title IX complaint resolution process. The Final Rule will likewise make it less likely for VRLC clients to engage in the campus process due to, among other particulars, the inappropriately narrow definition of "sexual harassment," the requirement of live hearings and direct cross-examination of victims, and an inappropriate and unequal standard of evidence that unfairly burdens survivors and makes findings of responsibility for sexual assault and other sex-based harassment more onerous. VRLC has seen that survivors are considering a "now or never" approach to bringing a complaint, exacerbated by either not being close to on-campus counseling or by hiding information from family members who do not know about their experience of sexual violence. Accordingly, there will inevitably be a decline in the number of victims willing to file complaints with the Department of Education alleging violations of Title IX by their schools and/or cooperate with the Department of Justice on pending investigations. Such

declines in reporting and hesitance to participate in the grievance process either through educational institutions or at the Department of Education directly threaten and frustrate VRLC's mission and purpose.

199. In addition to chilling and discouraging victims of sex-based harassment from seeking justice under Title IX, whether through their school or the Department of Education, the Final Rule will make it difficult for VRLC to provide appropriate legal counsel to its clients, leading to further reductions in reporting.
200. In cases where an individual proceeds with a complaint to their school, VRLC's mission is frustrated given the nature of the Final Rule. In particular, the Final Rule makes it more difficult for VRLC to accomplish its mission of obtaining justice for survivors of sex-based harassment because it makes beneficial outcomes less likely and because even where those outcomes remain available, success will take more time and effort. In addition, because the Final Rule allows schools to resolve reports of sex-based harassment without any clear timeframe and even delay investigations for an unspecified period when there is an ongoing parallel criminal investigation, educational institutions are unlikely to respond promptly to VRLC's clients' complaints. This trend requires VRLC to spend additional staff time and resources that it has not had in the past in attempting to reach school officials concerning its clients' complaints.
201. VRLC has also had to devote staff time to reviewing and understanding the Final Rule in order to advise clients in ongoing campus investigations and advocate effectively on their behalf. This use of time has decreased the amount of time available to provide legal services, including work on ongoing litigation.

202. **ERA** furthers its mission through engaging in public education efforts as well as policy reform and legislative advocacy; providing free legal information and counseling; and litigating cases involving issues of gender discrimination in employment and education at all stages, from the administrative process to the United States Supreme Court. ERA has a long history of pursuing gender justice and equal opportunity for women and girls in education and has litigated a number of important precedent-setting cases, including *Doe v. Petaluma City School District*, 54 F.3d 1447 (9th Cir. 1995), which established that a school can be sued for sex discrimination under Title IX when it fails to address student-on-student sex-based harassment, and *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957 (2010), which established a university violated Title IX by reducing collegiate athletic opportunities for all women. ERA has participated as *amicus curiae* in scores of state and federal cases involving the interpretation and application of procedural rules and civil rights laws that have an impact on access to justice and economic opportunity for women and girls. Through its Advice and Counseling program, ERA also provides free information and assists individuals on matters relating to sex discrimination at work and in school. As part of its mission, ERA counsels and represents individuals who have been victims of sexual assault and other sex-based harassment in matters pursuant to Title IX.
203. ERA brings this action on its own behalf because the Final Rule (i) requires resource-intensive efforts that divert resources from its daily operations; (ii) limits the efficacy of available avenues of redress to ERA's clients and others it serves; (iii) increases the costs ERA bears in its work on behalf of student victims of sex-based harassment; and (iv) otherwise directly conflicts with, impairs, and frustrates ERA's organizational mission and programmatic priorities.

204. Since the issuance of this Final Rule, ERA has diverted significant staff resources to reading, learning, analyzing, and understanding the changes to the Title IX regulations.
205. ERA has begun updating both internal and public-facing resources to reflect the changes from the Final Rule. These resources include training materials, advocacy guides, and know-your-rights guidance. ERA has also had to prepare and modify legislative trainings in California to include education regarding the effects of the Final Rule, thereby diverting resources away from other educational efforts and frustrating ERA's mission.
206. ERA has had to expand its Pro Bono Attorney Network to recruit more attorneys to address and mitigate the harms of the Final Rule to victims of sex-based harassment. As a result, ERA has been forced to overhaul its training program to educate new Pro Bono attorneys and retrain existing attorneys on the impact of the Final Rule. ERA also anticipates that it will be more difficult to recruit pro bono attorneys to represent complainant students in Title IX proceedings with their schools, because—regardless of whether the complainants are eligible for monetary compensation—there will be a long and difficult road for students to vindicate their civil rights.
207. In addition to training its own staff attorneys, ERA has also had to increase and modify the technical assistance it provides to educational institutions, student organizations, and attorneys. Prior to the Final Rule, ERA provided consulting services and could take on new work. Now, ERA is fielding requests to educate and inform on the impact of the Final Rule, rather than advocate for its clients.
208. ERA has diverted staff resources from existing collaborations with preK-12 and postsecondary institutions to help modify schools' existing policies to comply with the Final Rule. ERA is currently engaged in two large-scale, multi-year programmatic



collaborations, one with the Sacramento Unified School District that serves over 40,000 preK-12 students, and another with a post-graduate research institution with locations in two states. In each collaboration, ERA works with the institution to design and implement improved Title IX policies and trainings and to conduct climate surveys to assess improvements. ERA recently added COVID-19 guidance to this portfolio. The goal of this programmatic work is to improve protections for students against sex-based harassment. For one of these initiatives, ERA had completed its intensive policy and training work and was ready to hand off the implementation to the educators and administrators at the institution, while remaining available in an advisory capacity. Due to the Final Rule, however, ERA has been forced to abandon the current drafts of Title IX policies and training materials. Senior ERA staff will have to redo work that was near completion to account for the numerous Final Rule changes, setting the programmatic work back by nearly eighteen months in the case of the collaboration with the research institute. Not only has the Final Rule required ERA to divert resources away from other aspects of its programmatic work with these institutions, it has frustrated the mission of these collaborative partnerships by prohibiting ERA from engaging in the additional aspects of the programmatic collaboration that directly benefit students, including promoting women in the academic sciences environment, changing reward incentives and disciplinary structures, incorporating student involvement, and analyzing results of climate surveys and advising these institutions on how to respond.

209. ERA will undoubtedly expend additional resources over and above what it otherwise would to counteract the effects of the Final Rule. For example, ERA will have no choice but to continue diverting staff time and resources away from core programmatic activities, such

as litigating employment-related civil rights enforcement cases and cases involving Title IX enforcement that do not relate to sex-based harassment in schools, to step up its efforts to assist student victims of sex-based harassment in obtaining redress. Specifically, since the issuance of the Final Rule, when faced with questions about resource allocation and staffing, ERA has been forced to prioritize Title IX services. ERA has been forced to completely shut down its employment advice and counseling program reserved for Title VII complaints in order to field inquiries regarding the Final Rule. ERA has had to limit the program to Title IX matters. Where ERA formerly pursued five or six employment-discrimination cases each year, it now may only have the resources to pursue two. Additionally, of ERA's six attorneys, three now do Title IX work full time, a significant increase over the past two years, and ERA has recently added a fellow to focus solely on Title IX matters for LGBTQ students.

210. **Legal Voice** furthers its mission by participating in pro bono litigation services, legislative advocacy, and the provision of legal information and education. Legal Voice focuses on impact litigation and in particular works to support the communities most impacted by sex-based discrimination: women of color, LGBTQ and gender-nonconforming individuals, and immigrants. Legal Voice has served nearly 300 clients since 1978 through both direct representation and amicus support.
211. Legal Voice has provided pro bono representation in eight cases specifically related to Title IX in preK-12 schools and higher education. Two of those cases involved direct representation of sexual assault survivors.
212. As legislative advocates, Legal Voice has worked with Washington state legislators to codify additional protections for student survivors of sexual assault. For example, in the

2019 legislative session, Legal Voice successfully lobbied to ease the requirements to obtain a sexual assault protection order. In addition, Legal Voice crafted a bill that would have created a joint legislative task force on sexual violence in higher education, including Title IX protections and compliance. In the 2020 legislative session, Legal Voice successfully led efforts on a bill that imposes additional requirements on postsecondary educational institutions in their investigations of sexual misconduct. For each of these initiatives, Legal Voice provided testimony, drafted legislative language, and organized stakeholders.

213. Legal Voice brings this action on its own behalf because the Final Rule (i) requires resource-intensive efforts that divert resources from its daily operations; (ii) limits the efficacy of available avenues of redress to Legal Voice's clients and others it serves; (iii) increases the costs Legal Voice bears in its work on behalf of student victims of sex-based harassment; and (iv) otherwise directly conflicts with, impairs, and frustrates Legal Voice's organizational mission and programmatic priorities.
214. Legal Voice has had to divert time and resources to reviewing the Final Rule and updating its Know Your Rights materials for Washington, Idaho and Alaska. As a result, Legal Voice has been hindered in its ability to provide legal advice, technical assistance, and representation to student victims of sex-based harassment. This time would have otherwise been spent working on existing matters and ongoing litigation.
215. Legal Voice also expects to divert resources to providing increased technical assistance and education to students and educational institutions regarding the applicability of the Final Rule to pending and future Title IX cases, given the uncertainty in this area. Legal Voice also expects to divert additional resources to legislative advocacy to codifying

protections under Title IX at the state level, because in the previous year, changes were contemplated but stakeholders decided to wait until the Final Rule was issued. As a result, Legal Voice will have fewer resources to devote to litigation because of its staffing capacity.

216. CAASE furthers its mission by creating and facilitating educational curricula to empower high-school students to end sex-based harassment in the Chicagoland area, as well as Illinois-wide and nation-wide.
217. CAASE furthers its mission by advocating for systemic reforms that provide support for and expand options for survivors of sexual harm and that provide for appropriate accountability for offenders -- both individual and institutional. CAASE does this via legislative actions, community engagement and education, coalition-building, and participating in strategic criminal legal system convenings.
218. CAASE furthers its mission by providing legal representation for survivors of sex-based harassment in civil litigation, as victims' rights representatives in the criminal justice system, and as advocates for public policies that increase the efficacy of criminal and civil laws pertaining to sex-based harassment. Among its cases, CAASE represents students over the age of 13 who have survived sex-based harassment and need support to continue their education, including navigating the Title IX complaint process.
219. CAASE furthers its mission through community engagement by centering communities most impacted by sexual harm. CAASE provides platforms for survivors to share their experiences and expertise which shapes our work, educates the public, and raises awareness.

220. CAASE brings this action because the final rule (i) requires resource-intensive efforts that divert resources from CAASE's daily operations; (ii) limits the efficacy of available avenues of redress to CAASE's student clients; (iii) otherwise directly conflicts with, impairs, and frustrates CAASE's organizational mission and programmatic priorities; and (iv) likely conflicts with case law and impairs CAASE's ability to advise its clients.
221. Since the issuance of the Final Rule, members of CAASE's Legal Department have had to shift much of their focus away from directly representing clients, because they are required to assess the potential impact of the Final Rule on existing and potential future cases. They have also been forced to forgo important projects to devote time to preparing and giving Know Your Rights presentations and drafting collateral materials to spread awareness of these issues. The members of the Legal Department have had to dedicate time to plan for how best to support and represent their clients in their cases once schools have modified their policies, and they will need to continue to spend significant time doing research and communicating with schools in order to stay up to date on when and in what ways they are making changes in order to be in accordance with the Final Rule.
222. CAASE's Legal, Community Engagement, and Policy departments have also had to delay the development of a Restorative Justice program because the necessary resources are currently tied up in these efforts to fully understand and be prepared to provide expert assistance regarding the Title IX regulations.
223. CAASE's Community Engagement and Policy departments have also had to delay the development of a project designed to bring gender justice advocates and criminal justice reform advocates together to discuss shared goals and to build solidarity and community.

224. Since the issuance of the final rule, CAASE's Community Engagement Department has had to shift focus away from building a survivor advisory board and building connections with individuals who have experienced sexual violence on the southside of Chicago, to building relationships and connections with student survivors. The members of the Community Engagement Department have had to plan and develop new outreach and collateral as a result of the new regulations, shifting time away from other opportunities and projects. They have had to spend time arranging and attending meetings with school employees and students in order to discuss what the new regulations mean and how both students and staff can respond.
225. CAASE's Policy Department has spent a substantial amount of time analyzing the new rule and comparing it to previous guidance, current laws in Illinois, and current bills in formation in Illinois. The members of this department have dedicated significant time and resources to sorting out potential and confirmed conflicts of law, trying to determine what schools will do in response to the new regulations, and updating documents and written collateral. They have had to shift focus from passing other bills related to crime victims' rights, rape kit expansion, workplace harassment and violence, and the sex offender registry in order to work on state-specific legislation to ensure the new regulations do not undermine the ability of student victims of sex-based harassment to maintain or achieve access to education. The Policy Department has also pulled back from nearly all workplace advocacy efforts, among other projects, in order to focus on and address this issue. Because these preemption issues were not explained in the Proposed Rule, CAASE has been forced to assess these issues on short notice after the publication of the Final Rule.

226. The members of CAASE's Prevention Department have spent an enormous amount of time reading and analyzing the regulations and associated literature. In order to do that, they have had to divert time from supporting and responding to the abrupt shift towards digital e-learning resulting from the global pandemic. They have also spent time fielding questions from faculty from higher education institutions about the regulations and how to put pressure on their school administrators to respond appropriately.
227. CAASE's Communications Department has had to divert time away from its normal operations in order to take meetings with other departments, develop messaging around this issue, and ensure reporters are educated about the distinctions between the national impact and the local, Illinois-specific impact of these regulations. This includes: spending time writing content, keeping media contacts informed about issues and preparing relevant CAASE staff for story-specific interviews, and developing/implementing a social media campaign about the changes focused on target populations. The regulations have also delayed the executions of other planned projects, including the re-launch of CAASE.org.
228. All departments at CAASE will undoubtedly have no choice but to continue to expend substantial resources in order to counteract the effects of the new regulations at the expense of their other projects, activities, and responsibilities.
229. In addition to diverting Plaintiffs' resources and frustrating Plaintiffs' missions, the Department's discriminatory motivation underlying the Final Rule also harms women and girls—including Plaintiffs' clients—who are hindered in bringing their own claims to challenge the Final Rule.

## CLAIMS FOR RELIEF

### COUNT ONE

#### *Administrative Procedure Act – Not in Accordance with Law*

230. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.
231. Under the APA, a court must “set aside agency action” that is “not in accordance with law.”<sup>241</sup>
232. Congress crafted Title IX’s prohibition on sex discrimination in education programs and activities receiving federal financial assistance to promote equal educational access for girls and women. Sexual harassment is recognized as a barrier to such access, and sexual assault is the most extreme form of sexual harassment. The Department of Education—the administrative agency tasked with enforcement of Title IX’s civil rights provisions—is responsible for ensuring that schools that receive federal funding are acting to prevent and address sexual harassment through prompt and effective remedial measures.
233. Until 2017, the Department of Education recognized that sex-based harassment can limit or deny students’ ability to participate in or benefit from educational opportunities, and the Department’s Title IX regulations and guidance documents represented good-faith attempts to reduce sex-based harassment in educational institutions. The Final Rule represents a complete departure from established practice and procedure regulating educational institutions. It will undermine Title IX’s unequivocal and long-standing purpose to prevent and redress sex discrimination in schools, by eliminating protections for victims of sex-based harassment, imposing procedural requirements that will

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<sup>241</sup> 5 U.S.C. § 706(2)(A).



discourage victims from reporting, and permitting schools to respond in ways that will re-traumatize victims and make justice more elusive. The Final Rule is contrary to the text and purpose of Title IX, the Department’s own regulations, and Supreme Court precedent.

234. Sections 106.30, 106.44(a), 106.45(b)(1)(iv), 106.45(b)(1)(v), 106.45(b)(1)(vii), 106.45(b)(3)(i), 106.45(b)(3)(ii), 106.45(b)(5)(iii), 106.45(b)(6)(i), 106.45(b)(6)(ii), 106.6(h), 106.71(b)(1), and 106.71(b)(2) of the Final Rule are therefore “not in accordance with law” under the APA and should be vacated.

## COUNT TWO

### *Administrative Procedure Act – Arbitrary and Capricious*

235. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

236. The APA provides that a court must “hold unlawful and set aside” agency action that is “arbitrary, capricious, [or] an abuse of discretion.”<sup>242</sup> Under *State Farm*, the touchstone of “arbitrary and capricious” review under the APA is “reasoned decisionmaking.”<sup>243</sup>

237. The Department’s justifications for its decision runs counter to the evidence before the agency, relies on factors Congress did not intend for the agency to consider, is inconsistent with federal law and Supreme Court precedent, and disregards material facts and evidence.

238. The Department’s release of the Final Rule of over 2000 pages in the midst of the COVID-19 pandemic in May, 2020, with a compliance requirement for educational institutions set for August 14, 2020, is contrary to established practice and clearly unreasonable.<sup>244</sup> There

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<sup>242</sup> 5 U.S.C. § 706(2)(A).

<sup>243</sup> *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>244</sup> By contrast, when the Campus SaVE Act was signed into law in March 2013, it provided one year for its effective date, and the implementing regulations were effective on July 1, 2015. This was a reasonable timeframe for recipient schools to create and implement their own policies in the most effective manner.

is no emergency requiring schools to suddenly depart from protecting students from sexual assault.

239. The Department has therefore failed to provide a reasoned explanation for its decisions and Sections 106.30, 106.44(a), 106.45(b)(1)(iv), 106.45(b)(1)(v), 106.45(b)(1)(vii), 106.45(b)(3)(i), 106.45(b)(3)(ii), 106.45(b)(5)(iii), 106.45(b)(6)(i), 106.45(b)(6)(ii), 106.6(h), 106.71(b)(1), and 106.71(b)(2) of the Final Rule are therefore arbitrary and capricious.<sup>245</sup>

### **COUNT THREE**

#### *Administrative Procedure Act – Excess of Statutory Jurisdiction*

240. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.
241. The APA provides that a reviewing court shall set aside any agency action “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”<sup>246</sup>
242. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>247</sup> Courts and federal agencies have long recognized that sexual harassment and other sex-based harassment is sex discrimination, thereby requiring recipients to take steps to ensure that victims are not excluded from participating in, be denied benefits of, or subjected to discrimination in educational programs or activities because of experiencing such harassment. The Department “is authorized and directed to effectuate the provisions of

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<sup>245</sup> *State Farm*, 463 U.S. at 43.

<sup>246</sup> 5 U.S.C. § 706(2)(C).

<sup>247</sup> 20 U.S.C. § 1681(a).

section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute.”<sup>248</sup>

243. It exceeds Title IX’s nondiscrimination mandate for the Department to issue regulations that require schools *not* to protect students against sex discrimination. Yet the Final Rule requires schools to dismiss certain types of complaints of sex discrimination, thereby requiring schools to violate students’ and employees’ rights under Title IX. It further exceeds Title IX’s nondiscrimination mandate to include respondents in the prohibition of sex discrimination in a statute designed to protect the civil rights of complainants.
244. Nor is the Department authorized under Title IX to issue regulations that provide special protections to respondents in sex-based harassment investigations that are inequitable and unfair to victims of such misconduct. This will discourage victims of sex-based harassment from coming forward, thereby harming schools’ ability to create safe and inclusive learning environments and protect students from sex discrimination. The selective protections for respondents and burdensome procedures for victims is contrary to the letter and purpose of Title IX.
245. Furthermore, the Clery Act supersedes the Department’s Final Rule on key provisions concerning victims’ rights and conduct proceedings. Because Congress has spoken on these statutory interpretations, to the extent the Final Rule is inconsistent with the Clery Act, the Final Rule must be vacated.

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<sup>248</sup> 20 U.S.C. § 1682.

246. Therefore, the Department has failed to effectuate Title IX’s anti-discrimination mandate and has “gone beyond what Congress has permitted it to do.”<sup>249</sup> Thus, sections 106.30, 106.45(b)(1)(iv), 106.45(b)(3), 106.45(b)(6)(i), 106.71(b)(1), and 106.71(b)(2) of the Final Rule are in excess of statutory authority and must be vacated.

#### **COUNT FOUR**

##### *Administrative Procedure Act – Without Observance of Procedure Required by Law*

247. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

248. The APA requires that a notice of proposed rulemaking contain “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>250</sup> Courts “have generally interpreted this to mean that the final rule [an] agency adopts must be a logical outgrowth of the rule proposed.”<sup>251</sup> “A final rule is a logical outgrowth of the proposed rule only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.”<sup>252</sup>

249. The Final Rule contains several provisions that were not identified, described, or otherwise included in the Proposed Rule, including the following: (i) the requirement that recipients dismiss complaints if the victim graduated, transferred, or dropped out; (ii) the provision allowing schools to dismiss complaints if the respondent graduated, transferred, or retired;

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<sup>249</sup> *City of Arlington v. FCC*, 569 U.S. 290, 298 (2013).

<sup>250</sup> 5 U.S.C. § 553(b)(3).

<sup>251</sup> *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (internal citations omitted).

<sup>252</sup> *Daimler Trucks North America LLC, v. Evtl. Prot. Agency*, 737 F.3d 95, 100 (D.C. Cir. 2013) (citations omitted).

(iii) the sweeping exclusion of relevant evidence and testimony; (iv) the retaliation provision and; (v) the preemption provision. The Department “did not propose, and offered no indicating that it was contemplating” these provisions.<sup>253</sup> Based on the Proposed Rule, the public could not have anticipated the need to comment on these topics. The Department therefore failed to provide adequate notice and opportunity to comment on the proposed rulemaking, in violation of the APA, 5 U.S.C. § 706(2)(D). The Final Rule must be vacated.

250. Additionally, the Final Rule’s regulatory impact analysis did not sufficiently justify the costs and benefits of the rulemaking, thus evading the APA’s critical procedural protections that ensure agency regulations are warranted and evidence-based.

251. Sections 106.30, 106.45(b)(3)(ii), 106.45(b)(6)(i), 106.6(h), and 106.71(b)(1) of the Final Rule therefore violate the APA because they were promulgated without observance of procedure required by law.

## **COUNT FIVE**

### *Violation of the Equal Protection Guarantee of the Fifth Amendment*

252. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

253. The Due Process Clause of the Fifth Amendment to the United States Constitution forbids the federal government from denying equal protection of the laws, including by discriminating on the basis of sex.

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<sup>253</sup> *Id.* at 100.

254. In issuing the Final Rule, Defendants were motivated, at least in part, by their discriminatory—and baseless—gender stereotype that many women and girls lack credibility with regard to sex-based harassment. This stereotype includes the perception that women and girls who report sexual harassment misunderstood a harmless romantic advance and that those who report sexual violence often are either lying or have regret about a consensual sexual encounter. The Department’s decision to single out sex-based harassment for uniquely burdensome and inequitable procedures is evidence of their intent to discriminate based on sex.
255. The statements and actions of Secretary DeVos and others in the administration, as well as the circumstances under which the Final Rule was issued, further demonstrate that Defendants issued the Final Rule knowing it would have a disparate impact on women, who constitute the overwhelming majority of sex-based harassment survivors, by reducing federal protections for victims of sex-based harassment. They took this action not despite this impact on women and girls, but because of it.
256. Sections 106.30, 106.44(a), 106.45(b)(1)(iv), 106.45(b)(1)(v), 106.45(b)(1)(vii), 106.45(b)(3)(i), 106.45(b)(3)(ii), 106.45(b)(5)(iii), 106.45(b)(6)(i), 106.45(b)(6)(ii), 106.6(h), 106.71(b)(1), and 106.71(b)(2) of the Final Rule therefore violate the Equal Protection guarantee of the Fifth Amendment to the U.S. Constitution.

#### **PRAYER FOR RELIEF**

Wherefore, Plaintiffs respectfully request that this Court:

1. Declare that the Final Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and without observance of procedure required by law within the meaning

of 5 U.S.C. § 706(2)(A), (C), and (D); and in violation of the Fifth Amendment's equal protection guarantee;

2. Vacate and set aside the Final Rule;
3. Stay the effective date of the Final Rule pursuant to 5 U.S.C. § 705;
4. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and
5. Grant other such relief as this Court may deem proper.

Dated: June 10, 2020

Respectfully submitted,

By: \_\_\_\_\_

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Court for District of Massachusetts  
forthcoming*



**2020 PROGRESS  
UPDATE:  
METOO  
WORKPLACE  
REFORMS IN  
THE STATES**

**NATIONAL WOMEN'S LAW CENTER | 20 STATES BY 2020**

BY ANDREA JOHNSON, RAMYA SEKARAN, SASHA GOMBAR | SEPTEMBER 2020

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## INTRODUCTION

Three years after #MeToo went viral, the unleashed power of survivor voices has led to more than **230 bills** being introduced in state legislatures to strengthen protections against workplace harassment and a remarkable **19 states** enacting new protections. Although many of these laws are just starting to take effect, initial reports from the ground show both that they are making a difference in many crucial ways, but that this progress is incomplete. Indeed, states have been slow to adopt some of the reforms that promise to make the biggest difference for those most marginalized by harassment and for preventing workplace harassment.

**As state legislative sessions began in 2020, energy remained high for advancing Me Too reforms.**

Nearly 400 state legislators from 42 states and the District of Columbia—from both sides of the aisle—joined the #20StatesBy2020 pledge declaring their commitment to supporting and working with survivors to strengthen protections against sexual harassment in 20 states by 2020.<sup>1</sup>

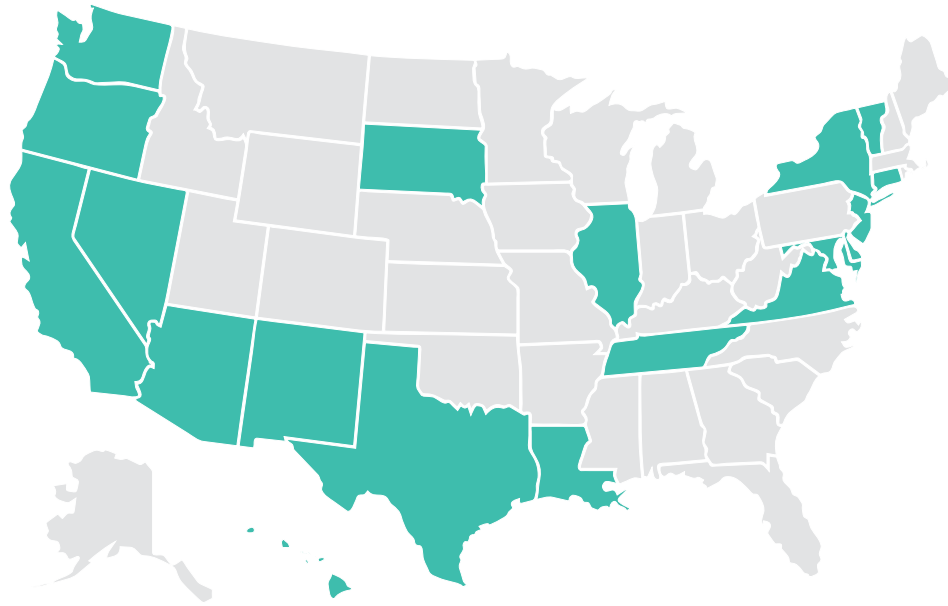
**The onset of the COVID-19 pandemic stalled much of this momentum** as many state legislatures abruptly shut down or shifted to emergency relief efforts just three months into 2020. **At the same time, the need for strong workplace anti-discrimination and anti-harassment laws is clear and more urgent than ever.** COVID-19 unleashed an economic recession that hit women hardest, with especially high levels of job

loss for Black women and Latinas.<sup>2</sup> And the Movement for Black Lives has shined a light on the many forms of oppression that Black women, Indigenous women, and other women of color continue to face at work, often including shockingly low wages and poor working conditions—inequities that the COVID-19 crisis has further exacerbated. Without a safety net or optimism about their chances of finding another job, workers are more desperate to keep a paycheck at any cost and less willing to report workplace abuses, increasing their vulnerability to harassment, discrimination, exploitation, abuse, and retaliation at work. Recognizing this, legislators in states like **North Carolina**<sup>3</sup> have continued to introduce legislation to strengthen workplace anti-discrimination and anti-harassment laws as part of the effort to rebuild from COVID-19.<sup>4</sup>

This report provides an updated overview of the progress that has been made in advancing workplace anti-harassment reforms in the states from October 2017 to September 2020, as well as in New York which has been especially active in strengthening its anti-harassment laws. The report also highlights some of the stories of how survivors have led the push for these important state law reforms.

### **CLOSING IN ON WORKPLACE HARASSMENT LAW REFORM IN #20STATESBY2020**

At a time when partisan politics seems to have reached a fever pitch, the Me Too movement has seen conservative and progressive state legislators alike, in states from



Tennessee to Oregon, speaking out and pushing for long overdue reforms to anti-harassment laws, many of them motivated and united by their own Me Too stories. Many of the Me Too workplace reforms have passed with bipartisan support. Major trends in the new reforms include the following:

- **15 STATES LIMITED OR PROHIBITED EMPLOYERS** from requiring employees to sign nondisclosure agreements as a condition of employment or as part of a settlement agreement.
- **11 STATES AND NEW YORK CITY IMPLEMENTED OR STRENGTHENED ANTI-HARASSMENT TRAINING** requirements for certain employers.
- **7 STATES ENACTED MEASURES TO REQUIRE OR ENCOURAGE EMPLOYER ANTI-HARASSMENT POLICIES**
- **7 STATES LIMITED EMPLOYERS' USE OF FORCED ARBITRATION**, though several of these laws are being challenged in court.
- **6 STATES EXPANDED WORKPLACE HARASSMENT PROTECTIONS** to include independent contractors, interns, and/or volunteers for the first time.

### **PROGRESS SLOW ON REFORMS THAT WOULD HAVE HIGHEST IMPACT FOR WORKERS MOST IN NEED OF PROTECTIONS**

Workers in low-wage jobs—who are disproportionately women of color and immigrant women—experience some of the highest rates of workplace harassment and most severe repercussions for speaking out.<sup>5</sup> They should be the priority focus of workplace policy reforms, and yet, since #MeToo went viral, only Illinois, Maryland, New York, and Vermont have been able to pass the most basic and crucial reform—ensuring that the many low-paid gig workers, domestic workers, home healthcare workers, and other workers who work for smaller employers or as independent contractors have legal protections against workplace harassment

Likewise, only three states have meaningfully extended their statute of limitations for bringing a workplace harassment claim. But initial reports from jurisdictions that have extended the statute of limitations to three or more years emphasize this reform has been especially important for workers in low-wage jobs, who otherwise are often forced to choose between using their time to get another job to support their family or finding legal counsel, bringing a harassment claim, and seeking justice. The necessity of this reform has grown even more urgent with the COVID-19 crisis limiting access to courts and agencies and increasing the economic instability of so many workers.

In some states, important protections for low-wage workers were actually rolled back. In D.C. and Michigan, measures that raised the tipped minimum wage so tipped workers would no

longer have to tolerate harassment from customers to make ends meet were repealed.<sup>6</sup>

Reforms that would more fundamentally shift employers' incentive and ability to prevent harassment have also proven challenging. Since #MeToo went viral, only California and New York have succeeded in updating the standard for what constitutes illegal workplace harassment and only Maryland, Delaware, and New York have updated standards for when employers are liable for that harassment. Existing standards have for too long allowed employers and courts to minimize and ignore the impact and reality of workplace harassment and power dynamics, especially in low-paid workplaces. And only Virginia, New York, and Connecticut have increased the financial relief available to harassment victims to an amount that would meaningfully incentivize employers to address and prevent harassment.

Only Vermont and New York City have taken steps to require climate surveys in more workplaces, despite the importance of such surveys in helping employers understand the prevalence of harassment in their workforce and providing an important anonymous channel for workers to raise concerns. And even the policies passed by Vermont and New York City are relatively modest.

Finally, while much progress was made in 2019 and 2020 in response to workers and survivors demanding broad policy solutions to address workplace harassment, too many reform efforts remain narrowly focused on sexual harassment, undercutting protections for women of color, immigrants, people with disabilities, and others who experience harassment based on multiple identities.

## **ME TOO WORKPLACE POLICY REFORMS MUST BE FURTHER STRENGTHENED AND EXPANDED**

**POLICY CHANGE MUST BE DRIVEN BY AND CENTERED ON THOSE MOST HARMED BY HARASSMENT.** Workers and survivors should be shaping policy solutions to harassment. Their engagement will help ensure these policies actually meet the needs of those who experience sexual violence and other forms of harassment. In particular, policy change efforts should include and center workers in low-wage jobs; women of color; queer, transgender, intersex, and gender non-binary folks; immigrant workers; people with disabilities; and those who are currently or formerly incarcerated.

## **THE BE HEARD IN THE WORKPLACE ACT: A FEDERAL BILL AND A MODEL FOR STATE ACTION**

In April 2019, U.S. Representative Katherine Clark and Senator Patty Murray introduced in Congress the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination (BE HEARD) in the Workplace Act—a landmark, comprehensive workplace anti-harassment bill.<sup>8</sup> This bicameral bill has the support of 169 members of congress and over 50 civil rights, women's rights, and worker's rights organizations. While Congress has yet to move the great majority of anti-harassment reforms that have been introduced since #MeToo went viral, BE HEARD can serve as a legislative model for states looking to carry the torch of Me Too workplace policy reform in the face of congressional inaction.

Specifically, the BE HEARD in the Workplace Act would:

- extend protections against harassment and other forms of discrimination to all workers;
- remove barriers to access to justice, such as short statutes of limitations and restrictively interpreted legal standards;
- promote transparency and accountability, including by limiting the use of abusive NDAs and forced arbitration and requiring companies bidding on federal contracts to report any history of workers' rights violations;
- and require and fund efforts to prevent workplace harassment and discrimination, including by requiring employers to adopt a nondiscrimination policy, requiring the EEOC to establish workplace training requirements and provide a model climate survey to employers, and ensuring that tipped workers are entitled to the same minimum wage as all other workers.

Lawmakers must craft solutions that don't just benefit those with the most privilege, financial resources, and access to legal systems, but take into account how workplace power dynamics, workers' financial insecurity or immigration status, and employers' and courts' stereotyped assumptions about who is credible and who is not can make it impossible to report harassment, much less settle or file a claim. Policy reforms should also focus on preventing harm before it ever happens, rather than only after it occurs, and on shifting workplace structures to build worker power, like raising the minimum wage, and ensuring equal pay, paid leave, and fair work schedules.

**WORKPLACE HARASSMENT REFORMS SHOULD NOT BE LIMITED TO SEXUAL HARASSMENT.** Like sexual harassment, workplace discrimination and harassment based on race, disability, color, religion, age, or national origin all undermine workers' equality, safety, and dignity—and these forms of harassment and discrimination often intersect in working people's actual experiences. The sexual harassment a Black woman experiences, for example, may include racial slurs and reflect racial hostility. Indeed, Equal Employment Opportunity Commission (EEOC) charge data indicate that women of color—and Black women in particular—are disproportionately likely to experience sexual harassment at work, highlighting how race and sexual harassment can be intertwined.<sup>7</sup> Legislation that focuses exclusively on sexual harassment has the odd and impractical result of providing a worker who experiences multiple, intersecting violations with only partial protection. Lawmakers should craft solutions that recognize these intersections.

**“I don't think you can talk about the history of sexual harassment without talking about race. The early history of this country thrived off the sexual harassment and assault of Black women. Slavery was dependent on the rape of Black women, who became pregnant and gave birth to children who would become slaves. When slavery was no longer legal, Black women's sexuality was then vilified and even criminalized. Current sexual harassment laws reflect that complicated history. The law needs to recognize that race and sex are inevitably intertwined. Attempting to ask plaintiffs/victims to separate race and sex is requesting an impossible feat.”**

- PHILLIS RAMBSY, RAMBSY LAW AND SPIGGLE LAW FIRM, TENNESSEE, KENTUCKY, AND D.C., MARYLAND, VIRGINIA

**“The extension of anti-harassment protections in New York to cover protected characteristics like race, ethnicity, and gender identity is an important victory. Through our helpline and worker focus groups, we regularly hear from women, including domestic workers and house cleaners, who are subjected to intersectional forms of harassment. While it often relates to their gender, it also overlaps with their ethnicity and the languages they speak. By eliminating special carve-outs and streamlining protections, we get closer to addressing discrimination as it actually occurs and ensuring that the law is more inclusive and accessible for all.”**

- SEHER KHAWAJA, LEGAL MOMENTUM, NEW YORK

**“It isn't just white women who are getting sexually harassed, so it is an artificial construct to not include race, national origin, religion, etcetera [when strengthening anti-harassment protections]. Looking forward, we have a moment of opportunity that should be grasped to fill in these gaps on a national and state-wide basis.”**

- WENDY MUSELL, LAW OFFICES OF WENDY MUSELL; LEVY VINICK BURRELL HYAMS LLP, CALIFORNIA

**ME TOO REFORMS SHOULD NOT JUST FOCUS ON THE WORKPLACE.** Sexual harassment doesn't just happen in the workplace, and it doesn't just affect adults. Too many students experience sexual violence and other forms of harassment in elementary and secondary schools and in college. And just as in the workplace, often the sexual harassment students experience is entwined with other forms of harassment and discrimination. To prevent harassment at work, we must start by addressing it in schools, as the treatment and behavior students experience from their peers, teachers, and administrators ultimately shapes workplace norms about gender, race, respect, and accountability. States can help schools prevent harassment and assault by promoting the use of regular school climate surveys, requiring age-appropriate consent and healthy relationship education in K-12, requiring educators to receive ongoing training to recognize implicit biases and implement trauma-informed approaches in the classroom, restricting schools' use of strict and gendered dress codes, requiring amnesty policies for students who may fear reporting harassment or an assault when doing so would reveal they violated a student code, and ensuring harassment investigations and disciplinary hearings are fair and equitable for both those alleging harassment and those who are the subject of complaints, including Black and brown students, LGBTQ students, and students with disabilities.

# #20STATESBY2020 ADVANCES

## ENSURING ALL WORKING PEOPLE ARE COVERED BY HARASSMENT PROTECTIONS

**PROTECTING MORE WORKERS:** *Legal protections against harassment extend only to “employees” in most states and under federal law, leaving many people unprotected. States have been working to extend protections against harassment and discrimination to independent contractors, interns, and volunteers.*

### 2020

**SOUTH DAKOTA** enacted legislation extending protections against workplace discrimination to interns.<sup>9</sup>

### 2019

**ILLINOIS** enacted legislation to extend protections against all forms of harassment to contractors, consultants, and other individuals who are contracted to directly perform services for the employer.<sup>10</sup>

**MARYLAND** enacted legislation to extend discrimination and harassment protections to independent contractors and the personal staff of elected officers.<sup>11</sup>

**NEW YORK** expanded upon its 2018 legislation by passing legislation to ensure subcontractors, vendors, consultants, and others providing contracted services are protected not just from sexual harassment, but from all forms of discrimination in the workplace.<sup>12</sup>

### 2018

**DELAWARE** enacted legislation to expand employees covered by its sexual harassment protections to include state employees, unpaid interns, applicants, joint employees, and apprentices.<sup>13</sup>

**NEW YORK** enacted legislation to protect contractors, subcontractors, vendors, consultants, and others providing contracted services from sexual harassment in the workplace.<sup>14</sup>

**VERMONT** enacted legislation to prohibit sexual harassment of all people engaged to perform work or services, expanding protections against harassment to independent contractors, volunteers, and interns.<sup>15</sup>

**“The expansion of New York’s law to cover independent contractors and those who work for smaller employers has been critical. It has made it possible to assist more women who come to us through our helpline. Prior to this amendment, we saw too many vulnerable women falling through the cracks—women who equally deserved anti-discrimination protections yet who were arbitrarily excluded based on their employment situation.”**

- SEHER KHAWAJA, LEGAL MOMENTUM, NEW YORK

**COVERING MORE EMPLOYERS.** *In many states, harassment laws do not cover smaller employers, and federal law does not reach employers with fewer than 15 employees. Since October 2017, states have been working to extend anti-harassment protections to all employers, regardless of size.*

## 2019

**ILLINOIS** enacted legislation extending protections against discrimination to all employers, regardless of size. Previously, Illinois' workplace anti-discrimination law covered employers of all sizes for sexual harassment, pregnancy, and disability discrimination claims, but all other antidiscrimination protections extended only to employers with 15 or more employees.<sup>16</sup>

**MARYLAND** enacted legislation to extend protections from all forms of harassment to all employers, regardless of the employer's size.<sup>17</sup>

**NEW YORK** enacted legislation to extend protections against discrimination to all employers, regardless of the employer's size. Previously, New York had only extended anti-sexual harassment protections to all employers regardless of size.<sup>18</sup>

## 2018

**NEW YORK CITY** enacted legislation to amend its Human Rights Law to extend gender-based anti-harassment protections to all employers, regardless of the number of employees.<sup>19</sup>

## ¡YA BASTA! COALITION: ENDING SEXUAL VIOLENCE AGAINST JANITORS

The ¡Ya Basta! movement developed, in response to a 2015 documentary, *Rape on the Night Shift*, that brought into public consciousness what too many janitorial staff already knew: industry conditions, including isolated work environments and language barriers, made these workers – many of whom are immigrant women – especially vulnerable to abuse.

The documentary brought these issues to the attention of the Service Employees International Union-United Service Workers West (SEIU-USWW), which represents janitors in California. The union surveyed its members and found that approximately half had been sexually harassed or assaulted at work.<sup>20</sup> Janitorial workers with SEIU-USWW who identify as survivors formed the worker-led ¡Ya Basta! Coalition, composed of an array of labor and survivor advocacy organizations, including Worksafe, UC Berkeley's Labor and Occupational Health Program (LOHP), Equal Rights Advocates, Futures Without Violence, and the California Coalition Against Sexual Assault.

Workers from the ¡Ya Basta! Coalition and Immigrant Women Rising – a movement of janitors and allies mobilized by SEIU-USWW – organized to push for legislation (AB 1978) requiring janitorial industry

employers to register with the state and provide biennial in-person sexual harassment prevention training with worker input, or risk losing their ability to operate in California. Workers testified in support of the bill, organized rallies across the state, put up billboards, and participated in a hunger strike in front of the state capitol. In September 2016, the Governor signed the legislation into law.

Unfortunately, it soon became clear that more was needed to ensure that trainings were trauma-informed, culturally-aware, industry-specific, and effective. The workers got back to work: they organized to push for legislation that would strengthen the training requirements by requiring that trainings be conducted through a peer-to-peer, or promotoras, education model. In September 2018, 100 janitors marched 100 miles to Sacramento to pressure the Governor to sign AB 2079, which would require employers to conduct the trainings through peer education.<sup>21</sup>

Although Governor Brown vetoed the legislation that year, the workers did not relent. They continued to pressure the government to act and the following year, Governor Brown signed the Janitor Survivor Empowerment Act (AB 547) into law.<sup>22</sup> The new legislation requires the state to curate, with the input of a training advisory committee, a list of qualified organizations and peer trainers to provide the required anti-sexual harassment training. The training advisory committee is required to include representatives from a collective bargaining agent that represents janitorial workers and sexual assault victim advocacy groups. Employers are also required to submit a report confirming training completion to the state.



# RESTORING WORKER POWER AND INCREASING EMPLOYER TRANSPARENCY AND ACCOUNTABILITY

**LIMITING NONDISCLOSURE AGREEMENTS (NDAs).** *NDAs can silence individuals who have experienced harassment and empower employers to hide ongoing harassment, rather than undertake the changes needed to end it. Some employers require employees to enter into NDAs when they start a job that prevent them from speaking up about harassment or discrimination. Other times, NDAs are imposed as part of a settlement of a claim. States have been working to limit employer power to impose NDAs in both contexts while still supporting survivors who may want an assurance of confidentiality. The effectiveness of states' different policy approaches remains to be seen, but in California, at least, several employee rights attorneys report initial positive impacts.*

## 2020

**HAWAII** enacted legislation prohibiting employers from requiring employees, as a condition of employment, to enter into NDAs preventing them from disclosing or discussing sexual harassment or assault occurring in the workplace or at work-related events. It also prevents employers from retaliating against employees for reporting or discussing sexual harassment or assault.<sup>23</sup>

**NEW MEXICO** enacted legislation prohibiting private employers from requiring employees to sign an NDA in settlement agreements related to sexual harassment, discrimination, or retaliation or from preventing employees from disclosing sexual harassment, discrimination, or retaliation occurring in the workplace or at a work-related event. The legislation does allow for confidentiality about the amount of the settlement or, at the employee's request, facts that could lead to the identification of the employee or factual information related to the underlying claim. No such confidentiality provisions, however, can preclude employees from testifying in judicial, administrative, or other proceedings pursuant to a valid subpoena or legal order.<sup>24</sup>

## 2019

**ILLINOIS** enacted legislation to render void any contract provision that would, as a unilateral condition of employment or continued employment, prevent employees or prospective employees from disclosing truthful information about discrimination, harassment, or retaliation. However, these contract provisions are allowed when they are a mutual condition of employment negotiated in good faith and the agreement is in writing; demonstrates actual, knowing, and bargained-for consideration from both parties; and acknowledges the employee's right to report allegations to the appropriate government agency or official, participate in agency proceedings, make truthful statements required by law, and request and receive legal advice.

The legislation also prohibits an employer from unilaterally imposing such an NDA in a settlement or termination agreement, unless including such a provision is the documented preference of the employee and is mutually beneficial to both parties; the employer notifies the employee of their right to have an attorney review the settlement or termination agreement; there is valid, bargained for consideration in exchange for the confidentiality; the provision does not waive any future claims of harassment, discrimination, or retaliation; and the employee is given 21 days to consider the agreement and seven days to revoke the agreement.<sup>25</sup>

**LOUISIANA** enacted legislation prohibiting settlements of workplace sexual harassment or sexual assault claims against the state that use public funds from containing an NDA preventing the claimant from disclosing the underlying facts and terms of the claims.<sup>26</sup>

**NEVADA** enacted legislation to render void and unenforceable provisions in settlement agreements that prevent a party from disclosing factual information relating to a civil or administrative action for a felony sexual offense, sex discrimination by an employer or a landlord, or retaliation by an employer or landlord for reporting sex discrimination. The law also prohibits courts from entering an order that would prevent disclosure of this information. The amount of a settlement agreement may still be kept confidential and claimants can request a confidentiality provision to protect their identity, unless a government agency or public official is a party to the settlement agreement.<sup>27</sup>

**NEW JERSEY** enacted legislation to make NDAs in employment contracts or settlement agreements that prevent the disclosure of details relating to a claim of discrimination, retaliation, or harassment unenforceable against employees. If the employee publicly reveals sufficient information to identify the employer, the employee will not be able to enforce the employer's nondisclosure obligations. Every settlement agreement must include a notice specifying that although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable. The legislation also prohibits retaliation against an employee who refuses to enter into an agreement with an unenforceable provision.<sup>28</sup>

**NEW YORK** enacted legislation to render void and unenforceable any provision in an agreement between an employer and an employee or potential employee that prevents the disclosure of factual information related to discrimination, unless the provision provides notice that it does not prohibit the employee from speaking with law enforcement, the Equal Employment Opportunity Commission, a state division or local commission on human rights, or an attorney.<sup>29</sup>

New York also enacted legislation to extend its 2018 law limiting NDAs in sexual harassment settlement agreements to more broadly limit NDAs in settlements relating to all discrimination claims. This legislation also added additional protections for complainants choosing to enter into an NDA, including requiring the provision be written in plain English and in the primary language of the employee and providing that the provision is void if it prevents the employee from participating in an agency's investigation or from disclosing facts necessary to receive public benefits.<sup>30</sup>

**OREGON** enacted legislation to prohibit employers from requiring an employee or prospective employee as a condition of employment, continued employment, promotion, compensation, or the receipt of benefits to enter into an agreement preventing the disclosure of discrimination (including harassment) or sexual assault that occurred in the workplace, at a work-related event, or between an employer and an employee off the employment premises. An employer may enter into a settlement, separation, or severance agreement with a nondisclosure or a nondisparagement provision preventing the disclosure of factual information

relating to discrimination, harassment, or sexual assault only if the employee claiming to be discriminated against requests it and is given seven days to revoke the agreement.<sup>31</sup>

Oregon also enacted legislation prohibiting candidates, political committees of campaigns, and public office holders from using campaign funds and public funds to make payments in connection with a nondisclosure agreement relating to workplace discrimination, including harassment and sexual assault.<sup>32</sup>

**TENNESSEE** enacted legislation to make void and unenforceable any provision in a settlement agreement entered into by a governmental entity that prohibits the parties from disclosing the details of the claim or the identities of people related to the claim. However, victims of sexual harassment, sexual assault, and other offenses, including sexual exploitation and domestic abuse, retain the ability to keep their identities confidential.<sup>33</sup>

**VIRGINIA** enacted legislation to prohibit employers from requiring an employee or prospective employee to sign, as a condition of employment, a nondisclosure or confidentiality agreement that has the purpose or effect of concealing the details relating to sexual assault.<sup>34</sup>

## 2018

**ARIZONA** enacted legislation to allow an individual who is bound by an NDA to break the NDA if asked about criminal sex offenses by law enforcement or during a criminal proceeding. The legislation also prohibits public officials from using public funds to enter into a settlement with an NDA related to sexual assault or sexual harassment.<sup>35</sup>

**CALIFORNIA** enacted legislation to prohibit employers from requiring an employee to sign, as a condition of employment or continued employment, or in exchange for a raise or a bonus, a release of a claim or a right, a nondisparagement agreement, or other document that prevents the employee from disclosing information about unlawful acts in the workplace, including sexual harassment. The law clarifies that these provisions do not apply to NDAs or releases in settlement agreements that are voluntary, deliberate, and informed, and provide consideration of value to the employee, and where the employee was given notice and opportunity to retain an attorney or was represented by an attorney.<sup>36</sup>

California also enacted legislation to prohibit confidentiality provisions in settlement agreements that prevent the disclosure of factual information related to claims of sexual assault, sexual harassment, or other forms of sex-based workplace harassment, discrimination, and retaliation filed in a civil or administrative action. Claimants can request a confidentiality provision to protect their identity, unless a government agency or public official is a party to the settlement agreement. This prohibition does not apply to confidentiality provisions regarding the amount paid under a settlement agreement.<sup>37</sup>

**MARYLAND** enacted legislation to make unlawful NDAs and other waivers of substantive and procedural rights related to sexual harassment or retaliation claims in an employment contract or policy. The law also protects employees from retaliation for refusing to enter into such an agreement.<sup>38</sup>

**TENNESSEE** enacted legislation to make it unlawful to require an employee or prospective employee, as a condition of employment, to execute or renew an NDA regarding sexual harassment. Employees covered by an NDA cannot be fired as retaliation for breaking the NDA.<sup>39</sup>

**VERMONT** enacted legislation to prohibit employers from requiring any employee or prospective employee, as a condition of employment, to sign an agreement that prevents the individual from opposing, disclosing, reporting, or participating in a sexual harassment investigation. The legislation also requires a settlement agreement relating to sexual harassment explicitly state that it does not prohibit the claimant from: filing a complaint with any state or federal agency; participating in an investigation by a state or federal agency; testifying or complying with discovery requests in a proceeding related to a claim of sexual harassment; or engaging in concerted activities with other employees under state or federal labor relations laws. The agreement must also state that it does not waive any rights or claims that may arise after the settlement is executed.<sup>40</sup>

**WASHINGTON** enacted legislation to prohibit employers from requiring an employee, as a condition of employment, to sign an NDA, waiver, or other document that prevents the employee from disclosing sexual harassment or assault occurring in the workplace, at work-related events, or between employees, or an employer and an employee, off the employment premises.<sup>41</sup> Washington also enacted a separate law providing that NDAs cannot be used to limit a person from producing evidence or testimony related to past instances of sexual harassment or sexual assault by a party to a civil action.<sup>42</sup>

**NEW YORK** enacted legislation to prohibit employers from using NDAs in settlement agreements or other resolutions of a claim that prevent the disclosure of the underlying facts and circumstances of sexual harassment claims, unless the condition of confidentiality is the complainant's preference. The complainant must be given 21 days to consider the provision and seven days to revoke the agreement.<sup>43</sup>

**“California’s new law limiting the use of NDAs in settlements “has really allowed people to step into their own power and feel their own voice and make that choice themselves, which has been hugely impactful in regaining some of what was stolen by the harasser.”**

- BARBARA FIGARI, THE FIGARI LAW FIRM, CALIFORNIA

**PROHIBITING NO-REHIRE PROVISIONS.** *No-rehire provisions in settlement agreements bar employees from ever working for their employer again. Such provisions may impact the individual’s ability to be employed and disincentivize others from coming forward when they experience harassment. To address this problem, states are limiting the use of no-rehire provisions.*

## 2019

**CALIFORNIA** enacted legislation to prohibit no-rehire provisions in agreements to settle employment disputes that prevent an employee who has filed a claim against the employer from working again for the employer, or any parent company, subsidiary, division, affiliate, or contractor of the employer. The new law does not prohibit, however, the employer from including a no-rehire provision in a settlement with an employee if the employer has made a good faith determination that the employee engaged in sexual harassment or sexual assault.<sup>44</sup>

**OREGON** enacted legislation to prohibit no-rehire provisions in agreements resolving claims of discrimination (including harassment) or sexual assault, unless the employee requests it and is given seven days after signing to revoke the agreement. The new law does not prohibit, however, the employer from including a no-rehire provision in a settlement with an employee if the employer has made a good faith determination that the employee engaged in discrimination (including harassment) or sexual assault.<sup>45</sup>

## 2018

**VERMONT** enacted legislation to prohibit no-rehire provisions in sexual harassment settlements that prevent an employee from working again for the employer, or any parent company, subsidiary, division, or affiliate of the employer.<sup>46</sup>

**“The prohibition on no rehire clauses in settlements “has been so important. It was awful to have clients sign these because they could basically be locked out of an entire industry. It has been very helpful to have really clear guidance on no-rehire clauses because it was so bad for workers in low-wage jobs and so potentially retaliatory.”**

-ELIZABETH KRISTEN, LEGAL AID AT WORK, CALIFORNIA

**STOPPING FORCED ARBITRATION.** *Many employers compel their employees to waive their right to go to court to enforce their rights to be free from harassment and other forms of discrimination. They require employees instead to arbitrate any such disputes. Forced arbitration provisions funnel harassment claims into often secret proceedings where the deck is stacked against employees and can prevent employees from coming together as a group to enforce their rights. While federal law limits states’ ability to legislate in this area, some states are working to limit employers’ ability to force their employees into arbitration. Many of these provisions are being challenged by employers in the courts.*

## 2019

**CALIFORNIA** enacted legislation providing that applicants or employees cannot be forced to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (FEHA) or other specific statutes governing employment. The law prohibits employers from threatening, retaliating or discriminating against, or terminating any applicant or employee for refusing to consent

to waiving any right, forum, or procedure for a violation of any provision of the FEHA.<sup>47</sup> **Note:** In 2020 a federal district court enjoined California from enforcing this law on the basis that it is preempted by the Federal Arbitration Act. That decision has been appealed to the 9th Circuit.<sup>48</sup>

**ILLINOIS** enacted legislation to render void any provision that requires, as a condition of employment or continued employment, an employee or prospective employee waive, arbitrate, or diminish any claim of discrimination, harassment, or retaliation, unless the agreement is in writing; demonstrates actual, knowing, and bargained-for consideration from both parties; and acknowledges the employee’s right to report allegations to the appropriate government agency or official, participate in agency proceedings, make truthful statements required by law, and request and receive legal advice.<sup>49</sup>

**NEW JERSEY** enacted legislation to make unenforceable provisions in employment contracts that waive any substantive or procedural right or remedy relating to discrimination, retaliation, or harassment claims. The legislation also specifically provides that no right or remedy under the New Jersey Law Against Discrimination or any other statute or case law can be prospectively waived. Retaliation against an employee who refuses to enter into an employment contract with an unenforceable provision is prohibited.<sup>50</sup> **Note:** this law is currently being challenged in federal court as preempted by the Federal Arbitration Act.<sup>51</sup>

**NEW YORK** enacted legislation to extend its 2018 prohibition on forced arbitration to all discrimination claims.<sup>52</sup> **Note:** This law has been challenged in court with federal district courts finding it preempted by the Federal Arbitration Act and a state court finding that it was not preempted.<sup>53</sup>

## 2018

**MARYLAND** enacted legislation to render void, except as prohibited by federal law, any provision in an employment contract, policy, or agreement that waives any substantive or procedural right or remedy related to a future claim of sexual harassment or retaliation for reporting sexual harassment.<sup>54</sup>

**NEW YORK** enacted legislation to prohibit mandatory arbitration to resolve allegations or claims of sexual harassment.<sup>55</sup> **Note:** This law has been challenged in court with federal district courts finding it preempted by the Federal Arbitration Act and a state court in finding that it was not preempted.<sup>56</sup>

**VERMONT** enacted legislation to prohibit employers, except as otherwise permitted by state or federal law, from requiring any employee or prospective employee to sign an agreement or waiver as a condition of employment that waives a substantive or procedural right or remedy available to the employee with respect to a sexual harassment claim.<sup>57</sup>

**WASHINGTON** enacted legislation to make void and unenforceable any provisions requiring an employee to waive their right to publicly pursue a cause of action, or to publicly file a complaint with the appropriate state or federal agencies, relating to any cause of action arising under state or federal anti-discrimination laws, as well as any provision that requires an employee to resolve claims of discrimination in a confidential dispute resolution process.<sup>58</sup>

**PROTECTING THOSE WHO SPEAK UP FROM DEFAMATION LAWSUITS.** *When survivors of workplace harassment and assault speak up, they are often not believed and face retaliation. Increasingly, defamation lawsuits are being weaponized by sexual harassers as another retaliatory tactic to silence survivors and others who speak up about harassment. Many states have “anti-SLAPP” (anti-Strategic Lawsuit Against Public Participation) laws to protect individuals who are “slapped” with a meritless defamation lawsuit seeking to silence their exercise of free speech and petition rights regarding matters of public interest. In the last few years, states have strengthened their anti-SLAPP and related laws to provide greater protection to those who speak up about sexual harassment and assault.*

## 2020

**NEW YORK** passed legislation strengthening its “anti-SLAPP” law by expanding the definition of “public interest” to cover “any subject other than a purely private matter” and requiring an award of attorneys’ fees and costs for an individual who defeats a SLAPP lawsuit.<sup>59</sup> The bill sponsor and advocates spoke of this legislation as protecting those who speak out against sexual harassment, abuse, and assault from being “slapped” with defamation lawsuits.<sup>60</sup>

**LOUISIANA** enacted legislation providing that non-profit organizations cannot be held liable for disclosing to a prospective employer, in good faith, information about a former employee, volunteer, or independent contractor engaging in sexual harassment, assault, abuse, trafficking, or misconduct.<sup>61</sup>

## 2019

**TEXAS** enacted legislation providing that charitable organizations, or such an organization’s employee, volunteer, or independent contractor, cannot be held liable for disclosing to a current or prospective employer, in good faith, information reasonably believed to be true about a former employee, volunteer, or independent contractor engaging in sexual harassment, assault, abuse, trafficking, or misconduct.<sup>62</sup>

## 2018

**CALIFORNIA** enacted legislation amending their “anti-SLAPP” law to include among communications that cannot be subject to a defamation lawsuit complaints of sexual harassment made by an employee, without malice, to an employer based on credible evidence as well as communications between the employer and interested persons regarding a complaint of sexual harassment. The legislation also authorizes an employer to answer, without malice, whether the employer would rehire a former employee and whether a decision to not rehire is based on the employer’s determination that the employee engaged in sexual harassment.<sup>63</sup>

**TRANSPARENCY ABOUT SEXUAL HARASSMENT CLAIMS.** *When employers resolve harassment claims out of public view, the lack of transparency can prevent accountability for broader reform. To remedy this, several jurisdictions have passed laws requiring the reporting or inspection of claims, complaints, investigations, resolutions, and/or settlements involving workplace harassment.*

## 2019

**ILLINOIS** enacted legislation to require every employer to disclose to the Department of Human Rights the total number of adverse judgements or rulings regarding sexual harassment or discrimination against it during the preceding year; whether any relief was ordered against the employer; and the number of rulings or judgements broken down by protected characteristic. This information will be published in an annual report available to the public, but the names of individual employers will not be disclosed. If the Department is investigating a charge of harassment or discrimination, it may request the employer provide the total number of settlements from the preceding five years relating to harassment or discrimination. Employers may not report the name of any victims of harassment or discrimination as part of these disclosures. These requirements remain in effect through January 1, 2030.<sup>64</sup>

## 2018

**ILLINOIS** enacted legislation to require reporting of discrimination, harassment, sexual harassment, and retaliation claims involving executive branch employees, vendors and others doing business with state agencies in the executive branch, board members and employees of the Regional Transit Boards, and all vendors and others doing business with the Regional Transit Boards. The reports must be made publicly available on each office's website.<sup>65</sup>

Illinois also enacted legislation requiring local governments, school districts, community colleges, and other local taxing bodies to report whenever they approve a severance agreement with an employee or contractor because the employee or contractor was found to have engaged in sexual harassment or discrimination. These reports must be made available on the internet and to the local press within 72 hours.<sup>66</sup>

**LOUISIANA** enacted a law requiring each state agency to make available to the public every year the number of sexual harassment complaints received by the agency, as well as the number of complaints which resulted in a finding that sexual harassment occurred, the number which resulted in discipline or corrective action, and the amount of time it took to resolve each complaint.<sup>67</sup>

**MARYLAND** enacted legislation to require employers with 50 or more employees to complete a survey from the Maryland Commission on Civil Rights on the number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee; the number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment; and the number of sexual harassment settlements that included a provision requiring both parties to keep the terms of the settlement confidential. The aggregate number of responses from employers for each category of information will be posted on the Maryland Commission on Civil Rights' website. The number of times a specific employer paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment will be retained for public inspection upon request. Employers are required to submit these surveys by July 1, 2020, and July 1, 2022.<sup>68</sup>

Another new law requires each unit of the executive branch of the state government to submit information about its sexual harassment policies and prevention training and a summary of sexual harassment complaints filed, investigated,

resolved, and pending in an annual report to the state Equal Employment Opportunity Coordinator and the Maryland Commission on Civil Rights.<sup>69</sup>

**NEW YORK CITY** enacted legislation to require all city agencies, as well as the offices of the Mayor, Borough Presidents, Comptroller, and Public Advocate, to annually report on complaints of workplace sexual harassment to the Department of Citywide Administrative Services. The Department is required to report the number of complaints filed with each agency; the number resolved; the number substantiated and not substantiated; and the number withdrawn by the complainant before a final determination. Information from agencies with 10 employees or less will be aggregated together. This information will be reported to the Mayor, the Council and the Commission on Human Rights, which will post it on its website.<sup>70</sup>

## LIMITING THE USE OF PUBLIC FUNDS IN SETTLEMENTS.

***When elected officials make taxpayers foot the bill for their harassment, they can avoid real accountability. Like Congress did in its 2018 reforms to the Congressional Accountability Act, several states have been changing their laws to prohibit elected officials and candidates from using public funds to pay for sexual harassment judgements or settlements.***

## 2019

**CALIFORNIA** enacted legislation prohibiting the use of campaign legal defense funds and campaign funds to pay or reimburse a candidate or elected officer for a penalty, judgment, or settlement related to a claim of sexual assault, sexual abuse, or sexual harassment.<sup>71</sup>

**LOUISIANA** enacted legislation making state employees and elected officials found to have engaged in sexual harassment responsible for all or a portion of the amount of the settlement or judgment. The amount a state employee shall be responsible for depends on several factors including their ability to pay; whether they were performing their official duties at the time the harassment occurred; the severity of the harassment; and the stage of litigation.<sup>72</sup>

## 2018

**NEW YORK** enacted legislation requiring state government officials and employees who have a judgment against them for sexual harassment to personally reimburse the state within 90 days for any payment the state made to the plaintiff.<sup>73</sup>

## FORMER NEW YORK LEGISLATIVE STAFFERS BRING ABOUT SWEEPING STATEWIDE REFORM

In 2018, seven former New York State legislative employees who experienced, witnessed, or reported sexual harassment while working in the legislature came together to demand change. Emboldened by #MeToo, their passions for public service, and their desire to no longer remain silent, they formed the Sexual Harassment Working Group.<sup>74</sup>

In March 2018, the Working Group issued a press release urging the legislature and Governor to conduct a transparent review of the state's sexual harassment laws. Unfortunately, the legislature passed reforms without adequate input from survivors and other experts – reforms that fell short of what was truly needed to address the broken system that had failed survivors for too long.<sup>75</sup>

New York's 2018 elections for state Senate seats and an open state attorney general seat provided another opportunity for the advocates to leverage. Many candidates were eager to demonstrate their support for women. The Working Group ensured that harassment was part of the discussion by sending questions about the issue to the attorney general debate moderators.<sup>76</sup>

The Working Group held group strategy sessions, conducted research, and brought together a broad

coalition of civil rights organizations, women's rights and girls' rights advocacy groups, transgender rights advocates, and workers' rights litigators. From that organizing, the Working Group published public policy recommendations for protecting New York employees—both public and private—from harassment. The Working Group also called for a public hearing to provide stakeholders, especially survivors, an opportunity to utilize the most powerful tool of all to push for change – their lived experiences.<sup>77</sup>

Their efforts were successful. On February 13, 2019, the New York legislature held its first joint legislative public hearing on sexual harassment in over 27 years. Dozens of witnesses signed up to testify, including the Working Group, and the hearing lasted 11 hours.<sup>78</sup> Members of the Working Group recall the power of being able to confront the legislature with their vulnerability and the trauma they had experienced in a public and formal way. While the legislative process often involves negotiations behind closed doors, the public hearing created a unique kind of accountability. Following the hearing, when legislators brought solutions to the table, advocates and the public eye were watching to ensure that proposals were responsive to the powerful lived experiences the survivors had shared in such a public way.

This hearing, followed by a second hearing that May, a lobby day in Albany, press conferences, and a roundtable discussion of the proposed reforms with legislators organized by the Working Group and other advocates, led to the passage in August 2019 of a suite of groundbreaking reforms to prevent and respond to discrimination in the workplace. These reforms are detailed in this report.

# EXPANDING ACCESS TO JUSTICE

**EXTENDING STATUTES OF LIMITATIONS.** *Short statutes of limitations can hamper the ability of individuals to bring harassment complaints, especially given the trauma of assault and other forms of harassment, which can impact the ability of individuals to take prompt legal action.*

## 2019

**CALIFORNIA** enacted legislation to extend from one to three years the statute of limitations for filing employment discrimination complaints with the Department of Fair Employment and Housing.<sup>79</sup>

**CONNECTICUT** enacted legislation to allow employees who have been subjected to discrimination, including harassment, 300 days to submit a complaint to the Connecticut Commission on Human Rights and Opportunities where previously they had only 180 days.<sup>80</sup>

**MARYLAND** enacted legislation to extend the statute of limitations for filing workplace harassment claims with the Commission on Human Relations from six months to two years, and from two years to three years for filing workplace harassment claims in court.<sup>81</sup>

**NEW YORK** enacted legislation to extend the statute of limitations for filing workplace sexual harassment complaints with the Division of Human Rights from one to three years.<sup>82</sup>

**OREGON** enacted legislation to give employees who have experienced discrimination (including harassment) five years, instead of one, to file a complaint with the Bureau of Labor and Industries or a civil suit.<sup>83</sup>

## 2018

**NEW YORK CITY** enacted legislation to extend the statute of limitations for filing claims of gender-based harassment with the New York City Commission on Human Rights from one year to within three years after the alleged harassing conduct occurred.<sup>84</sup>

**“Extending California’s statute of limitations has been “extremely helpful for low-wage workers, who . . . often need to make very difficult decisions: how you pay rent, put food on the table, versus making a complaint. Having the additional time to stabilize their economic situations before they proceed is very important, and I think is one of the greatest positive moves for low-income survivors of harassment.”** -

WENDY MUSELL, LAW OFFICES OF WENDY MUSELL; LEVY VINICK BURRELL HYAMS LLP, CALIFORNIA

**ESTABLISHING DISCRIMINATION AND HARASSMENT HELPLINES.** *Survivors and bystanders often do not speak up about workplace harassment because they fear retaliation for reporting and/or it is unclear to whom they should report and what their options are. Workers need multiple, trusted avenues for reporting, including anonymously. Confidential hotlines or helplines that are independent of an employer can play an important role in increasing reporting and stopping harassment.*

## 2020

**NEW JERSEY** enacted legislation requiring the Civil Service Commission—an independent body that hears and rules on appeals filed by civil service employees and candidates—to set up a confidential hotline for state employees to report incidents of workplace harassment and discrimination, and to receive information about relevant laws, policies, and procedures, as well as referrals for further assistance and counseling, if requested. The Commission is required to produce an annual report to the public on the number and types of calls received.<sup>85</sup>

## 2018

**ILLINOIS** enacted legislation requiring the Department of Human Rights to establish a sexual harassment and discrimination helpline to which individuals in public and private employment can report, including anonymously, and



receive help with finding resources, including counseling services, and assistance in filing sexual harassment and discrimination complaints with the Department or other applicable agencies. The Department must annually report the number and type of calls received.<sup>86</sup>

**ENSURING RIGHTS TO BE FREE FROM HARASSMENT CAN BE ENFORCED.** *Some state laws declare that workplace discrimination, including harassment, is unlawful, but do not provide a meaningful—or any—mechanism for an employee to enforce their right to a discrimination and harassment-free workplace in court. This lack of a meaningful “cause of action” to enforce the law seriously undermines survivors’ ability to pursue justice and hold their employers accountable as well as employers’ incentive to prevent harassment from occurring to begin with.*

## 2020

**VIRGINIA** enacted legislation strengthening its cause of action for employment discrimination, which previously only provided relief for a narrow set of employees working for an employer with more than 5 but less than 15 employees and only when an employee was discriminatorily discharged. Virginia’s new law provides a cause of action for all types of discrimination, not just discrimination ending in discharge, and protects employees whose workplace has 15 or more employees, or 5 or more employees in the case of unlawful discharge. The new law also explicitly prohibits discrimination on the basis of sexual orientation or gender identity.<sup>87</sup>

**REVISING THE “SEVERE OR PERVASIVE” LIABILITY STANDARD.** *The requirement under federal law and most state laws that harassment be “severe or pervasive” in order to establish a hostile work environment claim has been interpreted by courts in such an unduly restrictive manner that only the most egregious conduct qualifies. These interpretations minimize and ignore the impact of harassment and severely undermine harassment victims’ ability to pursue claims, hold employers accountable, and obtain relief for the harm they have suffered. Two states have passed legislation seeking to address and correct these harmful interpretations.*

## 2019

**NEW YORK** enacted legislation to explicitly remove the restrictive “severe or pervasive” standard for establishing a hostile work environment claim. Under the new standard, harassment is an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions, or privileges of employment because of the individual’s membership in one or more protected categories. The law provides that an employee need not compare their treatment to that of another employee in order to state a claim. Employers can assert a defense to such a claim if they can show that the harassing conduct did not rise above what a reasonable person in the same protected class would consider petty slights or trivial inconveniences.<sup>88</sup>

**“The change to California’s severe or pervasive standard has been especially important for our low-wage worker clients. Being able to tell them that one incident of harassment can be enough to state a claim and that they do not have to show some heightened standard of harm and instead that they need only show “disruption of emotional tranquility” is very meaningful. I have found that for my transgender clients subjected to workplace harassment based on misuse of name and gender pronouns, these two changes make their claims easier to explain to a factfinder and more in line with how my clients experience the harassment – one incident of misgendering is devastating.”** — ELIZABETH KRISTEN, LEGAL AID AT WORK, CALIFORNIA

## 2018

**CALIFORNIA** enacted legislation to clarify the “severe or pervasive standard.” The law states that a single incident of harassment is sufficient to create a hostile work environment if the harassment has unreasonably interfered with the employee’s work performance or created an intimidating, hostile or offensive working environment. Moreover, a victim need not prove that their productivity declined due to the harassment; it is sufficient to prove that the harassment made it more difficult to do the job. Additionally, the new law clarifies that a court must consider the totality of the circumstances in assessing whether a hostile work environment exists and that a discriminatory remark may contribute to this environment even if it is not made by a decision maker or in the context of an employment decision. Courts are to apply these standards to all workplaces, regardless of whether a particular occupation has been historically associated with a higher frequency of sexually related comments and conduct than other occupations.<sup>89</sup>

**CLOSING A LOOHPOLE IN EMPLOYER LIABILITY.** *Under federal law and many state laws, employers can avoid liability for a supervisor’s harassment of subordinates if the employer can show that it took steps to prevent and address the harassment and that the employee did not take advantage of the employer’s available preventative or corrective measures, like reporting the harassment to the employer. In practice, this means that employers are able to evade liability by showing little more than they provide training or have a policy on the books, regardless of quality or efficacy. States have been working to close this judicially created loophole that is blocking harassment victims from obtaining justice.*

## 2019

**NEW YORK** enacted legislation to provide that the fact that an individual did not make a complaint to the employer about harassment does not determine whether the employer is liable for the harassment.<sup>90</sup>

**ENSURING EMPLOYER LIABILITY FOR SUPERVISOR HARASSMENT.** *The Supreme Court’s 2013 decision in Vance v. Ball State University limited victims’ ability to obtain redress under federal law when they experience sexual harassment by low-level supervisors. That case held that when employees with the authority to direct daily work activities—but not the authority to hire, fire, and take other tangible employment action—harass their subordinates,*

*their employers are no longer vicariously liable for that harassment. The Vance decision is grossly out of touch with the realities of the workplace, as supervisors with the authority to direct daily work activities can wield a significant amount of power over their subordinates. Many state courts follow federal law interpretations—and thus the Vance case—in interpreting their own state anti-harassment laws. Several states have been working to expand employer accountability for harassment by lower-level supervisors.*

## 2019

**MARYLAND** enacted legislation to make employers liable for harassment by individuals who have the power to make decisions regarding employees’ employment status or by those who direct, supervise, or evaluate employees. An employer is also liable if its negligence led to the harassment or allowed the harassment to continue.<sup>91</sup>

## 2018

**DELAWARE** enacted legislation to hold employers responsible for sexual harassment by supervisors when the sexual harassment negatively impacts the employment status of an employee. A supervisor includes any individual who is empowered by the employer to take an action to change the employment status of an employee or who directs an employee’s daily work activities.<sup>92</sup>

**REDRESSING HARM TO VICTIMS OF HARASSMENT.** *Compensatory damages can compensate victims of harassment for out-of-pocket expenses and emotional harm caused by harassment, and punitive damages awarded to victims punish employers who acted maliciously or recklessly in engaging in harassment. However, compensatory and punitive damages are capped in harassment and other discrimination cases under federal law and many state laws; in some states, they are not available at all. Limiting these damages means that individuals who have experienced egregious sexual harassment may not be fully compensated for their injuries, and employers are less incentivized to prevent harassment before it happens.*

## 2020

**VIRGINIA** enacted legislation allowing victims of employment discrimination to recover uncapped compensatory and punitive damages to address their injury. The law had previously only provided victims up to 12 months of back pay.<sup>93</sup>

## 2019

**CONNECTICUT** enacted legislation permitting a court to award punitive damages to a victim of employment discrimination, overturning a Connecticut Supreme Court ruling disallowing such damage awards. Uncapped compensatory and punitive damages are now available.<sup>94</sup>

**NEVADA** enacted legislation allowing victims of employment discrimination to be awarded the same remedies as available under federal law, which includes compensatory and punitive damages, capped based on the employer size. Previously Nevada's anti-discrimination law had only allowed victims to recover two years of back pay and benefits and to be

reinstated.<sup>95</sup> While this legislation increased the relief available under Nevada law by bringing it into line with the relief available under federal law, the damages available under Title VII are themselves in need of reform and the damage caps need to be removed.

**NEW YORK**, which previously provided for uncapped compensatory damages in discrimination claims, but did not authorize punitive damages, enacted legislation authorizing punitive damages, without limitation on the amount, for all employment discrimination actions brought against a private employer.<sup>96</sup>

## HOTEL WORKERS DEMAND PANIC BUTTONS

Some industries may require unique solutions for addressing sexual harassment and violence responsive to the particular nature of their work. For many years, hotel and hospitality workers across the country have been organizing and demanding that their employers address widespread sexual harassment and violence by customers. For example, after finding that 58% of women hotel workers and 77% of women casino workers surveyed had been sexually harassed by a guest,<sup>97</sup> workers with UNITE HERE Local 1 in Chicago pushed for the passage of

the "Hands Off Pants On" ordinance, which was passed in 2017 and requires hotels to provide a panic button to hotel workers assigned to clean or restock guest rooms or restrooms alone and requires hotels to develop a written anti-sexual harassment policy.<sup>98</sup> Since #MeToo went viral, several states, including Washington, Illinois, and New Jersey in 2019, have passed legislation requiring hotels to provide employees panic buttons. Illinois' law also covers employees who work in casinos and Washington's law also applies to janitors and security guards who work in isolated conditions. Illinois' and Washington's laws require employers to adopt an anti-sexual harassment policy and Washington's law also requires employers to provide anti-sex discrimination and harassment training.<sup>99</sup>

# PROMOTING PREVENTION STRATEGIES

***While Title VII has been interpreted to provide employers with an incentive to adopt sexual harassment policies and training, it has created a situation where employers effectively are able to shield themselves from liability by having any anti-harassment policy or training, regardless of quality or efficacy. Employer anti-harassment training and policies have been largely ineffective in preventing harassment in the first instance in part because they are not mandatory, and because they are focused on compliance with the law, instead of preventing harassment.***

**REQUIRING ANTI-HARASSMENT TRAINING.** *Effective training, especially when tailored to the specific workplace and workforce, can reduce workplace harassment. Several jurisdictions have passed legislation requiring training for employees and in some cases mandating the content.*

## 2020

**NEW JERSEY** enacted legislation requiring state employees responsible for managing and investigating complaints of harassment and discrimination to receive additional training every three years conducted by the New Jersey Attorney General's Advocacy Institute, or another organization with expertise in response to and prevention of sexual violence, in consultation with the New Jersey Coalition Against Sexual Assault.<sup>100</sup>

**VIRGINIA** enacted legislation requiring all government contractors with more than 5 employees and a contract over \$10,000 to provide annual training on the employer's sexual harassment policy to all supervisors and employees.<sup>101</sup>

## 2019

**CONNECTICUT**, which previously only required employers with 50 or more employees to train supervisory employees, enacted legislation to require all employers with three or more employees to provide sexual harassment training to every employee and to require those with fewer than three employees to provide training to supervisory employees. Employers must also provide employees with supplemental

training at least every 10 years. The Connecticut Commission on Human Rights and Opportunities is required to create and make available at no cost to employers an online training and education video or other interactive method of training that fulfills these requirements.<sup>102</sup>

**ILLINOIS** enacted legislation to require the Department of Human Rights to produce a model sexual harassment prevention training program to be made available to employers and to the public online at no cost. The program must include an explanation of sexual harassment; examples of conduct that qualifies as sexual harassment; a summary of relevant state and federal provisions and remedies; and a summary of employers' responsibility in preventing, investigating, and correcting sexual harassment. All private employers in the state must use this model or create their own program that equals or exceeds the model's standards. Employers must provide this training at least once a year to all employees. Illinois also amended its sexual harassment training requirement for public employees to expand it to a "harassment and discrimination" prevention training.<sup>103</sup>

## 2018

**CALIFORNIA**, which previously only required employers with 50 or more employees to provide sexual harassment training to supervisory employees once every two years, enacted legislation expanding the requirement so that employers with five or more employees are now required to provide at least two hours of interactive sexual harassment training and education to all supervisory employees, and at least one hour of such training to all nonsupervisory employees in California within six months of their assumption of a position, by January 1, 2021. After January 1, 2021, employers must provide the required training to each employee once every two years.<sup>104</sup> California also enacted legislation that authorizes, but does not require, employers to provide bystander intervention training.<sup>105</sup>

**DELAWARE** enacted legislation to require employers with 50 or more employees to provide interactive sexual harassment prevention training and education to employees and supervisors within one year of beginning employment and every two years thereafter. Employers are required to provide additional interactive training for supervisors addressing their specific responsibilities to prevent and correct sexual harassment and retaliation.<sup>106</sup>

**LOUISIANA** enacted a law requiring each public employee and elected official to receive a minimum of one hour of sexual harassment training each year. Supervisors and employees designated to accept or investigate complaints must receive additional training. Each agency must also maintain public records of each employee and official's compliance with the training requirement.<sup>107</sup>

**MARYLAND** enacted legislation requiring all state employees to complete at least two hours of in-person or virtual, interactive training on sexual harassment prevention within six months of hire and every two years thereafter. Additional training is required for supervisors.<sup>108</sup>

**NEW YORK** enacted legislation to require New York's Department of Labor to develop a model sexual harassment prevention training program, and to require all employers to conduct annual interactive training using either the state model or a model that meets state standards.<sup>109</sup>

**NEW YORK CITY** enacted legislation to require employers with 15 or more employees to conduct annual anti-sexual harassment interactive trainings for all employees, including supervisory and managerial employees. The training must include information concerning bystander intervention and the specific responsibilities of supervisory and managerial employees in addressing and preventing sexual harassment and retaliation.<sup>110</sup> New York City also now requires all city agencies, the offices of Mayor, Borough Presidents, Comptroller, and Public Advocate to conduct annual anti-sexual harassment trainings for all employees.<sup>111</sup>

**VERMONT** enacted legislation to allow the state Attorney General or the Human Rights Commission to inspect employers for compliance with sexual harassment laws and, if the Attorney General or Commission deems it necessary, require an employer, to provide an annual education and training program to all employees or to conduct an annual, anonymous climate survey, or both, for a period of up to three years.<sup>112</sup>

**REQUIRING STRONG ANTI-HARASSMENT POLICIES.** *Anti-harassment policies are merely encouraged, not required, by federal law. As a result, many employers lack anti-harassment policies, particularly smaller organizations without the resources to engage legal and human resource experts to develop them. In response, several jurisdictions*

*passed legislation requiring public and/or private employers to have anti-harassment policies or directing state agencies to develop model policies for broader use.*

## 2020

**VIRGINIA** enacted legislation requiring all government contractors with more than 5 employees and a contract over \$10,000 to post their sexual harassment policy in a conspicuous public place and publish it in the employee handbook.<sup>113</sup>

**WASHINGTON** enacted legislation (SB 6205) requiring employers of long-term care workers to develop and disseminate a written policy on how to handle workplace discrimination and abusive conduct, including sexual harassment or assault. The policy must be available in English and each of the three languages spoken most by long-term care workers and must be reviewed and updated annually. Among other provisions, employers must also implement plans to prevent and protect employees from discrimination and abusive conduct to be developed, monitored, and updated at least every three years by a workplace safety committee of employee-elected members, employer-selected members, and at least one service recipient.

## 2019

**CONNECTICUT** enacted legislation to require an employer to either provide its employees, within three months of their start date, with a copy of its sexual harassment policy via email, or to post the policy on their website and provide employees with a link to the Connecticut Commission on Human Rights and Opportunities' sexual harassment website.<sup>114</sup>

**NEW YORK** enacted legislation requiring employers to provide employees their sexual harassment prevention policy at the time of hire and at every annual training, in English and in the employee's primary language if the commissioner on labor offers model policies in the employee's primary language. The legislation also required the Department of Labor to evaluate the impact of its current model sexual harassment prevention guidance document and sexual harassment prevention policy every four years and update as needed.<sup>115</sup>

**OREGON** enacted legislation to require all employers to adopt a written policy to reduce and prevent discrimination (including harassment) and sexual assault. The policy must provide, among other things, a process for an employee

to report discrimination and sexual assault and statements outlining the statute of limitations and the prohibition on NDAs. Additionally, the law requires the Bureau of Labor and Industry to make model procedures and policies available on its website, which employers may use to establish their own policies.<sup>116</sup> Oregon enacted similar requirements for public employers.<sup>117</sup>

## 2018

**ILLINOIS** enacted legislation to require companies bidding for state contracts to have a sexual harassment policy.<sup>118</sup>

**LOUISIANA** enacted a law requiring each state agency to develop and institute a sexual harassment policy that, among other minimum requirements, contains a clear prohibition against retaliation and an effective complaint process that includes taking immediate and appropriate action when a complaint is received and details the process for making a complaint and alternative designees for receiving complaints.<sup>119</sup>

**NEW YORK** enacted legislation to require its Department of Labor to create and publish a model sexual harassment prevention guidance document and sexual harassment prevention policy that employers may utilize in their adoption of a sexual harassment prevention policy.<sup>120</sup> It also enacted legislation to require bidders on state contracts to certify as part of the bidding process that the bidder has implemented a written policy addressing workplace sexual harassment prevention and provides annual sexual harassment prevention training to all of its employees. If a bidder is unable to make this certification, they must provide a signed statement explaining why.<sup>121</sup>

**WASHINGTON** enacted legislation to establish a state women's commission to address several issues, including best practices for sexual harassment policies, training, and recommendations for state agencies to update their policies.<sup>122</sup> Additionally, the state equal employment opportunity commission is required to convene a working group to develop model policies and best practices to prevent sexual harassment in the workplace, including training, enforcement, and reporting mechanisms.<sup>123</sup>

**REQUIRING NOTICE OF EMPLOYEE RIGHTS. No workplace anti-harassment or anti-discrimination law will be truly effective if working people are unaware of the laws and their protections. The stark power imbalances that often exist between an employee and the employer can make it difficult**

**for working people to feel safe enough to speak up about workplace abuses. Requiring employers to post or otherwise share with employees information about their rights can help employees better assert those rights.**

## 2018

**CALIFORNIA,<sup>124</sup> DELAWARE,<sup>125</sup> ILLINOIS,<sup>126</sup> NEW YORK CITY,<sup>127</sup> and VERMONT<sup>128</sup>** all enacted legislation to require employers to post or otherwise share with employees information about employees' rights to be free from sexual harassment.

**LOUISIANA** enacted legislation to require establishments that have been licensed by the state to serve or sell alcohol to distribute an informational pamphlet to their employees with information on identifying and responding to sexual harassment and assault.<sup>129</sup>

**REQUIRING CLIMATE SURVEYS. A climate survey is a tool used to assess an organization's culture by soliciting employee knowledge, perceptions, and attitudes on various issues. Anonymous climate surveys can help management understand the true nature and scope of harassment and discrimination in the workplace, inform important issues to be included in training, and identify problematic behavior that may be addressed before it leads to formal complaints or lawsuits.**

## 2018

**NEW YORK CITY** enacted legislation to require all city agencies, as well as the offices of the Mayor, Borough Presidents, Comptroller, and the Public Advocate, to conduct climate surveys to assess the general awareness and knowledge of the city's equal employment opportunity policy, including but not limited to sexual harassment policies and prevention at city agencies. Additionally, the new law requires all New York City agencies and the offices of the Mayor, Borough Presidents, Comptroller, and Public Advocate to assess workplace risk factors associated with sexual harassment.<sup>130</sup>

**VERMONT** enacted legislation to allow the state Attorney General or the Human Rights Commission to inspect employers for compliance with sexual harassment laws and, if the Attorney General or Commission deems it necessary, require an employer, to provide an annual education and training program to all employees or to conduct an annual, anonymous climate survey, or both, for a period of up to three years.<sup>131</sup>

# THE FIGHT FOR JUSTICE AND ACCOUNTABILITY IS FAR FROM OVER

As the Me Too movement has made clear, the laws and systems in place designed to address harassment have been inadequate. While much progress has been made in the last three years, policymakers must continue to strengthen protections and fill gaps in existing law and policy to better protect working people, promote accountability, and prevent harassment.

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- 7 NAT'L WOMEN'S LAW CTR., OUT OF THE SHADOWS., *supra* note 5 at 16-19 (Out of the sexual harassment charges filed with the EEOC by women, 56 percent were filed by women of color; yet, women of color only make up 37 percent of women in the workforce).
- 8 BE HEARD IN THE WORKPLACE ACT, S. 1082, 116th Cong. (2019).
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- 11 H.B. 679, 2019 Gen. Assemb., Reg. Sess. (Md. 2019).
- 12 A8421, § 4, 2019-2020 Reg. Sess. (N.Y. 2019).
- 13 H. Substitute No. 1 for H.B. 360, 149th Gen. Assemb., Reg. Sess. (Del. 2018).
- 14 S.B. 7507C, § 296-d, subpart F, 2017-2018 Leg. Sess. (N.Y. 2018).
- 15 ACT 183, H.707, § 1, 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
- 16 H.B. 252, 101st Gen. Assemb. (Ill. 2019).
- 17 H.B. 679, 2019 Gen. Assemb., Reg. Sess. (Md. 2019).
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- 24 H.B. 21, 2020 Reg. Sess. (N.M. 2020).
- 25 S.B. 0075, 101st Gen. Assemb. (Ill. 2019).
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- 28 S. 121, § 2, 218th Leg., 2018-2019 Reg. Sess. (Nj. 2019); *see also* § 10:5-12.8.

- 29 A8421, § 7, 2019-2020 Reg. Sess. (N.Y. 2019).
- 30 A8421, § 7, 2019-2020 Reg. Sess. (N.Y. 2019).
- 31 S.B. 726, 80th Leg., 2019 Reg. Sess. (Or. 2019); S.B. 479, 80th Leg. Assemb., 2019 Reg. Sess. (Or. 2019).
- 32 S.B. 478, 80th Leg. Assemb., 2019 Reg. Sess. (Or. 2019).
- 33 H.B. 594, 111th Gen. Ass., Reg. Sess. (Tenn. 2019).
- 34 H.B. 1820, 2019 Reg. Sess. (Va. 2019); see also VA. CODE ANN. § 40.1-28.01 (2019).
- 35 H.B. 2020, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018).
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- 37 S.B. 820, 2017-2018 Reg. Sess. (Cal. 2018).
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- 62 H.B. 4345, 86th Leg. (Tx. 2019).
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- 64 S.B. 0075, 101st Gen. Assemb. (Ill. 2019).
- 65 H.B. 138, 100th Gen. Assemb., 2nd Reg. Sess. (Ill. 2018); see also State Officials and Employees Ethics Act, 5 Ill. Comp. Stat. Ann. 430/20-10(c) (Ill. 2003).
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- 68 DISCLOSING SEXUAL HARASSMENT IN THE WORKPLACE ACT OF 2018, S.B. 1010, § 2, 2018 Gen. Assemb., Reg. Sess. (Md. 2018).
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- 82 A8421, § 13, 2019-2020 Reg. Sess. (N.Y. 2019).
- 83 S.B. 726, 80th Leg., 2019 Reg. Sess. (Or. 2019).
- 84 NEW YORK, N.Y., STOP SEXUAL HARASSMENT IN NYC ACT, Int. No. 663-A (2018).
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- 86** H.B. 138, 100th Gen. Assemb. (Ill. 2018).
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- 103** S.B. 0075, 101st Gen. Assemb. (Ill. 2019).
- 104** The California Department of Fair Employment and Housing must develop or obtain two online, interactive training courses on the prevention of sexual harassment in the workplace and make them available on the Department's website. S.B. 1343, 2017-2018 Reg. Sess. (Cal. 2018); S.B. 778, 2019-2020 Reg. Sess. (Cal. 2019).
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## EDUCATION

# DeVos's New Title IX Sexual Harassment Rule, Explained

In May 2020, Betsy DeVos's Department of Education announced a [final Title IX rule](#) weakening protections against sexual harassment in schools, including protections against sexual assault.<sup>1</sup> If it goes into effect, this rule will make schools more dangerous for all students. This is why it was opposed not only by survivors' advocates and women's rights organizations, but also by colleges and universities, superintendents, principals, mental health professionals, and many other stakeholders. The new rule, which is scheduled to take effect on August 14, 2020, explicitly seeks "a reduction in the number of Title IX investigations" schools undertake by making it harder for sexual harassment victims to come forward, requiring schools to ignore victims in many instances when they do ask for help, and denying victims fair treatment when they try to use the system that is supposed to protect them. That's why the National Women's Law Center will be fighting in court to ensure the new rule never takes effect.

The below step-by-step walkthrough sets out what the new rule means and how it departs from the Department's previous policy.

## IGNORING VICTIMS

Schools will be allowed—and in many cases, forced—to ignore sexual harassment victims if: (i) they were sexually harassed in the wrong place; (ii) they asked the wrong person for help; (iii) they haven't suffered enough by DeVos's standard; (iv) they are no longer participating or trying to participate in the school's program or activity; (v) their respondent is no longer at their school; or (vi) they don't submit a written complaint.

- **HARASSED IN THE WRONG PLACE:** Previously, Department of Education policy required schools to investigate all student complaints of sexual harassment, regardless of where the harassment occurred, to determine if the harassment had affected the student's ability to participate in classes and other school activities.<sup>2</sup> Under the new rule, schools will be required to dismiss all complaints of sexual harassment that occurs outside of a school program or activity. According to the Department, the only incidents that occur within a school program or activity (and therefore cannot be dismissed) are those where the school has "substantial control" over both the respondent and the context of the incident, or those that occur in a building owned or controlled by a student organization that is officially recognized

by a college or university.<sup>3</sup>

This rule will be devastating for students who are sexually assaulted at a fraternity that isn't officially recognized by their university or in off-campus housing, or who are harassed or stalked online outside of a school-sponsored program, and then forced to continue attending class with their rapist or abuser—or even a class *taught* by their rapist or abuser. This is why [student body presidents](#)<sup>4</sup> and [fraternity](#)<sup>5</sup> and [sorority](#)<sup>6</sup> members expressed “deep concern” about this provision, citing the fact that nearly 9 in 10 college students live off campus and many social gatherings occur off campus. Similarly, in their comments on this proposal, school administrators were [“shocked”](#)<sup>7</sup> by this [“serious mistake,”](#)<sup>8</sup> which inhibits their ability to provide a safe environment for their students. Campus police officers agreed, noting that under the proposed rule, “[s]exual assault would be the only crime response restricted in this manner,” as schools would not be restricted from disciplining students for off-campus behavior such as robberies, hate crimes, auto theft, or murder.<sup>9</sup>

- **ASKED THE WRONG PERSON FOR HELP:** Previously, schools were required to address: (i) any *employee-on-student* or *student-on-student* sexual harassment if a “responsible employee” knew or should have known about it, and (ii) all *employee-on-student* sexual harassment that occurred “in the context of” the employee’s job duties, regardless of whether a “responsible employee” knew or should have known about it.<sup>10</sup> A “responsible employee” was defined broadly as anyone whom “a student could reasonably believe” had the authority to redress sexual harassment or had the duty to report student misconduct to appropriate school officials.<sup>11</sup> Under the new rule, institutions of higher education will be allowed to ignore all incidents of sexual harassment unless the Title IX coordinator or a school official with “the authority to institute corrective measures” has “actual knowledge” of the incident.<sup>12</sup>

This means under the new rule, colleges and universities can ignore all sexual harassment by a student or school employee unless one of a small subset of high-ranking school employees actually knows about the harassment. Colleges and universities won't have any obligation to respond when a student tells a residential advisor, teaching assistant, or professor that they are experiencing sexual harassment. They will not even be obligated to address sexual abuse of a college student by a

professor—even if the abuse occurs “in the context of” the professor’s job duties—*unless* the student reports it to the Title IX coordinator or an undefined official with “authority to institute corrective measures.”

As survivors from [Michigan State University](#), [University of Southern California](#), and [Ohio State University](#) have pointed out, had the proposed rule previously been in place, their schools would have had no responsibility to stop serial predators like Larry Nassar, George Tyndall, or Richard Strauss—just because the victims reported the abuse to coaches and trainers instead of the “right” employees—even though Nassar, Tyndall, and Strauss sexually abused countless students in the context of their jobs as medical doctors.<sup>13</sup> Again, it’s no surprise that in their comments opposing this proposal, school officials in higher education were alarmed by the [“terrible consequences”](#)<sup>14</sup> of this requirement.

- **HASN'T SUFFERED ENOUGH:** Previously, schools were required to investigate all complaints of sexual harassment, which was defined as “unwelcome conduct of a sexual nature.”<sup>15</sup> Under the new rule, schools will be required to dismiss all complaints that do not meet one of DeVos’s three stringent definitions of “sexual harassment”: (i) unwelcome “quid pro quo” sexual harassment by a school employee (e.g., “I’ll give you an A if you have sex with me”); (ii) an incident that meets the definition of “sexual assault,” “dating violence,” “domestic violence,” or “stalking” under the Clery Act; or (iii) “unwelcome conduct” on the basis of sex that is “determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access” to a school program or activity.<sup>16</sup>

This means under the new rule, schools are arguably required to ignore complaints of sexual harassment unless the victim can show that the harassment has been so severe that it is affecting their ability to do their schoolwork or attend classes. This means many victims will be forced to endure repeated and escalating levels of abuse before they can get help. By the time their school intervenes, they may have already dropped out.

It’s not surprising that school officials commenting on the proposed rule thought this provision made [“little sense”](#)<sup>17</sup> and pushed schools in the [“opposite direction”](#)<sup>18</sup> from student safety. Title IX exists to ensure that sex discrimination, including sexual harassment, is never the end of anyone’s education, and accordingly, schools

should respond to sexual harassment complaints long before students are “effectively denied” equal access to education.

- **VICTIM NO LONGER PARTICIPATING OR TRYING TO PARTICIPATE IN THE SCHOOL’S PROGRAM OR ACTIVITY:**

Under this new rule, for the first time, students will only be able to file a sexual harassment complaint with a school where they are still “participating in or attempting to participate in the education program or activity” when they file the complaint.<sup>19</sup> This means that schools will not be allowed to investigate a complaint of sexual harassment—even if the respondent is still enrolled or teaching at the school—if the victim has already graduated, transferred, or even dropped out because of the harassment. Similarly, if a visiting high school student is sexually assaulted by a college student or a professor during an admit weekend, the survivor will not be able to file a complaint with that college unless they are still planning to enroll there. This will tie the hands of schools that want to respond to known sexual harassment, particularly by individuals who are still affiliated with the school and who could be a serial rapist or abuser. Unfortunately, students and other stakeholder weren’t given a chance to comment on the harms of this rule, as it wasn’t included in the Department’s proposal.

- **RESPONDENT NO LONGER AT THE SCHOOL:** Under the new rule, for the first time, schools will be allowed to dismiss complaints—even during a pending investigation or hearing—because the respondent is no longer enrolled in or employed by their school.<sup>20</sup> This means if a student graduates or transfers to another school after sexually assaulting another student, the school will no longer have to investigate or provide supportive measures to help the survivor continue their education. Similarly, if a teacher retires or resigns after his sexual abuse of many students over several years comes to light, the school will no longer have to investigate to determine the scope of the abuse, the impact of the abuse on students, and whether other employees knew about the abuse but ignored it. Without such an investigation, the school would not be able to remedy the hostile environment for the survivors and possibly the broader school community, or take steps to prevent such abuse from happening again. Unfortunately, students and other stakeholder weren’t able to comment on the dangers of this rule, as it wasn’t included in the Department’s proposal.

- **NO FORMAL WRITTEN COMPLAINT:** Under the new rule, for the first time a school will not be required to investigate any report of sexual harassment unless it receives a “formal complaint” filed by the victim (or their parent or guardian) or signed by the Title IX coordinator, requesting an investigation.<sup>21</sup> This requirement is especially harmful for young children, whose complaints of sexual assault or other harassment are typically made verbally, and students with disabilities that inhibit their ability to read, write, or sign a complaint.

## MISTREATING VICTIMS:

Previously, when alerted to possible sexual harassment, schools were required to respond “reasonably” to sexual harassment by investigating, providing remedies, and preventing the harassment from occurring again.<sup>22</sup> Under the new rule, schools’ responses are deemed acceptable as long as they are not “clearly unreasonable” or “deliberately indifferent”<sup>23</sup>—regardless of whether the victim is able to feel safe again in school.

Educators in K-12 and higher education alike objected to the parts of this rule that were proposed, because, along with the other proposed changes, it will “perversely”<sup>24</sup> give students in school—including children—“less protection”<sup>25</sup> from sexual harassment than adults in the workplace. They also criticized this rule for creating “confusion and absurdity” for individuals who are protected from sexual harassment under both Title IX and Title VII—such as college and graduate students who are employed by their schools<sup>26</sup> and school employees in both K-12 and higher education—but who would receive different and conflicting levels of civil rights protection if the proposed Title IX rule were to be finalized.

## UNFAIR INVESTIGATION AND HEARING PROCEDURES

When a sexual harassment victim is able to get an investigation, schools will still be allowed—and in many cases, forced—to use unfair and re-traumatizing procedures that aren’t required in any other investigations of student or staff misconduct—including: (i) creating unnecessary delays, (ii) presuming the harassment never occurred, (iii) re-traumatizing the survivor through direct, live cross-examination, and (iv) using an unfair standard of proof that tilts the investigation in favor of named harassers.

- **UNNECESSARY DELAYS:** Previously, the Department of Education recommended that schools finish

investigations within 60 days.<sup>27</sup> If there was an ongoing criminal investigation, schools were required to “promptly resume” the school’s investigation as soon as the police had finished gathering evidence—not wait for the ultimate outcome of the criminal investigation (which can take a very long time).<sup>28</sup>

The new rule drops the 60-day recommendation and allows schools to delay their own Title IX investigations for an unspecified period if there is an ongoing criminal investigation<sup>29</sup>—despite the fact that such investigations can be very lengthy. The new rule ignores the fact that Title IX is a civil rights law, not a criminal law, and that schools are required to conduct their own investigations *independent of the police*. The rule will make it particularly difficult for K-12 students who suffer sexual abuse to have a timely Title IX investigation, since most K-12 employees are required by state law to report child sexual abuse to the police,<sup>30</sup> which will trigger a criminal investigation. Student survivors have noted that many school investigations already take [more than 180 days or even up to 519 days](#) to resolve.<sup>31</sup> State attorneys general commenting on the proposed rule pointed out that creating additional grounds for delay will only further “[re-victimize](#)” survivors “as the process drags on without resolution or relief.”<sup>32</sup>

- **PRESUMPTION OF NO SEXUAL HARASSMENT:** Under the new rule, for the first time, schools will be required to start all sexual harassment investigations with the presumption that no sexual harassment occurred<sup>33</sup>—even though no such presumption is required for other school investigations of student or employee misconduct, like physical assault or religious harassment. In other words, schools will be effectively forced to presume that all students who report sexual harassment are lying. This presumption, which improperly imports a criminal law standard into a non-criminal investigation, perpetuates the sexist myth that women and girls frequently lie about sexual assault and other forms of sexual harassment. As the state attorneys general and campus police officers pointed out when opposing the proposed rule, this requirement not only “[improperly tilts the process](#)” in favor of named sexual harassers<sup>34</sup> but also wrongly imports a criminal law presumption into non-criminal investigations.<sup>35</sup>
- **RETRAUMATIZING LIVE CROSS-EXAMINATION:** Previously, schools were “strongly” encouraged to have students submit their investigation or hearing

questions to a “trained third party,” who would ask the questions on their behalf.<sup>36</sup> Under the new rule, in higher education, survivors and witnesses in sexual harassment investigations will be forced to submit to cross-examination “directly, orally, and in real time” by the respondent’s “advisor of choice” if they want their statements to be considered as evidence by the school.<sup>37</sup> The respondent’s advisor could be an angry parent or fraternity brother of the respondent, a faculty member who oversees the survivor’s academic work, or an “attack dog” criminal defense lawyer—even if the survivor cannot afford an attorney. This live, adversarial cross-examination will occur without the legal protections, including rules of evidence, that are available in courtroom proceedings, ensuring that many student survivors will be retraumatized or deterred from coming forward at all, and that many witnesses will refuse to participate in investigatory processes. In K-12 schools, schools will have the *option* of forcing students to undergo this process,<sup>38</sup> despite evidence showing that hostile cross-examination makes it especially difficult for children to provide accurate testimony.

A requirement that schools conduct live, quasi-criminal trials with live cross-examination only in sexual misconduct investigations—and not in investigations of other types of student or staff misconduct—communicates the toxic and false message that allegations of sexual harassment are uniquely unreliable. The Supreme Court has never required this type of live adversarial cross-examination in school investigations.<sup>39</sup> Student survivors who have been subjected to live cross-examination by their rapist’s advisor have reported tremendous stress and trauma as a result.<sup>40</sup> Furthermore, as many attorneys and educators pointed out when criticizing the proposed rule, it is “[nonsensical](#)”<sup>41</sup> to require school administrators to make “on-the-spot” or “[real-time evidentiary decisions](#)”<sup>42</sup> during cross-examination when even judges in courtrooms are not required to do so. Ultimately, this rule will only “[inhibit the Department’s stated goals of discovering the truth.](#)”<sup>43</sup>

- **TILTED STANDARD OF PROOF:** Previously, schools were required to use a “preponderance of the evidence” standard (i.e., “more likely than not”) in all sexual harassment investigations.<sup>44</sup> This is the same standard that is used by courts in [all civil rights cases](#)<sup>45</sup> and is [the only standard of proof](#)<sup>46</sup> that treats both sides equally. Under the new rule, schools will be able to choose between using the preponderance standard or the much

higher standard of “clear and convincing evidence” (i.e., “highly and substantially more likely than not”) to determine responsibility for sexual harassment, as long as they use the same standard against student and staff respondents.<sup>47</sup> Because some school employees’ collective bargaining agreements require use of the “clear and convincing evidence” standard for all employee misconduct investigations, some schools will thus be required to use the “clear and convincing evidence” standard in student sexual harassment investigations, even if they continue to use the preponderance standard for all other investigations of student misconduct, like a fist fight or religious harassment.

Allowing schools to use a “clear and convincing evidence” standard that tilts the scales in favor of respondents and to apply this standard only in sexual harassment investigations is inequitable and discriminatory. This rule again appears to be based on the harmful rape myth that students who report sexual harassment are inherently less credible than students who report other types of misconduct.

## HARMFUL RESPONSES

Schools will be allowed to use mediation to resolve student-on-student sexual assault complaints and will be permitted to fail to provide survivors with meaningful support. Both of these changes threaten significant harm to students who experience sexual assault or other forms of sexual harassment.

- **MEDIATING STUDENT-ON-STUDENT SEXUAL ASSAULT:**

Previously, schools were prohibited from using mediation to resolve sexual assault complaints,<sup>48</sup> because mediation assumes both parties share responsibility for the assault, because mediation can allow assailants to pressure survivors into inappropriate resolutions, and because mediation often requires direct interaction between the assailant and survivor, which can be retraumatizing. Under the new rule, schools will be allowed to use mediation to resolve any sexual harassment complaint, including student-on-student sexual assault (but not employee-on-student sexual assault).<sup>49</sup>

Students, survivors, and advocates alike opposed this rule when it was proposed because mediation can “[foster coercion](#),” allows abusers to manipulate victims,<sup>50</sup> and allows students to be “[pressured by administrators](#)” into entering mediation.<sup>51</sup>

- **LACK OF MEANINGFUL SUPPORT FOR VICTIMS:**

Supportive measures (or “interim measures”) are reasonable steps that schools are required to take—before, during, or without an investigation—to ensure that sexual harassment does not interfere with a student’s education. Supportive measures can include changes to class schedules or housing assignments to separate the students, counseling services, tutoring services, excused absences, or changes in assignments and tests.<sup>52</sup> Previously, schools were instructed to minimize the burden of these measures on the complainant.<sup>53</sup> For example, schools were permitted to issue a *one-way* no-contact order prohibiting the named harasser from contacting the complainant (instead of a *mutual* no-contact order prohibiting both parties from contacting each other).<sup>54</sup>

Under the new rule, schools will be prohibited from providing supportive measures that are “disciplinary,” “punitive,” or that “unreasonably burden” the other party.<sup>55</sup> This may lead some schools only to impose *mutual* no-contact orders, which puts victims at risk of discipline, given that [abusers often manipulate victims](#) into violating mutual no-contact orders.<sup>56</sup> This could also mean that schools will [force victims to change their own classes and dorms](#) to avoid their rapist or abuser, because changes to the respondent’s schedule may be seen as unreasonably burdensome.<sup>57</sup>

## NO NOTICE OF RELIGIOUS EXEMPTIONS

Schools that believe they have a religious exemption from Title IX that allows them to discriminate based on sex won’t have to inform the Department of Education or students and families in advance that they are claiming this exemption, which can especially harm women and girls, LGBTQ students, pregnant or parenting students, and students who access or attempt to access birth control or abortion.

- Under the new rule, the Department of Education is assuring schools that they will not be required to claim a religious exemption from Title IX exemption from the Department, or give students or their families any notice that they are claiming a religious exemption, *before* they engage in sex discrimination.<sup>58</sup> Schools can simply claim a religious exemption *after* they are already under investigation for violating Title IX.<sup>59</sup>
- On top of this, in a separate Title IX rule,<sup>60</sup> DeVos has proposed expanding the religious exemption to allow

many more schools to [discriminate based on sex in the name of religion](#).<sup>61</sup> This new proposed rule would allow schools that have only a tangential relationship—or even no relationship—to religion to claim a right to discriminate simply because they subscribe to “moral beliefs or practices.”<sup>62</sup> This means that in DeVos’s view, a school could discriminate based on not only moral principles that often have religious undertones like “modesty” or “purity,” but also common secular principles like “fairness,” “honesty,” or “intellectual freedom.”<sup>63</sup>

- These two Title IX rules, separately and together, will be especially dangerous for women and girls, LGBTQ students, pregnant or parenting students, and students who access or attempt to access birth control or abortion.

\* \* \* \* \*

For all these reasons, the rule was strongly opposed by a wide array of stakeholders when it was proposed:

- **Students**, including [student survivors](#),<sup>64</sup> [fraternity](#) and [sorority](#) members,<sup>65</sup> and [student body presidents at 76 colleges and universities in 32 states](#),<sup>66</sup>
- **Educators**, including [American Federation of Teachers](#),<sup>67</sup> [American Council on Education](#),<sup>68</sup> [Association for Student Conduct Administration](#),<sup>69</sup> [Association of American Universities](#),<sup>70</sup> [Association of Title IX Administrators](#),<sup>71</sup> [International Association of Campus Law Enforcement Administrators](#),<sup>72</sup> [National Education Association](#),<sup>73</sup> [The School Superintendents Association](#),<sup>74</sup> and [73 law professors from 26 states](#),<sup>75</sup>

- **Civil rights advocates**, including [Consortium for Citizens with Disabilities](#),<sup>76</sup> [Human Rights Campaign](#),<sup>77</sup> [Leadership Conference on Civil and Human Rights](#),<sup>78</sup> [MALDEF](#),<sup>79</sup> [NAACP](#),<sup>80</sup> [National Center for Transgender Equality](#),<sup>81</sup> [National Employment Lawyers Association](#),<sup>82</sup> [Southeast Asia Resource Action Center](#),<sup>83</sup> and [Southern Poverty Law Center](#),<sup>84</sup>
- **Medical experts**, including [American Psychological Association](#)<sup>85</sup> and [900+ mental health professionals](#),<sup>86</sup> and
- **Government officials**, including [145 state legislators from 41 states](#),<sup>87</sup> [36 United States senators](#),<sup>88</sup> and [19 state attorneys general](#).<sup>89</sup>

1 Dep’t of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (May 22, 2020), [www.federalregister.gov/d/2020-07057](http://www.federalregister.gov/d/2020-07057).

2 Dep’t of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at 5 (Jan. 2001) [hereinafter 2001 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (schools are responsible for addressing sexual harassment if it is “sufficiently serious to deny or limit a student’s ability to participate in or benefit from the school’s program,” regardless of where it occurs). See also Dep’t of Educ., Office for Civil Rights, *Questions and Answers on Campus Sexual Misconduct*, 1 n.3 (Sept. 22, 2017) [hereinafter 2017 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> (“Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities”); Dep’t of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, 29 (Apr. 29, 2014) [hereinafter 2014 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (“a school must process all complaints of sexual violence, regardless of where the conduct occurred”); Dep’t of Educ., Office of Civil Rights, *Dear Colleague Letter: Sexual Violence*, 4 (Apr. 4, 2011) [hereinafter 2011 Guidance], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (“If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures.”).

3 34 C.F.R. §§ 106.44(a), 106.45(b)(3)(i).

4 Letter from 76 College and University Student Body Presidents to Betsy DeVos, Sec’y, Dep’t of Educ., at 1 (Jan. 30, 2019) [hereinafter Letter from 76 College and University Student Body Presidents], [https://assu.stanford.edu/sites/g/files/sbiyb6236/ff/student\\_body\\_presidents\\_comment\\_on\\_title\\_ix\\_proposal\\_1.pdf](https://assu.stanford.edu/sites/g/files/sbiyb6236/ff/student_body_presidents_comment_on_title_ix_proposal_1.pdf).

5 E.g., Letter from Asa Jungreis, President, Alpha Epsilon Pi Fraternity, University of California, Davis to Dep’t of Educ. (Jan. 28, 2019) [hereinafter Letter from A UC Davis Fraternity President], <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11081>.

- 6** E.g., Letter from A Sorority at the University of California Davis to Dep't of Educ. (Jan. 29, 2019) [hereinafter Letter from A UC Davis Sorority], <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11790>.
- 7** Letter from The School Superintendents Association to Betsy DeVos, Sec'y, Dep't of Educ., at 5 (Jan. 22, 2019) [hereinafter Letter from The School Superintendents Association], [https://aasa.org/uploadedFiles/AASA\\_Blog\(1\)/AASA%20Title%20IX%20Comments%20Final.pdf](https://aasa.org/uploadedFiles/AASA_Blog(1)/AASA%20Title%20IX%20Comments%20Final.pdf).
- 8** Letter from American Council on Education on behalf of 61 Higher Education Associations to Betsy DeVos, Sec'y, Dept. of Educ., at 16 (Jan. 30, 2019) [hereinafter Letter from 61 Higher Education Associations], <https://www.acenet.edu/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf>.
- 9** Letter from International Association of Campus Law Enforcement Administrators to Betsy DeVos, Sec'y, Dep't of Educ., at 4 (Jan. 28, 2019) [hereinafter Letter from Campus Law Enforcement Administrators], <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10515>.
- 10** 2001 Guidance, *supra* note 2, at 10, 12, 13.
- 11** *Id.* at 13.
- 12** 34 C.F.R. § 106.30(a) (defining “actual knowledge”); see also § 106.44(a).
- 13** Letter from 21 Ohio State University Survivors to Betsy DeVos, Sec'y, Dep't of Educ., and Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., at 3 (Jan. 30, 2019), <https://www.publicjustice.net/wp-content/uploads/2019/01/Comments-of-Ohio-State-Survivors-on-Title-IX-NPRM.pdf>; Letter from 82 Student Survivors of Larry Nassar at Michigan State University, George Tyndall at University of Southern California, and Richard Strauss at Ohio State University to Betsy DeVos, Sec'y, Dep't of Educ., and Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., at 2 (Nov. 1, 2018), <https://www.publicjustice.net/wp-content/uploads/2018/11/November-1-Survivor-Letter-to-ED.pdf>.
- 14** Letter from 5 Student Affairs Associations to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., at 7 (Jan. 29, 2019) [hereinafter Letter from 5 Student Affairs Associations], <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11689>.
- 15** 2001 Guidance, *supra* note 2, at 2.
- 16** 34 C.F.R. § 106.30(a) (defining “sexual harassment”); see also § 106.45(b)(3)(i). Note: The new rule does not create new Title IX protections against domestic violence, dating violence, and stalking. Title IX prohibits all forms of sex-based harassment, which includes non-sexual conduct associated with domestic violence, dating violence, and stalking.
- 17** Letter from Pepper Hamilton LLP on behalf of 24 Private Liberal Arts Colleges and Universities to Betsy DeVos, Sec'y, Dep't of Educ., at 16 (Jan. 30, 2019) [Letter from 24 Private Liberal Arts Colleges and Universities], <https://www.wesleyan.edu/inclusion/dc/PH%20Comment%20Letter%20to%20Department%20of%20Education.pdf>.
- 18** Letter from The School Superintendents Association, *supra* note 7, at 4.
- 19** 34 C.F.R. § 106.30(a) (defining “formal complaint”).
- 20** § 106.45(b)(3)(ii).
- 21** 34 C.F.R. § 106.30(a) (defining “formal complaint”); see also §§ 106.44(b), 106.45.
- 22** 2001 Guidance, *supra* note 2, at 15-16.
- 23** 34 C.F.R. § 106.44(a); see also § 106.44(b)(2).
- 24** Letter from The School Superintendents Association, *supra* note 7, at 4.
- 25** Letter from National Education Association to Brittany Bull, Dep't of Educ., at 9 (Jan. 30, 2019) [hereinafter Letter from National Education Association], <http://www.nea.org/assets/docs/NEA%20Comment%20Letter%20RE%20ED-2018-OCR-0064.pdf>.
- 26** Letter from National Education Association, *supra* note 25, at 9.
- 27** 2014 Guidance, *supra* note 2, at 31-32; 2011 Guidance, *supra* note 2, at 12.
- 28** 2014 Guidance, *supra* note 2, at 28; 2011 Guidance, *supra* note 2, at 10. See also 2001 Guidance, *supra* note 2, at 21 (“because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively”).
- 29** 34 C.F.R. § 106.45(b)(1)(v).
- 30** See Dep't of Health & Human Servs., Admin. for Children & Families, Child Welfare Info. Gateway, *Mandatory Reporters of Child Abuse and Neglect* (2019), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/manda>.
- 31** Letter from Know Your IX to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., at 42-46 (Jan. 30, 2019) [hereinafter Letter from Know Your IX], [https://actionnetwork.org/user\\_files/user\\_files/000/029/219/original/Know\\_Your\\_IX\\_Comment\\_on\\_Proposed\\_Title\\_IX\\_Rule\\_\(1\).pdf](https://actionnetwork.org/user_files/user_files/000/029/219/original/Know_Your_IX_Comment_on_Proposed_Title_IX_Rule_(1).pdf).
- 32** Letter from 19 State Attorneys General to Betsy DeVos, Sec'y, Dep't of Educ., at 36 (Jan. 30, 2019) [hereinafter Letter from 19 State Attorneys General], [https://www.nj.gov/oag/newsreleases19/Title-IX\\_Comments.pdf](https://www.nj.gov/oag/newsreleases19/Title-IX_Comments.pdf).
- 33** 34 C.F.R. § 106.45(b)(1)(iv).
- 34** Letter from 19 State Attorneys General, *supra* note 32, at 35.
- 35** Letter from Campus Law Enforcement Administrators, *supra* note 9, at 6.
- 36** 2014 Guidance, *supra* note 2, at 31; 2011 Guidance, *supra* note 2, at 12.
- 37** 34 C.F.R. § 106.45(b)(6)(i).
- 38** 34 C.F.R. § 106.45(b)(6)(ii).
- 39** *Goss v. Lopez*, 419 U.S. 565, 566, 579 (1975) (holding that students in public schools facing short-term suspensions require only “some kind of” “oral or written notice” and “some kind of hearing”); see also *id.* at 583 (holding that a 10-day suspension does not require “the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident”).
- 40** E.g., Letter from Know Your IX, *supra* note 31, at 34.
- 41** Letter from 61 Higher Education Associations, *supra* note 8, at 10.
- 42** Letter from 24 Private Liberal Arts Colleges and Universities, *supra* note 17, at 13.
- 43** Letter from 19 State Attorneys General, *supra* note 32, at 40-41.
- 44** 2014 Guidance, *supra* note 2, at 13, 26; 2011 Guidance, *supra* note 2, at 10-11.
- 45** 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) [hereinafter Letter from Leadership Conference on Civil and Human Rights], <http://civilrightsdocs.info/pdf/policy/letters/2019/Joint-Comment-Title-IX-NPRM-01302019-Final.pdf>.



- 46** Letter from National Women's Law Center to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., at 33 (Jan. 30, 2019) [hereinafter Letter from National Women's Law Center], <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf>.
- 47** 34 C.F.R. § 106.45(b)(1)(vii).
- 48** 2011 Guidance, *supra* note 2, at 8; 2001 Guidance, *supra* note 2, at 21.
- 49** 34 C.F.R. § 106.45(b)(9).
- 50** *E.g.*, Letter from Know Your IX, *supra* note 31, at 39.
- 51** Letter from 76 College and University Student Body Presidents, *supra* note 4, at 2.
- 52** 2014 Guidance, *supra* note 2, at 32-33; 2011 Guidance, *supra* note 2, at 16-17; 2001 Guidance, *supra* note 2, at 16.
- 53** 2014 Guidance, *supra* note 2, at 33; 2011 Guidance, *supra* note 2, at 15-16.
- 54** 2011 Guidance (“the school may prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school’s investigation”).
- 55** 34 C.F.R. § 106.30(a) (defining “supportive measures”).
- 56** Letter from National Women's Law Center, *supra* note 46, at 22.
- 57** Letter from 36 U.S. Senators to Betsy DeVos, Sec'y, Dep't of Educ., at 6-7 (Jan. 30, 2019) [hereinafter Letter from 36 U.S. Senators], <https://www.help.senate.gov/imo/media/doc/013019%20Proposed%20Title%20IX%20reg%20caucus%20letter.pdf>.
- 58** 34 C.F.R. § 106.12(b).
- 59** *Id.*
- 60** 85 Fed. Reg. 3190.
- 61** National Women's Law Center, NWLC Submits Comment Opposing Betsy DeVos's Title IX Proposal to Enable Sex Discrimination in the Name of Religion (Feb. 18, 2020), <https://nwlc.org/resources/nwlc-submits-comment-opposing-betsy-devoss-title-ix-proposal-to-enable-sex-discrimination-in-the-name-of-religion>.
- 62** *Id.* at 15, 21.
- 63** *Id.* at 21.
- 64** *E.g.*, Letter from Know Your IX, *supra* note 31; Letter from End Rape on Campus to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ. (Jan. 30, 2019), <https://static1.squarespace.com/static/51f82234e4b097de73d1a373/t/5c526bce21c67c217bba88a5/1548905423597/End+Rape+on+Campus+Comment.pdf>.
- 65** *E.g.*, Letter from a UC Davis Fraternity President, *supra* note 5; Letter from a UC Davis Sorority, *supra* note 6.
- 66** Letter from 76 College and University Student Body Presidents, *supra* note 4.
- 67** Letter from American Federation of Teachers to Brittany Bull, Dep't of Educ. (Jan. 30, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-9123>.
- 68** Letter from 61 Higher Education Associations, *supra* note 8.
- 69** Letter from 5 Student Affairs Associations, *supra* note 14.
- 70** Letter from Association of American Universities to Brittany Bull, Dep't of Educ. (Jan. 24, 2019), <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Higher-Education-Regulation/AAU-Title-IX-Comments-1-24-19.pdf>.
- 71** Letter from Association of Title IX Administrators to Betsy DeVos, Sec'y, Dep't of Educ. (Jan. 28, 2019), [https://cdn.atixa.org/website-media/o\\_atixa/wp-content/uploads/2012/01/18120231/ATIXA-NPRM-Comments-Final.pdf](https://cdn.atixa.org/website-media/o_atixa/wp-content/uploads/2012/01/18120231/ATIXA-NPRM-Comments-Final.pdf).
- 72** Letter from Campus Law Enforcement Administrators, *supra* note 9.
- 73** Letter from National Education Association, *supra* note 25.
- 74** Letter from The School Superintendents Association, *supra* note 7.
- 75** Letter from 73 Law Professors to Dep't of Educ. (Jan. 30, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11900>.
- 76** Letter from Consortium for Citizens with Disabilities to Dep't of Educ. (Jan. 30, 2019), <https://nacdd.org/wp-content/uploads/2019/01/Final-CCD-Title-IX-comments-1.30.19.pdf>.
- 77** Letter from Human Rights Campaign to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ. (Jan. 30, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11375>.
- 78** Letter from Leadership Conference on Civil and Human Rights, *supra* note 45.
- 79** Letter from MALDEF to Brittany Bull, Dep't of Educ. (Jan. 30, 2019), <https://www.maldef.org/wp-content/uploads/2019/01/MALDEF-Title-IX-Comment.pdf>.
- 80** Letter from Leadership Conference on Civil and Human Rights, *supra* note 45, at 11.
- 81** Letter from National Center for Transgender Equality to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ. (Jan. 29, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11557>.
- 82** Letter from National Employment Lawyers Association to Betsy DeVos, Sec'y, Dep't of Educ. (Jan. 30, 2019), <https://www.nela.org/index.cfm?pg=83FedReg61483>.
- 83** Letter from Leadership Conference on Civil and Human Rights, *supra* note 45, at 11.
- 84** *Id.*
- 85** Letter from American Psychological Association to Brittany Bull, Dep't of Educ. (Jan. 30, 2019), <https://www.apa.org/advocacy/interpersonal-violence/titleix-comments.pdf>.
- 86** Letter from 902 Mental Health Professionals and Trauma Specialists to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ. (Jan. 30, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-104088>.
- 87** Letter from 145 State Legislators in 41 States to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ. (Jan. 25, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-8535>.
- 88** Letter from 36 U.S. Senators, *supra* note 57.
- 89** Letter from 19 State Attorneys General, *supra* note 32.

# Protecting School Employees from Sexual Harassment

By: Jayme L. Walker

Gwilliam, Ivary, Chiosso, Cavalli & Brewer

## State Law Often More Expansive than Federal Law

- The FEHA extends protection to independent contractors and unpaid interns and volunteers (defined at 2 CCR § 11008(k)), as well as employees and job applicants. [Gov.C. § 12940(j)(1), (5); *Hirst v. City of Oceanside* (2015) 236 CA4th 774, 785-786, 187 CR3d 119, 127-128]
- The FEHA ban on harassment extends to all employers. [Gov.C. §§ 12926(d), 12940(j)(4)(A)]
- The FEHA ban on harassment extends to nonprofit hospitals and health care facilities affiliated with or owned by religious entities. [Gov.C. §§ 12926.2, 12940(j)(4)(B); see ¶ 7:158]
- Liability for harassment extends to any employee of a covered employer. [Gov.C. § 12940(j)(3); see ¶ 10:495 ff.]
- 3 year statute of limitations to file DFEH charge

## Using Title IX in Employment Sexual Harassment Cases

- No explicit statute of limitations, usually state law personal injury statute
- In states where only Title VII applies, can sue individual harasser under Title IX
- Recent case law in some circuits says Title IX and Title VII are both applicable in employment context. *Jane Doe v. Mercy Catholic Medical Center* (3d Cir. 2017) 850 F. 3d 545
- Breach of Mandatory Duty of Public Entity Under Government Code 815.6

Questions?

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## **Joint Guidance on Federal Title IX Regulations Analysis on the Interaction between Title VII and Title IX Requirements**

September 17, 2020

*Note:* This document focuses on a summary analysis of the interaction between Title VII and the Title IX 2020 Final Rule. For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Title IX Summary Proposed to Final Comparison*, available at [https://system.suny.edu/media/suny/content-assets/documents/sci/tix2020/TIX-Regulations-Text-for-Text-Comparison-Chart\\_v2.pdf](https://system.suny.edu/media/suny/content-assets/documents/sci/tix2020/TIX-Regulations-Text-for-Text-Comparison-Chart_v2.pdf)

### **Interaction between Title VII Obligations and the Title IX Final Rule**

The Final Rule presents particular challenges in situations where employees are potential complainants or respondents in matters involving sexual harassment or gender discrimination, and when claims involve allegations of discrimination under multiple protected categories, including gender discrimination. Recipients must fulfill explicit new procedural requirements in the Final Rule including requirements which appear to conflict with established Title VII legal principles and practices. The overlap of Title VII law and the Title IX Final Rule potentially became even more complex after the Supreme Court’s June 15, 2020 decision in *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, where the Supreme Court ruled that “sex” under Title VII explicitly includes sexual orientation and gender identity discrimination. Following *Bostock*’s reasoning regarding Title VII, we are likely to see courts confirm that allegations of Title IX violations on the basis of sexual orientation and gender identity discrimination may be considered gender discrimination under Title IX, and therefore may be subject to the Title IX Final Rule grievance process as well.

### **Institutional Obligations regarding Sexual Harassment under Title VII**

To begin, this memo will summarize the institutional obligations regarding sexual harassment under longstanding Title VII case law and guidance from the Equal Employment Opportunity Commission. Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for a covered employer to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of their employment, because of such individual’s race, color, religion, sex, or national origin. Since 1986, the Supreme Court has recognized that sexual harassment may constitute sex discrimination under Title VII when it is “sufficiently severe *or* pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment.”<sup>1</sup>

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<sup>1</sup> See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (internal quotation marks omitted) (emphasis added).



Under Title VII, covered employers must investigate claims of sexual harassment by or against employees. This duty exists irrespective of the gender(s) of the parties to the alleged harassment. This obligation to begin an inquiry is triggered once the employer “knew or should have known” that harassment may have occurred. An employer’s knowledge under Title VII’s “knew or should have known” standard is construed as including notice to any employer representative who supervises or manages employees or contractors.

The Title VII obligation is generally understood to be a *negligence* standard. This obligation to investigate once an employer knew or should have known about allegedly harassing conduct is addressed in two Supreme Court decisions from 1998: *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). According to the *Faragher* and *Ellerth* decisions, if an employer can provide evidence that it has an effective process for investigating claims of harassment, the employer can rely on the investigation process as an affirmative defense in a Title VII sexual harassment claim. Conversely, if an individual who alleges harassment under Title VII did not utilize an existing investigation procedure, this also can support an employer’s affirmative defense to a Title VII sexual harassment claim.

Following the *Faragher* and *Ellerth* decisions, employers face liability for harassment by a supervisor that results in a negative employment action such as termination, failure to hire, or losing wages. They can avoid liability only if they can show they reasonably tried to prevent and promptly correct the behavior, and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities offered by the employer. For harassment by non-supervisors, employers are liable if they knew, or should have known, about the harassment and failed to take prompt and appropriate corrective action.

### **Apparent Conflict between Title VII and Title IX Grievance Procedures**

The Final Rule creates a regime regarding sexual harassment in educational institutions that differs in several significant ways from the Title VII regime, posing potential conflicts in cases that implicate both laws. While the Final Rule section 106.6(f) states that “nothing in this part may be read in derogation of any individual’s rights under Title VII ... or any regulations promulgated thereunder,” in practice the new Rule’s highly-specific process may conflict with processes already established for employees under Title VII and corresponding state anti-discrimination laws, as well as federal, state, and local labor relations laws and agreements.

As a threshold matter, the interpretation of legal standards set forth in the new Rule are different than those set forth under Title VII regulations, enforcement guidance, and case law. Recipient employers may be confused about how they can comply with the Final Rule without potentially increasing risk and liability under Title VII. Compliance with the Final Rule appears to directly conflict with some actions required of employers under Title VII, though in the Preamble to the Final Rule, the Department states that “[r]ecipients should comply with both Title VII and Title



IX, to the extent that these laws apply, and nothing in these final regulations precludes a recipient from complying with Title VII.” 85 Fed. Reg. 30026, 30451 (May 19, 2020).

### Definition of Sexual Harassment

These possible conflicts proceed with the definition of “sexual harassment” under the new Title IX regulations. The Final Rule includes three types of conduct which may constitute “sexual harassment”: The Rule recognizes certain “quid pro quo” harassment as *per se* harassment, and also includes as *per se* sexual harassment four types of sexual misconduct which are addressed by the Violence Against Women Act (VAWA) and the Clery Act: sexual assault, domestic violence, dating violence, and stalking.

However, a meaningful difference with Title VII arises with the third type of conduct in the Final Rule’s definition of “sexual harassment”: conduct based on creation of a hostile work environment. The Final Rule’s definition of what constitutes a “hostile work environment” is much narrower than the definition under Title VII.

The Final Rule defines sexual harassment which creates a “hostile work environment” as “... (ii) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the educational institution’s education program or activity...” Final Rule § 106.30(a) (emphasis added). The Department specifically rejected the option of defining hostile environment sexual harassment as “severe, pervasive, **or** objectively offensive...” This rejected definition aligned more closely to the established Title VII standard, as well as to much of the case law on Title IX and previous interpretations of Title IX by the Department of Education itself.

Because Title IX and Title VII are different laws, the Department does not consider applying different standards for “sexual harassment” under each law to be a conflict. The Department acknowledges in the Preamble, “...Title VII defines sexual harassment as severe **or** pervasive conduct, while Title IX defines sexual harassment as severe **and** pervasive...” and “... Employers are aware that complying with Title IX and its implementing regulations does not satisfy compliance with Title VII.” 85 Fed. Reg. at 30451. The Department “...recognizes that other laws such as Title VII may have a different standard and impose different requirements. There is no inherent conflict between Title VII and Title IX, and employers may comply with the requirements under Title VII and Title IX...” *Id.* at 30441. It does not view compliance with multiple legal standards as problematic. Thus, a respondent could be found to have engaged in sexual harassment under Title VII, but not under Title IX’s narrower definition due to the differing definitions of “sexual harassment” in the respective regulations for each statute.





## Notice of Reports of Sexual Harassment

An additional implementation concern stems from the Final Rule’s requirement for when a recipient employer must evaluate and respond to an allegation of sexual harassment. Notice of the potential claim to the recipient, and the recipient’s subsequent responsibilities, are a critical component of the differences between the two regulatory schemes.

First, under the Final Rule, a sexual harassment claim only may be considered an actionable Title IX claim if the allegations are brought to the attention of “...a recipient’s Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.” Final Rule § 106.30(a). Further, a recipient only may conduct a formal investigation of the allegations under Title IX if the complainant files a formal complaint in writing, or the Title IX Coordinator files a complaint. *Id.*

In contrast, under Title VII, an employer is required to take action on a claim of sexual harassment raised in a variety of settings. It can be raised through a formal grievance process, or by a third party. A sexual harassment allegation may be presented verbally under Title VII. An employee may raise a claim to a trusted administrator, faculty member, or supervisor. Multiple reporting options have been recognized as critical to reporting potential sexual harassment claims in the employment context, where the person’s direct supervisor or faculty member may be the subject of the allegations.

The previous Title IX regulatory scheme also provided a variation of these reporting options, primarily through the “responsible employee” role. The Department has not prohibited the continued inclusion of the “responsible employee” role in recipient’s Title IX policies; however, as mentioned above, it would still require a formal complaint be filed with the Title IX Coordinator for an investigation under the Title IX Grievance Process to be conducted.

## Employer’s Jurisdiction

Another core distinction surrounds jurisdictional limitations imposed under the Title IX Final Rule. First, even if an allegation is raised in accordance with the Rule’s procedural requirements, a recipient employer must evaluate the allegations and make an immediate determination of whether the alleged acts occurred within a recipient’s education program or activity, also as defined by the Rule. Under the Final Rule, in general, conduct which occurs off-campus, including in off-campus residences (with an exception for property owned or controlled by certain student organizations and other potential and limited exceptions), as well as conduct which occurs outside the United State (such as within study abroad programs), is not covered. There also could be details of a complaint which constitute procedural deficiencies under the Title IX regulations, such as failure to sign a complaint. If the allegations do not meet that standard, a recipient is required to dismiss the complaint, i.e., not process the allegations



under the recipient’s Title IX process. Final Rule § 106.45(b)(3). Finally, if the allegation does not meet Title IX’s definition of sexual harassment, the recipient *must* dismiss the complaint. *Id.*

However, this same allegation may meet the threshold standard of an allegation of sexual harassment that a recipient employer is required to investigate under Title VII. If a recipient employer dismisses a sexual harassment allegation entirely under Title IX because it is required to do so, this dismissal could be considered a failure to fulfill its obligation to act under Title VII. As such, and as discussed further below, a recipient employer would need to make sure there was an opportunity to address such a dismissed claim separately for Title VII purposes.

### Response to Reports of Sexual Harassment

As mentioned above, a recipient employer’s responsibilities for how it evaluates and addresses sex discrimination and harassment complaints also vary under Title VII and Title IX. In fact, the Department recognized that an

...employer may need to implement policies to address conduct that goes beyond the definition of sexual harassment in Section 106.30 to fulfill its obligations under Title VII ... For example, the *Faragher-Ellerth* affirmative defense requires an employer to exercise reasonable care with respect to supervisor-on-employee harassment, while Title IX requires a recipient not to be deliberately indifferent ... Title VII also requires a negligence standard if a co-worker harasses another co-worker. *Id.*

The differing obligations imposed on employers under the two laws means that in some cases, an employer may be precluded under Title IX from taking actions that are required under Title VII. In fact, the required investigatory response is different under Title VII than under Title IX, particularly under the Final Rule.

Under the Title IX Final Rule, an employer recipient’s obligation to act under Title IX arises only when the recipient has “actual knowledge.” And under Title IX, a recipient fails to meet its obligation to act only if it reacts in a deliberately indifferent manner. The Department incorporated the deliberate indifference standard into the Final Rule even as it acknowledged that this standard is a different standard than an employer’s obligation to act under Title VII. Simply put, an employer recipient’s obligations to investigate under Title VII are broader, and arise in a broader array of circumstances. In some situations, a recipient employer may be unable to begin an inquiry that satisfies its Title VII obligations within the restrictions of the Final Rule.

Under Title VII there may be situations where the *Faragher/Ellerth* standard requires a claimant to file a sexual harassment claim through the employer’s internal process. However, there may be situations under the new Title IX rules where a claimant is required to file with the employer under Title VII to trigger employer liability, but the recipient employer may then be barred from investigating that claim under Title IX if it does not meet the new jurisdictional requirements. A



recipient employer will have to dismiss the complaint under Title IX, then provide a separate process under Title VII for investigating the claim. That process for investigating a Title VII-based claim still might need to incorporate the same standard of proof as the Title IX process<sup>2</sup> as there will be situations where the sexual harassment complaint *does* meet Title IX jurisdictional standards. The Department does not characterize this type of situation as a true conflict between Title VII and Title IX. In fact, its response to concerns about potential conflict between a recipient employer’s duty to act under each law (as well as its defenses under *Faragher/ Ellerth*) was as follows: “...Employers may not be able to use affirmative defenses to sexual harassment under Title VII for purposes of Title IX, but these final regulations do not in any way derogate an employers’ affirmative defenses to sexual harassment under Title VII...” 85 Fed. Reg. at 30451. However, recipients should be mindful that maintenance of multiple complaint processes which overlap in many but not all circumstances may be confusing to parties, the individuals who the procedures are designed to serve, and consider ways to mitigate this confusion.

### Prohibitions on Retaliation and Restrictions on Parties

The Final Rule’s definition and discussion of retaliation may be at odds with some procedural tenets of Title VII. Section 106.71 of the Final Rule protects parties and witnesses who refuse to participate in the Title IX process. A party or witness may avoid some or all of the Title IX investigation process. However, an employee-party’s option not to cooperate is contrary to established Title VII procedure. Under Title VII, which focuses on the employer-employee relationship, an employer can compel an employee to participate in an investigation of a gender discrimination or harassment complaint under Title VII.

The Final Rule is also inconsistent with the Equal Employment Opportunity Commission’s rules about restrictions on discussing complaints under investigation. Section 106.45(b)(5) of the Final Rule states that a recipient may not restrict a party or witness’ ability to discuss the allegations under investigation. Conversely, a party or witness who discusses a matter under investigation could find themselves the subject of a retaliation claim. As a practice tip, a recipient may advise parties and witnesses to take care when and if they discuss a complaint or information shared through the Title IX investigation process, if at all. The recipient should explain the reason to use caution is that discussion of a complaint and/or the investigation process, may be perceived as retaliatory conduct.

In fact, in its discussion of responses to Directed Question 3 (Application to Employees) put forward by the Department of Education in its Notice of Proposed Rulemaking, the Department emphasized its addition of the Retaliation section to the new Title IX regulations as a solution for addressing potential conflicts between (an already-existing) complaint process which complies

<sup>2</sup> Under the Final Rule, a recipient employer may opt to implement either a clear and convincing or preponderance of the evidence standard of proof in its Title IX policy. However, the same standard of proof must apply whether a party is a student or employee (including faculty). Prior to the Final Rule, some college and university employers had differing standards of proof in the student code of conduct, employee handbook, faculty handbook, and/or collective bargaining agreements.



with Title VII, and the new definitions and procedures set forth in the Final Regulations. *See, e.g.*, 85 Fed. Reg. at 30440-30441. The reasoning for how the Retaliation section addresses this conflict is not crystal clear. The Department does state that the Retaliation section is related to the availability of supportive measures to complainants and respondents. *Id.*

As previously mentioned, the Department noted that “...these final regulations provide in Section 106.6(f) that nothing in this part shall be read in derogation of an individual’s rights including an employee’s rights, under Title VII or its implementing regulations...” 85 Fed. Reg. 30451. The Department emphasizes this language in Section 106.6(f) in answer to potential conflicts between the language of Title VII and Title IX regulations. However, it is too soon to know if and how this statement resolves conflicts in practice as claims are adjudicated which implicate both statutory schemes.

### A Proposed Solution for Recipients

The Department of Education received numerous comments during the Notice and Comment period about apparent conflicts in definitions and requirements to act under the proposed Title IX Rule and established law under Title VII. In response, the Department argued that there is no inherent conflict between Title IX and Title VII enforcement schemes and stated it “will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer’s obligations under Title VII and Title IX.” 85 Fed. Reg. 30439. It also rejected the positions of commenters that recipient employers cannot comply with Title VII regulations, caselaw, and statutory schemes *and* the new Title IX regulations.

Instead, the Department maintained that where a claim may implicate employees as complainants or respondents, recipients can process claims through the specific grievance process in the new Title IX regulations, and also process a claim through a Title VII grievance process. The Department characterizes this option as handling the non-Title IX allegations through “another provision of the recipient’s code of conduct...” Final Rule § 106.45(b)(3). The Department stated more specifically:

“If a recipient has a code of conduct for employees that goes beyond what Title IX and these final regulations require (for instance, by prohibiting misconduct that does not meet the definition of “sexual harassment” under Section 106.30, or by prohibiting misconduct that occurred outside the United States), then a recipient may enforce its code of conduct even if the recipient must dismiss a formal complaint (or allegations therein) for Title IX purposes. These regulations do not preclude a recipient from enforcing a code of conduct that is separate and apart from what Title IX requires, such as a code of conduct that may address what Title VII requires. Accordingly, recipients may proactively address conduct prohibited under Title VII, when the conduct does not meet the definition of sexual harassment in Section 106.30, under the recipient’s own code of conduct,



as these final regulations apply only to sexual harassment as defined in Section 106.30...” 85 Fed. Reg. 30205.

The Department’s comment about “a code of conduct that may address what Title VII requires” appears intended to equate the broader universe of employment law-based complaints with the broader universe of student conduct which may be addressed in a recipient’s general code of student conduct. College and university administrators and counsel know, however, that corraling employment disputes under a general “code of conduct” umbrella glosses over the array of procedures which exist to handle employment discrimination and retaliation claims and which must be considered. For example, under Title VII, gender discrimination and harassment claims must meet the requirements for filing a claim via the Equal Employment Opportunity Commission (“EEOC”). In many states, a claimant and a recipient employer would have to meet the standards set forth in state antidiscrimination statutes and state agency regulations. These state laws and procedures generally track the EEOC’s rules.

### **Considerations for Handling Claims Involving Multiple Bases for Discrimination**

Finally, in the Preamble to the Final Rule, the Department addressed comments about why an employment gender discrimination claim must be investigated and adjudicated under the highly specific process mandated by the Department for Title IX claims, where this process is not mandated for claims of employment discrimination under other protective classes; “...for example, [a] commenter stated, if allegations also involve racial discrimination then it is unclear whether the recipient must carve out the non-sex discrimination issue and proceed without a live hearing yet address the sex-related claims with a hearing.” 85 Fed. Reg. 30449. One commenter suggested that Title VII be considered the exclusive forum for bringing discrimination claims that arise in the employment setting, including for sex discrimination claims. Another commenter suggested that Title VII claims preempt Title IX claims in this setting.

The Department rejected these suggestions. Going forward, recipients should be mindful of the possibility that some members of a recipient’s community might perceive that sex discrimination claims are taken more seriously than claims of other types of employment discrimination, even in terms of the exponentially greater amounts of resources and attention which are directed toward Title IX claims (conversely, it may appear to some that the onerous requirements of the Final Rule mean that institutions are taking these violations less seriously, or addressing them in a less meaningful way). As stated above and elsewhere in the Joint Guidance, the Supreme Court’s *Bostock* decision likely also means that employee sexual orientation and gender identity discrimination complaints must be adjudicated through the Final Regulations’ grievance process.

Where a complainant may allege race and gender discrimination, a recipient would need to investigate the gender discrimination claim through the Title IX process; one interpretation of the Final Rule and Preamble is that the race discrimination claim could not be investigated under the Title IX process as it does not meet jurisdictional requirements. Under such an interpretation, a recipient employer would need to process the gender discrimination complaint under the Final



Rule’s grievance process, and investigate the race discrimination complaint under a different internal grievance process.

Based on the Department of Education’s discussion in the Preamble, such a claim potentially arising under both Title IX and Title VII could be investigated either concurrently with the Title IX process, or under Title VII after the Title IX process is complete. This could result in a situation where two hearings might be needed – one before a determination in a Title IX matter, and another hearing arising under an employee or faculty handbook, state law, or a collective bargaining agreement. Such hearings are held when there is a challenge to an employer’s adverse action after that adverse action has been issued. Alternatively, a recipient employer would need to adopt a process which mirrors the Title IX grievance process outlined in the Final Rule § 106.45 for all types of discrimination, and/or all types of employment discrimination. The Final Rule requires a hearing according to its precise rules before an adverse action may be imposed under Title IX. Final Rule § 106.44(a).

Within this context, an individual investigator could investigate a complaint under both the Title IX and Title VII standards. However, an investigator would need to be mindful and explicit about when they are applying Title IX processes and definitions, and when they are applying standards which exist under employment discrimination (Title VII-based) procedures, when collecting and evaluating evidence. A hearing officer also must be explicit in the same way when they are evaluating evidence. Such a dual application could occur if all types of complaints are investigated under a procedure which adheres to the Title IX procedural requirements. Alternatively, a complaint could be assessed under Title IX-specific procedures, and also under a recipient employer’s nondiscrimination policy and procedures.

Finally, it is notable that the Department of Education rejected requests for the Department to coordinate with the EEOC, which implements Title VII regulations. In rejecting a coordinated response with the EEOC, the Final Rule correspondingly prohibits use of informal resolution procedures where a student alleges sexual harassment by an employee. Such a prohibition does not mirror the availability of mediation or other alternative dispute resolution procedures at the EEOC and/or state nondiscrimination agencies. The Department further stated that because it is not responsible for implementing Title VII regulations, it would not comment in detail about how a recipient could coordinate and/or meet its current obligations to comply with Title VII and the new obligations set forth in the new Title IX regulations.



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**Workshop D: Non-disciplinary/non-litigation responses to allegations of sexual harassment and sexual violence**



## RESTORATIVE JUSTICE IN CASES INVOLVING SEXUAL HARM

### RESOURCES

1. Campus PRISM (Promoting Restorative Initiatives for Sexual Misconduct on College Campuses)  
<https://www.sandiego.edu/soles/restorative-justice/campus-prism.php>
2. Five Things Student Affairs Administrators Should Know About Restorative Justice and Campus Sexual Harm  
<https://www.naspa.org/report/five-things-student-affairs-administrators-should-know-about-restorative-justice-and-campus-sexual-harm>
3. American Bar Association: Restorative Justice & Gender Based Violence  
[https://www.americanbar.org/groups/crsj/events\\_cle/program-archive/restorative-justice/](https://www.americanbar.org/groups/crsj/events_cle/program-archive/restorative-justice/)
4. A Conversation on Consent: A VICE on HBO Special Report (starting at minute 38):  
<https://www.youtube.com/watch?v=AwfZ1MYNvxk>
5. TedX Talk (“Dr. Alissa R. Ackerman offers a new perspective on restorative justice and how it can help those who suffered from sexual assault. With her personal experience, she shares with everyone the true importance of engaging in difficult conversations to heal from intimate harm.”)  
<https://www.youtube.com/watch?v=DTfBVR1eLFo>
6. State of New Jersey, Senate Bill No. 3070  
<https://legiscan.com/NJ/research/S3070/2020>
7. Survivors’ Agenda  
<https://survivorsagenda.org/>
8. California Senate Bill 493, amending California Education Code Section 66262.5 and adding Section 66281.8 (prohibits use of mediation)  
[https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB493](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB493)
9. Bill C-65: Amending Canada Labour Code  
<http://gazette.gc.ca/rp-pr/p2/2020/2020-06-24/html/sor-dors130-eng.html>
10. The Reckoning Podcast: A Survivor and Her Perpetrator Find Justice  
<http://www.reckonings.show/transcript21.html>

**General Restorative Justice Resources :**

1. 10 Ways to Live Restoratively :  
<https://emu.edu/now/restorative-justice/2009/11/27/10-ways-to-live-restoratively/>
2. "Healing Justice" (film)  
<https://www.world-trust.org/films-1>
3. Karp, D. *The Little Book of Restorative Justice for Colleges and Universities*. Good Books, 2019.

**Workshop E: The interplay of  
harassment, speech and the First  
Amendment**

# Who Wins: Sexual Harassment Prevention or the First Amendment?

# AGENDA

- It's not always a battle – free speech can help combat harassment.
- Free speech framework – student (college and K-12) framework
- Free speech – faculty/staff (employment) framework
- Academic freedom and the classroom
- Responding to bias and offensive speech

# It's not always a battle

- The First Amendment protects survivors who want to speak out about their experiences.
  - School context: *Norris v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12 (1st Cir. 2020)
  - Defamation: Alyssa R. Leader, *A “SLAPP” in the Face of Free Speech: Protecting Survivors’ Rights to Speak Up in the “Me Too” Era*, 17 First Amend. L. Rev. 441, 444 (2019)
- First Amendment claims can bolster Title IX claims arising out of differential treatment of women for their speech and gestures.
  - *Radwan v. University of Connecticut*, No. 20-2194 (2d Cir. 2020)
- Harassment often does not take the form of words.

# College Student Free Speech

# Today's College Student

Lessons from “**Free Speech on Campus**” by  
Cherminsky/Gillman

- Raised in “anti-bully” environment
- Want to create inclusive environment and protect against hateful speech
- But the law is clear – hate speech is not a defined category, and as used colloquially is often protected speech
- Campus administration can engage in its own speech, and denounce hateful speech



# Student Free Speech

- Public sector students have First Amendment rights under federal and state constitutions.
- Some state statutes (including in California) provide private school students First Amendment protections.
- Policies may also give additional free speech protections.
- Student Codes of Conduct must not be overbroad or vague
- Differences between K-12 vs. college students
- Some harassment policies fail First Amendment scrutiny.  
(See, DeJohn v. Temple University, 537 F.3d 301 (3d Cir. 2008)).

# Student Free Speech

**C a l i f o r n i a** (Cal. Educ. Code § 94367(a))

No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution. (Cal. Educ. Code § 94367(a).)

# College Student Free Speech

- *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), reaffirmed that public universities cannot punish students for indecent or offensive speech that is not disruptive and does not interfere with the rights of others—including a cartoon criticizing police brutality.
- *Healy v. James*, 408 U.S. 169 (1972), the Supreme Court held that a college's refusal to recognize a campus chapter of the Students for Democratic Society, an “anti-establishment” organization that promoted civil disobedience in higher education, was unconstitutional.

# Disciplining Classroom Speech

- Professors can set standards for student speech in instructional settings, that might be inappropriate in non-instructional settings.
- Corlett v. Oakland University Board of Trustees, 958 F. Supp. 2d 795 (E.D. Mich. 2013), the district court held a student submitting to his professor an assigned daily writing journal with entries titled “Hot for Teacher,” and that described her as “[t]all, blond, [and] stacked,” were not entitled to First Amendment protection

# Disciplining Student Speech

- Goldberg v. Regents of the University of California, 248 Cal. App. 2d 867 (1967):
  - “reasonable restrictions on the freedoms of speech and assembly are recognized in relation to public agencies that have a valid interest in maintaining good order and proper decorum .... Conduct, even though intertwined with expression and association, is subject to regulation....”
  - “Broadly stated, the function of the University is to impart learning and to advance the boundaries of knowledge. This carries with it the administrative responsibility to control and regulate that conduct and behavior of the students which tends to impede, obstruct or threaten the achievements of its educational goals. Thus, the University has the power to formulate and enforce rules of student conduct that are appropriate and necessary to the maintenance of order and propriety, considering the accepted norms of social behavior in the community, where such rules are reasonably necessary to further the University's educational goals.”

# K-12 Student Free Speech

## *Tinker v. Des Moines*, 393 U.S. 503 (1969)

- Neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”
- Key line is disruption: School officials can discipline students for speech that “might reasonably . . . le[a]d school authorities to forecast substantial disruption of or material interference with school activities.” *Id.* at 514.
  - Distaste for or disagreement with the speech is not enough.
- Also have authority to discipline speech that “colli[des] with the rights of other students to be secure and to be let alone.”
  - This line is less developed.

# Other K-12 Speech Supreme Court Cases

- *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986)
  - Public schools can discipline a student for giving a speech at a school assembly that is indecent, although not obscene.
- *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 273 (1988)
  - “[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”



# K-12 Speech Supreme Court Cases (cont'd)

- *Morse v. Frederick*, 551 U.S. 393 (2007)
  - “Bong Hits 4 Jesus” banner case. School authorities do not violate the First Amendment when they stop students from expressing views that may be interpreted as promoting illegal drug use.
- *B.L. v. Mahanoy Area Sch. Dist.* 964 F.3d 170 (3rd Cir. 2020), cert granted on Jan. 8, 2021
  - Important student speech case Supreme Court just decided to hear.
  - Supreme Court will decide whether *Tinker* applies to student speech that occurs off campus (in this case, on social media posted off campus on a weekend), or whether normal First Amendment rules applicable outside of school apply

# School Employee Free Speech

# Employee Free Speech

- Public sector faculty and staff free speech protections derive from federal and state constitutional guarantees and anti-retaliation statutes
- Private colleges and universities may have academic freedom and other rights derived from policies, as well as anti-retaliation statutes

# Free Speech Protections for Public Employees

Public doesn't leave all speech protections at the employment door

- ***Pickering*** Balancing Test - Retain First Amendment rights to speak out as a private citizen on matters of public concern, but can be disciplined for speech that diminishes the efficiency of public services (391 U.S. 563 (1968).)
- ***Connick*** – To be protected, speech must be on a matter of public concern (speaking as a citizen, not regarding private interests) (461 U.S. 138 (1983).)
- ***Garcetti*** – public employees who make statements pursuant to their official duties, are not speaking as citizens for First Am. purposes, and they may face employer discipline. 547 U.S. 410 (2006)

# What constitutes public concern?

- “Relat[es] to any matter of political, social, or other concern to the community”
- Determined by the content, form, and context of a given statement

# Examples of Matters of Public Concern

- Easiest case: matters of public interest (political issues, etc.) unrelated to the University or the employee's role
- “[T]he objectives, purposes, and mission of a public university”
- “No confidence” votes for public college or university presidents
- Discriminatory employment practices
- Misuse of public fiscal resources
- Faculty political speech that is “related to scholarship or teaching”

# Official Duties

- Not totally clear, but should be a practical inquiry and should focus on the duties one is “expected to perform”
- What about faculty “scholarship and teaching”?
  - Garcetti: “We need not ... decide whether the analysis ... would apply in the same manner to a case involving speech related to scholarship and teaching.”
  - 9<sup>th</sup> Circuit: *Garcetti* does NOT apply to teaching and academic writing that is performed pursuant to the official duties of the professor. Instead *Pickering* applies. *Demers v. Austin*, 729 F.3d 1011 (9th Cir. 2013).
  - 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> Circuits: Have applied *Garcetti* despite arguments that the speech related to scholarship and teaching, but the cases did not involve traditional classroom teaching or published scholarship

# Limitations on Instructional Speech

- Some courts are willing to uphold discipline based on offensive speech in the classroom that is not germane to the subject matter
- Robinson v. Howard University, 335 F. Supp. 3d 13 (D.D.C. 2018), aff'd, 788 Fed. Appx. 738 (D.C. Cir. 2019)
  - A law professor who used graphic, sexually suggestive language in a quiz and lecture on agency law was issued a letter of reprimand. Alleged that discipline was based on gender and violated Title IX.
  - The court dismissed his claim, stating that a reprimand was not an adverse employment action



# Limitations on instructional speech

- Buchanan v. Alexander, 919 F.3d 847 (5th Cir. 2019)
  - Associate professor with tenure used profanity and discussed her sex life and the sex lives of her students during her class (Early Childhood Program).
  - An internal investigation, and a subsequent faculty hearing, found that Plaintiff's action violated the university's sexual harassment policy and created a hostile learning environment. Plaintiff was dismissed.
  - The Fifth Circuit upheld the dismissal in the face of First Amendment challenge:
    - Professors are not permitted to say anything and everything simply because the words are uttered in the classroom context.
    - The professor's use of profanity and sex life discussions were not related to the subject matter or purpose of training Pre K–Third grade teachers.

# Limitations on harassing instructional speech

- Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2000)
  - Students complained about three separate incidents, alleging that their English professor repeatedly and gratuitously used obscene language without reference to assigned readings.
  - The court held that the professor has no constitutional right to use such words in a classroom setting where they are not germane to the subject matter, in contravention of the College's sexual harassment policy

# Limitations on harassing instructional speech

- Hayut v. State University of New York, 352 F.3d 733 (2d Cir. 2003)
  - Student brought a sexual harassment suit because the professor repeatedly called her “Monica,” in reference to her purported resemblance to Monica Lewinsky, asked her how her weekend with Bill Clinton was, and told the student, “[b]e quiet, Monica. I will give you a cigar later.”
  - “Professor Young articulates no defenses for his conduct and, specifically, has never expressly asserted that the comments complemented his classroom curriculum or had any other legitimate pedagogical purpose that might merit the kind of First Amendment protection that has long been recognized in the academic arena.”
  - The Second Circuit allowed the claim to proceed against the professor, as he misused his power as a state actor in the course of performing his duties

# Academic Freedom Concerns

- Online harassment of faculty silencing faculty free expression
- AAUP - cyberstalking, “faculty watch lists” and online harassment are threats to academic freedom
- What about “safe spaces” and “trigger warnings” and the academic freedom of faculty?

# Case Study

In a college-level creative writing class, a professor's required reading list includes literary classics that contain descriptions of explicit sexual conduct and/or depict women in submissive and demeaning roles. The professor creates a blog (available to all enrolled students) and instructs the students to post their analysis of the readings. Several of the students post provocative statements regarding the explicit sexual writing and one posts "These readings made me hard. I can't wait to the end of this class to reach climax. I'm especially interested in reading to the end with Sue." Sue makes a complaint that this post infringes on her right to equal access to the educational program as it has made her extremely uncomfortable and other students are now commenting about her sexual life.

Can the University restrict this speech?

# Responding to Offensive Speech

# Limitations on “Bias Response Team”

Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019)

- Speech First, challenged the University of Michigan’s anti-bullying and anti-harassing policy and Bias Response Team initiative (BRT) for allegedly stifling student’s protected speech because of its “over broad and vague prohibitions.”
- On Appeal, the 6<sup>th</sup> Circuit found that the Bias Response Team, created an “objective chill” to speech due to the implicit threat of negative consequences (e.g. ability to refer bias incidents to the police).

# Responding to offensive speech on campus

- “Tone from the top” – expressing school’s values
- Educate the community about 1st Amendment protections and requirements
- Consider alternative events
- Communication with the community
- Offer community resources for impacted employees
- Accommodate employees and students when possible
- Debrief with the community



# Additional Resources

- The Free Speech Project, Georgetown University, <https://freespeechproject.georgetown.edu/>.
- First Amendment Watch, Arthur Carter Journalism Institute, New York University, <https://firstamendmentwatch.org/faw-mission/>. • PEN America, <https://pen.org/about-us/>.
- ACLU, Speech On Campus, <https://www.aclu.org/other/speech-campus>
- University of California: National Center for Free Speech and Civic Engagement, <https://freespeechcenter.universityofcalifornia.edu/>
- University of Washington, “Building Community in Challenging Times,” <https://s3-us-west-2.amazonaws.com/uw-s3-cdn/wp-content/uploads/sites/77/2017/02/24075750/UW-Student-Life-Building-Community-in-Challenging-Times-Program-Framework2.pdf>).
- Texas A&M University, “Expressive Activity,” <http://provost.tamu.edu/Provost/media/Assets/pdfs-essentials/Access-Expressive-Activity-0618.pdf>.
- University of Michigan, “Expect Respect,” <https://expectrespect.umich.edu/>

**Workshop F: Applying trauma-informed principles in sexual harassment prevention and response**

# Trauma-Informed Interviewing in Workplace Investigations

By Keith Rohman, Brenda Ingram, and Cathleen Watkins



Trauma is part of the world we live in, and trauma survivors are present in every workplace. Some people are exposed to trauma on a daily basis as part of their jobs, such as first responders or mental health professionals. Others experience trauma as part of a work-related incident, such as workplace violence, a serious industrial accident, or a sexual assault. Finally, some employees experience trauma in their personal lives that influences how they respond to events at work.

To conduct effective investigations, workplace investigators need to recognize the signs of trauma and understand how it affects complainants, respondents, and witnesses. Recent studies in neuroscience show that trauma leaves an indelible imprint on the brain and impacts memory, perception, and the ability to recount specific events. In this article, we suggest a new paradigm for workplace investigators when interviewing those who have been directly exposed to trauma or are closely connected to those who have.

## What Is Trauma?

We now know that the impact of trauma is not confined to veterans suffering from combat fatigue, and many people have been exposed to traumatic events, either directly or indirectly, or are close to those who have. The Substance Abuse and Mental Health Services Administration, an agency within the U.S. Department of Health and Human Services, defines trauma as resulting from “an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual’s functioning and mental, physical, social, emotional or spiritual well-being.”<sup>1</sup>

Other researchers define psychological trauma as “the unique individual experience of an event or enduring condition, in which: the individual’s ability to integrate his/her emotional experience is overwhelmed, or the individual experiences (subjectively) a threat to life, bodily integrity, or sanity.”<sup>2</sup>

Based on these definitions, job-related trauma can be caused by sexual assault; severe or pervasive sexual harassment; experiencing an accident on the job, either by being the victim or a witness; workplace violence or bullying; stalking; operational decisions such as downsizing, mergers, or forced reassignments; and discriminatory or retaliatory behavior that leads an employee to feel overwhelmed and unable to cope.

Additionally, survivors of child abuse, domestic violence, serious criminal acts, natural disasters, or military conflict are employed in all types of jobs; they are managers, support staff, line operators, IT personnel, and customer service representatives. In short, they are our coworkers, and they may become part of a workplace investigation. Their life experiences may impact how they recall events or react to future events in the workplace.

## Differences in Professions

The term “trauma-informed” is now used in the fields of health care, mental health, law enforcement, education, and social work. It describes a way of interacting with people in a professional capacity that recognizes they may have been impacted by trauma.

Workplace investigators are not typically mental health professionals. Even if they had such training, their role as an investigator places them in a substantially different relationship with the people they are interviewing. This article is a collaboration of two experienced investigators and a clinical social worker, and we are mindful of the important distinctions between the two professions. Psychologists, social workers, therapists, and others working in mental health have different objectives, different confidentiality restrictions, different reporting requirements, and different training than investigators have. In addition, investigators’ procedures and the resulting reports are scrutinized in different ways than the work of mental health professionals and are sometimes subjected to legal challenges.

Despite the differences, however, both professions rely on asking people about information they possess and learning from the narratives that unfold. Professionals in both fields struggle at times when asking people to describe difficult experiences. These challenges are magnified when the interviewee shows signs of trauma and is at risk of being retraumatized by talking about what happened.

Your job as an investigator is to conduct the investigation even when trauma is a factor. Given the goal of obtaining the maximum amount of information without causing the interviewee unnecessary stress, interviewers are reconsidering how they approach traumatized witnesses. The Forensic Experiential Trauma Interview (FETI) process was developed by Russell Strand, formerly a senior special agent in the United States Army Criminal Investigations Command.<sup>3</sup> FETI was designed especially for interviewing traumatized individuals and is discussed in more detail below.

The FETI approach recognizes that when a person is traumatized, his or her ability to recall information is changed. Usually interviewers ask questions that use the “cognitive” brain (the thinking brain, or the prefrontal cortex). However, when someone has undergone an extreme stressful event, the “cognitive” brain tends to shut down, and the more “primitive” brain (limbic system and brain stem) takes over.<sup>4</sup>

### How Trauma Affects People

Bottom line, trauma impacts memory. As J. Douglas Bremner, MD, of Emory University School of Medicine wrote, “Clinical studies have shown alteration in memory function following traumatic stress, as well as changes in a circuit of brain areas . . . that mediate alterations in memory. The hippocampus, a brain area involved in verbal declarative memory, is very sensitive to the effects of stress.”<sup>5</sup>

Following a trauma, a person may only have fragmented memories, or memory gaps and inconsistencies.<sup>6</sup> Studies have shown that certain details that were most significant to the person experiencing the trauma can be strongly encoded and stored, while “peripheral details” may not be remembered. These details can fade quickly or be recalled inconsistently.<sup>7</sup> The authors of this article have direct experience with people reporting sexual assault, who often tell us they have snippets or flashes of memory, rather than full, linear recollections.

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Trauma leaves an indelible imprint on the brain and impacts memory, perception, and the ability to recount specific events.

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Significantly, as Jim Hooper, PhD, writing in *Psychology Today* noted, the interviewee’s idea of what was central and what was peripheral may be very different from the person asking the questions.<sup>8</sup> Put more simply, what is important for us as investigators may not have been that important to the person experiencing the trauma. A person experiencing a sexual assault or other trauma will sometimes withdraw mentally and focus on a seemingly incidental detail, such as an object in the room where the assault occurred, or a sound in the distance.<sup>9</sup>

“Remembering always involves reconstruction and is never totally complete or perfectly accurate,” Hooper writes. “Such gaps and inconsistencies are simply how memory works—especially for highly stressful and traumatic experiences . . . where the differential encoding and storage of central vs. peripheral details is the greatest.”<sup>10</sup> This reality undoubtedly impacts the investigator’s

primary objective, which is to collect memory-based information, sometimes weeks or months after an incident has occurred.

### Addressing Trauma’s Impact on the Investigation

Investigators are highly dependent on peoples’ memories, and routinely want to know who, what, where, when, why, and how from witnesses. Workplace investigators routinely ask about prior conversations, the chronological order of events, and thought processes and decision making.

These basic investigative questions target information that is accessed through the integrative functions of the prefrontal cortex, which brings together various types of memories stored in other brain structures into a chronologically ordered narrative. Generally, most people are able to give dependable, fact-intensive descriptions of events. In the majority of cases, the tried-and-true interview techniques used to investigate workplace allegations of misconduct are still reliable.

However, investigators may be required to interview those who fall outside this normal paradigm. Neuroscience and the neurobiology of trauma tell us that when witnesses have been stressed or traumatized, inconsistent statements should be expected, and could even be evidence the memory was laid down in the brain at a time of high stress and trauma.<sup>11</sup> As Strand notes, “Most trauma victims . . . are not only unable to accurately provide . . . information [about specific details], but when asked to do so often inadvertently provide inaccurate information and details which frequently cause the fact-finder to become suspicious of the information provided.”<sup>12</sup>

These observations about trauma and memory upend significant assumptions workplace investigators and others in the law make about credibility. For investigators and attorneys, inconsistent statements are typically seen as undermining the witness’s credibility and can factor significantly in how witness information is analyzed. In fact, the California Civil Jury Instructions cite inconsistent statements as among the factors jurors can use in assessing witness credibility.<sup>13</sup>

We understand that these new concepts about the impact on trauma on memory may be unsettling and controversial for experienced workplace investigators. And we recognize that this article will not resolve this controversy. Scientific research into trauma and memory is still unfolding, and there is no clear consensus yet on how investigators should navigate the credibility issues entwined in trauma and witness inconsistencies.

Fortunately, we do not need to resolve all these issues to conduct effective interviews with trauma survivors. There are relatively simple techniques that workplace investigators can utilize to draw out a witness’s fullest recollections, some of which are already part of current practice. Making other small changes in how interviews are conducted and how questions are worded (discussed

below) can go a long way toward obtaining more accurate and useful information.

### Interviewing More Primitive Parts of the Brain

As discussed above, the more developed parts of the brain, which constitute our consciousness, may not be able to access key details fully when undergoing trauma. Several parts of the brain—the amygdala, hippocampus, and prefrontal cortex—play important roles in both stress response and memory. This interplay between memory and trauma response can provide directions on how to effectively interview trauma survivors.<sup>14</sup>

To overcome the hurdles associated with incomplete memory recall, the FETI process works to increase the investigator's understanding of the witness's experience, and thus develop a better picture of the totality of the event.<sup>15</sup>

Many of the objectives of the FETI process align with our usual goals in an interview. We want to maximize the information obtained, reduce contaminating the interviewee's memory, and maintain the integrity of the investigation. The FETI process also seeks to minimize potential harm from retraumatization of the interviewee, which further serves the general goal of getting reliable information.

Aspects of the FETI approach that are already familiar to skilled workplace investigators include building rapport, explaining our role in a transparent manner, and using active listening skills and a neutral, nonleading process.

The FETI process adds another useful layer to our long-used interview practices. This approach starts even before the investigator asks the first question. Because those affected by trauma need to feel safe, investigators should have a comfortable, quiet, and private space for the interview, and have water and tissues available. Allowing the witness to choose where to sit is also important. Because traumatized witnesses worry about giving up control, let the witness select where to sit before the interview starts, even if it merely means picking one chair over another.<sup>16</sup> Offering witnesses this choice is a simple way of giving them some control to create a comfortable environment.

Once the interview starts, investigators need to be able to recognize the signs of trauma and be alert for them. These signs include lack of focus, fragmented or inconsistent memories, memory gaps, nervousness, confusion, disorientation, exhaustion, anxiety, and blunt affect.

Witnesses who are very anxious or stressed can sometimes feel compelled to use their hands and will benefit from doodling, playing with pipe cleaners, or using a fidget spinner. Article authors Rohman and Watkins once interviewed a college student about a sexual assault, and while responding to questions, the witness unwittingly shredded their business cards into countless little pieces.

For this witness, having fidget objects within reach likely would have had a calming effect and also alleviated the awkward apology the witness offered later for destroying the cards.

Offering a drink of water to someone revisiting trauma has several beneficial aspects. There is the basic caring dynamic involved in offering a drink, which can help build rapport. In addition, the act of drinking water requires a person to also breathe, which can be inherently calming.

Many, if not most, people find speaking to an investigator akin to going to the dentist, and any witness can be mistrustful and apprehensive. Investigators already know the opening moments of any interview are critical to building rapport, but this is magnified exponentially when trauma is a factor. When talking to trauma survivors, investigators need to demonstrate transparency and build trust. Before posing any questions, explain your role and what you'll be asking. If the witness seems reluctant, be prepared to offer a motivational statement that will encourage participation. For example, in sexual harassment investigations, reticent witnesses will sometimes open up if they believe that by doing so, they may help others or prevent harm to others.

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When witnesses have been stressed or traumatized, inconsistent statements should be expected.

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It can be helpful to let the interviewee know he or she is not alone, that others have also come forward. Although a workplace investigator cannot usually identify other witnesses, a motivational statement in this situation might be: "We are talking to lots of employees about this situation. Your experience will help management put together a complete picture of what happened."

Once the witness is comfortable, the FETI process, like other effective interview practices, advises the investigator to actively listen and to show empathy. Acknowledging that the witness experienced a traumatic event goes a long way toward achieving witness trust, but this must be done in a way consistent with our role as neutral investigators. Although therapists can use phrases like, "I'm so sorry this happened to you," or "I know this was a tough thing to experience," such statements are inappropriate coming from a neutral fact finder.

Neutral investigators can show empathy by recognizing the difficulty of the complaint process without acknowledging that an incident took place. Phrases like, "I can see this is hard for you to talk about," can show empathy without confirming any factual bases.

## Asking Trauma-Informed Questions

Front and center in most investigators' traditional toolkit is a basic set of questions, many of which focus on chronological order. How many times have you told a witness to "start at the beginning," or asked "What happened next"? These techniques target sequencing information stored in the prefrontal cortex and are designed to elicit a linear narrative.

A trauma-informed process is built on a different paradigm. It is designed to get at information stored in other parts of the brain, and to build the investigator's full understanding of the events, even when the witness has only fragmented memories.

Because trauma so significantly impacts the whole memory process, FETI focuses on drawing out what the witness is able to share. Rather than leading with, "Start at the beginning," investigators can say, "Start where you feel comfortable," or "Tell me what you remember." This simple, but effective, technique lets the witness choose a starting point. It gives the witness control over how the narrative unfolds and minimizes contaminating fragile memories.

"What happened next?" may be the most used question in traditional investigations. But, given the nonchronological recollections that can derive from a trauma situation, this standard question can effectively shut witnesses down; trauma survivors may be trying to fit the round peg of what they actually recall into the square hole of our question. Asking, "What else happened?" or "What else do you remember?" can be more productive when trauma is present.

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There is no clear consensus yet on how investigators should navigate the credibility issues entwined in trauma and witness inconsistencies.

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Establishing a chronology is an important part of investigations. However, focusing too rigidly on getting a chronology from a trauma survivor can be counterproductive and prevent the fullest possible disclosure. In addition, workplace investigators now usually have electronic data that can pinpoint when things occurred, leaving us less reliant on witness memories to establish timing. Text messages, cell phone logs, emails, Facebook messages, and other social media provide time-stamped data that is often more reliable than witness recollections.

There are other concerns about how we ask questions, concerns that are heightened with potential trauma survivors. In an important finding, Elizabeth Loftus, a psychologist who conducted ex-

tensive research on eyewitness testimony, showed that people will change their responses based on how a question is posed. In 1974, Loftus and her colleague, John Palmer, conducted experiments on the impact of leading questions by asking students to watch films of road accidents and to estimate the cars' rates of speed. Loftus and Palmer used different verbs in their questions, asking if the cars "smashed," "collided," "bumped," "hit," or "contacted." They found that based on which of verbs they used, the students changed the estimated speed of the vehicles.<sup>17</sup> When suggesting that the cars "smashed," the students estimated the cars traveled at 40.8 mph, the fastest rate. However, the verb "contacted" drew an estimated speed of only 31.8 mph from the students, the slowest rate.

It is important to note that the work of Loftus and Palmer was conducted on students who had not suffered any trauma in connection to the researchers' questions. Given what recent brain science tells us about the intersection of trauma and memory, investigators need to take even greater care not to influence traumatized witnesses inappropriately by asking questions that signal a desired response.

When experiencing traumatic events, some witnesses report becoming frozen. According to an article in *Scientific American* entitled, "Sexual Assault May Trigger Involuntary Paralysis," tonic immobility is a "state of involuntary paralysis in which individuals cannot move or . . . even speak."<sup>18</sup> The article cites a new study, published in *Acta Obstetrica et Gynecologica Scandinavica*, of 298 women who went to a rape clinic after an assault. Seventy percent of these women said they "experienced at least 'significant' tonic mobility and 48 percent met the criteria for 'extreme' tonic mobility during the rape."

Although scientists are still researching the frequency of tonic immobility or similar nonresponsive reactions, Strand notes that asking questions that get at why traumatized individuals did not call for help sooner, or why they did not assist others, can retraumatize them, and cause them to shut down. Such questions may also create, or compound, shame for witnesses by focusing on a failure to defend themselves. Instead, by asking people to share what they were thinking during an attack, witnesses may say, "I couldn't move or scream," or "I couldn't understand what was happening at that moment."<sup>19</sup> Those answers help the investigator understand why people responded as they did and will help build a full picture of what happened.

Other questions investigators can ask include:

- What was your thought process during the event?
- How did you react physically? Emotionally?
- What was the most difficult part of the experience for you?
- Is there something about this experience that you can't forget?

## Getting at Sensory Information

Trauma-informed questioning can include an area that workplace investigators rarely ask about: information about sensory details. During a traumatic event, the primitive part of the brain records sensory information more effectively than cognitive facts. Asking about these sense memories, like sounds, smells, sights, and touch, can enable a victim to begin remembering and talking about what happened in a manner that provides significantly more information.<sup>20</sup>

Sense memories can be a key to unlocking other memories. Strand referenced an interview with a police officer who was involved in an unsuccessful attempt to prevent a gun-related suicide. When the police officer was asked if he recalled any particular scent or smell in the moments after the suicide, the officer said in an animated manner that he had smelled honeysuckle. The officer was then able to provide several other details about the incident, presumably because the honeysuckle memory triggered other recollections.<sup>21</sup>

## Follow-Up Questions

Once the interviewee has provided his or her account, the investigator can then circle back to ask some follow-up questions for clarification and to try to fill in gaps in the narrative. However, a trauma-informed process requires the investigator to continue to be mindful of how the questions are phrased. The questions should be asked in a nonleading and sensitive manner that does not contaminate the witness's recollections.

## Closing the Interview

Endings are as important as beginnings in all interviews, but they can be even more meaningful in a trauma-informed interview. Just talking about traumatic experiences can trigger severe emotional reactions in witnesses, including nightmares or intrusive thoughts. The investigator can play an important role in dealing with this potential fallout.

During the closing moments of the interviews, the trauma-informed investigator advises the witnesses that they may have emotional reactions to having participated in the interview and to be prepared for these feelings. Therefore, the interviewer should conclude the questioning by again showing empathy to the witnesses while still using language appropriate to a neutral process. It is always appropriate to thank the witnesses for their cooperation, and to acknowledge that these are difficult subjects to talk about. If the organization has resources for the witnesses, such as an Employee Assistance Program or other counseling, the investigator can make sure the witnesses know about these resources.

One final point is that trauma is contagious. Investigators' contact with trauma stories can impact them in unexpected, negative ways, a phenomenon referred to as "secondary trauma." Secondary trauma is especially problematic when investigators have repeated contact with those who are traumatized, and even limited exposure can bring on secondary trauma. Self-care tech-

niques such as talking with a colleague or therapist, engaging in physical activities like hiking or exercise, and enjoying music or other artistic endeavors are important components of a successful trauma-informed approach to the interview process.

## Summary

We are not suggesting workplace investigators throw out their old playbook on how to conduct interviews. In fact, many of our traditional interview approaches are critical to a trauma-informed approach, including building rapport, being transparent about our role, showing empathy, and posing neutral, nonleading questions.

A trauma-informed interview approach supplements these techniques. Asking about sense memories, providing witnesses some modest control over the physical space where the interview takes place, being alert to the signs of trauma, and understanding possible differences in recollection and memory are just a few of these useful tools.

Brain science tells us that memories are fragile and imprecise, yet as investigators we rely on memories to put together a picture of what happened. Understanding trauma is a new area for most investigators, and as science's understanding of trauma and memory increases, the field of investigation needs to evolve as well. This article is not meant to be the final word on how interviews should be conducted; it is meant to increase understanding and serve as a starting point for continued discussion about these important issues.



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<sup>1</sup> Substance Abuse and Mental Health Services Administration, available at <https://www.samhsa.gov/trauma-violence>

<sup>2</sup> Laurie A. Pearlman, & Karen W. Saakvitne, Trauma and the Therapist: Countertransference and Vicarious Traumatization in Psychotherapy with Incest Survivors. New York: W.W. Norton, xix. Page 60. (1995)

<sup>3</sup> Russell Strand & Lori D. Heitman, *The Forensic Experiential Trauma Interview*, available at <http://www.azcvts.net/wp-content/uploads/FETI-Public-Description-Jan-2017.pdf> (2017)

<sup>4</sup> *Id.*

<sup>5</sup> J. Douglas Bremner, MD. *Traumatic stress: Effects on the brain*, Dialogues in Clinical Neuroscience, (2006), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3181836/>

<sup>6</sup> Jim Hooper, PhD, *Sexual Assault and Neuroscience: Alarmist Claims vs. Facts*, Psychology Today, (2018); available at <https://www.psychologytoday.com/blog/sexual-assault-and-the-brain/201801/sexual-assault-and-neuroscience-alarmist-claims-vs-facts>

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Russell Strand & Lori D. Heitman, *The Forensic Experiential Trauma Interview*

<sup>13</sup> CACI no. 5003. *Witnesses*, available at <https://www.justia.com/trials-litigation/docs/caci/5000/5003.html>

<sup>14</sup> J. Douglas Bremner, MD. *Traumatic stress: Effects on the brain*

<sup>15</sup> R. Strand & L. Heitman, *The Forensic Experiential Trauma Interview*. <http://www.azcvts.net/wp-content/uploads/FETI-Public-Description-Jan-2017.pdf> (2017)

<sup>16</sup> Workplace investigators also need to be careful about their own personal safety, including making sure they have an exit strategy with potentially volatile interviewees. In those situations, an analysis of competing priorities should be made.

<sup>17</sup> Saul McLeod, *Loftus & Palmer*, Simply Psychology (2014), available at: <https://www.simplypsychology.org/loftus-palmer.html>

<sup>18</sup> F. Russo, *Sexual Assault May Trigger Involuntary Paralysis*. Scientific American, (2017).

<sup>19</sup> Russell Strand & Lori D. Heitman, *The Forensic Experiential Trauma Interview*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

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## Supporting clients using trauma-informed principles in preparation for cross-examination in the Title IX context

By Rebecca Berry, Esq., Survivor Advocate and Attorney

Adequately preparing sexual harassment and assault victims/survivors for cross-examination during the Title IX hearing process is essential to a trauma-informed approach. As survivor advocates, our position on including pseudo-criminal, trial-like, cross-examination in the Title IX process was clear -- it is **not** trauma-informed. In fact, a strong majority of survivor and mental health advocates wrote public comment<sup>1</sup> that rejected proposed federal guidelines in 2019. The finalized guidelines released in May 2020 were established and now require colleges and universities to allow cross-examination of the complaining and responding parties, as well as any witnesses, during a live hearing led by a neutral adjudicator. Many advocates disagreed with the framing of the lineage of fair proceedings cases<sup>2</sup> such as in the opinion of *Doe v. Allee* (Jan 2019)<sup>3</sup>. The holding of that case in particular held that, "When a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses before a neutral adjudicator." The court here heralds cross-examination as fundamental to fairness but ignores the re-traumatizing nature of the adversarial questioning in the context of sexual harassment and assault. Because this process has become a central feature of Title IX hearings, it is imperative that advocates apply trauma informed principles to prepare their clients for what they may experience.

### **Preparing for Title IX hearing cross-examination**

For survivors of sexual assault and harassment, the cross-examination process can be daunting for several reasons. There is a fear that their memory of the situation in question will be attacked and they will be judged as incredible for the effects of trauma. There is also concern that this will be a process including public shaming in front of the respondent and adverse witnesses. Survivors are asked to not only talk about the traumatic experience in detail, but they are also asked to explain their behavior before, during, and after the experience. This means they are, by the nature of the process, forced to relive their traumatic experiences which is very likely to trigger symptoms of post-traumatic stress.

The word trauma is only mentioned once<sup>4</sup> in the *Doe v. Allee* case in reference to the possibility of trauma from being questioned directly by the respondent, however, it is not mentioned in reference to cross examination as a truth-finding tool.

While the entire Title IX process can be challenging and include factors outside of an advocate's control, there are trauma-informed ways to prepare for the more challenging aspects, like cross-examination, that we are aware will occur during the hearing.

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<sup>1</sup> Title IX Comment from Mental Health Professionals (2019), Available at: <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/01/Title-IX-Comment-from-Mental-Health-Professionals.pdf>

<sup>2</sup> *Doe v. Brandeis*, 177 F. Supp. 3d 561, 573 (D. Mass 2016); *Doe v. Univ. of S. Cali.*, B283406 (L.A. Cnty. Sup. Ct. 2019).

<sup>3</sup> *Doe v. Allee*, 30 Cal. App. 5th 1036 (Cal. Ct. App. 2019).

<sup>4</sup> *Id.* at pg. 44.

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### **Empowerment through Managing Expectations**

One key to trauma-informed preparation is empowering clients with information on what to expect. Taking enough time and effort to remove the mystery out of the process can reduce a client's anxiety and fears. Make sure clients know exactly what to expect before they show up to the hearing. Some schools in CA are requiring a pre-hearing meeting and process of documentation to lay out how the hearing will run, the scope of the content, and an opportunity to request trauma-informed accommodations. During that process, an advocate can prepare their client with information on the order of questioning and testimony, who will be present in the room, whether it is virtual or in-person, who will be asking the cross-examination questions, what will the roles be between the support person and the advisor, and other key aspects of the hearing.

### **Go through Questions Together in Safe Environment**

During preparation for cross examination, setting aside time to collaborate together on hearing questions and supporting the client in sharing their story in a linear fashion is imperative. This preparation time is the chance to safely guide the client through chronology, go back and clarify anything that is unclear, and jogging memory using a client's five senses. For example, a survivor may struggle to remember what happened next but instead of simply asking what's next, encouraging them to describe what their senses experienced will allow them to recall in a safe, non-adversarial space. This will help the client do the same at the hearing where there is significantly more pressure and emotion. In this safe environment, an advocate can use the trauma-informed approach of signaling difficult topics before asking a tough question. Advocates can also explain in advance why they are asking about a difficult subject, or why they are questioning a certain part of the story. It is important to thank and validate the client for sharing about the traumatic event. Survivors have already made the brave choice to report and follow through with this process, and so continuing to validate them throughout for the steps they are taking to get their story out is very supportive and trauma-informed. Always remind your client as well that they can ask for and take breaks at any time if questions are causing distress. This is also true within the hearing context and will be a crucial role for the advisor or support person to flag for the hearing officer or neutral adjudicator.

Cross examination in the Title IX process subjects survivors to intense scrutiny on their story and behavior in the larger context of a society that often fails to hold perpetrators of sexual harassment and assault accountable for *their* behavior. Given the prevalence of sexual assault and harassment and the vulnerability of those coming forward to participate in this administrative process, it is the duty of all involved - advocates, investigators, institutional staff, etc., - to be as trauma informed as possible. The examples above are a few approaches that can create safety and empowerment for clients.

# The PII Blog



## Being Trauma-Informed in the Time of COVID

🕒 May 20, 2020

By Keith Rohman

Trauma comes in all shapes and sizes, and as investigators we see it all. Whether it is someone reporting a sexual assault in a [Title IX investigation](#), a mitigation witness in a death penalty case, or the survivor of an auto accident, investigators regularly encounter the impact of trauma. Some people we interview have suffered trauma unrelated to our investigation, such as loss of a loved one or childhood abuse.

Interviewing people who have experienced trauma is never easy. With COVID-19 and the need for [video interviews](#), it is harder than ever. Investigators need to find new approaches to conducting trauma-informed interviews, so we can get people's accounts as completely and accurately as possible.

The hurdles are obvious. The first, of course, is the trauma of living through COVID-19. Everyone's life has been dramatically disrupted. Some have experienced the loss of a family member or live in fear for the vulnerable people they are close to. Many college students have lost their independence and are back home. Hopefully, those are supportive and loving environments; sadly, they are sometimes toxic and even dangerous.

Talking about intimate personal matters to an investigator is often hard, but many witnesses find it even more difficult when the conversation is through an anonymous camera lens. This can be especially true when privacy is at a premium in many homes. At the same time, those accused of misconduct are dealing with heightened fears about the investigation. The possibility of losing your job or being expelled from school is highly stressful in the best of times; these are not the best of times.

Fortunately, there are approaches you can take to effectively conduct trauma-informed interviews remotely. The first step is for investigators to acknowledge the

hurdles and how the loss of in-person contact affects the investigative process. Then, you can move toward techniques and strategies to mitigate this with a trauma-informed approach for video interviews that incorporates transparency, support, and rapport-building.

When starting the interview, spend more time discussing the circumstances and situation around the witness. Talk about the challenges of doing this interview on a video platform and not in person. Ask whether they are in a safe place to talk. Do they have enough privacy? If the witness has concerns about privacy, try to problem-solve with them. Maybe they can talk to you in a car or garage or backyard. A campus Title IX hearing officer told me about students testifying at video hearings from inside a bathroom or a closet. In any event, your offer to help problem-solve can build rapport by demonstrating that you are thinking about their situation.

Set up a process at the beginning for how the witness can contact you by text or phone if they have difficulties with the connection or if their privacy is interrupted. On your own side, as PII has discussed in an earlier blog on [conducting remote interviews](#), make sure your background looks professional, without personal photos or artwork that might distract the witness.

Our voices and our faces are the only tools we have on video conferences, so make sure the technology works to your advantage. Too many investigators are conducting video calls without the right lighting. Poor lighting makes you appear fuzzy. If your lighting is less than ideal, consider getting a “selfie” light or other type of webcam light. They are inexpensive and very effective. Run a test call with a colleague to make sure all of these pieces are working.

Timing matters as well. Trauma-informed video interviews should be short, ideally not more than an hour. Google “Zoom fatigue” if you want to better understand why. This means investigators need to decide ahead of time what information is critical. We sometimes think we need every detail; being trauma-informed means accepting that may not happen.

Finally, use the tools you already have for showing empathy and caring. Use a warm tone of voice. Being calm and centered can calm the witness. Slow the pace of your comments and questions a bit. Closely watch how the witness is doing, and if they look stressed, suggest a short break. Even if they say they want to keep going, tell them you need a quick break and take a second to stand up and stretch. It can lighten the mood a bit.

And do not forget your own self-care. Being trauma-informed means you know that trauma is contagious, and in these days, we are all living with a heightened level of stress.

There is *much* more to say about this subject, and PII’s [Title IX training affiliate, T9 Mastered](#), will be hosting a webinar on this subject. Send us an email at [piila@piila.com](mailto:piila@piila.com) or join T9 Mastered’s [mail list](#) to be notified of this event, which will feature myself and trauma expert Dr. Brenda Ingram.

*Keith Rohman is the president of Public Interest Investigations, Inc. He has been a*

*licensed private investigator for more than 35 years. He has extensive experience conducting trauma-informed interviews on cases ranging from death penalty matters to campus sexual assault allegations. Dr. Brenda Ingram provided invaluable assistance in preparing this post.*



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**Workshop G: Global models of  
sexual harassment policies for  
students and faculty**

# Mapping Sexual Harassment through the Gender Lens



**A Grounded Approach to Policy Making and Implementation  
In the Education Sector**

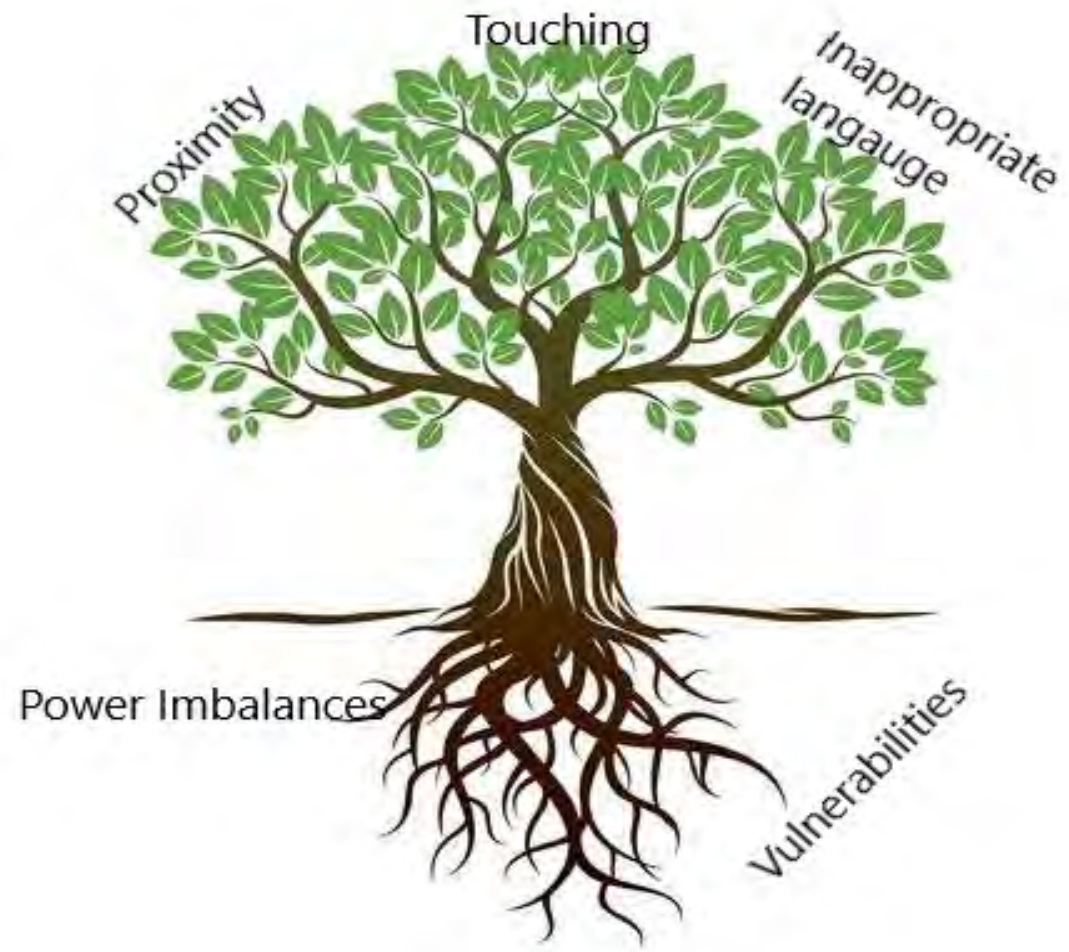
***Jill N. Samakayi-Makarati***

MWL, LLB

# Overview

- *Understanding Sexual Harassment*
- *Gender Dimensions*
- *Effective Policing Against Sexual Harassment*





What informs the root causes of  
Sexual Harassment?

Exploring the influence of gender  
biased socialisation

# Understanding Sexual Harassment

## From the Books of Law/Policy: Regulatory Frameworks

- International, Regional, National, Institutional
- ❖ Mainly define discrimination based on sex/gender or recognise sexual harassment as a form of discrimination
- The Constitution of Zimbabwe: An example
  - “A person is treated in a discriminatory manner...if they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected” [Section 56(4)(a)]  
(**Grounds** include “*sex, gender, class, economic or social status*”)
  - The State is obliged to take practical measures to ensure every person (female & male) is afforded equal opportunities to obtain education at all levels (Section 27)

# Understanding Sexual Harassment continued...

## ➤ Empowerment of women

“Every woman has **full and equal dignity of the person** with men and this includes equal opportunities...” [Section 80(1)]

“All laws, customs, traditions and cultural **practices** that infringe the rights of women conferred by this Constitution are void to the extent of the infringement” [80(3)]

## ➤ Institutional Codes of Conduct

### 1. University of Zimbabwe Code of Conduct

Defines sexual harassment as “*unwarranted conduct of a sexual nature that affects the dignity of **men and women at work***”. [Conduct - sexually colored, offensive, intrusive, degrading or intimidating *physical, verbal & non-verbal conduct*]

### 2. University of Zimbabwe Students’ Charter

Defines sexual harassment and includes mechanisms of detecting, as well as combating sexual harassment

# Understanding Sexual Harassment continued...

## Key Considerations when Policing Against Sexual Harassment

### The Student's Perspective

- Knowledge: Is there good appreciation of what constitutes sexual harassment?
- Remedies: Are there effective reporting mechanisms?

### The Potential Perpetrator's View

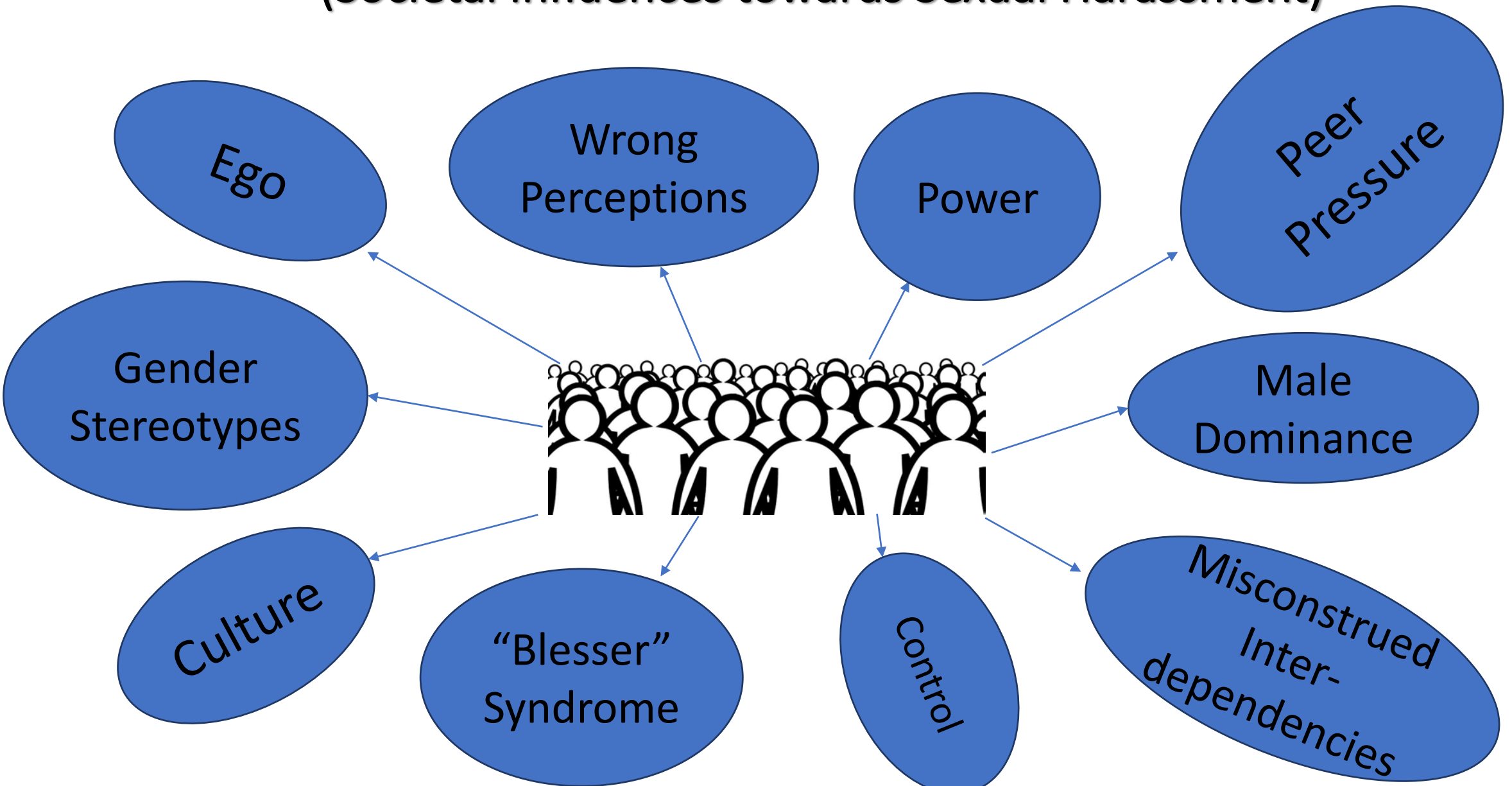
- Why tie sexual desires to perceived or actual needs of the survivor?
- Power games???
- Knowledge: appreciation of sexual harassment and its gender dimensions

Societal

Influences

# Gender Dimensions

(Societal Influences towards Sexual Harassment)



# Gender and Sexual Harassment

- Over the years “*gender*” has been associated with physiological characteristics of *men* and *women*, hence interchanged with “*sex*”
- However, “*gender*” is typically understood to be *socially constructed* roles, behaviours, activities and attributes that a given society considers appropriate for men and women (*societal influences/ socialisation*)
- Consequently, “gender” is *attitudinal*, as the gender differences are ascribed and hence in the *mind*. This contributes to the *creation of power relations* and imbalances in people of different physiological characteristics
- Power imbalances emanate from gender attributes and this contributes to sexual harassment
- Resultantly, sexual harassment is a form of discrimination, as well as gender-based violence (physical or emotional), as the perpetrator uses power or control over the victim/ survivor.

# Modes of Sexual Harassment in the Education Sector

- uninvited & unnecessary proximity
- outright sexual demands
- touching
- physical violence
- verbal comments, compliments and/or questions about appearance, lifestyle, performance in class
- unpleasant social media posts or phone calls
- Inappropriate actions like staring, sexually suggestive gestures, uninvited display of pornographic or other related materials
- overly concerned about ones' personal circumstances

**Note: These are** *Unwelcome, Unwarranted, Intimidating/Threatening & often Persistent*



# Common Effects of Sexual Harassment in students

- *reduced levels of concentration;*
- *emotional imbalances – moody, anger, withdrawal tendencies*
- *substance abuse*
- *peer rejection or rebuke*
- *untimely motherhood*
- *physical injuries*
- *Sexually transmitted infections*

*As long as the survivor is denied effective learning while others continue unhindered, that act is discriminatory on the ground of sex or gender*

# Policing for Sexual Harassment

## Recommended Steps

- **Assessment** among staff and students of: -
  - levels of understanding what sexual harassment is;
  - knowledge about discrimination on the grounds of gender or sex;
  - knowledge of regulatory frameworks that prohibit sexual harassment.
- **Awareness Raising**
  - existing regulatory frameworks, meaning, characteristics and effects of sexual harassment;
  - Creating **gender linkages** towards deconstruction of learned Stereotypes (i.e. awareness of ascribed gender roles and their effects);
  - Specifically highlight **discrimination**, as a **negative effect** of sexual harassment
- **Reporting Mechanism**
  - Gender sensitive & survivor-protective
  - Clear penalties for perpetrators
  - Data collection on trends

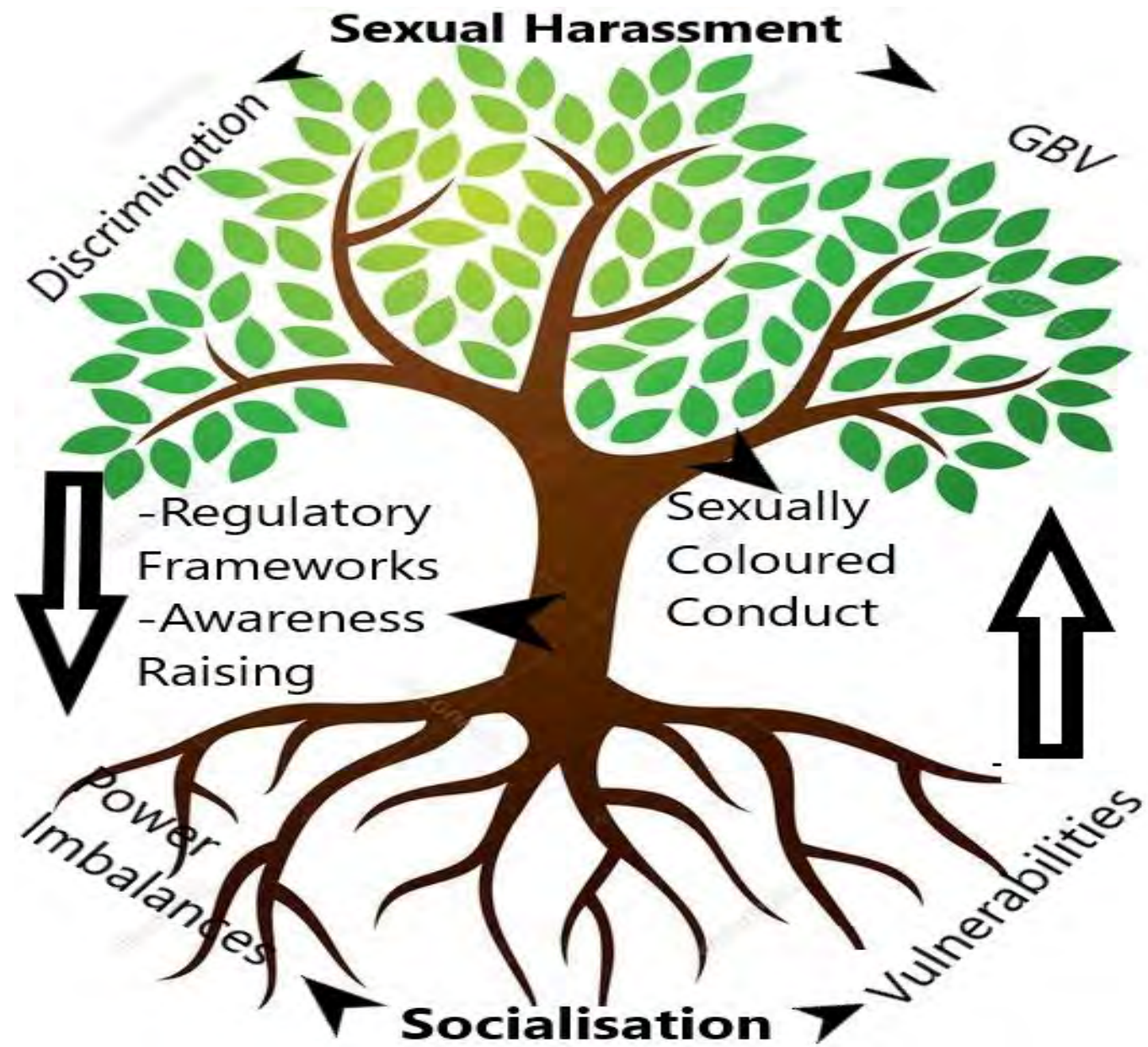
# Policing continued...

## Grounded Approaches

- Utilisation of student-experiential data collected from the Reporting Mechanisms to improve existing policies or develop new policies;
- Adopting the “Their Voice - *For Us, By Us, With Us*” concept to ensure student involvement in the development of policies that affect them.

## Advocacy

- Work with existing structures to advocate for a specific national policy or law on sexual harassment
- E.g. Ministry responsible for gender and women affairs; Zimbabwe Gender Commission; Southern & Eastern African Centre for Women’s Law (University of Zimbabwe)



**Thank You**

**Workshop H: Models for sexual  
harassment complaint resolution:  
investigations, informal resolutions,  
remediations, discipline**

AN EQUINET REPORT

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# HARASSMENT ON THE BASIS OF GENDER AND SEXUAL HARASSMENT: SUPPORTING THE WORK OF EQUALITY BODIES

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*Harassment on the basis of Gender and Sexual Harassment: Supporting the Work of Equality Bodies* is published by Equinet, the European Network of Equality Bodies.

**Equinet** brings together 42 organisations from 32 European countries which are empowered to counteract discrimination as national equality bodies across the range of grounds including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation. Equinet works to enable national equality bodies to achieve and exercise their full potential by sustaining and developing a network and a platform at European level.

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## EXECUTIVE SUMMARY

**Harassment on the basis of gender and sexual harassment** are recognized as forms of discrimination and prohibited by the EU Gender Equal Treatment Directives. The Directives indicate that Member States have to ensure that an equality body is in place to provide independent assistance to victims of harassment and sexual harassment, conduct independent surveys, publish independent reports and make recommendations, in matters of employment and vocational training, in the access to and supply of goods and services, and for the self-employed<sup>1</sup>.

In this context, **national equality bodies have an important role to play**. They can support victims of harassment on the basis of gender and sexual harassment, they can interact and cooperate with relevant stakeholders to build a culture of rights refusing harassment and sexual harassment, and they can develop appropriate tools to prevent all forms of harassment and sexual harassment. A proactive role of equality bodies is key in the fight against harassment on the basis of gender and sexual harassment.

This Equinet Report is based on the **Equinet training on combating harassment on the basis of gender and sexual harassment** held in Warsaw on 23-24 September 2014. It gathers the ideas and experiences shared by experts from national equality bodies and key partners to inform on the context of harassment on the basis of gender and sexual harassment at EU and national levels and to support the work of equality bodies in the field.

This Report analyses harassment on the basis of gender and sexual harassment as forms of discrimination and inequality, but also in the framework of gender-based violence and as violation of human rights.

### *The Equinet training*

The first part of the Report presents the contributions made by speakers and facilitators of the working groups of the Equinet training event in the form of event proceedings.

The first session touches upon the context of **harassment and sexual harassment in Europe**: according to the Fundamental Rights Agency survey on violence against women, up to 55% of women have experienced sexual harassment since the age of 15 in the EU-28, and 75 % of women in qualified professions or top management jobs have been sexually harassed. Existing legislation and policies at EU level to combat these phenomena are presented thanks to the contribution of the European Commission.

The second session presents the outcomes of exchanges between equality bodies' representatives and key partners on **how to build together a culture of rights**. The contribution by the Council of Europe expert analyses the possibilities that the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention, including sexual harassment under the forms of violence against women) brings to equality bodies. The representative of the European Women's Lobby adds to the picture by outlining the current work carried out by civil society and suggesting equality bodies to support prevention, protection, prosecution, provision and partnership.

Discussions with the representative of the European Institute for Gender Equality focuses on gender stereotypes and data collection. Equality bodies exchanged with Transgender Europe on the specificities of the experience of trans people on harassment and sexual harassment. With the

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<sup>1</sup> Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2010/41/EC on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.

European Women's Lobby, they discussed how to change societal culture via education and awareness.

The outcomes of workshops on **equality bodies' practices** are then presented. This includes the work of the Human Rights Defender in Poland on sexual harassment in the uniformed services, in cooperation with civil society, and the Ombud for Equal Treatment in Austria's moot court training to sensitize on harassment. The Irish Equality Authority supports the attention on harassment and sexual harassment within the framework of equality mainstreaming. The Commission for Equality in Labour and Employment in Portugal guides discussions on the importance of strategizing the work on harassment to combat it. The Ombudsman for Equality in Finland presents their campaign in educational institutions and their findings on gender-based harassment and sexual harassment in schools. The cooperation of equality bodies and of civil society for combating underreporting is also presented thanks to the intervention of the Defender of Rights in France.

The last session presents the content shared on **supporting victims, on the legal work of equality bodies**, including a review of existing legislation and the identification of **how to win a case**.

### *Lessons learnt*

Some **lessons learnt** emerged from the discussions and experiences shared during the training, and from exchanges between members of Equinet's Working group on Gender Equality.

They include **ways forward for improving the work of equality bodies** in tackling harassment on the basis of gender and sexual harassment.

Equality bodies can make recommendations to policy makers on gaps in existing legislation; make use of cases to increase awareness; conduct relevant research on the topic and ensure data collection and comparability; play a role in combating gender stereotypes and sexism in society; prevent the culture of harassment by raising-awareness of duty bearers, advertising professionals, the general public and training; in particular they can focus on preventive tools in the school place.

National equality bodies can cooperate with women's organisations, civil society, employers and trade unions, schools and labour inspection. They can promote positive examples and proactive approaches to make visible their work and role in the fight against harassment and sexual harassment. This should include attention to the intersectionality of harassment.

Training and awareness-raising activities should target employers and employees, teachers and students, judges, lawyers, media professionals, service providers, trade unions, police officers and aim at creating a culture of equality and rights. Moreover, national equality bodies could participate in the process of monitoring of the Council of Europe Istanbul Convention on preventing and combating violence against women and domestic violence.

Possible **ways forward for European level policy makers** include the monitoring of the correct implementation of EU Directives prohibiting harassment on the basis of gender and sexual harassment. EU policy makers should monitor that in every Member State, equality bodies are given a clear mandate and resources to cover the three areas of employment, self-employment and access to goods and services. The exclusion of media, advertisement and education from the scope of EU protection against harassment on the basis of gender and sexual harassment should be reviewed.

Cases dealt with by equality bodies allow identifying some good practices in terms of legislation which could be promoted at EU level and with national policy-makers: the positive duty on employers and schools to investigate and take measures to stop harassment and the positive duty on employers and schools to make equality plans annually, in which special attention must be given to measures that ensure the prevention and elimination of sexual harassment and gender based harassment.

A coordinated monitoring system in the area of cyber harassment, as well as a coherent system for collecting statistics on gender-based violence, are necessary to prevent harassment on the basis of gender, and sexual harassment. Moreover, EU policy makers could launch the procedure for the accession of the EU to the Istanbul Convention on violence against women and domestic violence. The European Commission could reconsider the possibility of having a EU-wide strategy and an action plan to combat all forms of violence against women and girls including sexual harassment.

EU policy makers could widely disseminate information about EU programmes and funding to combat harassment on the basis of gender, sexual harassment and violence against women. They could investigate links between lack of balance in decision making and segregation of the labour market with the high levels of sexual harassment experienced by women in management.

National equality bodies have a key role in combatting harassment on the basis of gender, and sexual harassment. To be able to do so, standards on their independence and resources should be foreseen at EU level in order to protect their effectiveness.

Possible **ways forward for national policy makers** include the importance of ensuring a comprehensive legal framework covering the scope of employment, the self-employed and access to goods and services, but also in the field of education, media, and advertising. Such legislation could include positive duty on employers, providers and school directors to have policies to prevent harassment and sexual harassment, and to report it; but also positive duty on schools, employers, and providers of goods and services to make equality plans annually. National legislations should foresee a consistent set of tools to protect people against harassment and sexual harassment under antidiscrimination, health and safety, and criminal legislation and provisions allowing for the recognition of multiple discrimination and intersectionality. Cases of sexual harassment where there is high risk of victimisation, should accord special protection. All European countries should ratify and properly implement the Istanbul Convention on violence against women and domestic violence.

**Other relevant stakeholders such as social partners**, at European level and national level, should adopt formal agreements to implement written anti-harassment policies in collective agreements, reflecting a real commitment to recognising the importance of the fight against harassment and sexual harassment in the workplace. Employers and trade unions should involve national equality bodies in the development of anti-harassment policies. Trade union representatives can be key allies in the struggle to combat underreporting and they should be provided with information on the reporting methods for claims against harassment and sexual harassment, including where they should be reported and which evidence should be kept as proof of the harassing behaviour.

Workplaces and educational institutions should prepare an annual gender equality plan in order to assess the gender equality situation and progress. Sexual harassment needs to be addressed and framed in the context of equality mainstreaming and equal access to dignity for all. Political leaders should take a stance against trivialisation of sexism.

# 1. INTRODUCTION

## 1.1. EQUINET

**Equinet is the European Network of Equality Bodies**, a membership-based organisation bringing together 42 equality bodies from 32 European countries including all EU Members States.

Equality bodies are public organisations assisting victims of discrimination, monitoring and reporting on discrimination issues, and promoting equality. They do so in relation to one, some or all the grounds of discrimination covered by European Union law – **gender, race and ethnicity, age, sexual orientation, religion or belief, and disability – and other grounds covered by their national equal treatment legislation.**

Equinet aims to promote equality in Europe by enhancing the strategic capacity of its members and developing the skills and competences of their staff. Equinet also works to identify and communicate the learning from the work of equality bodies, and enhance their recognition and strategic positioning in relation to all stakeholders at European level.

## 1.2. THE EQUINET WORKING GROUP ON GENDER EQUALITY

The Working Group on Gender Equality was established in 2013 following the incorporation of the work of the Network of Gender Equality Bodies (coordinated by the European Commission) into Equinet, as Equinet's platform for staff members of equality bodies working on gender issues. The working group aims to enable discussion, exchange of good practices, reflection among staff members of equality bodies, as well as action on the effective promotion of gender equality and to combat gender discrimination by equality bodies.

During its first meetings in 2014, working group members exchanged views on the importance of tools supporting their everyday work on harassment on the basis of gender, and sexual harassment. The topic of harassment and sexual harassment was therefore selected for the second Equinet Training on Gender Equality, which took place in Warsaw on 23-24 September 2014 and was hosted by the Polish Equinet member equality body: the Human Rights Defender of Poland.

This Equinet *Report on Harassment on the Grounds of Gender, and Sexual Harassment* is part of the work of the Gender Equality Working Group for 2014 as approved by the Equinet Executive Board and adopted by the membership. The Report is a follow up to the training on the same topic, in order to share experiences and ensure a correct interpretation of existing provisions, as well as to provide ideas on how to tackle harassment on the basis of gender, and sexual harassment.

Following the rich discussions during the training, the Working Group has identified lessons learnt for equality bodies and for improving the context. They include recommendations to national equality bodies, European and national policy makers and other stakeholders.

### 1.3. HARASSMENT, SEXUAL HARASSMENT AND VIOLENCE AGAINST WOMEN

**Harassment** on the basis of gender is prohibited by EU equal treatment legislation in employment relations, goods and service provision, and for self-employed workers. It is defined as unwanted conduct relating to the sex of a person which occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

**Sexual harassment** is prohibited as well, in the same domains, and is defined as any form of unwanted verbal, non-verbal or physical conduct of a sexual nature which occurs with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Sexual harassment is at the same time a form of gender-based violence or violence against women, discrimination, and a violation of human rights.

**Gender based violence** can be understood as violence directed against a person because of that person's gender, or violence that affects persons of a particular gender disproportionately.

Due to the high prevalence of women amongst the victims of sexual harassment, and of the root causes of sexual harassment in a historically unequal power relation between women and men, sexual harassment can be understood as a form of **violence against women**.

**Violence against women** is defined under the Istanbul Convention (Council of Europe, Convention on preventing and combating violence against women and domestic violence) as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

The Istanbul Convention includes sexual harassment under the forms of violence against women, as does the [FRA EU-wide Survey on Violence against Women](#).

This report will elaborate on harassment on the basis of gender, and sexual harassment as forms of discrimination and inequality, but also in the framework of law and policies against violence against women and protection of women's human rights.

### 1.4. PURPOSE AND APPROACH OF THIS REPORT

This Report is based on the Equinet training on combating harassment on the basis of gender and sexual harassment held in Warsaw on 23-24 September 2014. In its first part it presents the contents discussed during the training event. It draws on the presentations of speakers and experts, as well as the experiences shared by equality bodies working on gender equality and against harassment on the basis of gender and sexual harassment. The second part draws some conclusions which can be used to improve the work of equality bodies and the context in which they operate.

The Report was drafted and finalised with the assistance and input of the Equinet Working Group on Gender Equality.

Equinet is grateful for all contributions to this report from speakers, workshop facilitators, training participants and working group members.



The purpose of this Equinet publication is to:

- Inform the policy and legal debate on harassment on the basis of gender and sexual harassment at EU and national levels.
- Enhance the work of equality bodies to prevent and fight harassment on the basis of gender and sexual harassment by examining the issues they face in this work and by identifying good practice in responding to these issues.
- Identify relevant lessons and good practices from the work of equality bodies.
- Recommend possible ways forward to European and national policy makers, as well as other relevant stakeholders, in order to improve the context.

The Report addresses:

- The context of harassment on the basis of gender and sexual harassment in the EU
- Key issues in the work of equality bodies on harassment on the basis of gender, and sexual harassment
- Action that could be taken by equality bodies to tackle harassment on the basis of gender, and sexual harassment and build a culture of rights
- Action that could be taken at EU and national levels to improve the context and enhance the work of equality bodies on harassment on the basis of gender, and sexual harassment.

## 1.5. THE TRAINING EVENT

The Equinet training on Combating Harassment and Sexual Harassment held in Warsaw on 23-24 September 2014 strived to provide staff members of equality bodies with a space for peer learning and for discussing key challenges as well as good practices in the field.

This training aimed at exploring approaches and activities equality bodies can put in place to:

- Have a clear identification of the prevalence of harassment on the basis of gender and sexual harassment and the underlying dynamics.
- Support employers, providers of goods and services and education institutions to put in place procedures avoiding harassment and sexual harassment.
- Support a culture of rights which recognises and refuses harassment and sexual harassment.

This Equinet training was dedicated to an audience of 65 staff members of equality bodies with responsibilities in dealing with gender equality. The training programme allowed for participants with different professional backgrounds, including legal, policy and communication experts.

The Equinet Gender Equality Working Group had identified the key themes for the training:

- Legal concept: what is harassment, what is sexual harassment, differences from bullying, discrimination, specificities
- Victimisation: specificities of victimization in case of harassment and sexual harassment and how to ensure that victims report
- Good practices: experiences from national equality bodies
- Awareness-raising campaigns
- Investigation
- The burden of proof
- Sanctions
- Findings on harassment and sexual harassment from social science research

- Responsibility, third party liability
- How to build a case: gathering evidence
- Cooperation between different actors
- Under-reporting
- Strategic approach to work on harassment and sexual harassment

### 1.5.1. THE AGENDA OF THE TRAINING

AGENDA		
DAY 1		
08.30 – 09.00	<b>Registration and Welcome</b>	
09.00 – 10.30	<b>OPENING SESSION</b>	
	<b>Opening Address</b>	
09.00 – 09.30	<i>Evelyn Collins</i> – Chair of Equinet and Chief Executive of the Equality Commission for Northern Ireland	
	<i>Stanisław Trociuk</i> – Deputy Ombudsman, Human Rights Defender of Poland	
09.30 - 10.20	<b>Keynote address - Harassment and sexual harassment: why it happens, how to stop it</b>	
	<i>Kat Banyard</i> – Co-Founder and Executive Director, UK Feminista	
10.20 – 10.30	<b>Questions &amp; Answers</b>	
10.30-10.40	<b>Coffee break</b>	
10.40 – 12.10	<b>SESSION 1 – HARASSMENT AND SEXUAL HARASSMENT IN EUROPE</b>	
	Chair: Sandra Ribeiro, Member of Equinet Board, Moderator of Equinet Gender Equality Working Group and President of CITE, Portugal.	
	<i>This session aims at discussing the current context on harassment and sexual harassment on the basis of gender in Europe. The prevalence of sexual harassment and relevant patterns will be presented by FRA following their survey on violence against women. The European Commission will present existing EU legislation and policies on this topic.</i>	
10.40 – 11.00	<b>FRA survey on violence against women: findings concerning sexual harassment</b>	<b>Sami Nevala</b> Head of Sector Statistics and Surveys, Freedoms and Justice Department, EU Agency for Fundamental Rights (FRA)
11.00 – 11.25	<b>EU activities on harassment and sexual harassment</b>	<b>Emilie Jarrett</b> DG Justice, Gender Equality Unit European Commission
11.25 – 12.00	<b>Questions &amp; Answers – Discussion</b>	
12.00 – 13.30	<b>Lunch break</b>	

## SESSION 2 – BUILDING A CULTURE OF RIGHTS

Chair: Mari-Liis Sepper, Member of Equinet Board and Gender Equality and Equal Treatment Commissioner of Estonia.

13.30-14.55

*The high prevalence of cases of harassment and sexual harassment and the victimization risks make it key to ensure a proactive role of equality bodies in building a culture of rights and organisational tools to prevent harassment and sexual harassment. The Istanbul Convention and the new possibilities it brings for equality bodies will be presented, as well as some advice from the civil society. Pending confirmation, an insight on the US context will be presented as well.*

13.30 – 13.55	<b>The Istanbul Convention – preventing and combating sexual harassment</b>	<b>Lisa Gormley</b> Expert, Council of Europe
13.55 – 14.15	<b>The perspective of civil society</b>	<b>Edite Kalnina</b> European Women’s Lobby
14.15 – 14.20	<b>Response from the Chair opening the Q&amp;A session</b>	
14.20 – 14.40	<b>Questions &amp; Answers – Discussion</b>	
14.40 – 15.00	<b>Coffee break</b>	

## SESSION 3 – WORKSHOPS: BUILDING TOGETHER A CULTURE OF RIGHTS

15.00 – 16.20

*This workshop session will discuss how equality bodies can interact with the context presented during the plenaries and build a culture of rights together with other stakeholders.*

### Workshops hosted by:

- **EIGE (European Institute for Gender Equality)**, *Therese Murphy*
- **TGEU (Transgender Europe)**, *Richard Köhler*
- **European Women’s Lobby**, *Edite Kalnina*

## SESSION 4 – WORKSHOPS: EQUALITY BODIES’ PRACTICES

16.20 – 18.00

*This workshop session will discuss equality bodies work allowing to ensure a proactive and preventive approach to harassment and sexual harassment in different areas. Participants will rotate between the different groups every 50 minutes so that each participant gets to discuss two different experiences.*

### Participants will rotate in order to attend the different group discussions hosted by national equality bodies

- **Human Rights Defender, Poland**, *Katarzyna Wilkońska- uromska, Karolina Kedziora & Krzysztof miszek*: Sexual harassment in the uniformed services
- **Ombud for Equal Treatment, Austria**, *Cornelia Amon-Konrath*: Moot Court training to sensitise stakeholders on harassment
- **Equality Authority, Ireland**, *Stefania Minervino*: Framing harassment and sexual harassment within equality mainstreaming

**SOCIAL EVENT (19.00 – 21.00)**

DAY 2

9.00 – 10.20 SESSION 5 – WORKSHOPS: EQUALITY BODIES' PRACTICES CONTINUED

Participants will rotate in order to attend the different group discussions hosted by national equality bodies

- **CITE, Portugal, Sandra Ribeiro:** Strategising the work on harassment and sexual harassment in employment
- **Ombudsman for Equality, Finland, Jussi Aaltonen:** Campaigning against sexual harassment in educational institutions
- **DDD, France, Sandra Bouchon & Marilyn Baldeck:** Cooperation with NGOs in handling complaints on sexual harassment

10.20 – 10.35

*Coffee break*

SESSION 6 – SUPPORTING VICTIMS

10.35 – 11.50

Chair: Anna Błaszczak - Member of Equinet Board and Deputy Director of the Constitutional and International Law Dep., Human Rights Defender of Poland

*This session will discuss the legal background and possible ways forward for supporting the individual victims in building their cases.*

10.35 – 11.05

**Discrimination versus dignity:  
Harassment related to Sex and Sexual  
Harassment Law in European  
Countries and in the EU**

**Krzysztof Śmiszek**

Polish Society of Antidiscrimination Law

11.05 - 11.35

**How to build a case**

**Clare Hockney**

UK- GB Equality and Human Rights  
Commission

11.35 – 11.50

*Questions & Answers – Discussion*

11.50 – 12.50

SESSION 7 – WORKSHOPS: CASE STUDIES

*This workshop session will work on case studies to implement what was discussed in the plenary session concerning how to build a case.*

**Case studies will be discussed in different groups**

CLOSING OF THE SEMINAR

12.50 – 13.00

**Anne Gaspard** – Executive Director, Equinet Secretariat

**Mirosław Wróblewski** - Director of the Constitutional and International Law Dep., Human Rights Defender of Poland

## 2. SUMMARY OF THE TRAINING EVENT – SPEAKERS AND EXPERTS’ PRESENTATION

This chapter is a compilation of ideas shared by the speakers and experts during the training event, which do not necessarily reflect the position or opinion of Equinet and equality bodies. The information contained in this chapter relies on the notes taken by the Equinet Secretariat during the training, which might not reflect the nuances of the speakers’ presentations. Speakers and experts were asked to provide a short contribution based on their presentations and the discussions during the training. The contributions received have been integrated into the text.

### 2.1. OPENING SESSION

#### 2.1.1. OPENING ADDRESS ON BEHALF OF EQUINET

**By Evelyn Collins, Chair of Equinet and Chief Executive of the Equality Commission for Northern Ireland**

Evelyn Collins opened the training event by welcoming all the participants and speakers, and thanking the host Human Rights Defender of Poland. She underlined the importance of this training for Equinet and the work of equality bodies: sexual harassment is a particular form of discrimination between men and women in the labour market (and in the field of goods and services) but also a form of violence against women. The high prevalence of cases of harassment and sexual harassment, and the difficulty to tackle them, make it key for equality bodies to find tools to combat harassment and sexual harassment, support victims, and build a culture of rights.

Evelyn Collins underlined the relevant work of Equinet and the Working Group on Gender Equality in promoting gender equality and combating gender discrimination. In this context, she recalled the two key-publications [Equality Bodies and the Gender Goods and Services Directive](#) (2014) and [Equal Pay for Equal Work and Work of Equal Value: The Experience of Equality Bodies](#) (2013).

#### 2.1.2. OPENING ADDRESS ON BEHALF OF THE HUMAN RIGHTS DEFENDER OF POLAND

**By Stanisław Trociuk, Deputy Ombudsman, Human Rights Defender of Poland**

Stanislaw Trociuk described harassment as a behaviour aimed at the infringement of human dignity. He underlined that the notion of harassment must refer to and be interpreted under the legal category of human dignity. He moreover highlighted the importance of creating positive conditions and ensuring the right to compensation, including material compensation of the moral harm, to victims of harassment.

#### 2.1.3. KEYNOTE ADDRESS: HARASSMENT AND SEXUAL HARASSMENT: WHY IT HAPPENS, HOW TO STOP IT

**By Kat Banyard, Co-founder and executive Director, UK Feminista**

Kat Banyard started her presentation by displaying images of women in advertising. The attention was focused on ways in which the women’s body is shown in sexualized and erotized depictions, and how media representation reflects and reinforces sexism in society. Women are often presented as **sexual**

**objects** in mass media images, their bodies promoted as a product for male pleasure and consumption. Men are persuaded to think of women as their **subservient** pleasure providers. The **sexual objectification** of the female body and the proliferation of sexual images of women in the media, which are becoming increasingly violent, reflect and perpetuate **gender inequalities**, and create a hostile and intimidating environment for women facilitating the prevalence of **sexual harassment** against women and girls.

Kat Banyard recalled that in every society on earth, women and girls have less access to resources, opportunities and political power than men, and that at least one in three women around the world has been beaten, coerced into sex, or otherwise abused in her lifetime.

According to the World Health Organization, **school** is the most common setting for sexual harassment and coercion. Kat Banyard reported that one in three 16-18 year-old girls have experienced unwanted sexual touching at school in the UK, and nearly one in four 16-18 year-olds say that their teachers never said unwanted sexual touching, sharing of sexual pictures or sexual name calling are unacceptable.

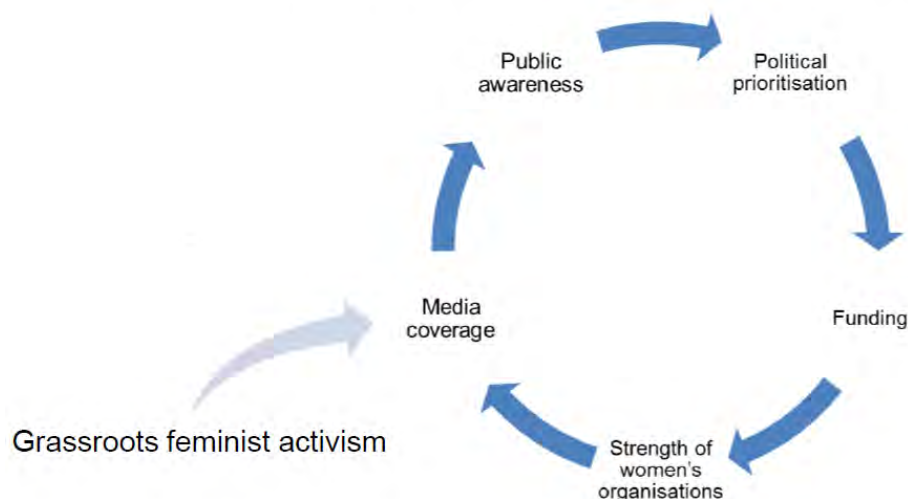
Kat Banyard underlined that Sexual Harassment is about **power**, it can happen at work, at school, in the street. It creates a **culture of impunity** and it has a serious impact on the status of women.

Sexual harassment must be understood in the context of **gender inequality**: sexual harassment is a consequence of structural gender inequalities in which sexual harassment can flourish and escalate, and it is important to prevent and address it in schools.

Where to begin and what we need?

### *Build a strong feminist movement*

## **Powering a movement**



According to Kat Banyard this movement must be continuously visible, it must generate public awareness so that women and men can stand up and speak out to stop the culture of impunity and to take on sexism in school, university and the community. It is necessary to support people to campaign for a world where women and men are equal by providing training and resources and offering a powerful force for change.

## *Strong institutional responses*

Sexism in all its forms should be challenged through strong institutional responses. Schools have a unique and critical role to play in addressing harmful attitudes and abusive behaviours. Schools should make gender equality a priority and support students who are standing up against sexism. She mentioned that UK Feminista supports young students and teachers to take action against sexism and promote gender equality. It offers workshops for schools and colleges to enable young people to learn about feminism, as well as to create a space for boys and girls to share their experiences.

## *Join the dots*

According to Kat Banyard it is important to understand what feeds the culture of men's entitlement to access women bodies. Men's access to the sex industry and pornography has become easier, and erotic and pornographic material often contains violent depictions. Pornographic pictures of women in newspapers, music videos and advertising promote male dominance, which reinforces and perpetuates sexual inequality. If women are portrayed as sexual objects, they will be treated like this. Sex establishments like striptease and lap dancing clubs normalise the sexual objectification of women and promote a **culture of pornography**. This sends messages to men that it is their natural right to enjoy pornography and the women's body in an unbalanced power relation.

Kat Banyard added that, according to her, prostitution is another issue to be addressed and it is important to find the right way to deal with it. She referred to the "Nordic Model" also known as the "Swedish Model" based on the approach adopted by Sweden in 1999 as a good practice: a set of laws and policies that penalize the demand for commercial sex while decriminalizing individuals in prostitution. She underlined that it provides women and men with tools to challenge the exploitation of women's bodies.

## 2.2. HARASSMENT AND SEXUAL HARASSMENT IN EUROPE

### 2.2.1. FRA survey on violence against women: findings concerning sexual harassment

**By Sami Nevala, Head of Sector Statistics and Surveys, Freedoms and Justice Department, EU Agency for Fundamental Rights (FRA)**

Sami Nevala opened his presentation by introducing [the FRA survey on violence against women in the EU](#). The survey is based on interviews with 42,000 women across the 28 Member States of the European Union. In each Member State, a minimum of 1,500 women aged 18-74 took part in the survey. All interviews were conducted face to face by female interviewers in interviewees' homes, using a standard questionnaire for all countries. The survey asked women about their experiences of physical, sexual and psychological violence, including domestic violence, since the age of 15 years and during the 12 months before the interview. The interviews took place between April and September 2012.

The survey also included **questions on sexual harassment**, including **cyber harassment**.

The survey used a list of 11 items to ask women about their experiences of sexual harassment<sup>2</sup>.

The 11 items represent various acts of sexual harassment and can be split into 4 broad forms of sexual harassment<sup>3</sup>.

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<sup>2</sup> FRA – European Union Agency for Fundamental Rights, Violence against women: an EU-wide survey. Main results, 2014, page 97.

<sup>3</sup> FRA – European Union Agency for Fundamental Rights, Violence against women: an EU-wide survey. Main results, Austria, 2014, page 97.

### Physical forms of harassment

- Unwelcome touching, hugging or kissing?\*

### Verbal forms of harassment

- Sexually suggestive comments or jokes that made you feel offended?\*
- Inappropriate invitations to go out on dates?
- Intrusive questions about your private life that made you feel offended?
- Intrusive comments about your physical appearance that made you feel offended?

### Non-verbal forms of harassment

- Inappropriate staring or leering that made you feel intimidated?
- Somebody sending or showing you sexually explicit pictures, photos or gifts that made you feel offended?\*
- Somebody indecently exposing themselves to you?\*
- Somebody made you watch or look at pornographic material against your wishes?\*

### Cyber harassment

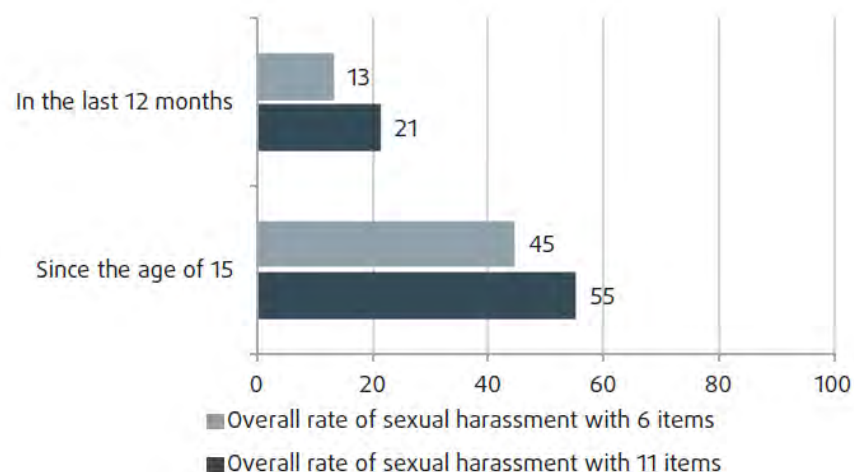
- Unwanted sexually explicit emails or SMS messages that offended you?\*
- Inappropriate advances that offended you on social networking websites such as Facebook, or in internet chat rooms?

Out of the total list of 11 items, six items were selected and considered as the most serious ones (see the asterisk “\*”).

The survey shows that the prevalence rates of women that have experienced sexual harassment since the age of 15 in the EU-28 range from 45% to 55%, depending on the set of sexual harassment items (6 questions and 11 questions, respectively).

Moreover, it has been estimated that 13% to 21% of women in the EU-28 have experienced sexual harassment in the 12 months before the interview.

### *Prevalence of Sexual Harassment (%)*



Source: FRA Violence against women: an EU-wide survey, 2014

The survey outlines the frequency of various forms of sexual harassment that women have been exposed to since the age of 15. Inappropriate staring or leering that made women feel intimidated



(30%) and unwelcome touching, hugging or kissing (29%) are the forms of sexual harassment women have experienced most frequently since the age of 15<sup>4</sup>.

**Forms and frequency of sexual harassment since the age of 15(%)**

Forms of Sexual Harassment	6 or more times	2-5 times	Once	Total
Inappropriate staring or leering that made you feel intimidated	10	14	6	30
Unwelcome touching, hugging or kissing	6	13	9	29
Sexually suggestive comments or jokes that made you feel offended	8	11	5	24
Intrusive comments about your physical appearance that made you feel offended	7	9	4	20
Intrusive questions about your private life that made you feel offended	4	8	5	16
Somebody indecently exposing themselves to you	1	5	10	16
Inappropriate invitations to go out on dates	2	7	6	16
Unwanted sexually explicit emails or SMS messages that offended you	2	3	2	7
Inappropriate advances that offended you on social networking websites such as Facebook, or in internet chat rooms	1	3	2	6
Somebody sending or showing sexually explicit pictures, photos or gifts that made you feel offended	1	2	3	5
Someone made you watch or look at pornographic material against your wishes	0	0	1	2

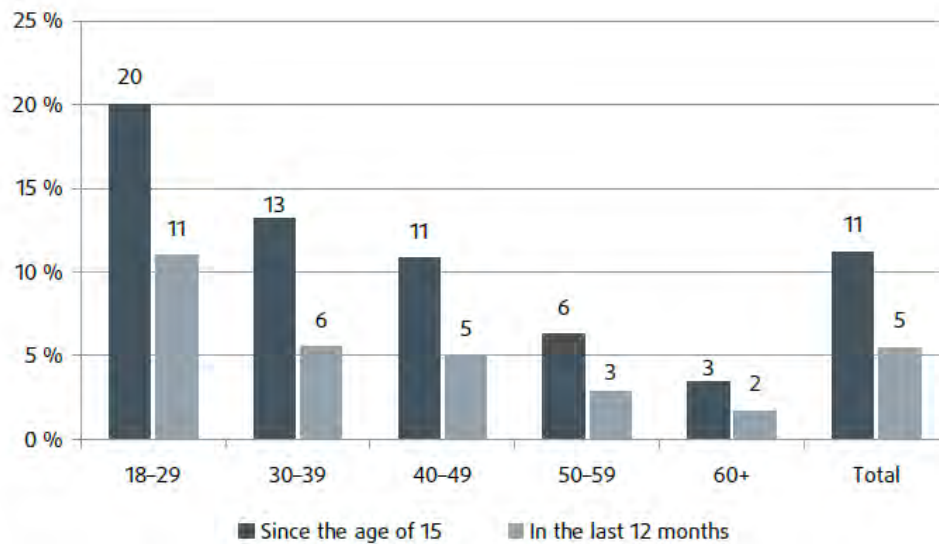
Notes: Taken individually, the sum of categories '6 or more times', '2-5 times' and 'Once' can differ from the total indicated in the table by +/- one percentage point. This difference is due to rounding.

Source: FRA Violence against women: an EU-wide survey, 2014

<sup>4</sup> FRA – European Union Agency for Fundamental Rights, Violence against women: an EU-wide survey. Main results, Austria, 2014, page 102.

Two items can be analysed as forms of **cyber harassment**: “unwanted sexually explicit emails or SMS messages” and “Inappropriate advances that offended you on social networking websites”. According to the FRA survey’s assessment on the **prevalence of cyber harassment across age groups** in the EU-28, one in 10 women (11%) has faced at least one of the two forms of cyber harassment since the age of 15, and one in 20 (5%) in the 12 months before the interview<sup>5</sup>.

### *Sexual Cyber harassment by age group (%)*



Source: FRA Violence against women: an EU-wide survey, 2014

Sami Nevala underlined that the variation in the prevalence of cyber harassment across Member States reflects the use of internet as a communication tool for both victims and perpetrators in different Member States. Acts of cyber harassment are more common in countries with high rates of internet access<sup>6</sup>.

Taking into account all forms of sexual harassment (11 items), women were asked to focus on the most serious incident that has happened to them since the age of 15. It came out that in many cases the perpetrator of the most serious incident is an unknown person (42%), followed by somebody from the employment context or somebody the victim knows (18%). The vast majority of perpetrators are men. Feelings of vulnerability, anxiety and loss of self-confidence are the most common psychological consequences experienced by women as a result of the most serious incident of sexual harassment. 35% of women having experienced a serious incident of sexual harassment did not talk about it to anyone before the interview.

As a follow up to the results of the FRA survey, Sami Nevala mentioned **5 key priorities**:

- Ratification of the Istanbul Convention.
- Member States should review adequacy of existing policies with regard to sexual harassment online.
- Internet and social media platforms should take steps to proactively assist victims of stalking to report abuse.
- Employers’ organizations and trade unions should further promote awareness of sexual harassment and encourage reporting.
- High levels of sexual harassment experienced by women in management must be addressed.

<sup>5</sup> FRA – European Union Agency for Fundamental Rights, Violence against women: an EU-wide survey. Main results, Austria, 2014, page 104.

<sup>6</sup> According to the FRA survey, Denmark and Sweden (18%) and Slovakia and the Netherlands show the highest prevalence rates of cyber harassment. The lowest rates are in Romania (5%) and in Lithuania and Portugal (6%).

He concluded his presentation by proposing different actions that should be taken to improve the context:

- Policy responses from different fields working together: employment, education, health.
- Reviewing scope and implementation of existing laws and policies and targeting men and women for gender equality.
- Training organizations, employers, healthcare, police.

## 2.2.2. EU activities on harassment and sexual harassment

By Emilie Jarrett, DG Justice, Gender Equality Unit European Commission

Emilie Jarrett started her presentation by underlining that **sexual harassment** is a form of **gender-based violence, discrimination, and a violation of fundamental rights**.

She recalled the **definition of harassment related to sex and sexual harassment** contained in the [Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation \(recast\)](#).

*“Harassment: where **unwanted conduct** related to the sex of a person occurs with the **purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment**” (Article 2(1)(c).*

*“Sexual harassment: where any form of **unwanted verbal, non-verbal or physical conduct of a sexual nature** occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment” (Article 2(1)(d).*

Harassment can happen at work (from bosses, colleagues, costumers), in school and at university (from teachers, professors and peers), in the street and online or through new technologies (cyber harassment).

Emilie Jarrett presented the actions undertaken by the European Commission in the field of harassment on the basis of gender and sexual harassment.

In terms of **legislation and policies**, she mentioned:

- [\*\*The Strategy for Equality between Women and Men 2010-2015\*\*](#): The Strategy identifies the priorities regarding gender equality at EU level and actions to be implemented by the Commission. Among the six priority areas set by the Strategy, key actions to end gender-based violence are foreseen and described and it is specifically stated that sexual harassment is a form of gender-based violence.
- The [\*\*Directive 2006/54/EC on equal treatment in employment and occupation \(recast\)\*\*](#): This Directive stipulates that *“harassment and sexual harassment are contrary to the principle of equal treatment and constitute discrimination on the grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subjected to effective, proportionate and dissuasive penalties”* (preamble, par. 6). Paragraph 7 clarifies that *“in this context, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of discrimination on grounds of sex and, in particular, to take preventive measures against harassment and sexual harassment in the workplace and in access to **employment, vocational training and promotion**, in accordance with national law and practice”*
- The [\*\*Directive 2004/113/EC on equal treatment in the access to and supply of goods and services\*\*](#): The preamble of this Directive specifies that *“discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside the labour market. Such*

*discrimination can be equally damaging, acting as barrier to **the full and successful integration of men and women into economic and social life***" (Paragraph 9)

- The [Directive 2010/41/EU on equal treatment in self-employment](#): The preamble of this Directive stipulates that *"to prevent discrimination based on sex, this Directive should apply to both direct and indirect discrimination. **Harassment and sexual harassment should be considered discrimination and therefore prohibited**"* (Paragraph 11)
- The [Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime](#): In this Directive, special attention is given to special support and protection to victims of certain crimes, including victims of gender-based violence.
- The [Framework Agreement on Harassment and Violence at Work](#) was signed in 2007 between the European Trade Union Confederation (ETUC/CES), the Confederation of European Business (BUSINESSEUROPE), the European Association of Craft Small and Medium-sized Enterprises (UEAPME), as well as the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP). The aim of the agreement is to increase the awareness and understanding of employers, workers and their representatives of workplace harassment and violence; provide employers, workers and their representatives at all levels with an action-oriented framework, and identify, prevent and manage problems of harassment and violence at work.

Emilie Jarrett highlighted the **key challenges** in terms of **data collection** such as the under-reporting by victims that often leads to an underestimation of the prevalence of the violence against women, as well as the diversity in policies and legal framework on violence against women in the EU Member States, including the variety of approaches and use of different definitions and categories. Nevertheless, she recalled the important work undertaken in this area by Eurostat, FRA and EIGE.

The European Commission has provided **funding** to civil society organisations, through the **Daphne programme**, and to Member States, through the **Progress programme**. The European Commission will continue providing funding through the [Rights, Equality and Citizenship programme](#).

The European Commission took action to combat female genital mutilation and in 2013 published a communication ["Towards the elimination of female genital mutilation \(FGM\)"](#) which focuses on prevention and victim support and describes a series of actions to be implemented over the next few years.

Emilie Jarrett highlighted **5 key challenges** in this area:

- Stereotypes and sexism
- Tackling under-reporting
- Engaging men and boys in gender equality and violence prevention
- Intersectionality: recognizing multiple forms of discrimination
- Emerging forms of violence such as cyber harassment

## 2.3. BUILDING A CULTURE OF RIGHTS

### 2.3.1. The Istanbul Convention – preventing and combating sexual harassment

**Lisa Gormley, Expert, Council of Europe**

Lisa Gormley's presentation focused on the main features of the [Council of Europe Convention on preventing and combating violence against women and domestic violence \(Istanbul Convention\)](#).

She introduced the Convention as a tool for equality bodies to actively participate in the response to violence against women.

She mentioned the valuable input by civil society in the Istanbul Convention during the Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) meetings. The CAHVIO group was mandated to prepare the draft of the Convention, which was eventually finalised in December 2010. Non-governmental organisations, academics, social workers, representatives of ministries and prosecutors had the opportunity to intervene with relevant information about their experiences in working in various manifestations of violence against women, the main challenges they faced and possible solutions.

The Istanbul Convention is a powerful tool to prevent and combat violence against women and girls. The adequate implementation of the Convention will make an important difference in the eradication of violence against women as it sets standards for practical measures to address different forms of violence against women from its roots.

Article 2 outlines the scope of the Convention: *“This Convention shall apply to all forms of violence against women, including domestic violence, which affects women disproportionately. Parties are encouraged to apply this Convention to all victims of domestic violence. Parties shall pay particular attention to women victims of gender based violence in implementing the provisions of this Convention”*.

The Convention states that *“parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction” (Article 40, Sexual Harassment)*.

The Convention contains an explicit mandate to cooperate and work together with equality bodies when implementing comprehensive policies: *“Parties shall take the necessary legislative and other measures to adopt and implement State-wide effective, comprehensive and co-ordinated policies encompassing all relevant measures to prevent and combat all forms of violence covered by the scope of this Convention and offer a holistic response to violence against women” (Article 7, para.1), “Measures taken pursuant to this article shall involve, where appropriate, all relevant actors, such as government agencies, the national, regional and local parliaments and authorities, national human rights institutions and civil society organisations” (Article 7, para. 2); and running awareness-raising campaigns or programmes: “Parties shall promote or conduct, on a regular basis and at all levels, awareness-raising campaigns or programmes, including in co-operation with national human rights institutions and equality bodies, civil society and non-governmental organisations, especially women’s organisations, where appropriate, to increase awareness and understanding among the general public of the different manifestations of all forms of violence covered by the scope of this Convention, their consequences on children and the need to prevent such violence” (Article 13, para. 1)*

Chapter II of the Convention mandates the creation a coordinating body, or a nomination of an existing institution, to collect national data on the extent of the problem of violence against women.

The Convention provides for the setting up of a monitoring mechanism with two pillars to assess how well its provisions are implemented by the States’ parties. One pillar is the Committee of the Parties, a political body. The other pillar is the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), an independent expert body. According to article 66(1), independent equality experts should become members of the GREVIO, and *“GREVIO may receive information on the implementation of the Convention from non governmental organisations and civil society, as well as from national institutions for the protection of human rights.”(Art. 68(5))*. Lisa Gormley highlighted that equality bodies should participate in the process of monitoring by providing relevant information and their expertise on gender-based violence.

### 2.3.2. The perspective of civil society

#### By Edite Kalnina, European Women's Lobby

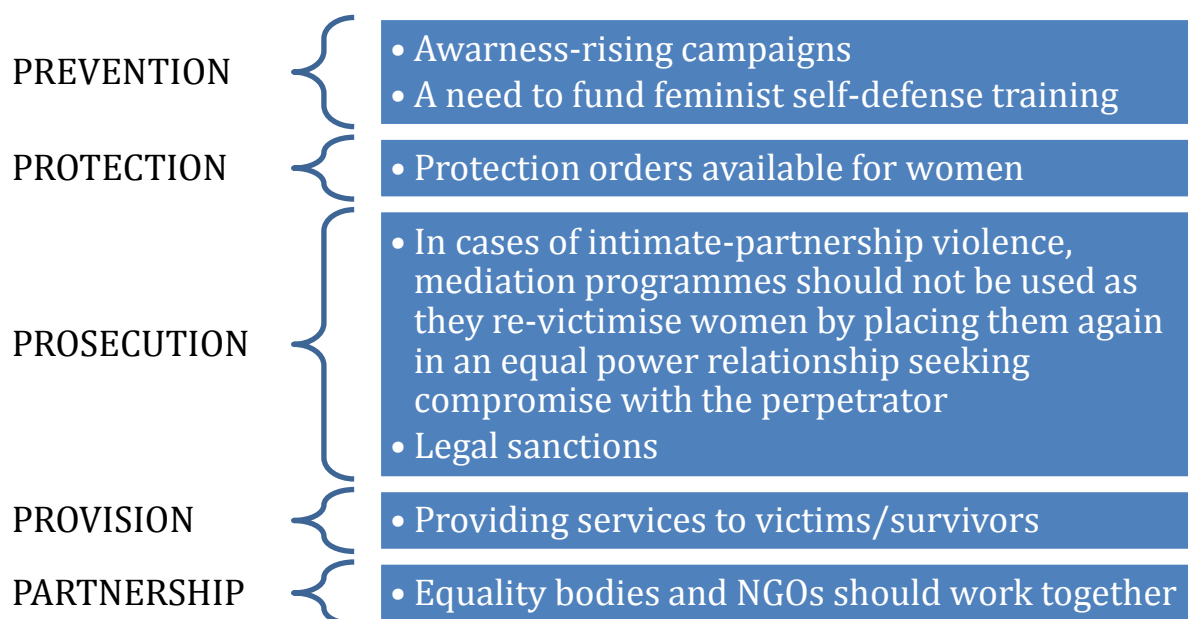
Edite Kalnina started her presentation by highlighting how slowly progress has been made with data collection and diagnostics.

By publishing a first European wide data on violence against women<sup>7</sup> in 1999, the European Women's Lobby drew attention to the fact that violence against women (VAW) is widespread everywhere, and that more than 20% of women suffered have from violence by their partner/ex-partner. It highlighted the huge prevalence of VAW in Europe as a violation of women's human rights and the need for stronger policies at national and EU level.

Edite Kalnina outlined the current challenges for civil society in the area of harassment on the basis of gender and sexual harassment:

- According to EIGE's report, over 25,000 shelter places are lacking in the EU ([EIGE Domestic Violence: Support Services](#)).
- Stalking is not defined in the legal framework of a number of EU countries.
- According to the FRA Survey on violence against women (2014), 75% of women in top management jobs across Europe experienced sexual harassment in their lifetime. Edite Kalnina argued that when we work on parity in decision making, including for having more women on boards, we cannot ignore these figures.
- Young women are also particularly at risk: 20% of young women (18-29) have experienced cyber sexual harassment.
- Women with disabilities are four times more likely to experience sexual violence and face forced sterilisation or abortion.
- Lesbian and bisexual women face targeted sexual harassment and abuse, and often receive an inappropriate response from authorities. Transgender people are particularly vulnerable to violence, especially in the public space and in street prostitution.

Edite Kalnina proposed different ways for equality bodies to act. Any action on combating male violence against women has to address five key areas referred to as the 'five Ps':



<sup>7</sup> European Women's Lobby, [Unveiling the Hidden Data on Domestic Violence in the EU](#), 1999.

She ended by inviting all the participants to share EWL's [petition](#) calling on the President of the European Commission to establish 2016 as European Year to end violence against women and girls.

## 2.4. WORKSHOPS: BUILDING TOGETHER A CULTURE OF RIGHTS

### 2.4.1. EIGE (European Institute for Gender Equality), Therese Murphy

The workshop addressed three main topics:

- The importance of the **link between gender stereotypes and sexual harassment**
- The importance of **data collection**
- The **role** that **equality bodies** can play in eliminating sexual harassment, in particular in the first two areas.

Discussions focused mostly on how equality bodies can build change for the elimination of sexual harassment by means of combating gender stereotypes.

In terms of **data collection**, Therese Murphy underlined that the different definitions of sexual harassment in different countries creates problems of comparability and harmonization. In some countries sexual harassment is addressed under criminal law, in others it is not and where it is not a crime, it is difficult to have comprehensive data collection. Equality bodies could play a key role in ensuring data collection on sexual harassment and comparability.

She made reference as well to the [EIGE Gender Equality Index](#), a multi-dimensional measurement tool on gender equality, formed by combining gender indicators into a single measure. One of the eight core domains of the index, measuring gender-based violence against women, had to be left without figures due to lack of data in the EU.

In terms of gender stereotypes, Therese Murphy mentioned the [EIGE Report 2013: a study of collected narratives on gender perception in the 27 EU Member States](#)

Several areas for action have been identified to modify gender stereotypes:

- It was agreed that a pre-condition to modify gender stereotypes is to create consensus on the need for change, on the harm brought by gender stereotypes. It was also agreed that gender stereotypes leading to harassment and sexual harassment are linked to stereotypes in different areas of life.
- The use of parental leave by men and a greater visibility to the caring role of men. This would be beneficial to the society overall due to the societal need of shared caring responsibility, of a care economy.
- The discourse on the cost of gender equality policies should be countered with arguments highlighting that they are an investment.
- Benefits and incentives, as well as positive action, and visibility, should be attributed to choices in contrast with gender stereotypes.
- Gender balance in top management and decision-making is an area where countering gender stereotypes would get visibility: it is important both to 'get women there' and create conditions for them to stay.
- In the area of violence in particular, a big obstacle is the culture of domestic violence as a private problem and gender stereotypes on the acceptance of violent behaviours.
- A move to modify gender stereotypes is to discuss how masculinity is built and to challenge traditional sexist assumptions on manhood. One equality body made a campaign based on the message "You are not a real man if you beat your wife".

The group discussed different roles that can be played by equality bodies to combat gender stereotypes leading to harassment and sexual harassment. It was underlined that equality bodies are attributed to a mandate under three European Directives, to work on harassment and sexual harassment in the areas of employment and vocational training, access to goods and services, and for self-employed workers: [Directive 2006/54/EC on equal treatment in employment and occupation \(recast\)](#), [Directive 2004/113/EC on equal treatment in the access to and supply of goods and services](#), [Directive 2010/41/EU on equal treatment in self-employment](#).

Some equality bodies do not work extensively on sexual harassment as it falls under criminal law. It was discussed how gender-based violence is caused and what the obstacles to gender equality are, as well as which role equality bodies could play in the prevention of gender-based violence, in the provision of information, and in the establishment of gender-sensitive research .

Some areas for work include:

- Training for providers and employers, support for the creation of tools for the prevention and reporting of harassment and sexual harassment.
- Cooperation with NGOs and women's organisations.
- Research on gender stereotypes and sexual harassment.
- Work on harassment as discrimination and on third party responsibility and duty bearers responsibility.
- Support the establishment of strong legislation e.g. imposing a duty on employers and schools to investigate any signs of harassment, not allowing them to ignore any signs of harassment (as in Finland).
- Convey to school directors the message that they are responsible for violence in schools, including harassment and sexual harassment.

#### 2.4.2. TGEU (Transgender Europe), Richard Köhler

This workshop was about harassment and sexual harassment experienced by trans people. According to the [FRA LGBT Study 2012](#), 58 % of trans people experienced harassment in public. In the round of introduction, participants discussed their own experiences in dealing with trans-related (sexual) harassment cases.

Richard Köhler outlined the various forms of harassment and sexual harassment trans people face on a daily basis: staring at chest and genitals; ignorance of preferred name/pronoun; inappropriate questions; revealing gender history; name-calling, spitting, black mailing or physical aggression.

Whether a trans person is protected on grounds of gender reassignment, gender identity or gender expression varies across different pieces of EU legislation. Explicit protection of trans people against sexual harassment has only been established in relation to gender reassignment. Richard Köhler pointed out the need for comprehensive legal coverage, covering gender identity and gender expression, and trans-inclusive proactive measures.



## EU Protection for Trans People

	Gender reassignment	Gender identity	Gender expression
Goods & Services	✓		
Employment & Social Security	✓		
Asylum	✓	✓	
Victim's Rights	✓	✓	✓



Richard Köhler recalled some important definitions such as:

- **Gender Reassignment** or gender confirming treatment is a set of medical measures that can but does not have to include psychological, endocrinology and surgical treatments aimed at aligning a person's physical appearance with their gender identity. Not every trans person wishes for or is able to undergo all or any of these measures.
- **Legal Gender Recognition** is the legal recognition of a person's gender identity including change of gender marker and name(s) in public registries and key documents.
- **Gender Identity** – Each person's deeply felt internal and individual experience of gender → every human being has a gender identity
- **Gender expression** refers to people's manifestation of their gender identity, and the one that is perceived by others. Typically, people seek to make their gender expression or presentation match their gender identity, irrespective of the sex that they were assigned at birth.

He underlined the importance of the **intersection between transphobia and misogyny**, which targets trans women. This phenomenon manifests itself in various ways:

- The media regularly depict trans women as sex workers.
- Trans men can be threatened by 'corrective rape'.
- The police ignores or misreads transphobia as 'male on male' violence.
- Rape definitions that require (legal) female gender of victim or presence of vagina (penetration) can be inaccessible for trans people.

Among the **key priorities** to combating harassment and sexual harassment against trans people, Richard Köhler mentioned:

- The ratification of the Istanbul Convention.
- Ensuring explicit gender identity and gender expression protection in non-discrimination and diversity policies, while using criminal law to combat bias-motivated crimes on these grounds.
- Interpreting existing equality protections to cover all trans people.
- Training and support for specialists and support providers working in victim support or law enforcement.
- Communicating possibilities for access to justice and redress to trans communities.

During the interactive part, participants studied trans-specific harassment case studies, discussing the applicability of relevant EU law, as well as the mandate of the equality body and possible ways of support.

### 2.4.3. European Women's Lobby, Edite Kalnina

Edite Kalnina started the workshop by asking all participants to write down what they consider as the key challenges in fighting sexual harassment. Some challenges mentioned were:

- Under-reporting
- Gender inequality in society
- Lack of rights-awareness
- Role of the media and advertising in reinforcing gender stereotypes

Following this, participants collected and discussed ideas for what equality bodies, Member States and the EU could do to combat sexual harassment. Ideas mentioned included:

- The important role of education
- Changing societal culture
- Awareness-raising about rights and remedies
- Taking cases to court
- Establishing 2016 as European Year to end violence against women.

## 2.5. WORKSHOPS: EQUALITY BODIES' PRACTICES

### 2.5.1. Sexual harassment in the uniformed services

**By the Human Rights Defender, Poland, Katarzyna Wilkołaska-Żuromska, Karolina Kedziora & Krzysztof Śmiszek**

During the workshop two main topics were discussed:

- How to influence uniformed services policies on harassment and sexual harassment
- How to combat under-reporting in closed bodies such as the police or army which do not appreciate external influences.

The Human Rights Defender of Poland has some key competences in relation to sexual harassment in the uniformed services: within the Department of Labour Law and Social Insurance there is a special Unit of Soldiers and Officers Affairs.

It was pointed out that what is effective in such cases is to **examine each case on-the-spot**. At this stage, the Defender's representatives try to earn officers' trust by highlighting the Defender's independence and its power to collect anonymous complaints. Thus, officers are more likely to confide cases of discrimination even though they do not make official complaints.

What the Defender's representatives can do is to **demand explanations** and aim to **solve the problem on-the-spot** by talking to superiors, who may know nothing about the problematic situation; **address a motion to the body** whose activity has been found to have caused an infringement; and **make a request for the initiation of disciplinary proceedings**.

In 2013 after a case which was discussed in the media, the Human Rights Defender made a request to the Minister of Interior asking for the introduction of anti-mobbing procedures in the police and uniformed services. **As a result of a strong commitment of the Plenipotentiary of the Chief of Police for the Protection of Human Rights**, the Chief of Police appointed a Team for Equal Opportunities Strategy within the Police. The police also established anti-discrimination and anti-bullying procedures for both civilians and officers to help resolve cases of victims of discrimination. The Team for Equal Opportunities Strategy within the Police aims at **analysing the existing legislation and procedural solutions** used in the uniformed services in terms of equal treatment for men and women; **identifying proposals for legislation and organizational changes affecting** the implementation of the principle of gender equality in the uniformed services; **organizing exchanges**

**of knowledge between the uniformed services** in such areas as research, regulations and best practices relating to the situation of women in the uniformed services.

Participants in the workshop were asked three questions:

- Why are there so few complaints?
- What actions can equality bodies carry out to increase awareness-raising amongst managers and officials?
- How can NGOs and equality bodies work as allies to eradicating harassment and sexual harassment in uniformed services?

Under-reporting is a significant problem. Some key reasons were identified:

- Internal hierarchy (culture of obedience) and fear of interruption of the career path.
- In some cases, legislation may limit national equality bodies' mandate and power.
- People don't perceive the support from equality bodies as successful.
- It's a male dominated sector and the organisational culture is prone to harassment, which is often perceived as normal.
- Previous unsuccessful cases may have a deterrent effect. It is moreover very rare that officers win legal cases against officials in higher position.
- Lack of confidentiality.
- There are not many women in uniformed services and the few that are there tend to follow the sexist culture for fear of 'not-belonging'. Moreover, it is difficult for women to enter the army, and if they complain, they run the risk of taking large steps backward.
- Lack of culture of reporting.

The participants in the workshop collected some key ideas on the role of equality bodies in the context:

- Raising awareness on harassment and sexual violence in uniformed services, also through media coverage.
- National equality bodies can support the establishment of equality internal policies in all uniformed services.
- Organizing training with a top-bottom approach: training the leadership.
- Make regular on-the-spot visits and submit anonymous questionnaires in order to assess the situation of women within the uniformed services
- Make sure that when the complaint is made, there will be an independent investigation and adequate sanction.

Even when legislation limits the equality bodies' mandate and powers, there can be space for soft strategies. NGOs and equality bodies should inform each other of strategies and seek reciprocal support by relying on their expertise. Equality bodies can ask NGOs to inform them of complaints that they receive from the uniformed services. In some countries (e.g. France), NGOs refer the victim to the equality body especially in cases where legal issues have to be solved.

### **2.5.2. Moot Court training to sensitise stakeholders on harassment**

#### **By the Ombud for Equal Treatment, Austria, Cornelia Amon-Konrath**

This workshop started with Ms. Cornelia Amon-Konrath presenting the experience of the Austrian Ombud for Equal Treatment with using a "moot court" activity, with participants taking part in simulated court proceedings, to sensitise stakeholders on discrimination cases. She explained how the

moot court is an engaging and therefore effective way to sensitise on the problem of sexual harassment.

The Ombud for Equal Treatment used the moot court system to train people on legal issues. A moot court is an activity used by many law schools in which participants simulate court proceedings based on hypothetical legal cases. The Ombud adapted and used it in workshops and seminars for stakeholders. By taking up roles, participants have the possibility to learn the practical side of practicing law and understand the dynamics and implications of a case.

This idea derived from the Austrian Ombud's experience in providing advice and legal aid to women and men who experience discrimination in the workplace, and in particular sexual harassment. She highlighted that preventive work is very important and combating harassment and sexual harassment clearly demands a top-down strategy, especially in hierarchical organizations. Therefore the Ombud informs stakeholders, such as trade unions, but also duty bearers including people who work in senior management, about discrimination, their responsibilities and possible ways to set up mechanisms to handle complaints.

During the workshop, Cornelia Amon-Konrath gave practical examples on how to set up a moot court to train stakeholders on discrimination cases, which can cover different grounds. Once the participants in the seminars or workshops choose their role, it is important to provide them with detailed scripts containing information on what to do (e.g. filing a written statement, explaining the reasons and implications of the undergone discrimination(s), identifying possible witnesses). All participants should receive close support from trainers who have to attend to all questions and difficulties that might arise. It is also important to allow all participants to be present at the proceedings. After the Court's "verdict", it is important to have a discussion with feedback from the participants, especially on how they felt in their role.

The participants in the workshop discussed how this tool could be effectively used. Most participants had had not yet used moot court exercises for their trainings, but many of them concluded that this is a new approach and tool that they might use in the future.

### 2.5.3. Framing harassment and sexual harassment within equality mainstreaming

#### **By Stefania Minervino, Equality Authority, Ireland**

This workshop's objective was to outline the principles of equality mainstreaming as a whole-organisational approach for preventing and re-dressing harassment and other gender-based discrimination. The workshop also aimed at presenting a rationale for clearly positioning harassment and sexual harassment within equality policies in workplaces.

The Equality legislation in Ireland covers the prohibition of discrimination, harassment and sexual harassment on nine grounds (gender, civil status, family status, age, disability, sexual orientation, race, religion and membership of the Traveller community). While the legislation provides valuable standards of non-discrimination for most organisations in the private and public sector, it also states that the promotion of equality is one of the key functions of the national equality body (i.e. Equality Authority) and it points therefore to a more substantive model of equality.

The Equality Authority is mandated to produce a statutory code on harassment and sexual harassment, which was last amended in 2012. The code provides useful guidelines for employers. While there is no legal obligation to translate the code into local organisational policies, most Irish workplaces would have a set of policies which normally refer to 'dignity at work', or 'dignity and respect' and which normally cover harassment, sexual harassment and bullying. While bullying can clearly have a discriminatory intent or impact, it is not defined under equality legislation and does not require to be linked with any of the nine protected grounds. There is often a certain degree of

confusion about the definitions of harassment, sexual harassment and bullying, and their respective legislative frameworks. On the other hand, it might be argued that harassment with a discriminatory intent will also amount to bullying if it becomes repeated, inappropriate behaviour.

Harassment is a unique form of discriminatory behaviour under the Irish Equality legislation. In the Irish context it can be a once off episode, but it can also be part of a discriminatory pattern.

The Equality Authority has been promoting proactive approaches to creating and sustaining a culture of equality within organisations such as workplaces and service providers, mainly by supporting equality mainstreaming initiatives in workplaces and in further education and training programmes.

Equality mainstreaming is the systematic integration of an equality perspective into everyday work and organisational practices. It aims at changing organisational culture through a medium and long term strategy. The main ingredients of equality mainstreaming are the adoption and promotion of equality policies (related to employment and access to goods and services), as well as the creation of meaningful sustainable processes which will aid the formulation and implementation of equality action plans and other equality initiatives. To maintain the equality agenda alive, it is also key to have equality liaison persons (or 'champions') and equality committees, as well as periodical equality training and awareness raising events. Other relevant processes may include: equality proofing of policies and practices, equality data monitoring, equality impact assessments of policies, active engagement and leadership on equality issues by staff, managers, trade unions and service users' panels.

While most workplaces in Ireland have a policy to deal with harassment and sexual harassment, this policy may be seen as disjointed from a wider equality agenda. It is sometimes forgotten that harassment and sexual harassment are forms of discriminatory behaviour which may be underpinned by structural inequalities in society and in the workplace.

Ideally, every equality policy should include a clear reference to harassment and sexual harassment and should be aiming at building a culture of rights and substantive equality, which would not leave room for any form of harassment. In this context, monitoring any informal or informal complaints, whether arising from staff or service users, may help to identify patterns of harassment, sexual harassment, direct or indirect discrimination. Harassment on the basis of gender often also intersects with other characteristics and/or grounds (family status, civil status, race, etc.).

The Equality Authority has funded and supported a number of equality mainstreaming projects and initiatives since 2008. Most projects presented sectoral or partnership approaches through the involvement of workers, employers and trade unions. In 2010, for example, the Equality Authority supported a project with the association of Commercial Mushroom Producers, the Migrant Rights Centre and SIPTU, the relevant Trade Union for the sector. This project successfully targeted female migrant workers in the mushroom industry who were vulnerable to harassment and discrimination in their workplaces. Union representatives reported that the project allowed hundreds of women to tackle successfully harassment in the workplace, by collective actions and improvement of their terms and conditions of work. Another project funded in 2011, applied a whole organisation approach to equality within three major trade unions: IBOA, CWU and Mandate. This project promoted the adoption and implementation of equality policies targeting discrimination and harassment; the policy implementation was supported through the piloting of a specific equality training module for Trade Union Representatives and an Equality Handbook focussing on discrimination, harassment and sexual harassment. Another project saw 6 major universities (DCU, NUIG, UCC, UCD, UL and TCD) team up through the Irish University Association's Equality Network to design and implement an e-learning tool on equality in the workplace. These universities have already equality infrastructures and policies in place, but needed a tool to promote a more effective implementation of the same. The e-learning programme includes a specific module on Dignity and Respect, which is focussed on how to tackle harassment, sexual harassment and bullying in the workplace.

The workshop discussion also focussed on the diverse mandates of equality bodies as well as the legal frameworks in relation to harassment and sexual harassment, and whether legal redress should be covered by civil or criminal law. Furthermore, some equality bodies would only have a mandate in relation to employment while some could only engage with the public sector, but their mandate would not necessarily cover the private sector.

The workshop discussion highlighted some challenges in relation to dealing with harassment on the basis of gender identity and multiple grounds.

Some of the northern European countries warned that their model of equality action planning may become a 'tick-the-box' exercise if related processes do not involve in a participatory manner all relevant stakeholders in institutions or workplaces.

In general, fear of reporting harassment and sexual harassment was perceived as being on the rise, due to more precarious work conditions and more uncertain terms of employment in the employment arena.

It also emerged that in some countries, harassment cases are often investigated by human resources departments and these investigations are not perceived as either independent or impartial, while in a few countries there are provisions for investigations by an independent body or actor.

It was also noted that the perceptions of harassment and sexual harassment vary greatly in multicultural work environments and societies, where cultural norms and values may present a greater variation and interfacing.

#### 2.5.4. Strategising the work on harassment and sexual harassment in employment

**By Sandra Ribeiro, CITE – Commission for Equality in Labour and Employment, Portugal**

This workshop discussed the importance of building and using a strategy to fight harassment and sexual harassment, using the experience of CITE as a case study. Participants talked about examples of strategies which may be helpful in tackling harassment and sexual harassment in their work.

Sandra Ribeiro guided the participants on discussing:

- **What is a strategy?**

She defined it as a method or plan chosen to bring about a desired future situation: the achievement of a goal or the solution to a problem.

- **What do we need to know before designing a strategy?**

We need to know the reality: we need data, we need numbers and we need to know the legal system.

- **How to build a strategy?**

She guided the discussion with five interlinked questions:

1. What are the concrete goals against which we can measure our progress?
2. Across the potential field available to us, how and where will we choose to play and not play?
3. In our chosen place to play, how will we choose to try to win against the competitors there?
4. What capabilities are necessary to win in our chosen manner?
5. What tools and cooperative agreements are necessary to operate to build and maintain the key capabilities?

The group discussed some examples of strategies:

- Sweden: Strategic litigation. How to try to find precedents and take cases depending on the bigger picture by selecting cases that are important for the whole society.

- UK: Test-case strategy. How to look for cases in areas where there is a gap such as cases on goods and services and on third party liability.
- Portugal: Strategic use of research and engagement of actors. Portugal is preparing a national survey on harassment in the workplace and in parallel creating a platform of engagement between CITE (equality body), the Lawyers Association, the Judiciary Study Centre, the Lisbon Council and the Labour Inspection, to study the survey results and develop concrete instruments for professional trainings with the aim of preventing harassment situations in Portugal.
- Media engagement to give visibility to cases and to engage the public.
- Germany: Prioritising and giving visibility to discrimination grounds. The Federal Anti-Discrimination Agency has one ground of discrimination per year to focus on (next year it will be gender).
- Norway: Engaging schools. They teach schools to recognize harassment e.g. harassment online.
- Not focusing solely on investigating cases but also on preventing cases.
- Making a business case against sexual harassment and harassment including loss of productivity: Companies like their reputation.
- Cooperation between several public services and authorities.
- Using education curricula to prevent harassment.
- Creating national surveys to have evidence and using them strategically to raise awareness and build consensus for change..

### 2.5.5. Campaigning against sexual harassment in educational institutions

#### By Jussi Aaltonen, Ombudsman for Equality, Finland

Jussi Aaltonen presented the Finnish Ombudsman for Equality's [campaign against sexual harassment in schools](#), which was launched in spring 2014.

He underlined that sexual harassment is a common phenomenon in Finnish schools and of upper comprehensive school students, 61% of girls and 46% of boys have experienced sexual harassment at some time or repeatedly. Moreover, 70 % of LGBT youth have experienced bullying or harassment.

Traditionally sexual harassment has been dealt with as a working life issue and harassment in schools has been approached as bullying. Schools have the obligation to intervene in sexual harassment and enforce a culture of zero tolerance for harassment. If harassment is approached as bullying it can be really difficult to understand the real essence of this issue, which is a gender issue.

School principals were often not aware of sexual harassment dynamics: the Ombudsman for Equality used to get replies from principals saying that sexual harassment is not a problem in their school. Over the past few years however, schools have become aware of an increased frequency of sexual harassment but there were no tools to tackle this problem. The Ombudsman for Equality decided to produce educational material for schools so that they could start to discuss the topic with pupils and students. The material has been conceived for secondary schools but it is suitable also for upper secondary schools and vocational schools. It includes a short film, a presentation for a structured lesson, instructions for teachers and a questionnaire for pupils to assess the prevalence of harassment in their schools.

Jussi Aaltonen underlined the main findings:

- Typical excuses for not intervening include: naming harassment differently, considering harassment as flirting or showing interest so that the unwanted nature of harassment doesn't come to light, blaming the victim of harassment and sexual harassment.

- Cases of harassment and sexual harassment in schools often take place in front of an audience (in classroom or in corridor).
- Harassment and sexual harassment can be more described as a process rather than an event. They are like a continuum of disrespectful and discriminatory behaviours.
- Harassing becomes a rule of the space and it leaves no space for the victim to defend him or herself or feel offended.

### 2.5.6. Cooperation with NGOs in handling complaints on sexual harassment

**By Sandra Bouchon Defender of Rights, France & Marilyn Baldeck, European Association against Violence against Women at Work**

This workshop was based on the experience of cooperation between the Defender of Rights and the European Association against Violence against Women at Work (AVTF) in dealing with harassment and sexual harassment.

Sandra Bouchon and Marilyn Baldeck outlined the [history of definition of sexual harassment in French law](#).

According to Article 27 of the Organic Law No. 2011-333 of March 2011, the Defender of Rights shall assist the victim in the preparation of his/her case. Each year, the Defender of Rights receives around ten complaints from women in both the public and private sector who consider themselves to have been victims of sexual harassment in their place of work. When it receives a complaint, the Defender of Rights may avail itself of a number of investigatory powers:

- Demanding written or oral explanations (hearings) and on-site inspections.
- Once its investigation has been conducted and it finds that sexual harassment has been committed, it may recommend to the perpetrator to redress the harm caused to the victim or set in place a number of measures, particularly as regards prevention and training.
- Submitting its observations to court.
- Reaching a mediation.

**Joint measures implemented by the Defender of Rights and the AVFT on the issue of sexual harassment:**

For a number of years, and particularly since the revision of the definition of sexual harassment introduced by the law of 6 August 2012<sup>8</sup>, the Defender of Rights and the AVFT have worked together on two levels: on the handling of individual cases and on recommendations to reform and improve the current legislation on harassment and sexual harassment.

The discussion with the participants in the workshop was focused on the following key topics:

- Admissibility of recordings as a form of proof
- Cooperation with NGOs: dealing with cases, improvement of laws
- Shift of the burden of proof
- Power of on-site inspections
- Power of investigation

In some countries recordings are not admissible (e.g. Hungary, Greece, Poland), in others recordings can be presented in court, but only after previous consent of the defendant or under other

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<sup>8</sup> Sexual harassment is defined in the Criminal Code: *“the fact to impose to someone repeatedly, words or acts with sexual connotation that affect the dignity because it's degrading or humiliating, or create against the person an intimidating, hostile or hurtful situation. Is also considered as sexual harassment: each form of serious pressure, even not repeated, in the real or visible aim to get an act of sexual nature, for his own profit or for a third person profit”*.



requirements (e.g. Austria, Czech Republic). In France this form of proof is valid in criminal procedures but not admissible in civil courts.

Some equality bodies cooperate with NGOs, but there are not many specialised in harassment and sexual harassment. Many equality bodies work together with labour inspectors, especially when they have no power of investigation and inspection, and they can't participate in proceedings before the court.

All the participants underlined the complexity of the burden of proof. According to the Equal Treatment Directive, *"when persons who consider themselves wronged because the principle of equal treatment has not been applied to them, establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."*<sup>9</sup> The claimant is required to 'establish facts' from which a presumption of discrimination arises: this can be easier in cases of discrimination where facts can be established, or at least presumed, through statistics, but it becomes more complicated in cases of harassment and sexual harassment. In Court, the provision must be implemented *"in accordance with the Member State's national judicial system"*. This implies that the circumstances, under which the burden of proof is shifted, may vary according to the legal norms in the Member States.

## 2.6. SUPPORTING VICTIMS

### 2.6.1. Discrimination versus dignity: Harassment related to sex and sexual harassment law in European countries and in the EU

#### Krzysztof Śmiszek, Polish Society of Antidiscrimination Law

Krzysztof Śmiszek started his presentation by outlining the **international standards** of protection in the area of harassment on the basis of gender and sexual harassment:

Firstly he mentioned the [CEDAW General Recommendation No. 19 on violence against women \(1992\)](#). According to this recommendation, sexual harassment includes such unwelcome sexually determined behaviours such as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

Under the recommendation, equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.

He then referred to the [European Committee of Social Rights Conclusions \(Turkey, 2010\) on Art. 26 of the European Social Charter \(revised\)](#). **Dignity at the workplace:** The Committee has ruled that it must be possible for employers to be held liable towards persons employed or not employed by them who have suffered sexual harassment from employees under their responsibility or, on premises under their responsibility, from persons not employed by them, such as independent contractors, self-employed workers, visitors, clients, etc. Moreover, victims of sexual harassment must have effective judicial remedies to seek reparation for pecuniary and non-pecuniary damage. These remedies must, in particular, allow for appropriate compensation of a sufficient amount to make good the victim's pecuniary and non-pecuniary damage and act as a deterrent to the employer.

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<sup>9</sup> Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 19.

Finally, it is important to mention the **International Labour Organisation guidelines** according to which sexual harassment can be described as any physical, verbal or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men, which is unwelcome, unreasonable and offensive to the recipient; where a person's rejection of, or submission to, such conduct is used explicitly or implicitly as a basis for a decision which affects that person's job; and a conduct that creates an intimidating, hostile or humiliating working environment for the recipient.

He continued mentioning the **European Standards** including the **Council Resolution of 29 May 1990 on the protection of the dignity of women and men at work**, the **Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work**, the **Recast Directive 2006/54/EC**, the **Goods and Services Directive 2004/113/EC** and the **Self-employed Directive (2010/41/EU)**.

According to the [Council Resolution of 29 May 1990 on the protection of the dignity of women and men at work](#), sexual harassment is a serious problem for many working women in the European community and is an obstacle to the proper integration of women into the labour market. It affirms that such conduct is unacceptable if it is unwanted, unreasonable and offensive to the recipient; a person's rejection of, or submission to, such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions; and such conduct creates an intimidating, hostile or humiliating work environment for the recipient.

The [Comm. Recom. of 27 November 1991 on the protection of the dignity of women and men at work](#) repealed the above mentioned definitions of the Council Resolution.

The **Recast Directive 2006/54/EC (after 2002/73/EC Directive)** stipulates that:

- **Preamble:** Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.
- **Art. 2.1 a:** Discrimination includes harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct.
- **Art. 2.1 c:** 'harassment': where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- **Art.2.1.d 'sexual harassment':** where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment;

The **Goods and Services Directive 2004/113/EC** affirms that:

- **Preamble:** Discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside of the labour market. Such discrimination can be equally damaging, acting as a barrier to the full and successful integration of men and women into economic and social life.

The **Directive 2010/41/EU on equal treatment in self-employment** states that:

- **Preamble:** To prevent discrimination based on sex, this Directive should apply to both direct and indirect discrimination. Harassment and sexual harassment should be considered discrimination and therefore prohibited.

Krzysztof Śmiszek highlighted the **key elements of the concepts of harassment and sexual harassment**. First, there is a double approach based on **systematic discrimination** (exclusion from the labour market and systematic obstacle in participation in economic life) and **discrimination of individuals**. Moreover, there is no need to prove the intention, to find a comparator and for a 'reasonable person test'. It is necessary to examine the purpose or effect from the perspective of individual person/victim of discrimination.

Among EU Member States, harassment and sexual harassment can be addressed under different perspectives. The concepts can be conceived in the context of:

- **Dignity**
- **Human rights**
- **Gender-based violence** (risk of lack of adequate compensation)
- **Health and safety in workplaces** (risk of lack of adequate compensation)
- **Discrimination**

When EU law is concerned, a double approach comes to the fore: a Discriminatory Approach and a Dignity Approach. Krzysztof Śmiszek suggested that dignity should not be put as a contradiction to the concept of discrimination but rather as a complementary approach, as part of legal discourse on discrimination (Polish Supreme Court ruling: it combines the two concepts. I PK 69/05: "discrimination is inevitably associated with the violation of human dignity. Respect for dignity is not only an imperative of legal nature but also has its moral dimension")

EU law includes a double perspective: dignity and discrimination. All perspectives are fine provided that they bring justice, assure effective procedures of claiming rights and compensate harm. However, an antidiscrimination approach should be introduced, since both concepts are related to the ground protected by the EU law explicitly (harassment) or by placing it in the context of sex equality law (sexual harassment). In addition, the antidiscrimination law provides unique legal instruments (burden of proof, no upper limits of compensation, sanctions).

Krzysztof Śmiszek concluded by mentioning some key uncertainties around the concepts of harassment and sexual harassment:

- There is no relevant CJEU judgements and we can rely on a very small number of national case law on sexual harassment and harassment on the ground of gender.
- There are questions around the issue of getting benefits as a result of submission to sexual harassment. Does it justify the conduct? Is it always an abuse of power? How far does the prohibition of sexual harassment go?
- With regard to the terms "unwanted conduct" – what kind of objection needs to be expressed and how clear should it be for the perpetrator in order to describe his/her conduct as "unwanted"?
- What are the preventive measures that should be taken by employers<sup>10</sup>? What are the limits of employer's liability? Is an internal anti-harassment policy enough to avoid responsibility?
- How far does the standard of individual perspective of the victim go? Can conduct that creates "an intimidating, hostile, degrading, humiliating or offensive environment" be perceived and assessed through the general standards of "reasonableness"?

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<sup>10</sup> Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), **Preamble**: "employers and those responsible for vocational training should be encouraged to take measures to combat all forms of discrimination on grounds of sex and, in particular, to take preventive measures against harassment and sexual harassment in the workplace and in access to employment, vocational training and promotion, in accordance with national law and practice"; **Article 26**: "Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion"

- Can sexual harassment relate to grounds other than sex (race, ethnicity, disability)? If yes, what is the actual ground of discrimination and what is the form of discrimination? Is it a multiple discrimination?

### 2.6.2. How to build a case

#### Clare Hockney, Equality and Human Rights Commission, UK- GB

Clare Hockney presented possible ways for supporting the individual victims of harassment and sexual harassment in building their cases.

One of the first problems to be addressed when an alleged case of harassment or sexual harassment occurs is the **collection of evidence**. In most cases it's difficult to find witnesses and, if there are any, they are afraid to come forward. Moreover, the contrast between two different versions of events requires an accurate assessment of credibility. When a case of harassment or sexual harassment occurs in a workplace, the victims first usually raise a complaint internally, for instance speaking to the human resources department or to their trade union, if they have one. If this is not the case, it is important to understand why the victim has not reported the facts, and if he/she has spoken to family members, friends or a doctor, who have to be asked to testify.

It is necessary to **assess if the evidence is consistent**. At this stage it is important to take a detailed statement early on and find out what exactly happened. This may include questions on the perpetrator's behaviour, the workplace environment and the culture of the organisation. In order to gather information the employer should be asked questions on the harasser, for instance whether there have been any complaints against this person before. Trade Unions can be involved in the process of investigation and gathering of information about the culture of the workplace

Evidence can be based on records, diaries, cards, letters, and messages, if they can be used in tribunal and court, as well as on medical evidence, under previous client consent to obtain medical records.

The **burden of proof** starts with the victim claiming sexual harassment. The victim must prove enough facts from which the court can decide, in the absence of any other explanation, that the discrimination, harassment or victimisation has taken place. Subsequently, in the absence of any other explanation, the **burden shifts onto the employer** to show that the employer, or someone whose actions or omissions they were responsible for, did not discriminate, harass or victimise the person making the claim.

**Employers** are legally responsible for discrimination carried out by workers employed by them or by their agents, unless they have taken all reasonable preventative steps. Concerning **third-party liability**, usually an employer will not be responsible for discrimination, harassment or victimisation by someone other than their employee or agent, but in some circumstances they may be legally responsible for the acts of others where they could, but do not, do something to stop it<sup>11</sup>.

**Service providers** can be liable if a customer is harassed by an employee or owner. As for employers, usually a service provider will not be responsible for discrimination, harassment or victimisation by someone other than their employee or agent, but it is possible that they are legally responsible for the acts of others where they could, but did not, do something to stop the discriminatory behaviour.

Finally, Clare Hockney gave some practical tips to be taken into account when dealing with a case of harassment and sexual harassment:

- See the client early and take a full statement.

<sup>11</sup>Sheffield City Council v Norouzi [2011] IRLR 897: <http://goo.gl/8eZATg>; Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] IRLR 327: <http://goo.gl/G9wZVW>.

- Gather as much information as possible in the early stages.
- Consider using family and friends as witnesses.
- Assess if the story is credible.

## 3. WAYS FORWARD

Some lessons learnt can be identified on the basis of the discussions and experiences shared during the training event held in Warsaw. They aim at improving the work of equality bodies in combating harassment on the grounds of gender and sexual harassment as well as the context at European and national level.

### 3.1. Lessons learnt for equality bodies

Equality bodies can make **recommendations to policy makers on gaps in existing legislation**. This can include scope not covered, weak victimisation provisions or duties on employers, schools management or service providers. They can also assess if antidiscrimination, health and safety and criminal law create a comprehensive set of legal tools to counter different aspects of harassment and sexual harassment behaviours.

They can make **use of previous cases** to promote positive examples and raise awareness of judges as well as public opinion, and **make visible to the public the role of national equality bodies** in tackling harassment on the basis of gender and sexual harassment. National equality bodies have the responsibility to take and investigate cases and build up robust case law on harassment and sexual harassment, including with effective, proportionate and dissuasive solutions.

**Equality bodies can conduct relevant research on harassment on grounds of gender and sexual harassment, on gender based violence and national prevalence studies**. Findings from such surveys will enable stakeholders to develop and implement measures targeting groups that are especially vulnerable to harassment and sexual harassment. Research is indispensable in revealing the extent of sexual harassment and reviewing the efficacy of existing policies. Equality bodies could play a key role in **ensuring data collection and comparability**. They can promote research on the root causes of sexual harassment, on the links between women underrepresentation in certain sectors and prevalence of sexual harassment, and the **impact of gender stereotypes** on gender equality and sexual harassment. Equality bodies can promote **proactive approaches to creating and sustaining a culture of equality within organisations** such as workplaces, educational settings and services providers, by supporting **equality mainstreaming initiatives**.

They can play a role in **combating gender stereotypes and sexism in society** underpinning harassment on the basis of gender and sexual harassment and **raising awareness**:

- **With duty bearers** by training, information and education for **employers and supervisors on their responsibilities for preventing and handling sexual harassment complaints** when they occur. Employers and supervisors should receive training on identifying potential problems and proactively intervening. It is important to make sure that all managers and supervisors understand their responsibility to provide a harassment-free work environment.
- **Cooperating with advertising professionals** in order to raise the attention on the negative influences of gender stereotypes and **promoting effective tools to avoiding sexist insults or degrading images of women and girls in the media**.
- **Producing informative materials and guidelines on harassment and sexual harassment** including information on legislation, definitions, strategies to prevent and combat harassment and sexual harassment, description of real cases of sexual harassment and different forms of gender-based harassment and sexual harassment.

Equality bodies can **prevent the culture of harassment** from spreading to younger generations by focusing on **schools**:

- **Supporting educational programmes and training for teachers and professionals in the education sector as well as for students**. Tackling sexual harassment and harassment in

schools is crucial for early prevention and for creating substantive equality around gender issues and gender roles.

- **Exchanging good practices to promote an education free from gender stereotypes and refusing violence against women.** Equality bodies could emphasise the need for education programmes focusing on equality between women and men and on the rejection of all forms of violence. They could produce educational material promoting the representation of the female image in a way that respects women's dignity, and supports discussions on masculinity challenging the association with violence and aggression.
- **Collecting information on the prevalence of harassment and sexual harassment in schools.** This is important also if the national legislation does not cover education in its scope, as is the case for EU legislation, in order to be able to provide evidence-based recommendations to legislators. Even if education is not in their mandate, national equality bodies can deal with at least parts of the educational system, using a broad understanding of 'vocational training' (Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)).

Equality bodies can **cooperate with women's organizations, NGOs and all the actors of civil society** to:

- Fight underreporting and support victims in speaking up and seeking assistance and remedies.
- Inform victims about their rights and opportunities for action and ensure them that their cases are addressed quickly and efficiently.
- Build a culture of equality and rights refusing harassment on grounds of gender and sexual harassment.

They can **cooperate with employers and trade unions** to:

- Develop **anti-harassment policies** and draft **guidelines and codes of conduct** on preventing and fighting harassment and sexual harassment.
- Provide guidance on how to develop effective measures, fulfil legal requirements, advise and counsel victims, including by developing model policies and reporting procedures to be used at workplace level (including the creation of counselling centres, hotlines and the formal definition of reporting procedures).
- Create a **culture of equality and rights** in the workplace to prevent harassment, sexual harassment and gender-based discrimination.
- Support a culture of attention to psycho-social risks in the workplace which include harassment and sexual harassment, and the development of risk assessment procedures and of awareness raising.

They can cooperate with **labour inspectors** to establish protocols to cooperate for claims of harassment and sexual harassment.

Equality bodies can participate in the process of monitoring of the Council of Europe **Istanbul Convention** on preventing and combating violence against women and domestic violence. They can cooperate with the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), by providing their assessment on the implementation of the Convention.

**Equality bodies and National Human Rights Institutions** could collaborate on the fight against harassment and sexual harassment. They could together monitor the consistent implementation of national legislation with EU Directives, the Council of Europe Istanbul Convention, and human rights standards set out at UN level (including Convention on the Elimination of All Forms of Discrimination against Women - CEDAW) including ILO conventions.

Furthermore, equality bodies could assess **intersectionality and multiple discrimination**. They could monitor harassment and sexual harassment on the intersection between the gender ground and other grounds including disability, religion, ethnicity, sexual orientation, age, recognize it and promote awareness on it.

## 3.2. Improving the context: lessons learnt for EU, national policy makers and other actors

### 3.2.1. EU policy makers

**Three EU directives<sup>12</sup> prohibit harassment on the basis of gender and sexual harassment**, in the field of **employment, self-employment and access to goods and services**. EU policy makers should ensure that the three directives are **correctly implemented** and that focus is given to all the three spheres of life.

The three EU directives foresee a role for equality bodies in combating harassment on the basis of gender and sexual harassment. EU policy makers should **monitor that in every country equality bodies are given a clear mandate and resources to cover the three areas of employment, self-employment and access to goods and services**. In case an additional mandate is given to existing equality bodies, EU policy makers should make sure that additional human and financial resources are provided, and that the necessary powers to correctly implement EU directives are provided as well. If the conditions are not provided, the European Commission should consider the use of its powers to launch infringement procedures.

**National equality bodies have a key role to combat harassment on the basis of gender and sexual harassment**. To be able to do so, **standards on their independence and resources** should be foreseen at EU level in order to protect their effectiveness.

**Media, advertisement and education** are excluded from the scope of the Gender Goods and Services Directive. As Equinet already [suggested](#), experience from equality bodies show that it is important for EU policy makers to **review this exception** as important roots of sexism take place in media, advertisement and education. In particular, **sexual harassment in education** among teens is a worrying phenomenon that should be firmly combated at EU level.

Cases dealt with by equality bodies allow us to identify some **good practices in terms of legislation** which could be promoted at EU level and with national policy-makers:

- The positive **duty on employers and schools to investigate and take measures to stop harassment** (Swedish legislation: Chapter 2, Section 3 and 7 in the Discrimination Act, SFS 2008:567)
- The positive **duty on employers and schools to make equality plans** annually, in which special attention must be given to measures to ensure the prevention and elimination of sexual harassment and gender based harassment (Finnish legislation, Section 6b of the Act on Equality between Women and Men 609/1986).

**Cyber harassment** needs to be effectively monitored. International or EU coordination may be needed in this area because of the world-wide nature of internet and social media networks.

EU institutions could establish a **coherent system for collecting statistics on gender violence including sexual harassment**. EU policy makers could **assess the results of measures taken to combat harassment on the basis of gender and sexual harassment at national and local level**, by encouraging Member States to submit statistics and relevant information. On the basis of information received from Member States, the European Commission could publish an annual report on violence against women assessing the extent to which Member States have taken appropriate measures and containing specific references on harassment on the basis of gender and sexual harassment.

EU policy makers could launch the procedure for the **accession of the EU to the Istanbul Convention on Violence against Women and Domestic Violence**. The EU's ratification of the Convention would

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<sup>12</sup> The [Directive 2006/54/EC on equal treatment in employment and occupation \(recast\)](#), the [Directive 2004/113/EC on equal treatment in the access to and supply of goods and services](#)); the [Directive 2010/41/EU on equal treatment in self-employment](#)



send a strong political message to all of its Member States. It would encourage them to sign and ratify the Convention and inspire changes to national law. EU Member States which are not parties to the Convention will be at least partially bound by it, as regards those provisions within EU competence including sexual harassment.

The European Commission could reconsider the possibility of having a **EU-wide Strategy and an Action Plan to combat all forms of violence against women and girls** including sexual harassment.

EU policy makers could widely disseminate information about EU programmes and funding to combat **harassment on the basis of gender and sexual harassment** and violence against women.

They could investigate links **between lack of balance in decision making and segregation of the labour market** with the high levels of **sexual harassment experienced by women in management**.

### 3.2.2 National policy makers

National policy makers could review scope and implementation of existing laws and policies and ensure a **comprehensive legislation**. Based on the good practices analysed in this report, a model law could include:

- Harassment and sexual harassment being prohibited in **employment, for self-employed and in access to goods and services, but also in the field of education, media, advertisement**.
- **Antidiscrimination, health and safety and criminal legislation** to create a consistent and coherent set of tools to protect people with a high level of protection against harassment and sexual harassment.
- Liability for both the **harasser and the employer, service provider and school management** in case of harassment reported and absence of measures to stop it.
- **Evidence** usually key in harassment and sexual harassment cases (including recordings of conversations) considered admissible in court cases.
- **Sanctions which are effective, proportionate and dissuasive**, in line with EU requirements.
- Positive **duty on schools, employers, and providers of goods and services to investigate and take measures to stop harassment**.
- **Positive duty** on employers, providers and school directors to have **policies to prevent harassment and sexual harassment, and to report** harassment and sexual harassment cases.
- Positive **duty on schools, employers, and providers of goods and services to make equality plans** annually, in which special attention must be given to measures to ensure the prevention and elimination of sexual harassment and gender based harassment.
- Provisions allowing for the recognition of multiple discrimination and intersectionality.
- Setting up a **strong, independent and effective equality body** with **adequate powers and resources** to ensure its ability to assist victims of harassment and sexual harassment.
- Provisions protecting against **victimisation**.

All European countries should **ratify and properly implement the Istanbul Convention** and review accordingly the scope of their laws, policies and codes of practices around harassment and sexual harassment. The Convention requires States parties to put in place comprehensive and coordinated policies in order to prevent violence, protect victims, prosecute the perpetrators, and to develop adequate systems for data collection. Relevant actors, such as government agencies, the national, regional and local parliaments and authorities, equality bodies, national human rights institutions and civil society organisations shall be involved in the fulfilment of measures taken to implement the Convention's provisions.

National policy makers of countries ratifying the Istanbul Convention will have to take **a number of measures including in the area of sexual harassment** such as:

- Establish services such as specialist support services, telephone helplines, counselling, and legal aid<sup>13</sup>.
- Train professionals to work with women at risk of sexual harassment and work closely with specialized NGOs<sup>14</sup>.
- Conduct at all levels awareness-raising campaigns and programmes, in collaboration with national equality bodies and civil society organisations, to increase understanding of all forms of violence against women including sexual harassment<sup>15</sup>.
- Include teaching material on violence against women, including sexual harassment, in formal curricula and at all levels of education<sup>16</sup>.
- Encourage the media to set guidelines and standards to prevent the spread of negative and sexist stereotypes which can lead to inappropriate behaviour against women and girls<sup>17</sup>.
- Establish one or more official bodies responsible for the monitoring and evaluation of policies and measures undertaken in the area of violence against women including sexual harassment<sup>18</sup>.

National policy makers could **issue codes of practice on sexual harassment**, developed in conjunction with employers, trade unions and national equality bodies. Codes of practice should contain a definition of harassment and sexual harassment consistent with EU law and measures to be taken.

National policy makers could **conduct awareness-raising activities** on the existence of harassment on the basis of gender and sexual harassment, the tools to prevent it, and the content of the relevant legal provisions. These activities should be aimed at ensuring that legislation or codes of practice, as well as possible remedies, become widely known among potential victims, perpetrators and other actors.

National policy makers could fund **training for all kind of actors such as lawyers, judges, teachers, nurses, employers, trade unionists, police officers** in cooperation with equality bodies. They need to know more about what sexual harassment is, how it can be addressed and what rights and obligations legislation foresees. More specific training and awareness could be provided on specific forms of harassment and sexual harassment experienced by transgender individuals.

Sexual harassment has to be addressed in the context of sexism. **Political leaders could take a stance against the trivialisation of sexism.** They could allocate resources on research to increase our knowledge about sexualised and pornographic gender stereotypes as root causes of harassment and sexual harassment; and to develop comprehensive measures to combat negative sexualized and pornographic gender stereotypes at all levels, starting from explaining the matters of stereotypes in schools. They could mainly target men and support discussions on male identity and the refusal of sexism, harassment and sexual harassment and violence against women.

Gender mainstreaming in national policies could allow policy responses from different fields working together: justice, but also employment, education and health.

### 3.2.3. Other actors including trade unions, employers' organisations and educational institutions

**Social partners, at European and national level**, should adopt formal agreements to implement written **anti-harassment policies** in collective agreements, reflecting a real commitment to recognising the importance of the fight against harassment and sexual harassment in the workplace.

<sup>13</sup> Art. 20, 22, 24, Council of Europe Convention on preventing and combating violence against women and domestic violence.

<sup>14</sup> Art. 15, Council of Europe Convention on preventing and combating violence against women and domestic violence.

<sup>15</sup> Art. 13.1, Council of Europe Convention on preventing and combating violence against women and domestic violence.

<sup>16</sup> Art. 14, Council of Europe Convention on preventing and combating violence against women and domestic violence.

<sup>17</sup> Art. 17, Council of Europe Convention on preventing and combating violence against women and domestic violence.

<sup>18</sup> Art. 10, Council of Europe Convention on preventing and combating violence against women and domestic violence.

**Employers and trade unions should involve national equality bodies** in the development of anti-harassment policies. These policies should explain what harassment is, how employers and employees should prevent and combat it, and which procedures are foreseen for reporting complaints. It should be distributed to each member of the organisation and also to others who interact with the organisation (third parties).

Employers should have the duty to ensure the **health, safety and welfare at work** of all employees, including sexual harassment given its potential impact on the health of those who suffer it.

Anti-harassment policies should be coupled with **anti-harassment training** for all employees. Training and education programmes should emphasize the **organisation's commitment to providing a work environment** that does not discriminate and is free of harassment, as well as explaining which conducts constitute harassment and sexual harassment and the organisation's procedures to reporting incidents. Employers should provide education and information about harassment and sexual harassment to all staff on a regular basis.

**Trade unions** should produce model policies to guide their representatives and members on dealing with sexual harassment and to use in negotiating policies with employers. They should make sure that trade union representatives keep the focus on gender equality and attention on harassment and sexual harassment also in periods with other social conflicts which might be considered of higher priority.

Trade union representatives can be key allies in the struggle to **combat underreporting** and they should be provided information on where claims against harassment and sexual harassment have to be reported, and which **evidence** should be kept as proof of the harassing behaviour.

Social partners could investigate the roots of the high levels of **sexual harassment experienced by women in management** and the links with the **lack of balance in decision making** and the **segregation of the labour market**.

**Workplaces and educational institutions** should prepare an annual **gender equality plan** in order to assess the gender equality situation and progress. **Sexual harassment needs to be addressed and framed in the context of equality mainstreaming and equal access to dignity for all**. Equality planning should be mandatory, e.g. for schools, businesses/ enterprises as well as public authorities.

# EQUINET MEMBER EQUALITY BODIES

## ALBANIA

Commissioner for the Protection from Discrimination  
[www.kmd.al](http://www.kmd.al)

## AUSTRIA

Ombud for Equal Treatment  
[www.gleichbehandlungsanwaltschaft.at](http://www.gleichbehandlungsanwaltschaft.at)

## BELGIUM

Interfederal Centre for Equal Opportunities  
[www.diversite.be](http://www.diversite.be) and [www.diversiteit.be](http://www.diversiteit.be)

## BELGIUM

Institute for the Equality of Women and Men  
<http://igvm-iefh.belgium.be>

## BULGARIA

Commission for Protection against Discrimination  
[www.kzd-nondiscrimination.com](http://www.kzd-nondiscrimination.com)

## CROATIA

Office of the Ombudsman  
[www.ombudsman.hr](http://www.ombudsman.hr)

## CROATIA

Ombudsperson for Gender Equality  
[www.prs.hr](http://www.prs.hr)

## CYPRUS

Office of the Commissioner for Administration (Ombudsman)  
[www.ombudsman.gov.cy](http://www.ombudsman.gov.cy)

## CZECH REPUBLIC

Public Defender of Rights  
[www.ochrance.cz](http://www.ochrance.cz)

## DENMARK

Board of Equal Treatment  
[www.ast.dk](http://www.ast.dk)

## DENMARK

Danish Institute for Human Rights  
[www.humanrights.dk](http://www.humanrights.dk)

## ESTONIA

Gender Equality and Equal Treatment Commissioner  
[www.svv.ee](http://www.svv.ee)

## FINLAND

Ombudsman for Equality  
[www.tasa-arvo.fi](http://www.tasa-arvo.fi)

## FINLAND

Non-Discrimination Ombudsman  
[www.ofm.fi](http://www.ofm.fi)

## FRANCE

Defender of Rights  
[www.defenseurdesdroits.fr](http://www.defenseurdesdroits.fr)

## GERMANY

Federal Anti-Discrimination Agency  
[www.antidiskriminierungsstelle.de](http://www.antidiskriminierungsstelle.de)

## GREECE

Greek Ombudsman  
[www.synigoros.gr](http://www.synigoros.gr)

## HUNGARY

Equal Treatment Authority  
[www.egyenlobanasmod.hu](http://www.egyenlobanasmod.hu)

## HUNGARY

Office of the Commissioner for Fundamental Rights  
[www.ajbh.hu](http://www.ajbh.hu)

## IRELAND

Irish Human Rights and Equality Commission  
[www.equality.ie](http://www.equality.ie)

## ITALY

National Office against Racial Discrimination - UNAR  
[www.unar.it](http://www.unar.it)

## ITALY

National Equality Council  
[www.lavoro.gov.it/ConsiglieraNazionale/](http://www.lavoro.gov.it/ConsiglieraNazionale/)

## LATVIA

Office of the Ombudsman  
[www.tiesibsargs.lv](http://www.tiesibsargs.lv)

## LITHUANIA

Office of the Equal Opportunities Ombudsperson  
[www.lygybe.lt](http://www.lygybe.lt)

## LUXEMBURG

Centre for Equal Treatment  
[www.cet.lu](http://www.cet.lu)

## (FYRO) MACEDONIA

Commission for the Protection against Discrimination  
[www.kzd.mk/mk/](http://www.kzd.mk/mk/)

## MALTA

National Commission for the Promotion of Equality  
[www.equality.gov.mt](http://www.equality.gov.mt)

## MALTA

National Commission for Persons with Disability  
[www.knpd.org](http://www.knpd.org)

## NETHERLANDS

Netherlands Institute for Human Rights  
[www.mensenrechten.nl](http://www.mensenrechten.nl)

## NORWAY

Equality and Anti-Discrimination Ombud  
[www.ldo.no](http://www.ldo.no)

## POLAND

Human Rights Defender  
[www.rpo.gov.pl](http://www.rpo.gov.pl)

## PORTUGAL

Commission for Citizenship and Gender Equality  
[www.cig.gov.pt](http://www.cig.gov.pt)

## PORTUGAL

Commission for Equality in Labour and Employment  
[www.cite.gov.pt](http://www.cite.gov.pt)

## PORTUGAL

High Commission for Migration  
[www.acidi.gov.pt](http://www.acidi.gov.pt)

## ROMANIA

National Council for Combating Discrimination  
[www.cncd.org.ro](http://www.cncd.org.ro)

## SERBIA

Commissioner for Protection of Equality  
[www.ravnopravnost.gov.rs](http://www.ravnopravnost.gov.rs)

## SLOVAKIA

National Centre for Human Rights  
[www.snsip.sk](http://www.snsip.sk)

## SLOVENIA

Advocate of the Principle of Equality  
[www.zagovornik.net](http://www.zagovornik.net)

## SPAIN

Council for the Elimination of Ethnic or Racial Discrimination  
[www.igualdadyndiscriminacion.msssi.es/](http://www.igualdadyndiscriminacion.msssi.es/)

## SWEDEN

Equality Ombudsman  
[www.do.se](http://www.do.se)

## UNITED KINGDOM - GREAT BRITAIN

Equality and Human Rights Commission  
[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

## UNITED KINGDOM - NORTHERN IRELAND

Equality Commission for Northern Ireland  
[www.equalityni.org](http://www.equalityni.org)



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 **Equinet**  
European network  
of equality bodies

Models for sexual harassment complaint resolution: investigations, informal resolutions, remediations, discipline - Youtube Link for:

**Breaking The Silence: Sexual harassment in the workplace**

<https://www.youtube.com/watch?v=MZ0y03EvGGg>

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Los últimos años han sido el escenario de feroces denuncias sobre la violencia sexual. La revista Time reconoció al movimiento #MeToo como personaje del año 2017 por su impacto en redes sociales y su capacidad para desestabilizar los mercados laborales en los Estados Unidos. Las actrices de Hollywood se vistieron de negro en la ceremonia de los Globos de Oro en enero del 2018 para denunciar el acoso sexual en sus trabajos. Las actrices francesas, a su vez, consideraron las quejas sobre acoso, abuso y consentimiento en el cine gringo como un ademán puritano y conservador, y reivindicaron a la mujer como agente de deseo. Las periodistas colombianas y argentinas se sumaron a la movilización y denunciaron acosos múltiples dentro de los medios de comunicación, donde varias de ellas habían recibido ofertas de trabajo o ascensos a cambio de sexo. Este libro es un primer esfuerzo por sistematizar las reacciones que se han dado en latinoamérica en los últimos cinco años a partir de las movilizaciones estudiantiles en contra el acoso sexual y la violencia de género en el contexto universitario.

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# Report from the Working Group on Restorative Initiatives for Sexual Violence

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Presented to the sexual violence response advisory  
council executive steering committee

August 2018

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# Executive Summary

In January 2016, the University of Alberta released its Report on the University of Alberta's Response to Sexual Assault. One of the recommendations in that report was to examine the possibility of using Restorative Justice (RJ) to address incidents of sexual assault. As a result, the Restorative Initiatives for Sexual Violence (RISV) Working Group (a sub-group of the Sexual Assault Recommendation Implementation Committee, or SARIC) was convened. In part, Recommendation #27 of that report was a recognition that criminal and disciplinary systems have been either ineffective or counterproductive in meeting the needs of victim-survivors. In the era of #MeToo, the potential shortfalls of these discipline systems, and the risks of relying on a single institutional response, have become even more pronounced.

The University of Alberta's Institutional Strategic Plan, For the Public Good, is meant to "empower and enable each member of the University of Alberta to build, experience, excel, engage and sustain."<sup>1</sup> Existing discipline processes, on many levels, fail victim-survivors in that they focus on the relationship between the offender and the institution; they do not allow for victim-survivors to engage and find closure. As a result, the values articulated in the ISP are not reflected for many of those

who have experienced sexual violence. The disempowerment of victim-survivors inherent in discipline processes provide limited opportunity for them to build, excel engage, or sustain.

After more than a year of study and careful deliberation, the RISV group recommends that the University invest in Restorative Justice as an option for victim-survivors. While it is by no means the answer in every case, it provides a different kind of resolution - one that gives voice and choice to the victim-survivor, and foregrounds the victim-survivor's needs rather than the offence. RJ provides an alternative to primarily punitive systems in that it requires accountability to those harmed rather than to the institution; it places the onus on the person responsible to recognize the harm they caused and take steps to repair it.

For all its promise, it must be recognized that poorly applied RJ has the potential to cause further harm. The RISV group has carefully considered the parameters for the use of RJ in cases of sexual violence, its place in University of Alberta structure and policy, and what is expected of RJ facilitators in cases of sexual violence. Recommendations are outlined on pages 27-31.

## Glossary of Terms

The terms below are defined for the purposes of this report only:

### Restorative Justice (RJ) for sexual violence

A collaborative approach to addressing harm, involving a trained facilitator, the people with a legitimate stake in the situation, and a focus on accountability and repairing the harm. These principles give rise to a wide range of potential processes, which can be designed to meet the needs of those harmed by sexual violence.

### Discipline/Disciplinary processes

An internal University process involving a complaint, investigation, findings by a decision-maker and possibly sanctions.

### Victim-survivor

A person who has experienced sexual violence. Recognizing that a single term cannot capture the experience of all, this term is the one currently used in sexual violence literature.

### Person harmed

In RJ, a person having experienced negative consequences as a result of sexual violence.

### Complainant

A person who has made a complaint in a University discipline process.

### Offender/Perpetrator/Accused

A person who has committed sexual violence.

### Person responsible

In RJ, a person who has caused harm through sexual violence.

### Respondent

In a discipline process, the person under allegation in a complaint of sexual violence.

### Disclosure

From the University of Alberta Sexual Violence Policy as "A verbal or written report or account by any person to a member of the University community that they may have experienced sexual violence."

### Complaint

From the University of Alberta Sexual Violence Policy: "Usually a written report or statement alleging sexual violence misconduct made to a University official under University processes for the purpose of initiating an investigation and resolution process."

<sup>1</sup> [www.ualberta.ca/strategic-plan](http://www.ualberta.ca/strategic-plan)

# Introduction

In January 2016, the University of Alberta released a report, entitled, "[Review of the University of Alberta's Response to Sexual Assault](#)." The report identified areas of strength, gaps, opportunities and capacity in six broad areas relating to sexual violence: Education/Prevention, Support, Policy, Tracking/Reporting, Communications, and Formal Complaints. The report detailed 46 recommendations, including the following:

*27. That a group consisting of Student Conduct and Accountability, Office of General Counsel, Sexual Assault Centre, UAPS, Residence Services, Faculty and Staff Relations, and other interested parties set parameters for the use of Restorative Justice in addressing sexual violence, and identify any necessary policy changes and training to be implemented.*

As a result, the Restorative Initiatives for Sexual Violence (RISV) Working Group was constituted. The group consisted of members from the following areas:

- Student Conduct and Accountability (Chris Hackett and Deborah Eerkes, co-chairs)
- Sexual Assault Centre (Sam Pearson, Director)
- Residence Life (Janice Johnson, Assistant Dean of Students, Residence)
- University of Alberta Protective Services (UAPS) (Sgt. Graham McCartney, Investigative Services Division)
- Office of the Dean of Students (Sarah Wolgemuth, Assistant Dean of Students, Student Life)
- Faculty and Staff Relations (Jeremy Wilhelm, Faculty and Staff Relations Officer)
- Helping Individuals At Risk (HIAR - Parker Leflar, HIAR Coordinator)
- RJ Facilitator from the community, who works within the criminal justice system (Alan Edwards, RJ Practitioner, The Restorative Opportunities Program)

In addition, the group consulted with the Office of General Counsel on legal issues.

Meetings were held monthly, starting in February 2017. Each member of the group brought specific expertise to the table. In order for all members of the group to be able to appropriately consider the many complex issues, it was necessary to ensure a basic level of knowledge across all of those areas. Therefore, the first nine meetings were organized around learning. Members of the group presented on their areas of expertise

— fundamentals of RJ (RJ), threat assessment, understanding sexual violence, and RJ as a victim-centred approach to addressing sexual violence. In addition, the group participated in webinars, read research papers, reports, white papers, books, and articles, all in an effort to understand the many complexities of RJ, of sexual violence and of institutionalization of RJ programs. A copy of the meeting schedule and activities is included in Appendix 1.

In the subsequent series of meetings, the group concentrated on setting parameters for the use of RJ in sexual violence, identifying any necessary policy changes, and laying out minimum and optimum requirements for facilitators.

While the RSIV group studied a wide range of sources in an effort to learn as much as possible about RJ as a potential response to sexual violence, this report, its definitions, and recommendations are intended to address the specific needs, resources, and systems at the University of Alberta.

## Current University of Alberta processes for responding to sexual violence

The University is required to provide a safe and harassment-free working, learning, and living environment. To achieve that goal, it has in place policies, procedures, and processes to receive and resolve complaints<sup>2</sup>. In the case of a finding of violation, sanctions can be imposed. While discipline systems act to "punish" negative behaviour, it also aims to prevent future similar behaviour and create a safer environment.

Currently, the University offers disciplinary processes for each of its constituencies. For staff and faculty, this process forms part of the Collective Agreements (NASA and AASUA<sup>3</sup>, respectively). For undergraduate and graduate students, the discipline process is encoded in the Code of Student Behaviour. Other relevant processes include the Graduate Student Assistantship collective agreement (for employment-related conduct) and the Post-Doctoral Fellow Discipline Procedure.

A robust disciplinary process, complete with procedural fairness for those alleged to have committed sexual violence and the ability to impose sanctions or discipline when the individual has been found (after a full investigation) to have committed an offence, is crucial. It is especially important when the respondent disputes the allegations. Disciplinary processes aim to provide a safe and harassment-free working, learning, and living environment by either shaping the behaviour of the

<sup>2</sup> Under the new Sexual Violence Policy, a Complaint is defined as "Usually a written report or statement alleging sexual violence misconduct made to a University official under University processes for the purpose of initiating an investigation and resolution process."

<sup>3</sup> The AASUA also negotiates collective agreements for Librarians, Academic Teaching Staff, Administrative & Professional Officers (APOs), Faculty Service Officers (FSOs), Trust/Research Academic Staff (TRAS), and Temporary APO, each with a process for discipline.

respondent or removing them from the community. Given that disciplinary processes are focused specifically on the behaviour and rights of the respondent, the complainant is treated mainly as a witness, and does not have a significant role in shaping the procedure or outcome.

Most of the disciplinary processes, with the exception of those relating to temporary staff, offer Alternative Dispute Resolution (ADR) as an option, either pre-complaint, or as a result of the complaint being routed to ADR by the Provost. It should be noted that ADR has often been interpreted to mean mediation or other conflict resolution, but it could be argued that ADR might be interpreted more broadly to refer to any facilitated resolution option outside of procedures in the collective agreements and discipline policies. The Code of Student Behaviour makes an oblique reference to alternatives to discipline in section 30.5.2(3): "If the procedures in 30.5.2(2) have failed to bring resolution or the Complainant chooses to initiate a formal complaint, the Complainant must deliver a written and signed statement explaining the alleged violation of the Code...".

## Sexual Violence Policy suite

In addition to the encoded procedures for disciplinary action, the new Sexual Violence Policy suite (SV Policy), approved by the Board of Governors in June 2017, makes an explicit commitment to a victim-survivor centred response wherever possible, and provides additional rights for complainants under the various disciplinary processes.

The SV Policy also includes an information document entitled [Options, Resources and Services for Those who have Experienced Sexual Violence](#). In particular, this document identifies a range of options available for those who choose to disclose or make a complaint under one of the above processes. The options include everything from taking no action, to getting personal support or medical attention, seeking modifications or interim measures (also defined terms under the SV Policy), safety planning, and assistance making a complaint. It should be noted that the list of options precludes mediation as a response to sexual violence. (See section on page 9 for a discussion on mediation vs. RJ).

## What we know about sexual violence on campus

### Campus sexual assault

Sexual assault is a major issue facing Canadian youth, students in particular. The General Social Survey on Canadian's Safety

(Victimization) found that, of all sexual assaults in Canada, almost half of them (47%) were committed against women aged 15 to 24<sup>4</sup>. Further to that, approximately 41% of sexual assaults were reported by students and, of these incidents, 90% were committed against women<sup>5</sup>. Similarly, a study done in 2001 found that 1 in 5 students at the University of Alberta had an unwanted sexual experience at some point in their lives.<sup>6</sup>

Although sexual assault is such a prevalent experience for students, much of what our society believes about it—how frequently this act of violence occurs, who commits it, who it happens to, why it happens, and how someone should be expected to respond to it—is inaccurate. For instance, our society continues to perpetuate the idea that sexual assault most often occurs at the hands of a stranger, even though this flies in the face of self-reported data. As an example, the University of Alberta study mentioned above found that, of the 1 in 5 students who had an unwanted sexual experience, 92% of them knew the person who sexually assaulted them.

For the purposes of this report, it is important to keep the following core facts about sexual assault in mind<sup>7</sup>:

1. Sexual assault is common;
2. Lying about experiences of sexual assault is rare;
3. Sexual assault usually happens between people who know each other;
4. Choosing to use offending behaviours is the only cause of sexual assault; and
5. Making a complaint is often not a desirable option for victim-survivors.

While the research cited above focuses predominantly on sexual assault, experiences of sexual violence fall along a continuum. In addition to sexual assault, sexual violence<sup>8</sup> includes sexual harassment, stalking, indecent exposure, voyeurism, distribution of intimate images, inducing intoxication, impairment or incapacity for the purpose of making another person vulnerable to non-consensual sexual activity, and other analogous conduct.

### Victim-survivors' needs

Victim-survivors of sexual violence experience varying degrees of trauma in various different ways, and have highly individualized needs when it comes to whether or how they want it addressed<sup>9</sup>. Given that acts of sexual violence are fundamentally about asserting power and control over another individual, all victim-survivors deserve access to resources and options that seek to put power and control back in their hands.

<sup>4</sup> Statistics Canada. (2017). *Self-reported sexual assault in Canada, 2014*. (Statistics Canada, Catalogue No. 85-002-X). Ottawa, ON: Statistics Canada.

<sup>5</sup> *Ibid.*

<sup>6</sup> LoVerso, T. (2001). "A Survey of Unwanted Sexual Experiences Among University of Alberta Students", University of Alberta Sexual Assault Centre.

<sup>7</sup> Samantha Pearson, "Understanding Sexual Violence" presentation to RISV, 24 November 2017.

<sup>8</sup> As defined in the University of Alberta Sexual Violence Policy suite.

<sup>9</sup> For one important study showing a wide range of survivor-victim expectations, needs, and outcomes see Mary P. Koss, "The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes." *Journal of Interpersonal Violence*, June 2014.

Unfortunately, though widely used, disciplinary and criminal processes rarely address victim-survivors' needs, particularly the need to be in control of their own healing process.

This is reflected in the very low number of complaints against students made to University of Alberta Protective Services (13 in 2017), compared to the number of individuals seeking support from the University of Alberta Sexual Assault Centre (204 in the same time period). Furthermore, McGlynn and Westmarland examined a series of studies and concluded that "victim-survivors' understanding of justice were neither driven by, nor reflective of, conventional criminal justice."<sup>10</sup> It is likely that this conclusion applies to the University's internal discipline processes as well. In fact, some victim-survivors are seeking ways to safely confront the issue themselves or within their community and, without necessarily knowing the terminology, have been asking for restorative options.

### **Who are the offenders?**

Widely accepted research claims that most perpetrators of sexual assault on campus are serial predators.<sup>11</sup> If this were true, it would be irresponsible to offer RJ because the risk to safety would be far too great. However, David Lisak's research has come under increasing scrutiny, including his research methodology and use of data<sup>12</sup>. His claim that 90% of rapists commit an average of 6 rapes each has been all but debunked. Experience<sup>13</sup> within the University reveals that those who commit sexual violence are as varied as those who experience it. While predators do exist, there are some who come forward seeking help because they think they might have committed sexual violence, some who initially admit responsibility but recant at some point, some who refuse to engage with University officials due to legal jeopardy, and others.

As the issue of sexual violence receives more attention, there is evidence of a desire among those who have engaged in sexual violence to receive support and education as part of their personal endeavour to rectify the harm they have caused. It should be noted that as an educational institution with an obligation to support student and employee well-being, it is reasonable to provide a path to repairing harm for this group as well.

### **The University community**

The University of Alberta is a community of communities, comprising of a variety of cultures, ethnicities, religions, and genders. The reality is that not all communities within

the University have equal access to (or desire to access) disciplinary processes. Barriers to disclosing are equally diverse and may come from religious, cultural, or social strictures, as well as personal preferences. Similarly, University responses to sexual violence need to be sensitive to the needs of individuals within those communities as well as the communities themselves.

For a member of the University community to be able to fully engage in University life, they must feel safe and valued, and be treated with dignity. Unfortunately, when a victim-survivor seeks justice through our disciplinary processes, they are considered more as a witness than someone who may have experienced a life-altering event. Their ability to fully function and excel in their roles - whether student, staff or faculty - may be severely hampered by not being able to address the harm they experienced and seek the resolution they need.

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<sup>10</sup> McGlynn and Westmarland, "Kaleidoscopic Justice: Sexual Violence and Victim-survivors' Perceptions of Justice." *Social and Legal Studies*, 2018.

<sup>11</sup> Lisak, David, and Paul M. Miller, "Repeat Rape and Multiple Offending among Undetected Rapists." *Violence and Victims*, Vol. 17. No.1, 2002. <https://www.davidlisak.com/wp-content/uploads/pdf/RepeatRapeinUndetectedRapists.pdf> Accessed 13 August 2018.

<sup>12</sup> Coker (2016) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2932481](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932481) Accessed July 13, 2018.

<sup>13</sup> University of Alberta Sexual Assault Centre, Residence Services, Protective Services and Student Conduct and Accountability. For a recent study that shows that, while serial predators on college campuses exist, they are not responsible for the majority of sexual violence on those campuses, see Swartout, Koss, and White, "Trajectory analysis of the campus serial rapist assumption." *JAMA Pediatr*, 2015.

# What is Restorative Justice

For the purpose of this report, we use the term RJ to mean a collaborative approach to addressing harm, involving a trained facilitator, the people with a legitimate stake in the situation, and a focus on accountability and repairing the harm. “Restorative justice requires, at minimum, that we address victims’ harms and needs, hold offenders accountable to put right those harms, and involve victims, offenders, and communities in this process.”<sup>14</sup> Other organizations, institutions, or practitioners may use terms like restorative practices, deliberative justice or transformative justice to describe processes using similar underlying principles.

Howard Zehr, a leading expert in RJ, identifies the three basic principles that make a response restorative:

1. Violations of people and interpersonal relationships lead to the central question “Who has been hurt?”
2. Violations create obligations, leading to the question, “what are their needs?” and
3. The central obligation is to put right the wrongs, leading to the question, “whose obligations are these?”

Restorative justice occurs around the world, from very local (families, schools) to national processes. While the forms of RJ contemplated in post-secondary institutions may take different shapes, it is important to acknowledge that what we understand as RJ is deeply rooted in indigenous societies. The circles used by the Inuit in the Canadian North and the conferencing practiced by the Maori in New Zealand are particularly illuminating for our own practices<sup>15</sup>. Whatever form RJ takes, the basic elements and principles highlighted above are shared across the range of restorative options.

Just as there is variance in the terminology used to describe it, the practice itself may take many different forms depending on the needs of those who have been harmed. The most recognizable form of RJ may be the face-to-face meeting, but there are countless other ways to achieve similar goals. See the chart below for some general examples of processes that reflect a restorative approach:

<b>For victim-survivors</b>	<b>For offenders</b>	<b>Communities of Care &amp; Reconciliation</b>
Peace circles	Peace circles	Peace circles
Family group conferencing	Family group conferencing	Family group conferencing
Community conferencing	Community conferencing	Community conferencing
Victim restitution	Circles of Support and Accountability (CoSA)	Circles of Support and Accountability (CoSA)
Victim-offender mediation	Victim restitution	Victim circles of support
Victim circles of support	Victim-offender mediation	Victimless conferences
Victim services	Victimless conferences	Offender family services
Crime compensation	Related community service	Family centred / community social work
	Reparative boards	
	Youth aid panels	
	Victim sensitivity training	

Rather than insisting on a single RJ process like a face-to-face meeting, which may be effective or desirable in only a small number of situations, a victim-survivor centred approach demands that we examine all options. There is significant value in exploring a wide range of restorative responses with the victim-survivor, not least of which is empowering them to choose processes to suit their specific needs.

## How does RJ compare to disciplinary processes?

The recommendation to consider RJ as a response to sexual violence in the January 2016 report originally arose from

pleas from the community for better ways to provide justice for victim-survivors of sexual assault. Many groups—including victim-survivor support services (both on campus and throughout the province); LGBTQ+, Indigenous, and racialized communities; and many others—believe that the current disciplinary processes disadvantage, ignore, retraumatize, and/or abuse victims of sexual violence. Many have identified the need for an alternative that takes into account the victim-survivors themselves, rather than just the rights of the accused.

In other words, they believe that it is possible to envision a form of justice in which victim-survivors are “protagonists,

<sup>14</sup> Zehr, Howard. *The Little Book of Restorative Justice: Revised and Updated (Justice and Peacebuilding)* (Kindle Locations 362-364). Good Books. Kindle Edition.

<sup>15</sup> Karp, Koss, Story and Williamson. *Campus PRISM webinar, February 2018.*



rather than peripheral actors.”<sup>16</sup> Additionally, concerns about the effectiveness of criminal or disciplinary policy responses to sexual violence continue to grow across North America. Karasek noted, “We cannot fire, expel or jail our way out of [the sexual violence] crisis. We need solutions at the scale of the problem that prioritize both justice and healing, not one at the expense of the other.”<sup>17</sup>

It would follow, then, that all efforts should be taken to redistribute that power and control back into the hands of the victim-survivor whenever possible.

The chart below illustrates some of the main comparisons between disciplinary processes and RJ:

This is particularly important, as noted earlier in the report, when you consider the fact that sexual violence is an act in which someone’s power and control have been taken away.

	<b>Disciplinary Process</b>	<b>RJ</b>
What triggers a process?	Complaint under relevant policy/procedure.	Survivor requests RJ.
How is guilt assessed?	University decision-maker decides whether a policy violation occurred on a balance of probabilities.	Person responsible must acknowledge causing harm.
Investigation/Finding	Necessary in order to impose sanctions.	Not necessary; require only agreement by the parties to participate in good faith.
Procedures	Fixed, must be followed.	Flexible, responsive to the needs of the person harmed.
Procedural Fairness	Required: Procedural fairness for a respondent is a legal requirement when a sanction is a possible outcome.	Inherent: Multi-partial <sup>18</sup> facilitation ensures substantive fairness for all parties. In particular, active involvement and voice in process provides fairness to victim-survivors.
Role of Accused/Person Responsible	Right to be silent or challenge evidence and witnesses, makes submissions, speak to impact of sanction. May decline to participate. Some may speak through a representative.	Voluntary participation, listens, speaks honestly, participates in restorative resolution.
Role of Survivor/Harmed Party	Witness; entitled to speak to impact and sanction, and to know outcome.	Steers process, identifies needs, participates in restorative resolution.
Who decides what happens?	Relevant University authority.	Participants in the RJ process.
How is the community considered and/or involved?	Safety of community may be taken into account in making decision re: sanction.	Community can participate by supporting the victim-survivor, holding responsible person accountable and has the opportunity to identify community issues that contributed to the behaviour.
What is the outcome?	Possible sanction imposed as a result of policy violation.	Resolution decided by participants based on the needs of those harmed.

<sup>16</sup> Herman, Judith Lewis. “Justice from the Victim’s Perspective.” *Violence Against Women*, May 1, 2005. <http://journals.sagepub.com/doi/abs/10.1177/1077801205274450> Accessed 13 August 2018.

<sup>17</sup> Sofie Karasek, “#InMyWords: why America needs a social movement for survivors’ justice.” Keynote address, *Ending Gender-Based Violence conference*, University of Michigan, 3 May 2018.

<sup>18</sup> Rather than being impartial (like a mediator or an adjudicator) a Restorative Justice facilitator must be “multi-partial”, or take steps to ensure each participant is equally heard, understood and supported.

There are a number of advantages built into disciplinary processes. First, it is the University itself that conducts an investigation, makes a finding on whether or not a policy violation took place, and imposes sanctions. This is especially necessary in cases in which the respondent disputes the allegation. Second, as a result of a finding, the University can remove or restrict the involvement of those deemed to be a danger to the community. Third, robust procedural fairness protections are built into disciplinary processes, and external judicial and quasi-judicial reviews act as a check on University decisions.

On the other hand, disciplinary processes do not promote personal accountability and, in fact, the adversarial nature can discourage respondents from admitting responsibility. Furthermore, disciplinary processes privilege procedure over people and are not equipped to address negatively impacted relationships between those involved and the community more broadly. Because of the procedural fairness requirements, it is very difficult, if not impossible, to adapt the process to meet the needs of the complainant and is therefore unlikely to address the harm they experienced. The adversarial nature of disciplinary processes can also increase the chance of revictimization for complainants during quasi-judicial hearings.

Other disadvantages of the disciplinary process include:

- Potential backlash or retaliation against complainants when sanctions are applied by the University (something over which a complainant has no control).
- Sanctions may have limited impact on future behaviour, particularly because of the focus on procedural fairness for the accused rather than impact on others.
- The perception that sanctions will be overly severe prevents many victim-survivors from coming forward when they would prefer a more moderate or customized response.
- Disciplinary processes are limited in their ability to identify and address systemic factors that may have allowed, engendered, or contributed to the behaviour.

Some have expressed concerns that RJ is just “justice lite,” or the product of well-intentioned individuals who, in their desire to do good, do not treat the offences with the gravity they deserve. This is a view partly shaped by the assumption that punishing crime<sup>19</sup> is the only acceptable response and that not doing so is an abdication of responsibility on the part of the University. It should be noted that the view advocated by these critics does not provide an option that centres around

the needs of the victim-survivor. There may be some merit to the critique, however, in that it is crucial not to let good intentions cloud one’s vision, and to examine every possible unintended consequence of our structures and processes.

Sexual violence is a matter that must certainly be taken seriously, and RJ does so. Being directly confronted with the effects of one’s actions on others is a difficult process, and one that takes work and commitment.<sup>20</sup> It has been observed that, for the person responsible, simply allowing a disciplinary process to unfold and accepting the sanction is actually the easier route. It is precisely for that reason that RJ can be so effective in cases of serious incidents (genocide, homicide, sexual assault). Additionally, victim-survivors may be able to achieve the validation, acknowledgment, and closure they are routinely denied through disciplinary, criminal or civil processes. This is important to keep in mind in post-secondary contexts, where RJ use is typically limited to minor incidents in which a failure to resolve the issue is considered low-risk.

## Mediation vs. RJ

It is often the case that RJ is confused with mediation, or conflated with other dispute resolution processes. It is important to distinguish them, however, for the following reasons:

Mediation is a conflict resolution technique which involves a mediator and the parties to a dispute. It presumes that the dispute is the result of both parties contributing to a misunderstanding or conflict. The ideal outcome is a negotiated compromise in which the parties are able to settle on a mutually acceptable resolution, based on meeting the interests of all parties.

In contrast, RJ addresses behaviour by holding people responsible for the harm they have caused. It rests on a foundation of accountability, in which the person who caused harm acknowledges that they have done so and recognizes their obligations arising from that harm. It provides a framework for those harmed to articulate the negative effects of the behaviour on them and what they need to make it right. Those affected, potentially including members of the community, determine together what actions must be taken to address the harm.

Sexual violence is not a conflict. The inherent problem in using mediation to address sexual violence is that it ignores the fact that one party bears all of the responsibility for the harm experienced by others and almost inevitably results in some amount of victim blaming. As Zehr noted, people who have

<sup>19</sup> Coker (2016) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2932481](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932481) Accessed July 13, 2018.

<sup>20</sup> See Appendix A of the *Restorative Justice Process at Dalhousie University, Open statement from the Participants*. Llewellyn, Maclsaac and MacKay, 2015.

endured serious harm at the hands of another will likely find the neutral language of Mediation offensive. Additionally, the failure to acknowledge the obligations created by that harm means mediation is unlikely to be effective,<sup>21</sup> and very possibly re-traumatizing, especially in cases of sexual violence. For this reason, mediation should not be used in cases of sexual violence. A skilled facilitator knows the difference between mediation and RJ, and ensures that the focus remains squarely on the harm.

## Concerns and critiques around RJ

A number of concerns and critiques arise in response to the use of RJ generally, and its use in situations involving sexual violence in particular:

### *RJ is detrimental to victim-survivors*

Some advocates fear that victim-survivors will be pressured to participate in an RJ process, or to accept resolutions that are either not in their interest or are actively harmful.

The mistaken notion that RJ is designed to rehabilitate the offender only exacerbates this fear. This is a reasonable concern, and one that must be kept in the forefront of the facilitators' minds when designing any RJ process. Ultimately, RJ at the University of Alberta must be compliant with the Sexual Violence Policy, that is, grounded in the needs of the victim-survivor.

Additionally, some fear that those who have committed sexual violence will use RJ to manipulate the survivor or the University, or to avoid consequences. This concern is precisely why RJ requires extensive preparation with the participants before a process can begin. Part of the facilitators' responsibility is to assess their motives for participating in order to prevent further harm.

### *RJ is detrimental to the accused*

Conversely, there is the fear that the person responsible would be pressured to accept inappropriate resolutions. This may be a risk with untrained or unskilled facilitators, who allow the process to consider retribution rather than repairing harms. The focus must remain squarely on addressing harms, and steer away from purely punitive or other inappropriate suggestions if it is to be successful. Facilitators must challenge participants to carefully consider and articulate how a proposed resolution addresses the harms experienced by the victim-survivor.

An additional concern might be that a survivor could use RJ as a way to make false allegations, presuming a lower burden of proof. Given that there is no finding of fact by a

decision-maker, there is no burden of proof in RJ. Rather, it requires an acknowledgment by the person responsible that they did engage in sexual violence against another person. A false allegation could not pass this fundamental test.

### *RJ is too costly*

Closely related is the concern that training facilitators can be prohibitively expensive. It is important to note that lengthy and complex legalistic processes can also be prohibitively expensive. While RJ may divert some cases away from complaints (and potentially reduce legal costs associated with disciplinary processes) there is no way at this point to quantify potential savings. The University must not consider RJ to be a cheaper alternative to the existing disciplinary processes. If the University is to offer RJ as an option, it should do so because of the positive impact that it can have on the University community, and it must be willing to invest in appropriate facilitator training, or alternatively outsourcing to external skilled and trained facilitators.

Rather than focusing on the expense of training, the University would be better served by considering ways to mitigate costs. One way of addressing this concern is to consider the use of RJ in areas outside of sexual violence, so that highly trained facilitators are available for student conduct, staff and faculty issues and concerns about toxic environments, as well as incidents of sexual violence. Bringing trainers onto campus rather than sending potential facilitators away for training would bring significant savings and provide the opportunity to train more facilitators. Another possible approach is to identify levels of training to ensure that facilitators' training is commensurate with the issue at hand. Finally, some of the necessary training can be provided internally, such as that provided by the Sexual Assault Centre on understanding sexual assault, or for no cost, such as the training in trauma-informed responses offered by End Violence Against Women International Online Training Institute.<sup>22</sup>

### *The community is not ready for RJ*

Finally, researchers have expressed concerns over RJ falling flat in the face of an unprepared community. Daly (2002)<sup>23</sup> argues that a truly robust system should prepare the community for potential involvement in RJ. Its effectiveness could be limited in communities without shared values, or those who are unfamiliar with the principles of RJ. Attempting to introduce RJ into a community that is unprepared can result in poorly designed and applied processes, inappropriate use of RJ, and potential legal concerns. This speaks to the need for intentional community engagement when considering the use of RJ in general, and especially when contemplating RJ for sexual violence.

<sup>21</sup> Zehr, Howard, "Restorative Justice, Mediation and ADR," 2010. <https://emu.edu/now/restorative-justice/2010/08/13/restorative-justice-mediation-and-adr/> Accessed 13 August 2018.

<sup>22</sup> [www.evawintl.org](http://www.evawintl.org) Accessed 13 August 2018.

<sup>23</sup> Daly, Kathleen. "Mind the Gap: Restorative Justice in Theory and Practice," in Andrew von Hirsch, Julian Roberts, Anthony E. Bottoms, Kent Roach, and Mara Schiff (eds.) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*, Hart Publishing, 2002. Accessed 13 August 2018.

Preparing a community for RJ is crucial - it provides a common language of harms and repairs; it emphasizes accountability and community; it cements the notion that one's actions affect those around them, creating obligations to both consider the impact on others before acting and address any harm caused by those actions. To illustrate this point, University of Alberta Residences have experienced a culture shift since 2012 when they began using RJ. Their understanding of misconduct has moved from a focus on individual acts to a focus on the impact of those acts on the community. While our Residences do not address sexual violence with RJ, they stand as a positive example of the kind of culture change RJ can bring about.

## Advantages of using RJ for sexual violence

### *Alignment with institutional values*

The Institutional Strategic Plan, "For the Public Good," is intended as a roadmap for living our stated values in every University program, initiative, policy and decision. It creates the framework for members of the University community to build, experience, excel, engage and sustain, and identifies fundamental values, including **equality** and the **dignity of all persons, excellence, diversity, inclusivity and equity**.

In particular, Objective 19 of the ISP aims to "*Prioritize and sustain student, faculty and staff health, wellness and safety by delivering proactive, relevant, responsive, and accessible services and initiatives.*"

Current disciplinary processes can work to the exclusion of victim-survivors of sexual violence, further disempowering them, impeding their recovery and hindering rather than supporting wellness. Similarly, those who have engaged in sexual violence and want to address the harm they caused may not be served by a disciplinary or criminal process that excludes and disregards the needs of the victim-survivor.

Conversely, RJ provides an inclusive, collaborative way to address and repair harm, aligning directly with University of Alberta values. To offer an RJ option for those who desire it is to prioritize and sustain their health and wellness.

### *Survivor focus*

*Subject to the limitations set out in section 6 of this policy, those who experience sexual violence will be considered the primary decision-maker in matters pertaining to themselves. As such, [survivors] can determine whether, to whom and what to disclose, and whether to make a complaint within the University and/or an external law enforcement agency.*  
- University of Alberta Sexual Violence Policy, section 4b

As noted above, the Policy commits to sexual violence responses that centre around the needs of the victim-survivor. While the various disciplinary processes offer one way to

address sexual violence, they are limited in their scope and underutilized by victim-survivors. One of the many reasons for that is the manner in which disciplinary processes focus on the accused. Because the institution could impose severe consequences on the respondent, legal requirements for procedural fairness rights necessarily take centre stage.

Unfortunately, victim-survivors can be forgotten or retraumatized in an adversarial disciplinary process. Because of the procedural fairness requirements, these disciplinary processes are by their very nature not centred on the needs of the victim-survivor. The best we can offer victim-survivors in a disciplinary process is the choice of whether or not to make a complaint, to provide supports during the process, and to soften the most extreme forms of challenge or cross-examination.

By contrast, with RJ's spotlight squarely on addressing harms, the victim-survivor's experience and needs, and the responsible person's obligation to address those needs, become the centre of attention. In other words, victim-survivors have a direct say in the resolution and can veto any suggestions that don't meet their needs.

RJ is one of the only responses the University could provide that is not focused on the offender. A skilled facilitator uses multipartial facilitation, establishing an environment in which all participants are equally heard, understood and supported, while at the same time ensuring the centrality of the needs of the victim-survivor, in keeping with the University's commitment to a survivor-centred response.

### *Procedural Flexibility*

The flexibility inherent in RJ foregrounds the needs of victim-survivors by providing them with real choices throughout the process. It is important to note that the goal of RJ is not to hold a face-to-face meeting; the goal is to put the focus on the harm. A victim-survivor can be given voice and choice in designing the process, and deciding what they need in order to be able to move on. This can manifest in a wide variety of processes. Some examples include (not an exhaustive list):

- A face-to-face meeting;
- A face-to-face meeting, but with a proxy standing in for the survivor;
- Meeting by video-conference;
- "Shuttle" RJ, in which the facilitator speaks to each participant separately and conveys the desired messages between them; or
- An exchange of letters or videos between the participants identifying and addressing the harm caused by an act of sexual violence.

Even within a face-to-face meeting, there is much opportunity for flexibility. For example, the survivor could decide whether or not to attend a meeting in person, when and where that meeting would occur, what the goal(s) of that meeting would be, the order in which the participants speak, and many other procedural questions. The ability to be the principal architect in the creation of the justice process empowers the survivor to define what they need and how those needs might be met.

### **Adaptability**

Because RJ works on the basis of principles rather than procedures, it is adaptable to almost any situation, cultural group(s), or context. This means an RJ process can be tailored to address the specific needs of its participants to make it meaningful to them. It provides the opportunity to explain cultural understanding, experiences outside of the conventional, or even to build new community norms. Most importantly, RJ is one of the few institutional responses that can incorporate an intersectional approach to justice, taking into consideration the impacts of marginalization on the basis of culture, ethnicity, indigeneity, geographical location, gender identity, sexual orientation, ability, and other factors that significantly affect how one experiences the world. RJ offers an opportunity to address the effects and influence of oppression on instances of sexual violence.

Finally, because RJ is not required to be a complaint-based response, it offers a way to resolve harms that do not rise to the level of a policy violation, or those situations in which the University is not able to respond to a complaint due to jurisdictional or time constraints. For example, RJ could address an incident of sexual violence that occurred between two students at a private residence (outside of the University's jurisdiction), or an incident with a staff member that occurred outside of the time limitations set out in a Collective Agreement, providing all the parties agree to participate.

### **Accountability**

Punishing a person who violates our laws or policies is often considered a way of holding that person accountable. However, under the University's current disciplinary processes, the institution stands in for the victim-survivor throughout that process, and imposes a punishment as a consequence of violating the rules of the institution. In this conceptualization of accountability, by receiving some sort of policy sanction or criminal sentence, an offender pays their debt to the institution or society. In the University context, this means that disciplinary processes hold the offender accountable to *the institution*. While this is what some victim-survivors need or want, others do not equate punishment with justice and instead seek validation, explanation, reparation, voice, and choice.

RJ, on the other hand, centres on accountability to *the*

*individuals and community who were harmed*. It is based on the belief that accountability means taking responsibility for the consequences of one's actions and their impact on others. It means admitting wrongdoing, recognizing the effect one's actions have on others (harm caused), taking steps to make things right (or addressing the needs arising from the harm) and ensuring that it does not happen again (building trust). Disciplinary processes do not require any of these elements, whereas RJ depends on them. Consequently, for those victim-survivors who do not desire punishment and who seek to be represented in the accountability process, RJ may more closely align with their vision of justice.

### **Community involvement**

Sexual violence does not happen in a vacuum. By actively involving the community, RJ makes it possible to identify any systemic, structural, or environmental factors that encourage or contribute to negative behaviour. For example, consider a scenario where a social group comes to understand that many of their norms are conducive to sexual violence and need to be addressed. Ideally, in this situation the community would be provided with a mechanism to address those factors, creating stronger, more resilient community relationships, as well as providing benefits for the victim-survivor, and potentially preventing future sexual violence. In addition, there may be a role for community members in holding the person responsible accountable, supporting them in meeting any commitments made through an RJ process.

A wide range of RJ processes to address community harm are available. Some examples include:

- A community circle to address the effects of a misogynistic or homophobic environment;
- A restorative circle or similar process to address the effects of an incident of sexual violence on the surrounding community (e.g. factions formed as a result of an allegation of sexual violence);
- A healing circle for victim-survivors;
- A Circle of Support and Accountability (CoSA<sup>24</sup>) to help reintegrate an individual who has committed sexual violence into a community after a separation (suspension, leave, incarceration);
- A truth and reconciliation commission to address systemic or environmental factors that may contribute to sexual violence or rape culture.
- Restorative language can also be used in educational efforts, such as consent and/or bystander intervention education in a student community.

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<sup>24</sup> See [cosacanada.com](http://cosacanada.com) for more information. Accessed 13 August 2018

In each of these options, facilitators assist participants to focus on harm, work to identify the obligation to repair (or prevent) that harm, and determine how, when, and by whom those obligations would be met.

### **Ability to address secondary harm**

RJ recognizes that sexual violence is not simply an individual matter, but one that affects families, friends, and others within the victim-survivor's circle. Zehr identified the potential participants in a restorative process (in addition to those who caused the harm) as those who have been directly harmed, those who have been secondarily harmed, and the community or communities affected by the harm.<sup>25</sup> All of these harms are relevant but perhaps not in the same way or to the same degree.

Just as *who* can be affected by sexual violence varies depending on the situation, *the ways in which they are affected* can vary as well. For instance, a social group may become polarized after an incident of sexual violence occurs in their midst, causing significant rifts in social circles and potential feelings of isolation/loss of community. Alternatively, a social group might come to realize that the norms within that group are conducive to sexual violence and need to be changed. This is a process that demands tremendous self-reflection and community dialogue in addition to the rigours of daily life. A victim-survivor may also be subject to additional harm after disclosing an experience of sexual violence within their circle. This might include receiving a negative reaction from loved ones for reporting (or not reporting) the incident, for disrupting the family/community, or any number of other reasons. RJ offers ways to address all of the harms around sexual violence, whether or not the incident itself is resolved restoratively.

### **Goals of RJ**

The goal of RJ is to address the needs arising from harm to individuals or a community. It requires that those who cause harm take responsibility for their actions, and that they take steps to address that harm by committing to either concrete or symbolic repairs. Empathy and creativity are essential to restorative resolution. In other words, the person who caused harm must carefully listen to others about how they were affected, what they need as a result, contribute to discussions about ways to meet those needs, and then act to repair the harm.

Under those circumstances, it is very possible that RJ could result in reduced recidivism. Understanding how one's actions affect others and that one is responsible for those effects can

be a powerful deterrent to repeating a harmful behaviour. However, because this framing puts the focus back on the notions of "offense" and "the offender," reducing recidivism cannot be the primary goal of RJ.

There is a common assumption that RJ should result in an apology. This is not necessarily the case and, in fact, some victim-survivors do not enter RJ with the aim of receiving an apology.<sup>26</sup> Additionally, some express fear that victim-survivors will be pressured into forgiving those who perpetrated sexual violence against them through RJ. It must be clearly stated that forgiveness is not a goal of RJ. In some cases the person harmed may decide to forgive, but a process grounded in the needs of the victim-survivor means that expecting forgiveness from the person harmed would be highly inappropriate.

Rather than predicting or expecting any specific result (apology, forgiveness, reduced recidivism), RJ offers the possibility for a resolution specific to the needs of the victim-survivor, whatever they might be.

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<sup>25</sup> Zehr, *op cit*, pp. 37-38.

<sup>26</sup> Koss, Mary. "The RESTORE Program of Restorative Justice for Victims of Sex Crimes: Vision, Process and Outcomes." *Journal of Interpersonal Violence*, Vol. 29(9), 2014.

# Restorative Justice on Campus

## Intersection between Complaints and RJ

RJ can be a stand-alone response, or be used prior to, concurrently, or after a disciplinary (or criminal) process. Considerations about when and under what circumstances RJ is used would shape the process. For example:

- A student may be suspended and evicted for an incident of sexual violence in residence. The victim-survivor may have outstanding questions that need answering in order to feel comfortable with that person rejoining the University community at the end of the suspension. RJ may help answer those questions, including, “*why did that person choose me?*” and It can also result in agreement about boundaries and commitments for the responsible person’s return.
- A person accused of sexual violence is charged criminally but the Crown decides not to proceed to trial. The survivor could request RJ to address the harm caused by the incident and seek some form of closure.

As discussed previously, the focus and aims of RJ and disciplinary processes differ significantly. Disciplinary (and criminal) processes address the respondent’s offence and that person’s relationship to the institution or society more generally, while RJ addresses the needs of the victim-survivor, and aims to strengthen the community. This means that both can occur independently or be complementary. In fact, if a victim-survivor is satisfied with a Restorative resolution, any decision maker in a concurrent discipline process has the discretion to take that into account when determining sanction.

On the other hand, the reverse is not necessarily true for RJ. Because the goals do not intersect with those of the disciplinary processes, the outcome of a University or criminal process will not likely affect RJ. There may be some overlap, but RJ must remain squarely focused on addressing the specific harm to those affected by an incident, and not the sanctions imposed in a different process.

## Confidentiality

Few considerations are more important than confidentiality. Participants in an RJ process must be assured that whatever is said within an RJ process remains confidential. Successful RJ processes rely on openness, honesty, and the ability to be vulnerable. The potential benefits of this kind of communication are significant: RJ could lead to meaningful accountability for those responsible; and for the person harmed, real resolution in the form of addressing the victim-survivor’s specific needs, is possible.

The risk of concurrent or future disciplinary charges, whether or not the RJ process is successful, however, could have a chilling effect on participation in RJ. A responsible person would be rightly cautious in what they say in the context of an RJ process if there was any possibility it could be used as evidence that they committed an offence under University policy.

If the harm also rises to the level of a criminal offence, the jeopardy for the person responsible is much greater. Canada has no statute of limitations for sexual offences, meaning that a complaint to the police could happen at any time in the future, even if no complaint was brought forward when RJ was pursued. In order to make RJ possible in these situations, serious consideration must be given to whether and how records are kept. There may be opportunities in the form of an agreement with the Crown (either general or case-specific) that participation in RJ would be confidential and not used against a person. It should also be explicitly recognized that acknowledging responsibility for causing harm is not the same as an admission of guilt to policy or criminal violations.

In general, the assurance of confidentiality sets the groundwork for honest and open discussion. RJ is a voluntary process in which the participants should sign a confidentiality agreement before engaging, ensuring that anything learned through RJ will not be communicated elsewhere. At the beginning of any process, participants are informed about how their personal information is to be used, making the process FOIPP-compliant as well. Record-keeping should be carefully thought through and limited to the confidentiality forms and any written agreement generated.

## Safety Considerations

The University is responsible for ensuring a safe working and learning environment and therefore must also take steps before and throughout RJ processes to identify and reduce safety risks related to violence or suicide. Safety must be taken into consideration for all participants in an RJ process, including the victim-survivor, the person responsible, support people, and affected community members participating in any RJ response. Safety considerations include conducting assessments to identify, analyze, and manage the risk of violence or suicide.

## Violence risk

Violence risk assessment is conducted by gathering information about an individual’s words and behaviours; it is not intended to predict violence, but to identify violence risk factors and corresponding management strategies to address

or mitigate those risk factors. Violence in this sense refers to “actual, attempted, or threatened infliction of bodily harm on another person”<sup>27</sup>. Risk-enhancing factors to consider in terms of safety for participants in RJ responses include a history of violence (including and in addition to the incident that prompts an RJ response), recent or current thoughts or fantasies of violence, threats of violence, and concerns about the manageability of these risk factors. In addition, risk factors for sexual violence include a history of sexual violence, psychological adjustment, mental disorder, social adjustment and manageability.<sup>28</sup> Collecting sufficient information to make a preliminary assessment regarding safety in RJ responses to sexual violence calls for due diligence.

If any of the above risk-enhancing categories appears to be present, a more thorough inquiry into the nature of the specific risk factors may be warranted. In cases where the presence of risk factors is unmanageable or beyond the scope of facilitators and/or the university to manage, RJ should not be used.

## Suicide risk

Assessing suicide risk in a non-clinical environment relies on professional judgment informed by suicide awareness and prevention training, along with experience in suicide intervention. Suicide risk assessment determines the presence of factors such as whether an individual is having thoughts of suicide, the likelihood that an individual will act on those thoughts of suicide, and whether the individual has a plan to die by suicide, and the means or a timeline to enact that plan. The goal of suicide risk assessment is to enable the implementation of intervention strategies. Suicide intervention strategies, informed by a suicide risk assessment, can be utilized to increase an individual’s safety in the moment and connect them to further resources, such as counselling or emergency services, as needed and appropriate.

Both violence risk and suicide risk should be monitored, identified, analyzed and managed throughout an RJ response. Facilitators should gather information, analyze and assess the information in relation to known risk factors, and develop strategies to maintain or increase safety for all participants. In addition, facilitators should take into consideration the level of violence risk and suicide risk present in preparing for the process, while recognizing that these risks can be dynamic or emergent throughout RJ, and therefore must be ongoing considerations.

## Facilitation

The importance of skilled facilitators cannot be overstated. It is the facilitators who meet with the parties ahead of time (often

on multiple occasions) to prepare them for the process, ensure expectations are realistic, assess readiness to participate, and ensure the process is safe for all participants. Facilitators set the tone for RJ and, in the case of sexual violence, they must ensure that the process is victim-survivor centred, trauma-informed, and congruent with the principles of RJ. The facilitator must work with the person harmed to determine both the content and the process of the RJ dialogue. In addition, the facilitator must “maximize the empowerment of the survivor and build a relationship without leading, guiding, pulling, pushing, advising, suggesting, cajoling or coercing.”<sup>29</sup>

Facilitators should ground their practice in current research about the effects of trauma (Wilson, Lonsway & Archambault; Ahrens, et al), the needs of victim-survivors (Koss, Herman; Van Camp & Wemmers; Andrews, Brewin, Rose & Kirk; McGlynn, Westmarland, & Godden) and best practices in RJ facilitation (Choi; Koss; Keenan; Llewellyn & Philpott). They should also keep abreast of current literature and practices in these areas as they evolve.

Given the complexities of RJ for sexual violence, a co-facilitation (usually gender-balanced) model is advisable, allowing facilitators to support each other, capitalizing on their strengths and differences to provide support for all parties involved. Facilitators need to be experienced, skilled, highly trained in both RJ and dealing with trauma, well-versed in gender and power dynamics, and committed to the principles and philosophy of RJ.

In order to be most effective, RJ facilitators need institutional support. Because the expectations for the facilitators are so significant, they should take advantage of experts available to assist as needed with process design, trauma management, risk assessment, process debrief, program assessment and other elements. Members of the RISV group, and others with expertise across a range of areas, are available to support facilitators.

Sexual violence is an umbrella term for a wide range of behaviours. While the University must be prepared to deal with the far end of the spectrum, we can also expect instances in which resolution is less complex, and even some cases in which the harm does not rise to the level of a policy violation. In such cases, while the facilitator must be trained in trauma-informed RJ facilitation, this may be an area where less experienced facilitators can build capacity. Co-facilitation also allows less experienced facilitators to learn from those with more experience in some of the more serious cases, providing a model for sustainability.

<sup>27</sup> Douglas, K. S., S.D. Hart, C.D. Webster, & H. Belfrage. (2013). *HCR-20V3: Assessing Risk of Violence – User Guide*. Burnaby, Canada: Mental Health, Law, and Policy Institute, Simon Fraser University.

<sup>28</sup> Hart, Stephen D., P. Randall Kropp, D. Richard Laws, et al. *The Risk for Sexual Violence Protocol (RSVP): Structured Professional Guidelines for Assessing Risk of Sexual Violence*. Burnaby, Canada: Mental Health, Law, and Policy Institute, Simon Fraser University.

<sup>29</sup> Alan Edwards, “Restorative Justice in Cases of Serious Crime”, presentation to RISV working group on 25 August 2017.



Addressing the complexities of sexual violence relies on trained, skilled, and experienced facilitators. RJ processes that proceed with unskilled or inadequately trained facilitators could create a climate that harms the victim-survivor even further, does not offer meaningful accountability to the person responsible, and provides no other benefit to the community. Therefore, RJ should not be offered on campus unless the University is confident in the calibre of its facilitators.

## Risks and Opportunities

Current disciplinary processes are necessary in some cases and must be maintained. However, calls for more sophisticated and inclusive options must not be ignored, particularly when all eyes are on University campuses to be progressive and proactive. RJ has great potential to be one of those options.

In a world where social media is ubiquitous and movements like #MeToo abound, there is risk in new initiatives but, in fact, the University faces greater risk in maintaining the status quo. Already, a crowd-sourced spreadsheet<sup>30</sup> naming universities across North America for their substandard responses to sexual violence has been circulating. To rely on current systems and processes alone is to risk serious reputational damage.

Additionally, while it may not be possible to quantify the cost of sexual violence to an institution, we know the human toll is considerable.<sup>31</sup> Sexual violence can result in victim-survivors not being able to continue in their academic pursuits. It creates hostile environments, fosters fear, frustration and trauma. It contributes to poor mental and physical health. It can lead to disengagement, dissociation and even suicide.

A university can mitigate these effects by providing a range of services and supports, including our Sexual Assault Centre, the SV Policy's commitment to supporting survivors, and even its disciplinary systems. Adding RJ to the suite of options for victim-survivors represents the opportunity to provide a cutting-edge response to sexual violence and position the University of Alberta as a leader among Canadian post-secondary institutions.

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<sup>30</sup> <https://theprofessorisin.com/2017/12/01/a-crowdsourced-survey-of-sexual-harassment-in-the-academy/> Accessed 13 August 2018.

<sup>31</sup> University of Alberta Sexual Assault Centre: "[Common Reactions to Sexual Assault](#)." Accessed 13 August 2018.

# Recommendations

For many reasons outlined above, RJ may be the only option a victim-survivor is willing to consider. On the other hand, RJ is not the right response in every case. The University should carefully consider the expressed needs of the victim-survivor and make every attempt to design an option that might at least partially meet those needs. RJ has great potential as part of a suite of options to address sexual violence.

Given the unique characteristics of sexual violence victimization, RJ promises to be a powerful way to meet the needs of a survivor; it offers the potential for victim-survivors to be able to put the effects of an incident of sexual violence behind them and enjoy full participation in the University community. For the person responsible, RJ can offer a path to meaningful accountability. Like all process, however, RJ also has the potential to do further harm without careful planning and assessment. In order for it to fulfill its potential, the RISV working group recommends the following:

## General

***Recommendation: The University should offer RJ as an option for victim-survivors in cases of sexual violence.***

Given the limitations of current disciplinary systems and demands for a wider range of options for survivors, the University should invest in RJ as a necessary service in its suite of responses to sexual violence. This investment could be in the form of providing internal resources or connecting the University community with external facilitators.

***Recommendation: The University should consider offering RJ in other areas.***

RJ has been considered for use in student conduct, human resources, laboratories, departments and faculties. The University could maximize any investment in training RJ facilitators by increasing the areas in which RJ is offered. While not all facilitators would have to be trained up to the standards of those addressing sexual violence, a broader RJ mandate would expand the possible pool of facilitators and ensure program sustainability.

Additionally, using RJ more broadly would make restorative language more familiar and help prepare the community to be able to consider it as a legitimate option for serious or egregious situations. Restorative language can also shape educational efforts (consent education, ethics training), staff meetings, and conflict situations in a way that makes the community conversant with the language of harm, responsibility and restorative outcomes.

***Recommendation: Any RJ program or pilot should include both assessment and research.***

An RJ initiative should be subject to ongoing program evaluation, ensuring that it remains true to the principles and values of RJ and to the academic mission of the University. In addition, partnering with a researcher would lend credibility to an RJ program and enhance real-time evaluation. Furthermore, it would ensure that any RJ efforts remained tied to evidence-based practice.

## Parameters for use

***Recommendation: Any RJ response to an incident of sexual violence must be initiated by the survivor.***

In order for the process to be victim-survivor centred and trauma informed, the victim-survivor must initiate the process by requesting RJ, without pressure or persuasion. A victim-survivor should be provided with all options and a full understanding of the implications of each in order to be able to make an informed choice.

A request for RJ from a person who has committed sexual violence should not trigger communication with the victim-survivor. It would be highly inappropriate (and would naturally exert pressure on the victim-survivor) for the University to approach them with a request to participate in RJ. Alternatives based on restorative principles may be available in these cases.

***Recommendation: The responsible person must acknowledge their actions and give fully-informed consent to participate.***

Unless participation is fully voluntary, it is unlikely to be successful and may, in fact, lead to more harm. Once a victim-survivor requests RJ, the facilitator should reach out to the person responsible to discuss the possibility of participating in RJ. That discussion must include a full description of what RJ is, how it works, what would be required in order to participate, possible implications of choosing to do so, and what supports would be available throughout the process. Any participation of a responsible person necessitates an acknowledgement that they caused harm and a willingness to participate in good faith.

***Recommendation: The university should identify, assess and manage safety for the participants and the process.***

While the University has committed to a survivor-centred approach, it cannot abdicate its responsibility to provide a safe environment for all. Full threat assessment is likely not possible; however, the University should engage in an initial evaluation, including checking with HIAR, UAPS, and the Dean of Students (for students), HR (for employees), or Faculty and

Staff Relations (for academic personnel) to ascertain whether there might be any indicators of risk to safety (emotional, psychological or physical) or the process.

Because ongoing violence creates an unsafe environment, it should be established that any violence has stopped before considering the use of RJ. Further evaluation, if needed, could be undertaken in the form of an interview with the person responsible, as part of the RJ preparation. In addition, both the person harmed and person responsible should be assessed for risk of self-harm or suicide.

***Recommendation: The University should put measures in place to create a supportive environment for all participants.***

Discussions about safety must include the ability for all participants in RJ to feel supported throughout the process. The University should ensure that adequate supports in the form of advice and counseling for both parties. Those involved will not be able to fully participate unless they feel safe in doing so. Other assurances (see recommendations on confidentiality, process considerations and safety considerations) must also be in place in order to create a safe and supportive environment in which RJ can take place.

***Recommendation: Any RJ process should be designed and customized, in consultation with the survivor, to prioritize the survivor's needs.***

We recognize that sexual violence is an offence in which victims have had their power taken away. While the University cannot cede total control of a process to the victim-survivor, there are important choices that they can and should be able to make. These decisions might include<sup>32</sup>, for example:

- What form the RJ will take;
- Whether a meeting will occur, and if so:
- Whether to be present at the meeting or use a proxy or video conferencing;
- Time and date of the meeting;
- Who should (and who should not) attend that meeting, bearing in mind the need to support all parties;
- What questions should be asked, and in what order;
- The order in which the participants speak;
- Input into the resolution, and the right to reject it if they remain unsatisfied.

The use of scripts, or any other practice that might limit the flexibility to customize the process, should be avoided in cases of sexual violence. Additionally, facilitators should consider the wide range of RJ processes possible in order to meet the needs of the victim-survivor.

***Recommendation: RJ should include a reverse caution: "Nothing said in the course of RJ will be used against you in any other University process."***

RJ relies on openness, honesty and the ability to be vulnerable. Transparency about confidentiality benefits all parties to RJ. For the person harmed, it can clarify expectations and contribute to a feeling of safety. A person responsible would rightly be cautious about what they divulged in RJ if they feared that their words could be used against them in an administrative or criminal investigation. The University should make clear that no statements from within RJ, starting from the time a facilitator contacts the person responsible, will be used in any internal disciplinary process.

When the risk of concurrent or future criminal charges exists, this question becomes more complicated. The University should explore ways to address this issue, including record keeping practices, or agreements with the Crown that RJ is to be confidential. Especially when jeopardy in an administrative, civil or criminal process might be a factor, there should be no negative inference drawn by any decision maker in those processes as a result of an individual declining to participate in RJ. It should also be made clear that entering into RJ requires taking responsibility for causing harm; it does not require or entail admitting to a policy or criminal violation.

***Recommendation: RJ should be available to any member of the University community, whether or not the other party is also a member of the University community.***

If a member of the community discloses that an experience of sexual violence is interfering with their ability to fully participate in University life and makes a request for RJ, the University should endeavour to provide it in some form, regardless of where or when the sexual violence occurred, or whether or not the other party is a member of the University community. We recognize that safety assessment and internal support may not be available in the case of an external individual, or there may be other barriers to RJ in those cases. Facilitators should be clear about limitations and, where possible, offer alternatives based on restorative principles. In these cases, the University should draw on or collaborate with community organizations, taking into account capacity, the needs of the community and any legal obligations arising from the disclosure/request.

***Place in policy and systemic response***

***Recommendation: RJ should be initiated on request, not by a complaint.***

University of Alberta complaint processes should only ever be used to initiate an investigation for possible charges and sanctions. Nothing more than a disclosure and an expressed desire by the victim-survivor to enter RJ should be required

<sup>32</sup> Mary Koss, Webinar Campus PRISM webinar: Promoting restorative initiative for sexual misconduct on college campuses, Q & A - The RESTORE conference model perspective. 15 February 2018.

in order to offer RJ. It is important to note that engaging University discipline processes does not preclude a victim-survivor from using RJ.

***Recommendation: RJ should not be tied to any University disciplinary processes, but act as a stand-alone option.***

In order for RJ to be a realistic option for victim-survivors, it should be offered and operate independently from any disciplinary process. While it may occur concurrently with other processes, it should not rely on them in any way. The goal should be to create an environment in which RJ is an accessible and viable option, structured in a way to ensure the victim-survivor has influence over the process.

***Recommendation: The University should avoid creating policies or procedures around RJ.***

The University should offer RJ as a service, not a mechanism for enforcement. Like many other services, the provision of RJ should be designed by the experts (in this case, the facilitators). In order to be as flexible as possible and therefore responsive to the needs of victim-survivors, RJ should not be restricted by prescriptive policies and procedures. However, it is recommended that a centralized body or office oversees the establishment of common restorative principles, training of facilitators and the application of RJ on a case-by-case basis.

While facilitators may have a role in following up with participants and supporting the fulfillment of agreed repairs, RJ is purely voluntary, including voluntary compliance with any agreements arising from restorative processes. The University should not have a role in enforcing Restorative resolutions. A participant who is not satisfied that agreements are being honoured has the option of making a complaint about the original incident through a University disciplinary or criminal process. In a discipline process, the decision maker has the discretion to consider that the agreement from a RJ process was undertaken and not met as a factor in determining sanction.

## **Facilitation**

***Recommendation: Anyone facilitating RJ in an incident of sexual violence must be adequately trained.***

Facilitators in sexual violence cases must have, at a minimum, training in sexual violence, the effects of trauma, and restorative justice facilitation for sexual violence. In addition, they must have training or background in suicide prevention and violence risk assessment. As the seriousness of the incident (and therefore risk of additional harm) becomes greater, the experience and skill level of the facilitators must also increase. Ideally, the University would train a group of potential facilitators by bringing trainers in from more than

one source to ensure a well-rounded understanding of the many ways RJ can be structured.

At the very least, training and/or advice should be sought from the Promoting Restorative Initiatives for Sexual Misconduct (PRISM) on college campuses project.<sup>33</sup>

***Recommendation: Wherever appropriate, RJ to address sexual violence should involve a co-facilitation model.***

Given the complexity and emotional difficulty of sexual violence cases, co-facilitators can provide mutual support as well as more comprehensive support to participants. In addition, each facilitator brings a set of unique skills and abilities to their facilitation. Those with complementary skills could be paired to ensure the best experience for the participants.

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<sup>33</sup> [www.skidmore.edu/campusrj/prism.php](http://www.skidmore.edu/campusrj/prism.php) Accessed 13 August 2018.

# Appendix 1 - RISV Working Group Meeting Schedule

## Tasks:

1. Learning about the issues
2. Setting parameters for the use of RJ in sexual violence
3. Identifying policy changes
4. Identifying training needs

<b>Meeting Date</b>	<b>Task</b>	<b>Preparation</b>	<b>Presentation or Discussion</b>
24 February 2017	Introduction	Howard Zehr, "Little Book of Restorative Justice"	Introductory session
24 March 2017	Learning	PRISM Webinar	What might this look like at the UofA?
28 April 2017	Refocus discussion	Burning Bridges video (on own or prior to meeting)	<ul style="list-style-type: none"> <li>• Report recommendation</li> <li>• Definitions</li> <li>• Common understandings</li> </ul>
26 May 2017	Learning	Donna Coker "Crime Logic, Campus Sexual Assault, and Restorative Justice."	How do universities view/respond to sexual violence?
<i>Suggested summer 2017 reading</i>		<ol style="list-style-type: none"> <li>1. Vince Mercer &amp; Karin Sten Madsen "Doing restorative justice in cases of sexual violence: a practice guide." - European Commission Directorate-General Justice (discussing at August meeting)</li> <li>2. Mary P. Koss, "The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes," Journal of Interpersonal Violence, 2014, Vol. 29(9) 1623-1660. (discussed at December meeting)</li> <li>3. Dalhousie University, "<a href="#">Report from the Restorative Justice Process at the Faculty of Dentistry</a>," 2015 (discussing at September meeting)</li> <li>4. Dalhousie University, "<a href="#">Report of the Task Force on Misogyny, Sexism and Homophobia in Dalhousie University Faculty of Dentistry</a>," 2015 (discussing at September meeting)</li> <li>5. Optional: Jon Krakauer Missoula: Rape and the Justice System in a College Town (Not available on Google Drive)</li> </ol>	
25 August 2017	Learning	Vince Mercer & Karin Sten Madsen "Doing restorative justice in cases of sexual violence: a practice guide." - European Commission Directorate-General Justice.	<ul style="list-style-type: none"> <li>• Alan Edwards - presentation on restorative justice in the criminal justice system</li> <li>• See folder for PowerPoint</li> </ul>
22 September 2017	CANCELLED		
27 October 2017	Learning	N/A	Graham McCartney - presentation on risk assessment

<b>Meeting Date</b>	<b>Task</b>	<b>Preparation</b>	<b>Presentation or Discussion</b>
24 November 2017	Learning	Rebecca Campbell webinar " <a href="#">The Neurobiology of Sexual Assault</a> " (On own or before meeting in Triffo Hall 1-09)	Sam Pearson and Parker Leflar - presentation on myths and misconceptions about sexual assault
26 January 2018	Learning	<ul style="list-style-type: none"> <li>• Dalhousie University, "<a href="#">Report from the Restorative Justice Process at the Faculty of Dentistry</a>," 2015</li> <li>• Dalhousie University, "<a href="#">Report of the Task Force on Misogyny, Sexism and Homophobia in Dalhousie University Faculty of Dentistry</a>," 2015</li> <li>• Rebecca Campbell webinar "<a href="#">The Neurobiology of Sexual Assault</a>" (On own or before meeting)</li> </ul>	Interaction between sexual violence and community in an academic environment
23 February 2018	Setting parameters for the use of RJ in sexual violence	Mary P. Koss, "The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes," <i>Journal of Interpersonal Violence</i> , 2014, Vol. 29(9) 1623–1660.	Brainstorm what conditions might be necessary in order to proceed with an RJ process
23 March 2018	Setting parameters for the use of RJ in sexual violence	Read draft parameters for use generated from the previous discussion	Review the draft text. Discussion on facilitators.
27 April 2018	Identifying policy framework	Review Article 14/16 and Graduate Assistant collective agreements, Code of Student Behaviour and PDF discipline process, as well as Residence processes (in meeting)	Jeremy Wilhelm - presentation on due process issues related to administrative processes, esp. collective agreements - Staff and Graduate Assistant collective agreements <ul style="list-style-type: none"> <li>• How can RJ fit in?</li> <li>• Where are the barriers?</li> <li>• What policy changes might be necessary</li> </ul>
25 May 2018	Draft Report review	Read draft report distributed in advance of meeting	<ul style="list-style-type: none"> <li>• What barriers still exist?</li> <li>• How can we address those?</li> </ul>
Summer 2018	Report review	Read and respond electronically to draft report available online in early July. Report will be finalized electronically, taking into account comments from members of the group.	

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*[Note: Some links may require institutional subscriptions.]*

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# **Workshop I: Student Organizing against sexual harassment**

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*Campus*

# Engineering Professor Under Investigation for Harassment



Elena Neale and Anna Maria Camardo, June 6, 2019

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**CONTENT WARNING:** This article contains language related to sexual harassment, racial harassment and verbal abuse.

\*A pseudonym is used to protect the source's identity.

After reporting UC Santa Cruz professor Dimitris Achlioptas for racial and sexual harassment, two graduate students from the computer science and engineering department face a daunting administrative reporting process.

"I don't think I can take this Dimitris," Alex Muhammad\* told his spouse in October 2017. "He's awful to me. Even in the meeting yesterday he told me to 'shut the fuck up.'"

Muhammad was a recent arrival, but Skyler Bennett\* had grown used to life in the lab of computer science and engineering professor Dimitris Achlioptas.

"I knew that Dimitris was a little bit unhinged from taking his class," Bennett said. "He had been inappropriate, and he had been kind of cruel, but I thought that I had seen how far it would go."

By December 2018, both graduate students would abandon months — in Bennett's case, years — of research to protect their well-being. Tired of feeling verbally harassed, they filed allegations against Achlioptas detailing instances of racial and sexual harassment.

Since reporting, Muhammad and Bennett have been slogging through bureaucratic policies so dense even the officers overseeing them had to train for hours to understand them all.

"[Reporting] takes a toll on you. You lose a part of yourself," Muhammad said. "[...] I thought Santa Cruz would be a place that had values and it doesn't."

## Interactions with Achlioptas

Bennett first met Achlioptas as a third-year computer science major when he took his "Introduction to Analysis of Algorithms" class in winter 2016. He continued to work with Achlioptas and chemistry professor Nikolaos Sgourakis on a project during the summer of that year.

Throughout summer, Bennett spent many hours with Achlioptas, who would call him "moron," "retard," "idiot," "loser," "pussy," "punk," "autistic" and "asshole," Bennett said in a statement to academic employee relations director Susan Fellows on Jan. 22, 2019.

Bennett alleged that the vulgar language metastasized into sexualized comments. In his statement Bennett said that before expressing disapproval, Achlioptas said, "Are you ready to be anally raped?" among other similar comments.

Despite feeling unsafe, Bennett continued working under Achlioptas's advisement because of his project's success. He began pursuing a master's degree in computer science at UCSC in fall 2017.

Bennett said just days into his graduate program Achlioptas berated him over the phone, accusing Bennett of making an error. In the same phone call, Bennett expressed his discomfort to Achlioptas, who said "I believe you have a little bird chirping in your ear that you are 'suffering abuse' when that is far from the truth," according to Bennett's statement.

Bennett considered quitting the project after that phone call.

Also in fall 2017, Alex Muhammad came to UCSC to begin a doctoral program with Achlioptas as his adviser. Muhammad and Bennett worked in close proximity for about a year. During that time they told each other about their experiences with Achlioptas.

Muhammad, who is Muslim and of Palestinian descent, alleged that Achlioptas called him a terrorist multiple times during his interview over summer 2017. He also alleged in his official complaint to UCSC that racially and sexually charged interactions continued throughout their time working together.

On March 19, 2017, 11 days after Muhammad was admitted to UCSC, Achlioptas sent an email to several of his new graduate students with the subject line, "Team Terror." According to Bennett's statement, the email contained images of Achlioptas with three students of Greek, Iranian and Palestinian descent, including Muhammad.

Muhammad's complaint alleged that Achlioptas told him he resembled terrorists on wanted posters and that Achlioptas insulted his beard on multiple occasions.

Bennett also described witnessing Achlioptas call Muhammad a terrorist on multiple occasions and telling Muhammad that his beard made him look like "the enemy."

"Some time in winter [2018], Dimitris went to Germany and when he came back he said, '[Alex], I was in the airport and I saw this FBI wanted poster of this Muslim guy. I swear he looked exactly like you,'" Bennett said. "One time he tried to tell [Alex] he should shave his beard."

In his complaint Muhammad describes that once while in Achlioptas's car, the professor asked him if he performs oral sex on his wife. Muhammad said when he dismissed the question, Achlioptas began describing, in explicit detail, how much he enjoys performing oral sex on women.

"It felt like he was living the act, and I was extremely uncomfortable," Muhammad said. "Dimitris never let me give consent. He took consent. You never felt you could say no to Dimitris. He took it and if you ever said no you got humiliated."



Muhammad and Bennett asserted that Achlioptas would also ask personal favors, some of which unsettled them.

Muhammad was in Europe for part of summer 2018. In his Sept. 1 report, Muhammad stated that in July, Achlioptas asked him to transport \$9,500 in cash from the U.K. to the U.S. and drop the money at his friend's house. Through email correspondence with Achlioptas, Muhammad expressed significant discomfort with the request to transport money overseas.

Both complainants said the lab culture made it difficult to say no to Achlioptas's requests.

"I definitely had a sense that I needed him," Bennett said. "I think a normal thing that enables patterns of abuse is that you get conditioned to have your sense of self-worth depend on somebody's behavior. And you sort of feel like you have to take on all the responsibility for their feelings and their actions."

Once, when Bennett and Muhammad were in Achlioptas's office, Bennett said he asked Achlioptas if he ever worried his students would tell the world about his behavior. Bennett and Muhammad allege that Achlioptas went on to describe family connections to a hitman who charges \$5,000 per assassination. Muhammad told this to academic employee relations director Susan Fellows in a conversation on Jan. 25.

"Dimitris said to us, 'If you ever turn on me, \$5,000 is what your life is worth,'" Muhammad said.

Bennett and Muhammad said Achlioptas may have been joking, but they both felt threatened.

## Reporting Achlioptas

Muhammad said no one in the tech industry, where he has worked for over 10 years, would have tolerated Islamophobic speech like Achlioptas's alleged terrorist comments. Within the UC, complaints like this aren't filed through a human resources department, and codes of conduct are hard to enforce.

For Muhammad and Bennett, reporting brought a host of new issues.

Faculty discipline procedures start with the Faculty Code of Conduct (FCC). The FCC outlines behavioral expectations and lays out disciplinary processes, should a faculty member violate the code. It's also one of the only UC policies that includes language that would allow a student to report the behavior of faculty as harassment, assault or abuse.



Once an FCC violation is reported, investigation and stages of deliberation by UC governing bodies mean a resolution takes months to years.

"The faculty senate has authority to discipline faculty, but the only body that has authority to fire faculty are the regents," said Isabel Dees, Title IX director at UCSC. "It's on the recommendation of the chancellor and that's why it can be years."

Survivor support coordinator at Campus Advocacy, Resources and Education (CARE) and Title IX student advisory board member Gianna Passalacqua said the FCC contains minimal language geared toward protecting students. Passalacqua said the policy creates a mutually beneficial transaction between the university and the faculty, a dynamic which tends not to prioritize students.

If a student reports an FCC violation, the complaint can be routed through one of more than 10 offices that oversee student grievance processes, including Title IX and the Dean of Students Office, depending on the content of the allegations.

In a summit this year, Title IX and other offices met to review all the grievance processes open to students.

"The fact that we just had a summit to even identify all the processes is an acknowledgement that we don't even know how many there are, there are too many," Dees said. "Can you imagine someone having to go to 12 different offices? That's not an acceptable student experience."

Muhammad reported Achlioptas first, and about four months later, Bennett followed suit.

### **Aug. 22, 2018**

After over a year working together, Muhammad notified Achlioptas that he would not be returning for a second year at UCSC.

### **Aug. 28**

Muhammad emailed Baskin School of Engineering (BSOE) dean Alexander Wolf describing numerous instances he referred to as racial, religious and sexual harassment. Muhammad also informed Wolf he would be leaving UCSC.

### **Aug. 31**

Muhammad met with a Title IX officer for the first time. On the same day, a staff member at the Title IX Office notified Muhammad she had accidentally sent an initial outreach email to Achlioptas, an email meant to be seen only by the complainant. The breach alerted Achlioptas that Muhammad had reported allegations of harassment against him.

"I found that really inappropriate," Muhammad said. "Because, let's say I had decided to change my mind and stay. Now Dimitris knows I filed a complaint and I couldn't come back at that point."

### **Sept. 1**





Muhammad filed a formal complaint against Achlioptas through the online UC whistleblower hotline.

### **Sept. 7**

The UC Student-Workers Union (UAW) 2865 submitted a separate grievance charging UCSC with violating multiple articles of the UAW's collective bargaining agreement in reference to Muhammad's case.

The alleged violations include the Title IX Office leaking Muhammad's confidential information with Achlioptas and Achlioptas's behavior creating an unsafe work environment.

UAW 2865 graduate student representative Ana McTaggart expressed their opinion that the university does not prioritize the needs of students.

"That case involves a professor allegedly harassing, along both sexual and racial lines, multiple students," McTaggart said. "I would say the university does not treat a hostile work environment seriously. They ignore cases of sexual assault and harassment."

### **Sept. 8**

In an email, Muhammad told Achlioptas that any further communications from him would not receive response.

### **Sept. 17**

Muhammad moved to another state.

### **Sept. 19**

Muhammad contacted UCSC Assistant Vice Chancellor and Chief of Staff Lucy Rojas and Dean of Students Garrett Naiman to request a full, formal investigation and grievance process.

### **Oct. 9**

During a meeting, Rojas and Naiman told Muhammad they planned to look into hiring a third-party investigator to investigate Muhammad's allegations, Muhammad said.

### **Oct. 11**

Rojas emailed Muhammad an annotated list of his allegations against Achlioptas. The mark-up was meant to form the basis for Muhammad's complaint.

Rojas classified the allegations separately as relevant to the student grievance policy, performance issues, Title IX or whistleblower. In her email, Rojas classified allegations of Achlioptas telling Muhammad to "shut the fuck up," as well as calling Muhammad a "fucking moron," "loser," "idiot," and "incompetent," as performance issues.

### **Nov. 11**



Muhammad said Achlioptas emailed him regarding a journal paper submission, despite Muhammad's Sept. 8 instruction to cease all contact. After Muhammad alerted UCSC of this, dean Alexander Wolf initiated a no contact directive.

**Nov. 26**

Muhammad submitted a formal grievance to UCSC to initiate an investigation into Achlioptas. A formal grievance catalyzes a formal resolution process — in Muhammad's case, an investigation. Muhammad's grievance outlines 24 allegations against Achlioptas with notes on the policies alleged to have been violated. It also includes a list of remedies demanded of the UC.

**Dec. 16**

Rojas, as the complaint resolution officer for Muhammad's case, sent Muhammad an email responding to allegations 1-20 detailed in the formal grievance. She dismissed allegations 21-24, stating they did not constitute violations of university policy. These allegations included other faculty members witnessing Achlioptas's alleged behavior.

Rojas urged Muhammad to file allegations 1-20 through the faculty discipline process rather than the student grievance process because the remedies sought could not be afforded by the student grievance policy. The faculty discipline process would be the only route to Achlioptas's termination — Muhammad's desired penalty.

"If a requested remedy was that a student wanted to see a faculty member fired, this policy can't do that," said Rojas, speaking generally about the student grievance policy. "So that case would be referred to the faculty conduct process because that's not something that can be affected here. [...] Some of the outcomes here really come through kind of a negotiation, like asking to retake a test, or sometimes students asked for an apology."

**Dec. 20**

Muhammad said Achlioptas tried to call him via FaceTime. Muhammad immediately notified Garrett Naiman, Rojas and BSOE dean Alexander Wolf of this violation of the no contact directive, which classifies as prohibited behavior under the Sexual Violence and Sexual Harassment (SVSH) policy.

**Dec. 21**

Muhammad revised his grievance and demanded Rojas initiate a third-party investigation. Bennett reported his allegations to Title IX and academic employee relations director Susan Fellows.

**Jan. 22, 2019**

Bennett filed a formal complaint against Achlioptas through Title IX.

**Jan. 25**

Muhammad notified Susan Fellows about the hitman reference Achlioptas allegedly made to him and Bennett. Fellows asked Muhammad if he felt unsafe, but he replied that he didn't, so Fellows didn't report to the campus police.

## Feb. 7

Fellows notified Muhammad that she had failed to redact his new home address before sharing his grievance documentation with Achlioptas. This was the second time the university breached Muhammad's confidentiality and shared personal information with Achlioptas.

"Title IX made a similar mistake when it alerted Achlioptas of my complaint, and it feels like UCSC's mistakes keep putting me at risk," Muhammad said in his response to Fellows.

## Responses to the Process

UCSC only agreed to begin a third-party investigation once Bennett came forward, Muhammad said. There are now two open investigations into Achlioptas — one Muhammad filed under the faculty discipline process and one Bennett filed under Title IX.

"When I was in this mess with Dimitris, I thought I was alone," Muhammad said. "And then [Bennett] came forward, and then I said, 'Oh, it wasn't just me.' One thing I've learned is Dimitris was awful to a lot of people. And UCSC, by saying 'be silent,' has tried to prevent people from knowing what happened to prevent them from coming forward."

Title IX Office determined that none of Muhammad's allegations constitute a violation of the SVSH policy. The university hasn't disclosed much more than that to Muhammad, he said. After Muhammad filed his complaint in September, UCSC took almost seven months to initiate interviews with Bennett and Muhammad.

As it stands now, both Bennett and Muhammad feel the university has left them in the dark.

"The process is poorly designed," Bennett said. "But more than that, I don't think there is a person on this campus who feels that it is their responsibility to deal with people like me and people like [Muhammad]."

Achlioptas is participating in the investigations while on paid leave from UCSC. His lawyer, Michael J. DeNiro, a professor emeritus in the UC system, provided comment on behalf of Achlioptas.



"The complaints filed against my client by students at UCSC were assigned for investigation to separate offices at UCSC as alleged violations of Title IX and alleged violations of the Faculty Code of Conduct. Prof. Achlioptas is participating in the investigations. My client has confidence in the integrity of due process at UCSC, and is confident that he will be exonerated when the investigations end," DeNiro said in an email that contained a longer statement.

Achlioptas was not available for comment, but he released a statement on his personal web page on May 31, 2019 in response to an article the *Mercury News* ran the previous day. In his statement, Achlioptas said he is not "anti-Muslim," stating that both his young children attend daycares run by Muslim and Pakistani women.

Achlioptas referenced both complainants in his statement.

"Several of the allegations by Student1 concern events that occurred in May 2018, during the celebration of our son's second birthday party," Achlioptas said in the statement. "Student1 was invited, along with his wife, and approximately 70 other guests. One more UCSC student was invited (not mentioned in the [Mercury News] article). Student1, his wife, and the other UCSC student were the first people to arrive at approximately 2pm. They were also the last people to leave, well past midnight."

In his statement, Achlioptas said 15 students from the most recent class he taught at UCSC nominated him for an excellence in teaching award, and that, to his understanding, this was the most nominations received among all professors teaching large classes at UCSC that year.

## Faculty Involvement

Muhammad said UCSC's handling of his and Bennett's cases is indicative of a larger, systematic issue. The UC cares more about protecting faculty than protecting students, he said.

"People like Dimitris exist because faculty, staff and administration enable them," Muhammad said. "And until faculty, staff and administration value doing the right thing over allowing predators to prey on students there will be more [Alexs] and there will be more [Skylers.] And that is the only reason I'm doing this — because I don't want any more [Alexs] and I don't want any more [Skylers]."

Nikolaos Sgourakis, an assistant professor in UCSC's chemistry and biochemistry department, worked closely with Achlioptas. Sgourakis witnessed Achlioptas call Muhammad a terrorist, according to allegation 22 in Muhammad's complaint.

Graduate students' success is often at the mercy of their advisers. Faculty advisers oversee research, connect students to mentors and projects, help them get published and sit on thesis committees. But if faculty are reluctant to condemn inappropriate behavior, the burden of speaking up falls on students.



"I wish that when I showed up to UCSC, there had been a big fucking banner hanging over the CS department saying 'here there be monsters.' I wish I had just known," said Morgan Spencer,\* a student organizer in the department and witness to Achlioptas's allegedly abusive behavior.

In late August 2018, Muhammad abandoned months of research and alerted BSOE dean Wolf of his intention to transfer out of UCSC. He now resides and studies in another state.

"I had a choice in my life between education and abuse, and for a year I chose abuse. And students shouldn't have to make that choice," Muhammad said. "And unless Dimitris is gone, more students will have to make that choice."

Being involved in an ongoing investigation of his adviser has made Bennett's road to graduation rocky. Bennett said Alex Pang, the computer science and engineering graduate program director, said it would be inappropriate for Bennett to write a thesis that contained material Achlioptas had made intellectual contributions to without Achlioptas's involvement.

Disappointed and reluctant to start a new thesis from scratch, Bennett emailed BSOE dean Alexander Wolf to ask for a thesis committee without Achlioptas. Wolf agreed, Bennett said.

But the committee had a request that Bennett found strange. They wanted him to include a subsection of the introduction in which he was to state exactly what he did on the paper and list each of his contributors, Bennett said.

## Awaiting Resolution

Campus Provost and Executive Vice Chancellor Marlene Tromp and Wolf sent out a public response to the allegations against Achlioptas on May 29. Tromp and Wolf emphasized the university's dedication to the investigations into Achlioptas's conduct.

"We understand our community's alarm that our silence on this matter signals tolerance. This is simply untrue," Tromp and Wolf said in the email. "[...] In most instances, there is also very little we can say publicly, because of the privacy rights afforded to all parties, to protect the integrity of our investigation, and to protect the due process rights of all involved."

In April, Bennett said he was concerned that some of his questions for the university remained unanswered. Because responsibility for investigations is diffused between offices and their employees, students can feel ignored and lost in administrative processes.



On Feb. 1, Title IX director Isabel Dees told Bennett the investigation would happen mostly in February and there would likely be an evidence review in March, Bennett said. Bennett heard back from an investigator in March. The investigation is ongoing at time of press.

“We have several lines of questioning with the university, things we’re trying to find out, that are months old, and will just never be answered,” Bennett said. “I really don’t know why that is. I suspect it’s that no one feels like they’re the person who’s supposed to respond to that email. I don’t even know if they’re talking about it.”

On May 31, the third-party investigator looking into Muhammad’s allegations routed through the faculty discipline process notified Muhammad the investigation had concluded. The investigator told Muhammad to direct any questions to academic employee relations director Susan Fellows.

Muhammad was not told the results of his investigation. Fellows told Bennett that the university would notify him if the executive vice chancellor decided to pursue discipline, Bennett said. He also said Fellows told him over the phone that she anticipates the discipline will be decided in one to four months.

Since reporting allegations against Achlioptas, Muhammad and Bennett’s lives have been turned upside down. They have experienced academic and emotional turmoil and are still unsure where the investigations stand.

“Any system that inherently lacks transparency is a system that will be abused,” Muhammad said. “And that’s what’s going to happen here. I don’t believe Dimitris will get a punishment that warrants what he deserves, and this system is designed to protect people who ruin lives. Dimitris has ruined my life and UCSC doesn’t care.”

**TAGS**

#DIMITRIS ACHLIOPTAS

#FCC

#TITLE IX



## Elena Neale and Anna Maria Camardo

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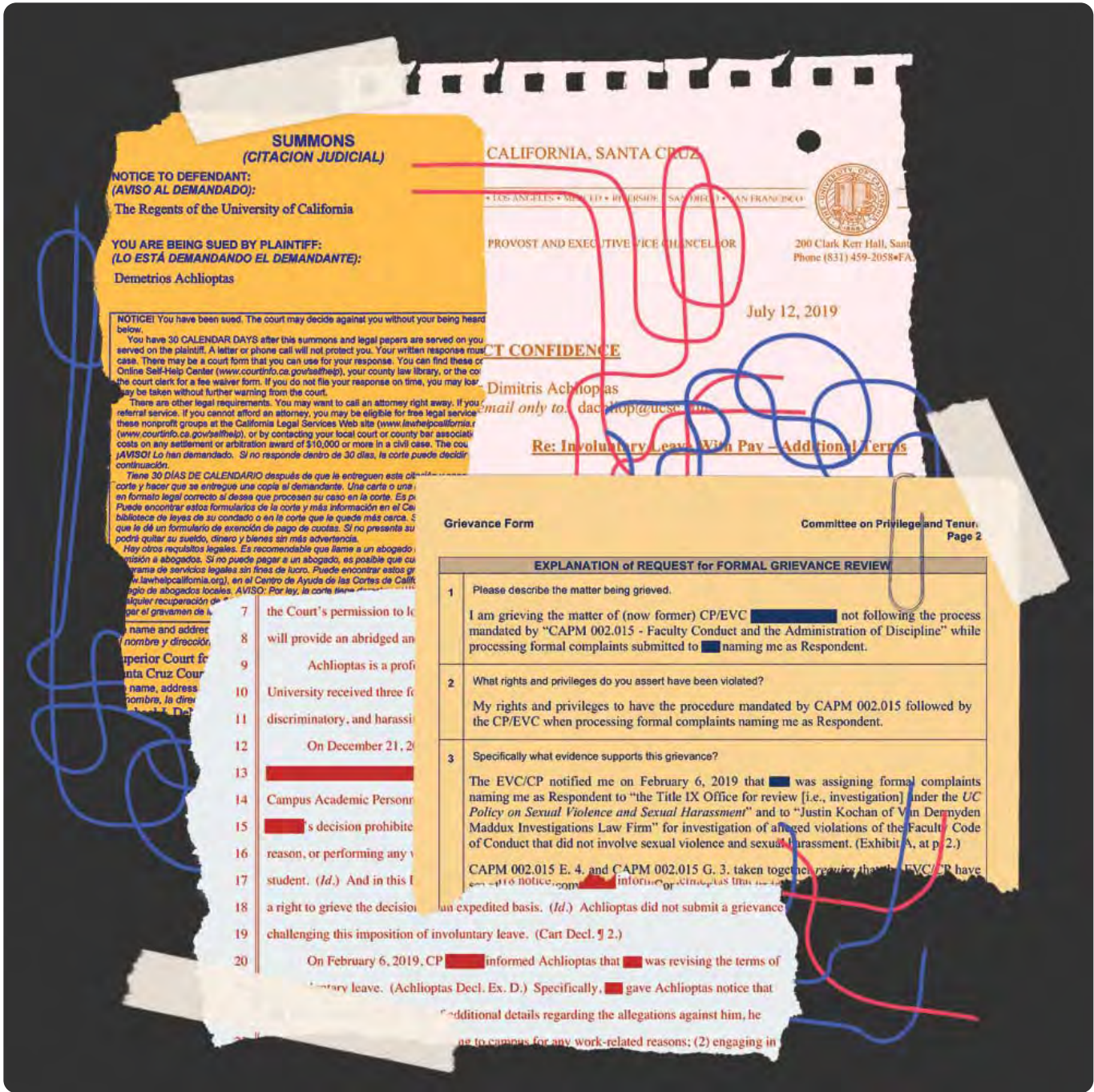


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## Investigations Into Engineering Professor Found to Warrant Discipline





Elena Neale and Anna Maria Camardo, December 5, 2019

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Updated: Dec. 6, 2019 10:55 a.m.

**Content warning:** *This article contains references to sexual and racial harassment.*

*\*A pseudonym is used to protect the source's identity*

Four hundred and sixty one days ago, Alex Muhammad\* filed a formal complaint against UC Santa Cruz computer science and engineering professor Dimitris Achlioptas through the UC whistleblower hotline.

Three hundred and seventeen days ago, Skyler Bennett\* filed a formal complaint against Achlioptas through UCSC Title IX.

The university opened investigations into the allegations against Achlioptas through the Faculty Code of Conduct (FCC) process on Feb. 6 with former UCSC graduate students Bennett and Muhammad as co-complainants. UCSC Title IX Director Isabel Dees opened a separate investigation the same day with Bennett as the sole complainant.

Since *City on a Hill Press* last reported on this case in June, Bennett's Title IX investigation and both complainants' joint FCC investigation concluded. The complainants now wait for Achlioptas to face a hearing before the Committee on Privilege and Tenure (CPT), which will begin in January.

"There's a cyclical nature to this, where part of the reason that abusive behavior perpetrated by professors can get this far is because there's just a systematic failure to correct for these things," Bennett said, "and a big part of that is making the process totally opaque and miserable, so much more than it needs to be, for complainants. It severely disincentivizes you from standing up for yourself."

## The Faculty Code of Conduct

Muhammad's and Bennett's FCC investigation concluded on May 31. Interim Campus Provost and Executive Vice Chancellor (CP/EVC) Lori Kletzer initiated disciplinary action against Achlioptas on Sept. 20.

Muhammad filed a revised grievance to UCSC on Dec. 21, 2018 alleging that, on multiple occasions, Achlioptas called him a terrorist. The grievance alleged Achlioptas made additional derogatory comments related to Muhammad's race and religion.

Two investigations into UC Santa Cruz professor Dimitris Achlioptas concluded and a new one opened. Another UCSC faculty member is under investigation for retaliation against a complainant regarding the investigations into Achlioptas. As hearing dates approach, complainants are hoping for justice within a convoluted process.



The Committee on Charges issued a report on July 8, 2019, finding probable cause that Achlioptas had engaged in research misconduct, verbally abusive and coercive behavior toward students and harassing and discriminatory behavior toward students.

In response to the committee's report, Kletzer wrote to Achlioptas on July 12 informing him of additional terms to his involuntary leave notice issued by the former CP/EVC on Feb. 6 to prevent Achlioptas from setting foot on the UCSC campus or contacting students. The former CP/EVC granted Achlioptas an exception to communicate with four graduate students he was advising.

In her July 12 letter, Kletzer revoked this exception. Kletzer also alerted Achlioptas he was no longer permitted to serve as principal investigator for four grants in which he is named, limiting his research activity. The complainants said the university never notified them about this decision.

"There's very little feedback back to complainants in the Faculty Code of Conduct. I say that descriptively, not to endorse," Kletzer said. "[...] The critical issue here is, in a process that hasn't come to a conclusion, you have to watch the information that you reveal because it can be revealed with prejudice. And that's the tricky place here, is the prejudicial nature of potential information sharing."

Kletzer said she had conversations with students and administrators about meeting with the Academic Senate to discuss the points at which complainants receive information throughout the FCC process.

Academic Employee Relations Director Susan Fellows emailed both complainants on Sept. 20, stating Kletzer initiated disciplinary action because the investigation found probable cause that Achlioptas violated the FCC. Neither Bennett nor Muhammad has seen the investigator's full report related to their FCC case.

"The best way to guarantee due process and ensure a process is fair is through transparency where what is done is visible to all the relevant parties," Muhammad said. "[...] Any process that lacks transparency is one that is likely to be unfair, and I only hear about due process from the university when they're talking about people with power. I never hear about my due process rights."

Both complainants have been called to testify at a hearing for Achlioptas in front of the CPT. The hearing dates are set for Jan. 24 and 27 and Feb. 3, 7 and 10. At time of press, neither complainant has committed to testifying.

Achlioptas declined to provide comment for this story.

"I want to participate in a process that brings justice," Bennett said. "But I need to have confidence in that process."

When complainants agree to testify, they also agree to be cross-examined by the defendant's attorney. Muhammad said he worries cross-examination will make him a target of personal attacks, which could have lasting impacts on his emotional well-being and mental health.



"One thing I've learned from recent news is, when the facts aren't in question, [the opposition] attack[s] the witness," Muhammad said. "I'm only going to expose myself to this if the process is reasonable."

## Title IX

Compared to the FCC process, Title IX offers more opportunities for complainants to review evidence.

Bennett received the Title IX report and notice of outcome for his case on July 17. Achlioptas's attorney, Michael J. DeNiro, emailed Muhammad's and Bennett's attorney, Latika Malkani, later that day urging her to advise Bennett not to disclose the contents of the report. Bennett didn't disclose the contents of the report to *CHP*, but he said he was relieved by the outcome of the investigation.

"It is really surreal to see the worst moments of your life being analyzed with respect to policies, all based on a variety of evidence and testimony," Bennett said. "It's a relief to be done with one part of the process, but I always understood that the end of the investigation would not mean the end of this chapter of my life."

Academic Employee Relations Director Susan Fellows emailed Bennett on Sept. 19 notifying him that Kletzer initiated disciplinary action after the investigation found a preponderance of evidence that Achlioptas violated the Sexual Violence and Sexual Harassment (SVSH) policy.

In his grievance from Dec. 21, 2018, Muhammad alleged that Achlioptas asked him if he performs oral sex on his wife, told him to fulfill certain research requirements so Achlioptas could "show how big [his] dick is" and falsely outed another student as gay with the intent of humiliating that student.

On Feb. 4, 2019, Chief Campus Counsel Lorena Peñaloza notified Muhammad that the UCSC Title IX office determined none of his allegations against Achlioptas met the prima facie requirement for a violation of the SVSH policy.

On June 21, UCSC Title IX Director Isabel Dees emailed Muhammad notifying him that she reversed her office's previous prima facie decision. The reversal entitled Muhammad to formal complaint resolution options under UCSC Title IX.

"It is my understanding that you gave indication to our office in August 2018 that you did not wish to be a complainant in a Title IX process," Dees said in the email. "At that time our office provided you with referral to other grievance processes with authority to respond to the vast majority of your concerns. Further, our

office indicated to you that we desired to address the concerns you shared that related to Title IX following the conclusion of your selected grievance process.”

In a response to Dees’s email, Muhammad said he had repeatedly requested to be a complainant, beginning in August 2018.

Dees was not able to discuss the details of the case or, despite multiple requests, provide comment for this story.

UC systemwide Title IX opened an investigation into Muhammad’s allegations on Oct. 3 at Dees’s request.

“I appreciate that systemwide Title IX has opened an investigation into my allegations and I remain hopeful of as fair an outcome as possible,” Muhammad said. “However, the fact that it took 13 months to open an investigation in the first place is an inherently unfair and unacceptable process.”

## ***Demetrios Achlioptas v. The Regents of the University of California***

Achlioptas challenged the integrity of the investigations into his behavior on multiple occasions.

Achlioptas first submitted a grievance to the CPT on June 18, arguing that the former CP/EVC hadn’t correctly followed the process as mandated by the FCC when processing formal complaints naming Achlioptas as the respondent.

He argued that the former CP/EVC’s decision to initiate Title IX and FCC investigations before forwarding the complaints to the Committee on Charges failed to adhere to the Campus Academic Personnel Manual (CAPM) pertaining to the FCC process.

Before Achlioptas filed his grievance with the CPT, his attorney, Michael J. DeNiro, emailed Interim CP/EVC Lori Kletzer asking her to discard the report compiled by the investigator in the FCC case and ask the Title IX investigator to stop his investigation without preparing a report. DeNiro cited the alleged CAPM violation as grounds for nullifying the results of the concluded investigations.

DeNiro further requested that Kletzer only initiate any new investigations after the Committee on Charges recommends that she do so.

CPT Chair Jorge Hankamer replied to Achlioptas’s grievance on June 28 in a letter.

“We do not find that the CP/EVC has failed to follow any required procedure in your case,” Hankamer wrote to Achlioptas.

On July 1, Achlioptas filed a lawsuit against the UC Board of Regents with the Superior Court of the State of California, County of Santa Cruz (Civil Division).



In his lawsuit, Achlioptas petitioned for a writ of mandate and a complaint for injunctive relief against the regents — which would prevent the university from moving forward with the investigations into Achlioptas's alleged violations of Title IX and the FCC.

"Achlioptas does not challenge the facts or reasoning behind the University's decisions. Instead, he seeks to delay the underlying administrative process indefinitely with contrived and hypertechnical demands that serve no proper purpose," said Jean-Paul P. Cart, attorney for the regents, in the formal opposition to Achlioptas's petition. "Achlioptas has failed to meet his burden and his Application should be denied."

Judge John Gallagher denied Achlioptas's request for injunction on Sept. 4.

"The court finds that Petitioner has not met his burden of demonstrating a reasonable probability of success on the merits, or the risk of irreparable injury," Gallagher wrote in his decision. "This application for a preliminary injunction is therefore denied."

## New Investigation into Faculty Retaliation

Based on a complaint by Muhammad, systemwide Title IX opened a formal investigation on Oct. 29 related to allegations of retaliatory conduct by professor emeritus Manfred Warmuth regarding the ongoing investigation into Achlioptas.

Muhammad emailed Baskin School of Engineering Dean Alexander Wolf and systemwide Title IX Deputy Director Kendra Fox-Davis on Sept. 27 alleging Warmuth persistently attempted to contact him asking him to show leniency regarding discipline against Achlioptas.

"One professor pressuring a student regarding another faculty member's discipline is inappropriate and unethical," Muhammad wrote in his email to Wolf and Fox-Davis. "[...] My relationship with Prof. Warmuth was my last academic link to UCSC. By reporting this misconduct, I know that link is broken, and I have now lost everything I had at UCSC. Please remember the cost victims pay when we come forward."

In his Sept. 27 email, Muhammad cited seven times that Warmuth allegedly attempted to contact him via email and Skype, beginning on July 30.

During the only Skype call Muhammad answered, Warmuth allegedly told Muhammad he met with Achlioptas in person prior to the call, which, if true, would violate the terms of Achlioptas's involuntary leave notice. In one email, Warmuth told Muhammad to consider Achlioptas's family when pursuing discipline.

"Them having a family has nothing to do with how this process should play out, because I can tell you nobody at UCSC has ever considered my wife in this process and the cost that us having to live in different states has taken on her life and her well-being mentally and emotionally and nobody has even expressed sadness or sympathy or empathy," Muhammad said. "But speaking generally, faculty have this [...] mentality that they protect each other, and I find it disgusting."

## Recent Events



Muhammad's wife, Sally Daley,\* said Achlioptas arrived in person at the lab where she works at San Jose State University on Nov. 1.

"Around 4:15, I heard a knock on the door," Daley said. "I walked over to the door, opened the door and I didn't see anyone right away [...] and then a face popped up from behind the door so I saw his face and his shirt, and [...] in that split second I recognized him."

Daley said she was "freaked out" and wondered why Achlioptas would be there. She said she immediately texted Muhammad about what happened. Muhammad then sent an email detailing the incident to systemwide Title IX Deputy Director Kendra Fox-Davis and Dean of Students Garrett Naiman.

Around 7 p.m. that day, a lab member sent an email to the rest of the lab stating that Achlioptas attempted to find Daley earlier that afternoon. The email included photographs of Achlioptas and instructed others not to let him into the lab or answer any of his questions.

Daley said the incident has since impacted her daily life at SJSU.

"We have to be careful to keep the door closed all the way, all the doors are locked," Daley said. "Every Friday when I'm teaching, one of my colleagues from the lab is there with me because my PI [principal investigator] is also stressed out, she saw him apparently. I have to call campus police every time I have to go to my car. When I park I am always looking over my shoulder, when I walk, I am always looking over my shoulder. It's scary."

Fox-Davis sent Achlioptas an email on Nov. 4 alerting him that she had received reports he had attempted to contact Daley at SJSU. Fox-Davis referenced an Oct. 11 no-contact directive UCSC Title IX Director Isabel Dees sent Achlioptas prohibiting him from communicating with complainants directly or through a third party.

"This conduct, if true, may violate the No-Contact Directive and/or warrant a separate investigation," Fox-Davis said in the email. "We urge you to abide by the parameters of the No-Contact Directive and cease any attempt [to] contact the Complainant, including through his spouse."

On Nov. 7, Dees issued an additional no-contact directive between Achlioptas and Daley due to reports from Nov. 1.

Systemwide Title IX issued a revised letter to Muhammad on Nov. 19 stating the investigation into Achlioptas expanded due to the new reports of Achlioptas's visit to Daley's workplace. The investigation is expected to conclude within 90 business days of its Nov. 19 expansion.

On Dec. 3, Interim CP/EVC Lori Kletzer sent a letter of admonition to Achlioptas in which she stated that Achlioptas's attempts to contact Daley at her workplace violated Dees's Oct. 11 directive.





"This alleged failure to comply with a directive from Director Dees interferes with the University's ability to carry out its obligation to conduct the Title IX investigation in a timely, effective, and neutral manner," Keltzer wrote in the letter. "The purpose of this letter is to admonish you for that action."

Kletzer added that failure to adhere to the terms and conditions issued by campus and systemwide Title IX may create independent grounds for disciplinary action.

On Dec. 6, after time of press, Achlioptas requested *CHP* include the following comment.

"I sincerely apologize to the wife of my former graduate student for recently trying to reach out to her in person. It was a terrible mistake of judgement on my part that I deeply regret. I realized my mistake as soon as she opened the door to her lab after I knocked. Embarrassed by my conduct, I mumbled 'I am sorry' and walked away," Achlioptas wrote in an email. "I am truly sorry for the distress I caused."

*Correction: The original version of this article stated Judge John Gallagher dismissed Demetrios Achlioptas v. The Regents of the University of California on Sept. 4. It has since been corrected to read that Judge John Gallagher denied Achlioptas's request for a preliminary injunction on Sept. 4.*

**TAGS**

#DIMITRIS ACHLIOPTAS

#FCC

#TITLE IX

**Elena Neale and Anna Maria Camardo**

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*Campus*

# Engineering Professor Dimitris Achlioptas Resigns



Elena Neale and Anna Maria Camardo, January 30, 2020

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*\*A pseudonym is used to protect the source's identity.*

Dimitris Achlioptas resigned from his position as UC Santa Cruz computer science and engineering professor in December 2019.

Achlioptas' resignation came in the wake of two investigations into Faculty Code of Conduct (FCC) and Title IX policy violations. Investigations concluded in May and July 2019, respectively.

"I can't say what changed," said complainant Skyler Bennett.\* "I wish he had done this earlier so that I didn't have to spend a year of my life trying to be heard and be believed."



Illustration by Ryan Tran

The university opened an FCC investigation into

Achlioptas' behavior on Feb. 6, 2019 with Bennett and Alex Muhammad,\* two former graduate students who worked under Achlioptas' advisement, as co-complainants. The Title IX office opened a separate investigation with Bennett as the sole complainant the same day.

As *City on a Hill Press (CHP)* previously reported, Muhammad's and Bennett's FCC investigation concluded on May 31. UCSC's Committee on Charges issued a report on July 8, finding probable cause that Achlioptas engaged in research misconduct, verbally abusive and coercive behavior toward students and harassing and discriminatory behavior toward students.



Bennett received the report and notice of outcome for his Title IX investigation on July 17. He did not disclose the results of the investigation to CHP, but said he was relieved by the outcome.

Muhammad's and Bennett's attorney, Latika Malkani, said she received notice in January 2020 from a UCSC representative that Achlioptas resigned in December. Both complainants say they have not received any direct notification of Achlioptas' resignation from UCSC administration.

"It's an in-progress personnel matter and having characterized it as that I am not at liberty to share anything," said interim Campus Provost and Executive Vice Chancellor (CP/EVC) Lori Kletzer.

Achlioptas declined to comment for this story.



Illustration by Ryan Tran

Throughout the reporting and investigation processes, both complainants grew frustrated with what they understand to be a convoluted and imprecise university protocol for handling complaints.

"Dimitris resigning, while it's important, doesn't change the root causes of why this was such an arduous and painful and drawn out process," Muhammad said.

## Hearing Dates Came and Went

After both investigations concluded, the Committee on Privilege and Tenure (CPT) scheduled hearing dates for Jan. 24 and 27 and Feb. 3, 7 and 10 of this year. The role of the CPT is to make a disciplinary recommendation to the chancellor.

Muhammad, Bennett and their attorney, Latika Malkani, told *CHP* the university never gave them more information about the hearing after the initial notification.



As Jan. 24 approached, Bennett grew anxious because he hadn't heard anything from the university. He had expected to be prepped by UCSC's external counsel ahead of the first hearing date, since both he and Muhammad had been asked to testify.

Bennett received a text from Malkani on Jan. 10 saying Achlioptas resigned.

Neither Bennett, Malkani nor Muhammad knew what the resignation meant for the status of the hearing. Without any word from the university, they operated under the assumption that the hearing had been cancelled.

"I do not believe they are proceeding as originally scheduled," Malkani said.

When *CHP* asked why the university never notified the complainants about changes in the CPT hearing process, interim CP/EVC Lori Kletzer said she didn't know the complainants hadn't been informed.

"You have now informed me that they have said they were not informed. That's not something that I was informed of," Kletzer said. "I'm not confirming that they weren't notified, what I'm hearing from you is the first that I have heard that. And again, they are freer to comment than we are, so my answer is really I don't have an answer."

Both complainants want to make sure Achlioptas' resignation doesn't sweep systemic flaws under the rug. They've emphasized there are still conversations to be had about how the reporting process can be revised with complainants in mind. Neither is content to accept that the process they experienced is the process others will have to go through.

"The fact that UCSC has us participate in the process and then largely kept us in the dark as developments occurred indicates how little they valued our participation," Muhammad said, "and it is indicative of them seeing us as tools and not people."

Dimitris' behavior was horrible and was really harmful to me and to other people. And that's disturbing, and that's something I felt I needed to address somehow or do something about. But it's frankly not as disturbing as the experience of reporting and seeing how the system works.

I still feel like I'm missing so many answers about how and why so many things went unaddressed, unnoticed, unfollowed up on, why the university did and didn't do some of the things that it did throughout this process, and how this can be made better. Dimitris is just a person, but the university is this whole piece of machinery.

I can sort of reason about one person behaving maliciously toward another, and I feel like I can also forgive someone who mistreats me, but you can't really forgive an institution and it feels like that battle is far from being over. Even if Dimitris' active role in this story is done, I still feel like there's a really urgent need for the university to sincerely listen to people who have been through these processes, to seriously acknowledge what they've done wrong and the cost of their failures and to try to implement meaningful changes that will prevent these things from happening."

— **Skyler Bennett,\***  
complainant





## Elena Neale and Anna Maria Camardo

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### **Examples of university sexual harassment policies and compliance offices:**

#### **University of Oklahoma**

- Sexual Misconduct Policies - <https://www.ou.edu/eoo/policies>
- Institutional Equity Office - <https://www.ou.edu/eoo/institutional-equity-and-title-ix-office>

#### **California State University**

- CSU Title IX Policies - <https://www2.calstate.edu/titleix/Pages/policies.aspx>  
(Note: [Executive Order 1095](#), listed on the page cited above, includes requirements for mandatory training for students, faculty and staff)
- CSU Title IX compliance offices - <https://www2.calstate.edu/titleix>

#### **University of California**

- UC Sexual Harassment and Sexual Violence Policies - <https://sexualviolence.universityofcalifornia.edu/policies/>
- UC Systemwide Title IX Office - <https://www.ucop.edu/title-ix//index.html>
- UC required training in sexual harassment prevention and response - <https://sexualviolence.universityofcalifornia.edu/education-training/>

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### **Legislative and other state mandates related to sexual harassment/violence prevention and response**

- California Fair Employment and Housing Act - <https://www.dfeh.ca.gov/legalrecords/#law>
- CA SB-1343 Employers: sexual harassment training: requirements - [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB1343](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1343)
- California State Auditor Report 2013-124 (Summary Report) - Sexual Harassment and Violence: California Universities Must Better Protect Students by Doing More to Prevent, Respond to, and Resolve Incidents - <https://www.auditor.ca.gov/reports/summary/2013-124>

**Co-Opted Compliance: How Men’s Rights Groups Shape the Meaning of Title IX in Universities (1972-2020)**

**ABSTRACT**

Drawing from the theory of legal endogeneity, this article offers a field-level analysis of how progressive social movements, organizations, and conservative counter-movements shape the meaning of Title IX anti-harassment laws in U.S. universities. In order to accomplish this, I construct a genealogy of amendments in Title IX law and school-level policy at the University of California (UC). I supplement this data with 16 key informant interviews with UC Title IX staff. I advance knowledge on how legal and social movement strategies employed by feminist movements and Title IX administrators rendered Title IX susceptible to what I call “co-opted compliance” by the men’s rights movement. I develop conditions under which co-opted compliance is most likely to occur and offer suggestions for future research.

Key words: Title IX, campus sexual assault, sexual harassment, legal endogeneity, co-opted compliance

## INTRODUCTION

Alongside the popularization of the #MeToo movement, the United States has also seen shifts in Title IX law that decenter the priorities of survivors of sexual harassment and sexual violence (SVSH). Left wing media often suggest that once the conservative Trump administration appointed Education Secretary Betsy DeVos, progressive aspects of the law written by the Obama administration were quickly gutted (see for example: Grayer and Stracqualursi 2020). In regards to Title IX sexual harassment laws, however, little academic scholarship has systematically examined how different stakeholders – or “field actors,”<sup>1</sup> as I will refer to them – have shaped Title IX over time, and in particular, how they may have enabled or hindered one another from shaping the meaning of the law. Through a “genealogy of law,” (Grattet and Jenness 2005), I investigate how various field actors use the formal law to shape university-level Title IX policies on formal investigation procedures for peer sexual harassment in the University of California (UC). I identify three main groups of actors who shape changes in Title IX law on sexual harassment investigations: feminist survivor activists, Title IX administrators, and men’s rights groups<sup>2</sup>. I characterize each group more in-depth in the Findings section below.

I draw from the theory of legal endogeneity (Edelman 2016) in order to try to understand how various field actors shape Title IX in the face of ambiguous written law. In this paper, I make contributions both to scholarship on how Title IX laws are constructed, as well as to socio-

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<sup>1</sup> The term “field actors” draws from sociological literatures on actors who exist in organizational, social movement, and legal fields. See “Field Level Analysis” section of this paper for more information.

<sup>2</sup> An important distinction should be made between men’s rights groups and respondent’s rights groups. Although both groups argue for some of the same provisions, men’s rights groups are distinctly anti-feminist, and form men’s rights organizations. Respondents’ rights advocates may not necessarily form organizations. Some are professors at high profile universities. Many have called themselves feminists and believe in defending due process rights and fair administrative processes (see for example: Kipnis 2017).

legal theory on the relationship between law, organizations, and social movements. First, I contribute to knowledge on Title IX sexual harassment law in three main ways: 1) I identify the origins of changes in formal law and university-level policy on how Title IX investigation procedures for peer harassment are constructed; 2) I describe the key actors, dominant institutions, and various logics involved in shaping the meaning of Title IX law nationally; and 3) I theorize how these key field actors enabled and hindered one another in shaping Title IX. Second, I contribute to theory on the relationship between law, organizations, and social movements by highlighting how behavior by feminist survivor activists and Title IX administrators *preceding* activity by men's rights groups rendered the legal field susceptible to co-optation by the men's rights movement. Most importantly, I introduce a new concept called "co-opted compliance," which is when a counter-movement shapes the meaning of formal law, overshadowing the interests of both organizations and the progressive social movement that fought for the law in the first place. In the Discussion section, I provide the conditions under which co-opted compliance of civil rights laws in higher education is most likely to occur. Finally, I conclude by discussing directions for future research.

## THEORETICAL CONSIDERATIONS AND CONTRIBUTIONS

### *Legal Endogeneity Theory and Symbolic Compliance*

The theory of legal endogeneity demonstrates how organizations influence the meaning of Title VII<sup>3</sup> workplace anti-discrimination laws (Edelman 2016). Signaling attention to ambiguous civil rights law, organizations adopt anti-discrimination policies and procedures that center managerial priorities (Edelman 2016). Courts defer to the existence of these policies as

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<sup>3</sup> Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex and national origin.



evidence of non-discrimination – a process known as “judicial deference” (Edelman, Uggen and Erlander 1999; Edelman et al. 2011; Edelman 2016). Work by Albiston (1999) also shows how organizations use strategic settlement behavior in social reform laws like Title VII to control the content of law and create precedent favorable to their interests (see also: Galanter 1974).

Typically, these processes negatively affect survivors’ rights mobilization both within the organization’s internal grievance processes (Marshall 2005) and in court against their employer (Albiston 1999, Edelman 2016).

Addressing these problems, Edelman (2016: 3) says that we have become “a symbolic civil rights society: one in which symbols of equal opportunity are ubiquitous and yet often mask discrimination and help to perpetuate inequality.” In her work, she articulates a concept that she calls “symbolic structures,” policies or procedures that are infused with value irrespective of their effectiveness (Edelman 2016: 5). She explains that symbolic structures exist along a continuum from “*symbolic and substantive*, meaning that they signal attention to law and are effective at achieving legal ideals, to *merely symbolic*, meaning that they are ineffective at achieving legal ideals but retain symbolic value” (Edelman 2016: 5).

Scholarship on the theory of legal endogeneity (Edelman 2007, 2016) and the symbolic compliance concept (Edelman 1992, 2016; Edelman and Petterson 1999) are widely cited, but, as I show in this article, do not entirely explain why sexual harassment laws are ineffective in the Title IX context. Research on Title VII did not explore the role of possible counter-movements in shaping the meaning of the law, which is a main theoretical contribution of my work. Further, in the Title VII context, many organizations’ responses to civil rights law were “merely symbolic,” especially given that they were constructed by HR professionals who drove the “managerialization” of anti-discrimination policies (Edelman, Fuller, and Maria-Drita 2001;

Edelman et al. 1991). In contrast, I show how Title IX staff in the UC attempted to construct investigation procedures that were both symbolic and substantive, but their attempts were undermined by the men's rights movement. I suggest that "co-opted compliance," more than "merely symbolic compliance," better helps to explain why sexual harassment investigation procedures were rendered ineffective in reducing SVSH in the UC.

*Applying Legal Endogeneity Theory and Symbolic Compliance to Title IX*

Because Title IX laws were modeled after Title VII laws in many ways (Edelman and Cabrera 2020; DOE 2011; Miller 1995), research aiming to understand why Title IX laws are ineffective in reducing sexual harassment draw lots of comparisons between the Title IX context and what Edelman found in the Title VII context. One of the most important recent statements about sexual harassment comes from a 2018 report by the National Academies of Sciences, Engineering, and Medicine (NASEM 2018) titled *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine*. It lists symbolic compliance to Title IX as a major factor that enables ongoing sexual harassment in academia:

An increased focus on symbolic compliance with Title IX and Title VII has resulted in policies and procedures that protect the liability of the institution but are not effective in preventing sexual harassment... Fortunately, if there is a will among campus leaders to reduce and eliminate sexual harassment, there are policy and programmatic paths forward to achieve that goal (NASEM 2018: 4).

Other academic works have analyzed the "managerialization" of Title IX laws and the ways in which schools may be merely symbolically compliant to Title IX law (Gualtieri 2020; Pappas 2016; Albrecht and Nielsen 2020). However, these studies have yet to map the field of all the different possible actors that shape Title IX, going beyond an analysis of how organizations

shape law. They have yet to examine how feminist survivor activists and counter-movements like the men's rights movement have been able to shape Title IX over time. In this article, I begin to map the field of various social actors involved in shaping Title IX law and examine the processes and mechanisms by which they shape law over time.

*The Relationship Between Law, Organizations, and Social Movements*

Neo-institutional literature in sociology explores how organizations shape law, with a particular interest in how organizations shape the meaning of law that is meant to regulate them (Albiston 1999; Dobbin and Kalev 2017: 808–828, 2018, 2019; Dobbin, Schrage, and Kalev 2015; Dobbin et al. 2011; Edelman 2016, 1992; Edelman et al. 2011; Edelman and Talesh 2011; Kalev et al. 2006; Kelly and Dobbin 1999; Marshall 2003, 2005; Selznick 1948; Talesh 2009, 2012, 2014, 2015). Other sociological studies address the relationship between law, organizations, and social movements (Edelman, Leachman, and McAdam 2010). Since the publication of *Social Movements and Organizational Theory* (Davis et al. 2005), many organizations theorists – often with social movements scholars – have explored the intersection of organizations and social movements. My work builds on a tradition that follows the work of Davis et al. (2005) in bringing social movements and organizations scholarship together (see, for example, Davis and Thompson 1994; Davis and Zald 2005; Lounsbury, Ventresca, and Hirsch 2003; Morrill, Zao, and Rao 2003; Schneiberg, King and Smith 2008).

Some scholars have examined the role of social movements in shaping how Title IX laws are adopted and implemented in schools. Short (2005) shows how feminist social movements informed K-12 schools' implementation of Title IX anti-harassment policies in the 70s and 80s before the courts ruled that schools can be found liable for peer sexual harassment. Katuna and Holzer (2016) show how feminists shaped how survivors mobilized early Title IX sex

discrimination laws through legal education, examining pamphlets created by feminist organizations from 1978-1980. Much less is known about how various groups shape Title IX, especially over the last decade, from 2010-2020, and in particular, how they shape investigation processes for SVSH in universities. I also offer a novel perspective to the literature on law, organizations, and social movements by examining how behavior of feminist survivor activists and university administrators *preceding* mobilization by men's rights groups enabled the men's rights movement to co-opt Title IX law.

### *Field-Level Analysis*

Organizational theorists are interested in studying organizational fields, referring to “organizations that, in the aggregate, constitute a recognized area of institutional life key suppliers, resource and product consumers, regulatory agencies, and other organizations that produce similar services and products” (DiMaggio and Powell 1983). The term “field” incorporates social movements and legal institutions as well (Edelman et al. 2010). Social movement fields are constituted by actors, including organizations, individual activists, and sympathetic politicians who seek change in social institutions (Armstrong 2002; Levitsky 2007). Legal fields are constituted by lawyers and their professional organizations (courts, administrative bodies, and legislatures) in which they operate, and the everyday people who implement legal requirements and ideals (Bourdieu 1987; Edelman et al. 2001; Edelman 2007). More recent scholarship examines the “interorganizational field” – a population of organizations within a particular market or other social sphere that are engaged in similar work (Scott 1992; Edelman et al. 2001; Stryker 2000; Grattet and Jenness 2005).

New institutional scholars use field-level analysis as a way of theorizing the process through which a field shapes the culture and behavior of organizations within the field. Field

level analysis can be achieved using a variety of methods, both qualitative and quantitative. Using qualitative methods, the relationship between legal, organizational, and social movement fields can be traced by analyzing the language and behavior that different field actors within each field employ, and by coding to identify their prerogatives in written formal laws and organizational policies and practices over time. In his investigation of how automobile manufacturers (the organizational field) shape the meaning of consumer protection laws (the legal field), Talesh (2012, 2015) examines the meta-linguistic frames (Mertz 2007; Conley and O’Barr 2005; Talesh 2012) of various field actors and traces them through amendments in consumer protection laws in two states. Edelman’s theory of legal endogeneity is based on a field-level analysis that focuses on how organizational fields and legal fields shape one another in the construction of various Equal Employment Opportunity policies and practices. In this article, I conduct a field-level analysis of the relationship between social movement, organizational, and legal fields in examining how Title IX SVSH laws are constructed in universities.

#### GATHERING DATA, ANALYSIS, AND CASE SELECTION

In order to theorize how various field actors contributed to men’s rights’ co-optation of Title IX, I created a “genealogy of law,” a method used to trace legal constructs – such as definitions and other legal concepts – in laws and policies over time (Grattet and Jenness 2005). The goal of a genealogy of law is to keep record of the key producers, the point of origin, and the destination of each change in a law or policy (Grattet and Jenness 2005). I began the research with the following question: how do various field actors use the formal law to shape university-level Title IX policy on formal investigation procedures for peer harassment in the University of

California from 1972-2020? Answering this question required two levels of genealogy. The first was a genealogy of policies and procedures on peer harassment in the UC, which I gathered from 1981-2020. The second was a genealogy of the formal law on Title IX that may have motivated changes in the policy. I gathered relevant legal documents on Title IX from 1972, the year of publication of the original federal Title IX statute, through 2020. I simultaneously collected 16 key informant interviews from Title IX staff in the UC, who helped inform me about important changes in investigation policies and procedures from 1981-2020, relevant laws that contributed to these changes, and insight into the key field actors who pushed for these changes. Below I describe how I gathered these three types of data, and how I analyzed the data through multiple rounds of coding and reflexive memo writing.

#### *Gathering Data*

##### i. UC Policies (1981-2020)

With the help of Title IX staff in the UC, I compiled past university-level policies and procedures on sexual harassment from 1981-2020. Within this time frame, I identified 12 years in which there was a new sexual harassment policy published. 8 different versions of the Title IX policy were published between 2010 and 2020. I also had access to archival documents from Title IX staff that included flowcharts demonstrating procedures for investigations in different years, as well as worksheets that succinctly described changes in policies and procedures. These documents were originally intended to educate community stakeholders on changing Title IX procedures, but they served as an important tool for my analysis.

##### ii. Formal Law on Title IX (1972-2020)

Title IX is a complex law that is constructed via federal statutes from Congress, statutes in state legislatures, administrative documents from the Department of Education, and case law

in the courts. I wanted to understand which of these many laws could help me understand the legal origins of investigation policies and procedures in the UC, as well as how various field actors used the formal law to bring about changes in investigation policies and procedures in the UC. Studying changes in law that, in turn, affected changes in the UC – and not all schools – helped me narrow my focus, and enabled me to conduct an in-depth qualitative content analysis of different types of legal documents. This also helped to control for different dynamics across different types of schools (for example, religious or private), and different state-level dynamics.

For federal statutes, I analyzed the original 1972 statute on Title IX (42 U.S.C. §§1681) and tracked changes in its implementing regulations over time (34 C.F.R. Part 106). I researched state statutes related to Title IX in the California State Assembly, although I did not find that they had much of a role in shaping how investigation procedures are constructed in schools. Next, I gathered administrative documents from the Department of Education’s Office of Civil Rights. These documents included dear colleague letters, guidances, question and answer documents, OCR case processing guides, a notice of proposed rulemaking on Title IX, a public comment submitted by the UC during the open notice and comment period for the proposed rule, and the Final Rule to the proposed rule. I also analyzed an OCR investigation against UC Berkeley. Finally, I studied case law on Title IX by examining eight survivor (or complainant) lawsuits against the UC, and six men’s rights (or respondent) lawsuits against the UC. Key informants I interviewed also pointed me to three other men’s rights lawsuits in California that affected how they constructed their policies and procedures for investigations. I examined six respondent cases in total. I used Westlaw to study the history of schools’ liability under Title IX. And, I accessed case summaries on Title IX cases nationally from the National Association of College and University Attorneys listserv, released weekly from March 2020-June 2020. For

federal statutes, state statutes, and documents from OCR, I gathered documents from publicly available online archives. For OCR complaints against the UC, I found documents publicly available on UC websites. For case law, I used Westlaw, an online legal research tool.

### iii. Key Informant Interviews (2020)

I interviewed 16 key informants, consisting of Title IX staff from two campuses in the UC. I prepared a semi-structured interview guide for each interview, but also allowed time for open-ended discussion with key informants. Participants guided me on what laws and policies to investigate, as well as which field actors fought for changes in these laws. Key informants helped me understand when a change in UC investigation policy happened because of a change in law, or if it happened for some other reason, such as because of a protest, or the implementation of a task force. I also asked key informants about their own personal values, their views on how laws were constructed and implemented, and their moral stake in Title IX administrative work. I interviewed participants anywhere from one to three hours, with an average of about 2.5 hours per participant. I contacted participants a second time if I needed help gathering more information, or had follow up questions regarding our interview. I recorded and transcribed interviews for coding, removing identifying information like names from transcript data. In the Findings, I omit the names of the campuses I recruited from as well as any identifying information about key informants in order to protect the anonymity of my participants.

### *Data Analysis*

In order to construct the genealogy of Title IX policy in the UC and the genealogy of formal law, I conducted two rounds of coding. In round 1, I traced changes in Title IX policy and Title IX law across 9 items:

- The definition of “sexual harassment” and “sexual violence”



- Requirements for staff trainings
- Responsibilities and tasks of Title IX officers in investigations
- Laws on whether parties in a Title IX investigation are allowed to bring representation (advisers/ lawyers)
- The use of hearings; both indirect and live hearings
- The use of cross-examination
- The standard of evidence
- The deliberate indifference standard
- The definition of “discrimination on the basis of sex”

In round 2, I coded for the different field actors who fought for the changes. I wrote reflexive memos throughout the coding process. My goal was to describe the key actors, dominant institutions, and various logics involved in shaping the meaning of Title IX law nationally. In doing so, I identify feminist survivor activists, university Title IX administrators, and men’s rights groups as the three main groups relevant to my analysis. In some instances, key informant interviews helped me characterize the actors who fought for certain changes. In other instances, I was able to trace language that field actors employ through the documents I analyzed. For example, older Dear Colleague Letters under the Obama administration employed the term “survivor,” to talk about respondents, while the 2017 Dear Colleague Letter from the administration used the terms “accused” and “accuser” to talk about respondents and complainants, respectively. Additionally, some documents detailed the actors who fought for the law. Court documents, for example, listed the lawyers representing plaintiffs in cases against the UC. Lawyers’ websites online typically clearly advertised their position as survivor advocates or men’s rights advocates.

*Case Selection*

The goals of this paper are to identify the origins of changes in formal law and university level policy on sexual harassment investigations over time; to identify and characterize the field actors who affected these changes; and to theorize how they enabled or hindered one another from shaping Title IX in schools via the law. Instead of constructing a genealogy of law and policy that studied many different schools' policies in a single year or a limited number of years (methods used by Grattet and Jenness (2005) to study hate crime laws), I chose to construct a genealogy from data that spanned across five decades. In order to conduct an in-depth, multi-method, qualitative analysis of such an enormous amount of data, I chose to focus on changes that occurred in one major public university with national recognition as a leader in advancing civil rights: the University of California.

The UC was an early adopter and a “mature case” in implementing Title IX policy – they implemented Title IX compliance as early as the 1980s, when other schools neglected to do so until as late as the 2010s. The UC had many years of policies and procedures available for analysis, and their status as a public institution also made it easier for me to access archival documents relevant to my research. Their status as a secular, non-religious institution meant that there would be no exemptions for them under Title IX law.

Further, the UC has retained staff over many decades that implemented original Title IX policies, whereas other schools may have high turnover rates of Title IX staff due to legal trouble and general burnout. The UC has also hired leadership who worked on Title IX as part of the Department of Education during the Obama administration. Key informants with this level of historical and interorganizational insight were vital in helping me construct my genealogy.

Finally, California is an important location for studying civil rights in higher education. While California is known as a progressive and Democratic state, it is also the home of men's rights organizations and lawyers that advertise their services as "defense attorneys" for respondents in Title IX cases. Being a leader in Title IX implementation, the UC is a high-profile and attractive target for both complainant and respondent lawsuits, as well as OCR complaints, which were important tools in my analysis. By studying the UC, I was able to conduct an in-depth analysis of the widest possible breadth of legal documents involved in the construction of Title IX law.

#### FINDINGS: HOW MEN'S RIGHTS ACHIEVED CO-OPTED COMPLIANCE

Here, I show how survivors and their feminist advocates, feminist Title IX staff, and men's rights counter-movements have interacted with one another, shaping UC policy via the formal law in the face of ambiguous Title IX legal requirements. I offer 5 stages that explain how the legal field was rendered susceptible to co-opted compliance. In Stage 1, I show how Title IX was progressive in spirit, but ambiguous in its mandates about how schools should construct investigation procedures for peer harassment. In Stage 2, I show how feminist social movements focused on constructing a "compliance toolbox," to hold schools accountable to interpreting Title IX in a feminist manner, neglecting to codify demands about how investigation procedures should be constructed. In Stage 3, I show how Title IX administrators constructed progressive Title IX investigation procedures in the face of ambiguous law. In Stage 4, I show how men's rights groups counter-mobilized against feminists and Title IX administrators, citing the progressive implementation of the law as biased against men. In Stage 5, I demonstrate how

men's rights groups finally achieved "co-opted compliance" over Title IX laws by targeting ambiguities in formal law and specifying how investigation procedures should be constructed.

### **Stage 1: Ambiguous Law**

#### *The Progressive Spirit of Title IX*

Title IX of the Education Amendments of 1972 originated as a federal statute intended to ensure racial and gender equality in educational institutions in receipt of federal funding, applying to both public and private institutions, as well as universities and K-12 schools. It has not always included provisions on sexual harassment. Originally, Title IX was drafted by progressive legal activists, passed by Congress, and signed into effect by President Nixon in 1972. Congresswoman Patsy Takemoto Mink, the first Japanese-American woman to win a seat in Congress<sup>4</sup>, led the charge in using the federal statute as a tool to widen access to education for women and minorities by allocating government funding into programs for underrepresented populations (Wu n.d). In 1980, feminist legal scholar Catharine MacKinnon argued in *Alexander v. Yale* (1980) that sexual harassment constitutes a form of sex discrimination, and helped apply Title IX to sexual harassment cases in educational settings. The 1980s also marked a transition in how federal laws on Title IX were administered. Congress allocated the administration of Title IX to the newly formed cabinet-level Department of Health, Education, and Welfare – known today as the Department of Education (Radin and Howley 1988).

In 1990s, feminist legal activism in the courts established schools' liability for money damages for sexual harassment by teachers in *Gebser v. Lago Vista Independent School District* (1998), and for peer harassment in the case *Davis v. Monroe County Board of Education* (1999). Following activity in the courts, the Department's Office of Civil Rights (OCR) produced a

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<sup>4</sup> Title IX is also known as the Patsy Takemoto Mink Equal Opportunity in Education Act.

series of Dear Colleague Letters (DCLs) and Guidances on how schools should address campus sexual harassment and other forms of gender-based violence (see: DOE 1997, 2001, 2011).

These administrative documents echoed progressive, feminist social movement concerns that sexual harassment on college campuses is rampant, and negatively affects women's access to education, therefore reproducing gender inequality<sup>5</sup>.

*Ambiguity in Federal Statutes and Department of Education Communications*

In 1997 and 2001, the Department of Education released Guidances to help schools interpret how to comply with federal statutes and early court cases on Title IX, in particular, the *Monroe* court decision. The Guidances offered ambiguous suggestions for how schools should construct investigation procedures for sexual harassment and violence cases. The 1997 and 2001 Guidances do not require a school to create new, separate policies and procedures for Title IX besides what a school may already have in place for handling discrimination and misconduct complaints (DOE 2001: 19). The Guidances outline the following baseline requirements for investigations: that schools must notify parties involved that an investigation is occurring; that schools maintain “adequate, reliable and impartial investigation of complaints” and “reasonably prompt time frames”; that schools give “notice to the parties of the outcome of the complaint”; and, lastly, that schools give “assurance that the school will take steps to prevent recurrence of harassment and to correct its discriminatory effects on the complainant and others, if appropriate” (DOE 2001: 20). The 2001 Guidance also provides some insight into what types of evidence might be helpful to gather in resolving a dispute (DOE 2001: 9).

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<sup>5</sup> The 2011 DCL specifically references a study by the National Institute of Justice that found that 1 in 5 women are victims of completed or attempted sexual assault while in college, and that 6.1% of males were victims of completed or attempted sexual assault during college (NIJ 2007). The DCL states “The Department is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school’s programs and activities.”

The 2001 Guidance acknowledges that the specifics of investigation policies and procedures may vary widely in schools across the country, and leaves discretion up to schools and Title IX Coordinators to fill in the blanks. It states:

Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local requirements, and past experience. (DOE 2001: 20)

A decade later, the Department of Education under the Obama administration published the 2011 DCL, reminding schools of their obligation to comply with Title IX law. The document reiterates much of the language from the 2001 Guidance that a school’s investigation procedures “will vary” depending on a variety of factors unique to each school.

It does offer slightly more detail into how schools can provide an “adequate, reliable, and impartial” investigation of complaints, but it offers more suggestions than mandates. The DCL makes two notable requirements. First, it points to a requirement in the 2010 OCR Case Processing Manual (DOE 2010) that schools use the preponderance of the evidence standard<sup>6</sup> as they review evidence in their investigations. Second, it requires that schools build in appeals processes for both parties to contest the findings of an investigation, as well as opportunities for both parties to present witnesses and other evidence. The 2011 DCL also makes suggestions, using softer language like “schools may allow” and “OCR discourages schools.” These suggestions include that schools may allow or restrict parties from having their lawyers participate in proceedings, as long as the rules are consistent for both parties. Additionally, OCR discourages schools from allowing the parties in a case to cross-examine each other during the

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<sup>6</sup> The preponderance of the evidence standard is a low-level evidentiary standard typically used in civil courts. It is the lowest burden of proof, and means that it is more likely than not that the alleged claims in a complaint are true.

hearing, citing that cross-examination “may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment” (DOE 2011: 12). With few legal mandates and some bare-bones suggestions on how to build investigation processes, much discretion was left up to schools.

*Ambiguity in Department of Education Communications as Formal Law*

Not only was there ambiguity in the text of DCLs and Guidance documents from the Department of Education on how to construct investigation procedures; there was also a wave of criticism from legal scholars and lawmakers that the documents did not hold the weight of a legal mandate. Critics argued that in order for documents from an administrative agency to hold the weight of administrative law, the Department would have to propose a new rule and hold an open notice and comment period. The DCL and the Guidances did not go through this process, and therefore, should not be considered “law.”

For the most part, critics who championed this argument were concerned with respondents’ due process rights in Title IX investigations. In 2016, Senator James Lankford, Oklahoma, wrote a letter to the Department of Education to express his concern that the 2011 DCL is merely “interpretive” of law because it fails to cite “precise governing statutory or regulatory language that support their sweeping policy changes.” Two high profile critiques cited in the Senator’s letter were penned by 28 law faculty from Harvard University in *The Boston Globe* in 2014<sup>7</sup> and 16 law faculty from the University of Pennsylvania in *The Wall Street Journal* in 2015<sup>8</sup>. The Harvard op-ed, in particular, frames their school not as rushing to comply

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<sup>7</sup> Bartholet et al. 2014. “Rethink Harvard’s sexual harassment policy.” *The Boston Globe*, <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> (Accessed July 28, 2020).

<sup>8</sup> Gershman, Jacob. 2015. “Penn Law Professors Blast University’s Sexual-Misconduct Policy.” *The Wall Street Journal*, <https://blogs.wsj.com/law/2015/02/18/penn-professors-blast-universitys-sexual-misconduct-policy/> (Accessed July 28, 2020).

with law, but instead, inappropriately going “beyond” what the law states, and “jettisoning balance and fairness in the rush to appease certain federal administrative officials.”

### **Stage 2: Progressive Activists Build the Compliance Toolbox**

In Stage 2, I show how the feminist movement did not focus on codifying into law the specifics of how schools should interpret and implement investigation procedures for peer sexual harassment. Instead, the feminist movement focused on building a toolbox with which to hold schools accountable to complying with a feminist conception of Title IX. There were two main issues with this tactic: 1) even if the toolbox was effective in getting schools to comply, it only held schools accountable to complying with ambiguous federal statutes and administrative documents on Title IX; and 2) the tools within the toolbox were not always effective in fulfilling their intended function. Nonetheless, feminist activists – mainly college age women – organized around two main strategies that they hoped would get schools to interpret Title IX in a feminist, survivor-centered manner: 1) they filed complaints through the Department of Education’s Office for Civil Rights, which they saw as a body of oversight that could revoke federal funds from schools; and 2) they focused on legal strategies that would make it easier for survivors to sue schools and win money for damages. Cabrera (2020) finds that many feminists believe that schools, much like for-profit companies, must be punished through loss of profit and bad press in order to be motivated to comply with Title IX. These assumptions informed legal strategy of student survivor activists throughout the span of my analysis.

#### *Tool #1: Filing Complaints through OCR*

The original federal statute on Title IX – which did not yet include provisions on sexual harassment – granted the Department of Education the right to terminate federal funding for



schools that did not comply with the Department’s “rules, regulations and orders of general applicability.”<sup>9</sup> Research by Reynolds (2019) shows how both individuals and organizations like the American Civil Liberties Union filed hundreds of OCR Title IX complaints annually from 1994-2014 for a variety of reasons, including disagreement with how schools have handled internal complaints about sexual harassment, inequality in athletics, and concerns of academics. My data demonstrate that feminist survivor activists in the UC used OCR complaints as one social movement tool – as part of a larger social movement toolbox – intended to hold schools accountable to achieving Title IX’s intended function of reducing harassment in schools. As depicted in the documentary *The Hunting Ground* (Dick 2015), survivors of sexual assault from campuses across the country collaborated in filing Title IX complaints against their schools around 2013. Heldman, Ackerman, and Breckenridge-Jackson (2018) identify this era – from 2013 forward – as the “New Campus Anti-Rape Movement,” when student survivors mobilized to get their schools to comply with Title IX anti-harassment mandates.

I qualitatively analyzed documents related to a student survivor activist led OCR complaint against UC Berkeley that investigated whether Berkeley’s sexual harassment policies and procedures were compliant with Title IX in annual years 2011-2012, 2012-2013, 2013-2014, and 2014-2015. In particular, I examined a letter OCR wrote to Berkeley’s chancellor in 2018 summarizing the findings of their multi-year investigative report, which is based on an analysis of 401 oral reports or written complaints that the UC classified as sexual harassment and/or sexual violence (Faer 2018: 17). Of that number, 171 reports involved student-to-student sexual harassment or sexual violence (Faer 2018: 17).

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<sup>9</sup> The ability of an administrative department to revoke federal funds for non-compliance with department rules and regulations was constructed after Title VI (42 U.S.C. §2000d (1964)), which was used to address racial discrimination in schools, but not gender discrimination (Mango 1991).

The findings of the OCR investigation do not make suggestions to school officials to reform how they construct and implement the specifics of their internal formal investigation policies and procedures. It continues to leave much discretion up to the school. Instead, the OCR letter asks the school to take measures to make their grievance processes more accessible and easier to understand for both complainants and respondents. For example, OCR identified compliance issues with providing adequate notice of grievance resolution options to the complaining party (whether they could use formal investigation processes, or an alternative resolution process) (Faer 2018: 12, 29). OCR also noted that the Title IX office should have a clear opportunity for those involved in an investigation to proceed with a formal investigation at any point in an alternative resolution process (Faer 2018: 25). Other concerns included the amount of time it took to resolve complaints, which could stretch to over 12 months when the investigation and adjudication processes were both taken into account (Faer 2018: 29). The findings stressed increasing accessibility, clarity, and transparency around school investigation procedures, but did not instruct schools on how to build the investigation procedures, specifically.

While the OCR complaint was effective in changing certain practices in the UC, it may not have been because OCR acted in punitive manner toward the UC. While OCR was intended to be a body of oversight to revoke funding from non-compliant schools, one key informant interview participant called OCR complaints “more of a negotiation process,” than a punitive one. OCR has adopted a policy that compliance from schools is expected to be obtained voluntarily, before beginning “fund termination administrative hearings” (DOE 2011, 2010). To date, the UC has never lost federal funding for an OCR complaint.

*Tool #2: Expanding Schools' Liability*

In addition to filing complaints through OCR, progressives expanded schools' liability under Title IX as part of their compliance toolbox. In particular, legal activists focused on developing and expanding the standard by which survivors can sue schools for money damages. Currently, the standard is "the standard of deliberate indifference," which allows survivors to sue schools for money damages when a school's "response to the harassment [was] clearly unreasonable in light of the known circumstances" (*Davis v. Monroe* 1999). This concept is defined in the *Davis* case in 1999, and was developed in many key survivor cases against the UC, including *Lopez v. Regents of the University of California* (2013), *Takla and Glasgow v. Regents* (2015), and *Karasek et al. v. Regents* (2015, July 2016, December 2016, 2018, 2020). The lawsuits cited mention many of the same grievances with UC Title IX policy and procedure as in the OCR complaints, including long timelines for resolving complaints, lack of sufficient notice of investigation outcomes, and lack of sufficient discipline for serial harassers and potential repeat offenders. However, instead of focusing on how exactly schools should construct the specifics of investigation policies and procedures in these lawsuits, feminists and progressives used the lawsuits to continue expanding survivors' ability to sue schools.

Key informant interviews and excerpts in the cases against the UC talk about the deliberate indifference standard as notoriously difficult to meet, making it very challenging for survivors to win lawsuits and damages. I identified and examined eight survivor cases against the UC, and found that the cases 1) brought attention to the deliberate indifference standard, suggesting that it should be replaced with a different standard that would make survivors more likely to win; and 2) attempted to expand the definition of deliberate indifference by including that schools can be indifferent to "pre-assault claims."

In *Karasek v. Regents* (2016), the judge cited MacKinnon’s (2016) scholarship in *The Yale Law Journal* proposing that the deliberate indifference standard was “inconsistent with Title IX’s guarantee of equal educational outcomes on the basis of sex,” and that the law should apply a “due diligence standard” that would “hold schools accountable to survivors.” In *Karasek v. Regents* (2020), the plaintiffs and their lawyers attempted to expand the definition of deliberate indifference by arguing that a school could be deliberately indifferent to an overall climate of sexual harassment on campus, therefore creating a hostile environment before an assault has even occurred. The plaintiffs in the case allege that UC Berkeley Title IX staff had avoided using formal investigations for sexual assault claims in order to “avoid its statutory duty to report cases of sexual violence to DOE.”

Rights claims for survivors are certainly costly to the university – the California State Audit reported that the UC paid out \$45 million in settlements related to sexual harassment complaints from January 2008 through December 2017<sup>10</sup>. However, the threat and cost of legal action may not be enough of a motivation for schools to implement investigation procedures in a survivor-centered and feminist-oriented manner. It is extremely difficult overall for survivors to mobilize lawsuit as a tool in shaping Title IX policy in schools. According to key informant interviews, few survivor lawsuits make it past the settlement stage, and when they do, it is difficult to demonstrate that a school has been deliberately indifferent to harassment. And, even if these tools were improved upon so that survivors could win in court, survivor lawsuits only push schools to comply with ambiguous federal and administrative laws that throw the ball back to schools, giving administrators ultimate discretion over how to interpret the law.

### **Stage 3: Progressive Framing of Law in Organizations**

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<sup>10</sup> Nine of ten settlements in this data set were with complainants, and one was with a respondent (Howle 2018).

*In the Face of Ambiguity, Administrators Go “Beyond” the Law*

In the face of ambiguity in the formal law, it was up to schools to construct their own investigation procedures for handling sexual harassment and sexual violence on their campuses. In the UC, Title IX staff led the effort to construct policies and procedures that not only responded to civil rights law, but went “beyond” the law, paying particular attention to the needs of survivors of sexual harassment and sexual violence. In tandem with the rise of the “New Campus Anti-Rape Movement” (Heldman et al. 2018), the UC system transformed their Title IX response from 2013-2016 by hiring more Title IX staff and creating reformed policies. Instead of centering the university’s priorities in constructing investigation and adjudication policies and procedures, Title IX staff turned to victim advocacy trainings by rape crisis and domestic violence centers, which helped them construct investigation procedures that were “trauma-informed” and “survivor-centered.” One key informant said:

We didn’t know how to do it [how to construct investigations], so I went and took the advocate courses for domestic violence and sexual assault... Mostly we got training from the advocates, but they were the only ones doing the work. That’s why it all seems so victim centered.” –Title IX Officer in the UC

Another key informant explained that Title IX staff do the work out of a genuine interest in intervening in sexual harassment and violence and doing right by survivors. She relayed a sense that Title IX officers have had general freedom under university management to construct policies and procedures in a way that aligns with progressive social movement values. She said:

The irony is that so many of my Title IX colleagues both in the system and across the country... they do this work for love and not for money. They do this work because they believe in the prevention of sexual harassment and discrimination,

and they believe in the intuition's responsibility to do the right thing. We have been lucky to have been a really independent and highly supportive shop for lots of years. So, I have never been in a position where I was being told what to do, or where I had to protect the institution. – Title IX Officer in the UC

In the Title IX investigation policies and procedures in the UC from 2011-2019, administrators wrote a broad, inclusive definition of sexual harassment and sexual violence, and worked with their colleagues to think through different kinds of behaviors that might be appropriate to include in their policy. They went beyond the most physically violent forms of sexual misconduct, and included a huge spectrum of problematic behavior. They also constructed multiple types of grievance procedures, offering informal, formal, and alternative resolution processes to complainants. Formal investigations consisted of a Title IX Investigator taking statements from complaining parties and their witnesses, determining the credibility of the statements and any other corroborating evidence like emails or text messages, and making a “policy determination” – whether or not the investigator believes the respondent has violated the UC’s Title IX Policy. In compliance with the 2011 DCL, the UC implemented a low standard of evidence – the preponderance of evidence standard – in determining whether a respondent had violated their sexual harassment policy. And, they took measures to make sure that survivors were not asked traumatizing questions too many times, or asked inappropriate, victim-blaming questions during investigations. Certain measures included hiring external hearing officers to gather and relay questions that the complaining and responding parties may have of each other, and filtering these questions for relevance and appropriateness. With the discretion that they had, Title IX Officers interpreted law and constructed investigation policies and procedures in a fairly progressive manner.

*Administrators Shape Law in Organizations, Not the Formal Law*

While Title IX staff did have enormous discretion over how law is carried out within their organization, they were not able to shape the formal law on Title IX. Key informants expressed immense pressure to be neutral in their role as investigators, and talked about how many of their professional backgrounds as advocates of women and survivors were often used by responding parties in administrative hearings to discredit their findings. Because of the pressure to be neutral, Title IX officers also refrained from attempting to influence the formal law in any way, even though they feel they have the most balanced perspectives on the needs of both complainants and respondents who enter investigation processes. One Title IX staff member said:

It feels really interesting to be a cog in the wheel where I can't be one of those people who help to lobby for laws even if I see all the nuances and the process and how it plays out. You'd almost want that neutral person, that neutral body to be a voice in those conversations to say here's what we're seeing on the ground. I have to voice those pieces to the administrator who is representing the UC and hope that they voice that to the world... Even if I wrote an op-ed that would be used in every hearing for the rest of my life. I would have to write it anonymously.

Despite the fact that administrators shaped the law within their organization via how they constructed and implemented investigation policies and procedures, they had little to no influence on shaping written formal law on how Title IX investigations should be constructed.

**Stage 4: Counter-Mobilization by the Right**

By 2016, the UC had expanded their Title IX staff, brought on a Systemwide team to coordinate efforts across the UC's multiple campuses, and established robust policies and procedures for investigating and adjudicating sexual violence and sexual harassment. This coincided with mass media attention to the issue of Title IX as schools across the United States addressed new demands from the Department of Education from 2011 forward (DOE 2011; 2015). Despite the feminist spirit of Title IX, the release of multiple Dear Colleague Letters and Guidance documents from the Department of Education, the diligent work of survivor activists and allies to build the "compliance toolbox," and the attention of Title IX staff to creating university-level policies and procedures, specific measures addressing how schools should construct investigation procedures were still were not codified into formal law.

It was men's rights groups who mobilized in the courts and lobbied the Department of Education, changing case law and administrative law on how schools carry out investigations in compliance with Title IX anti-harassment provisions. Men's rights groups are led by individuals with PhDs and law degrees who have created organizations that operate externally to universities. Men's rights groups typically believe that women are the majority on college campuses, that women have achieved equality and even surpassed men in society, and that Title IX laws were created to defend women's supremacy over men. Title IX's anti-sexual harassment measures, they often claim, defend women who are making false accusations against men, and give schools the authority to ruin men's lives, futures, and careers without proper due process. They often call Title IX administrative processes "kangaroo courts," citing Title IX officers' construction of investigation procedures as inherently biased against men<sup>11</sup>.

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<sup>11</sup> FIRE Staff. 2020. "Campus Kangaroo Courts Under Fire; Lawsuit Highlights Due Process Violations." <https://www.thefire.org/campus-kangaroo-courts-under-fire-lawsuit-highlights-due-process-violations/> (Accessed July 20, 2020).



Starting in about 2015, men’s rights groups reached out to those disciplined under their school’s Title IX policy to help respondents sue schools. These groups included the National Coalition for Men (NCFM), and Stop Abusive and Violent Environments (SAVE), as well as affiliated California lawyers like Mark Hathaway and Jenna Parker, who advertise their services as defense attorneys for Title IX (although, they actually help plaintiffs sue universities). According to key informant interviews, it was likely men’s rights groups and affiliated lawyers – not individual respondents – who strategized to seek out many respondents and use the courts to systematically build precedent, legally changing how schools investigate and adjudicate SVSH. Notably, during my key informant interviews, I learned that men’s rights groups like SAVE also filed OCR Title IX complaints against the UC and lobbied the California State Legislature about Title IX. However, their efforts in these arenas mostly targeted scholarships and affirmative action programs intended to advance women, citing these women-only programs as discriminatory towards men. Here, I address the mechanisms by which men’s rights groups altered language in formal law on Title IX on how the UC should investigate Title IX sexual harassment and sexual violence complaints. I identify two main mechanisms: 1) one California based law firm – Hathaway Parker – coordinated to build precedent in case law in the California courts and nationally; and 2) men’s rights groups like SAVE and NCFM, which have chapters in California and nationally, lobbied the Trump administration to change administrative law.

### *Mobilizing in the Courts*

In about 2016, the law firm Hathaway Parker began filing lawsuits against universities for lacking procedural fairness in their Title IX investigation and adjudication processes. The lawsuits, however, were not private right of action lawsuits under Title IX. Instead, the firm filed writ of administrative mandamus lawsuits in local trial courts – which generally agreed with

schools' administrative findings – and then contested trial court holdings by taking the cases to state level appellate courts in California. Hathaway Parker used these writ lawsuits to attack the credibility of schools' disciplinary actions by arguing that the school's Title IX administrative processes were not constructed or conducted fairly, and were neither in compliance with the California Code of Civil Procedure, nor due process rights guaranteed by the 14<sup>th</sup> Amendment of the Constitution. Successful lawsuits overturned schools' expulsion of Title IX respondents, and changed case law on how schools should construct investigation procedures in the future.

Searching for relevant lawsuits in Westlaw, I identified and analyzed the following men's rights cases against the UC: *Doe v. Regents of University of California* (2016), *Doe v. Regents* (2016) and *John Doe v. Regents* (2018). Key informants directed my attention to two lawsuits against the University of Southern California, *John Doe v. University of Southern California* (2016) and *John Doe v. USC* (2018); and one case against Claremont McKenna College, *John Doe v. Claremont McKenna College* (2018).

Reading the court cases chronologically, I observed that the language of the lawsuits made similar criticisms of schools' Title IX investigation processes. The plaintiffs – respondents in Title IX cases – were represented by the same attorneys at Hathaway Parker, whose website linked to men's rights organizations as resources. The appellants argued that Title IX investigators are biased in favor of women over men; that respondents must have the ability to contest administrative findings in a formal evidentiary hearing; that schools must permit cross-examination of witnesses in hearings; and that investigation procedures should use the clear and convincing evidentiary standard, instead of preponderance of the evidence. Judges disagreed with most of the points brought forth in the suits. However, a judge need only agree with one or two points to grant a plaintiff a writ, overturning a school's administrative decision to suspend or

expel a respondent under their Title IX policy. Further, Hathaway Parker gradually won more and more of their points as they filed more writ lawsuits in different appellate courts, and future cases in California and nationally cited the precedent of older cases.

According to my analysis, writ lawsuits did not require schools to use a higher evidentiary standard, nor did they find that Title IX staff were biased. However, they did require schools to build a hearing process into their procedures so that respondents had the opportunity to respond to the allegations brought against them, and required that the responding party should be able to cross-examine critical witnesses of the complaining party, even if indirectly. One case in particular, *John Doe v. USC* (2018), caused the UC to pause Title IX investigations occurring at the time so that they could restructure their procedures in compliance with new case law requirements.

#### *Lobbying and the New Proposed Rule*

Where men's rights groups could not make changes to Title IX in the courts, they succeeded in lobbying Trump's Department of Education, led by Education Secretary Betsy DeVos. In 2017, the Department of Education released a new Dear Colleague Letter that rescinded the 2011 Dear Colleague Letter. The 2017 DCL adopts and cites the messaging of men's rights and respondent's rights groups that the 2011 DCL made it too easy for schools to discipline "the accused," and that the 2011 DCL was merely "interpretive," of law, rather than holding the weight of formal law. Among the procedures criticized in the letter include the too-lenient preponderance of the evidence standard, a lack of appeals process for accused students, and the discouraging of cross examination by the parties. The 2017 DCL undermines these past requirements by reiterating that the 2011 DCL did not hold the weight of formal administrative law because it did not go through a public open notice and comment period. The 2017 DCL

concludes that the Department intends to implement new administrative law through a formal rulemaking process that responds to public comments.

In 2018, the Department of Education released their New Proposed Rule, a 144-page document (DOE 2018). The document not only aimed to fill in the specifics of how schools should investigate and adjudicate sexual harassment, it aimed to codify these specifics into formal law. The document is forthright in mentioning that “numerous stakeholders” – including students accused of sexual assault – contributed to how the DOE constructed new Title IX measures (DOE 2018: 12). It mentions the “high stakes of sexual misconduct,” not only for complainants, but also for those who are accused. It frequently co-opts the language of feminists who fought for the law in the first place, citing accusations of sexual misconduct as limiting respondents’ access to equal educational opportunity:

...for respondents, a finding of responsibility for a sexual offense can have a lasting impact on a student’s personal life, in addition to [the student’s] educational and employment opportunities... potentially life-altering consequences deserving of an accurate outcome. (DOE 2018: 68)

Although the language of the rule offers an attempt to be balanced toward both complainants and respondents, it proposes amendments to Title IX law that are heavily informed by men’s rights priorities and talking points. Here, I address seven of the most notable amendments to how investigation procedures should be carried out for peer harassment, detailing how each is informed by men’s rights priorities.

1. Narrowed definition of sexual harassment and sexual violence

The new proposed rule suggests a narrowing of the definition of sexual harassment, citing that the 2011 DCL “captured too wide of a range of misconduct, resulting in infringement

on academic freedom and free speech and government regulation of consensual, non-criminal sexual activity” (DOE 2011: 11). In compliance with the 2011 DCL, the UC implemented a definition of sexual harassment that was also consistent with the Title VII definition – that harassment had to be “severe, pervasive, *or* objectively offensive.” According to key informant interviews, this definition helps to cover a range of possible discriminatory behavior. For example, a one time rape may be severe, but not necessarily pervasive; ongoing domestic violence may be both severe and pervasive; and inappropriate comments in the workplace may be interpreted as pervasive, but not necessarily severe. The new proposed rule suggests that schools should use the following definition of SVSH from the *Davis v. Monroe* court case, that the behavior must be “so severe, pervasive, *and* objectively offensive that it denies its victims equal access to education that Title IX is designed to protect” (DOE 2018: 9). Key informants suggest that this definition of sexual misconduct narrows the definition to the most violent and pervasive forms of behavior, betraying Title IX’s purpose, which is to address various forms of sex discrimination broadly, not just sexual assault. Additionally, the proposed rule requires what key informants referred to as “mandatory dismissals,” a requirement that schools must dismiss a complaint when it does not meet the new, narrowed definition of sexual harassment (DOE 2018: 50).

## 2. Retraining Title IX Staff

The document regards Title IX staff as potentially biased in regards to “sex-stereotypes” about men (DOE 2018: 96), and as presuming the guilt of men before an investigation has occurred:

Stakeholders have raised concerns that recipients sometimes ignore evidence that does not fit with a predetermined outcome, and that investigators and decision-

makers have inappropriately discounted testimony based on whether it comes from the complainant or the respondent. (DOE 2018: 44)

Notably, this information is gathered from “stakeholder concerns,” not actual analysis of evidence collected in schools’ Title IX reports, OCR analysis documents in measuring schools’ compliance with Title IX, or state Title IX audit reports. The proposed rule proceeds to mandate that Title IX staff at schools should be re-trained away from victim-centered and trauma-informed practices, “using training materials that promote impartial decision making that are free from sex stereotypes” (DOE 2018: 69).

### 3. Shifting responsibility away from Title IX Staff

In response to men’s rights claims that Title IX investigators are biased and are “judge and jury” in “campus kangaroo courts,”<sup>12</sup> the proposed rule revokes the old responsibility of Title IX investigators to make a policy finding (whether a respondent has violated their school’s SVSH policy) after conducting an investigation. Research shows that it was already typical for schools to involve many different types of staff when investigating and adjudicating SVSH cases (Armstrong et al. 2020). In the UC, the investigator collected evidence, interviewed witnesses, and produced a policy finding under the preponderance of the evidence standard. If there was a finding of responsibility – of having broken the SVSH policy – that finding of responsibility was then re-evaluated by an adjudicating body outside of Title IX, usually with the clear and convincing standard. The new proposed rule takes away the responsibility of Title IX investigators to produce a finding of responsibility (DOE 2018: 65). Under the new rule, universities must find someone else to create the policy finding, before then turning the policy finding over to an adjudication process. It is not clear whether the new proposed rule recognizes

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<sup>12</sup> See footnote number 11.

that many schools already separate their adjudication processes from their investigation processes.

#### 4. Requiring Schools to Allow Advisors

The new proposed rule includes a detailed section making major changes to the issue of parties' representation by advisors in a school's investigation process. Under the 2011 DCL, schools were instructed to either consistently allow or restrict parties from having advisors in Title IX investigation proceedings, and were discouraged from cross-examining witnesses and parties, as cross-examination can be re-traumatizing and victim-blaming. The new rule requires that parties must "have the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice," (DOE 2018: 51), that the school must provide an advisor for anyone who requests one (DOE 2018: 57), and that parties have the option to hire an attorney as their advisor (DOE 2018: 57). Key informants cited this as a problem of inequity, given that people with more resources, like faculty and wealthy students, are likely to afford to bring trained defense lawyers into Title IX cases, whereas complainants who experience disadvantage as a result of race, class, and gender, may get "stuck" with whoever schools appoint as advisors.

#### 5. Live Hearings with Cross Examination

The proposed rule requires institutions of higher education to implement hearings with live, formal cross examination. Cases in the California courts required hearings with indirect cross examination of critical witnesses. The new proposed rule requires that advisors cross-examine parties and witnesses in view of the opposing party (DOE 2018: 56). The text mentions that questions in cross-examination could be inappropriate or irrelevant, citing the purpose of rape shield laws, "which is intended to protect complainants against invasion of privacy, potential embarrassment, and stereotyping" (DOE 2018: 58). However, the only measure built

into the text against this issue is that: “The decision-maker must explain to the party’s advisor asking cross-examination questions any decision to exclude questions as not relevant” (DOE 2018: 52). Key informants suggested in their interviews that this still allows for inappropriate, retraumatizing and victim blaming questions to be posed to a complainant, even if the “decision-maker” later determines the question is inappropriate. Further, the rule suggests that past sexual behavior can be brought up during a cross-examination when, “the evidence concerns specific incidents of the complainant’s sexual behavior with respect to the respondent and is offered to prove consent” (DOE 2018: 52). This provision clashes with feminist definitions of consent, which require that consent be obtained in every sexual encounter.

#### 6. The Clear and Convincing Standard

Men’s rights groups argue that if the future of the accused person is at stake, a higher standard of evidence should be used in investigating claims of sexual harassment. The proposed rule does not directly require schools to implement the clear and convincing standard over the lower preponderance of the evidence standard. However, the proposed rule gives schools a forced choice:

The recipient must apply either the preponderance of the evidence standard or the clear and convincing standard. The recipient may, however, employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty. (DOE 2018: 61)



The UC has historically used the preponderance of the evidence standard to investigate peer harassment, and the clear and convincing standard for faculty who are investigated for harassment. Because faculty have “shared governance,” over the school’s Title IX policy, faculty are unlikely to give up the clear and convincing standard of evidence, which helps protect them from incurring disciplinary action for alleged SVSH. Therefore, according to key informant interviews, the UC will likely be obligated to apply the clear and convincing standard to peer harassment cases.

#### 7. Redefining Deliberate Indifference and “Discrimination on the Basis of Sex”

The new proposed rule changes the meaning of the standard of deliberate indifference and the meaning of “discrimination on the basis of sex.” The language shifts from viewing complainants – mainly women – as a protected category, to viewing respondents – mainly men – as a protected category, stating: “A [university’s] treatment of the respondent may constitute discrimination on the basis of sex under Title IX” (DOE 2018: 40). The rule then states that schools can be found to be deliberately indifferent under Title IX for neglecting to implement the new proposed procedures:

Deliberate indifference to a complainant’s allegations of sexual harassment may violate Title IX by separating the student from his or her education on the basis of sex; likewise, a respondent can be unjustifiably separated from his or her education on the basis of sex, in violation of Title IX, if the recipient does not investigate and adjudicate using fair procedures before imposing discipline. (DOE 2018: 40)

The rule guts private right of action for survivors, and grants respondents private right of action under Title IX for discrimination on the basis of sex.

**Stage 5: Co-Opted Compliance**

In Stage 5, men's rights groups achieve "co-opted compliance." Here, I show how the UC was obligated to comply with legal changes achieved by the men's rights movement, even when it conflicted with their values and priorities. Further, I show how survivor activists and their advocates attempted to resist changes in formal law on Title IX.

It is of great importance to note that there was an enormous resistance effort by feminist survivors, university administrators, and other progressive advocates against the formalizing of the new proposed rule on Title IX. During the 60-day open notice and comment period for the proposed rule, stakeholders submitted 124,196 comments to the Department of Education. A majority came from college-age survivor activists and feminist organizations that strategized to flood the Department with comments, knowing that the Department would be delayed in implementing the regulations in responding to every comment individually.

When finalized, the 2,000 page Final Rule gave schools a period of about three months to make massive changes to their investigation processes. Between 2018 and 2020, the UC was extremely vocal in condemning the practices written into the new regulations. The UC's president, Janet Napolitano, wrote an op-ed in *The Washington Post* in 2018 criticizing the requirements as "intimidating" to complainants and "undermining the very procedures designed to ensure fairness and justice" (Napolitano 2018). In the op-ed, President Napolitano says that the requirements for live hearings and cross examination, in particular, "Will discourage reporting." The UC also submitted a comment during the open notice and comment period, detailing the UC's primary concerns with the proposed regulations. The comment states that the rules come into conflict with the UC's "principles of equity."

Leading up to the August 14<sup>th</sup>, 2020 implementation deadline, various progressive and civil liberties organizations including the ACLU and Know Your IX sued Betsy DeVos and the Department of Education in an attempt to block the new rule (*Know Your IX et al. v. Elisabeth DeVos* 2020). There was also action by dozens of Attorneys General. 18 Attorneys General, including the Attorney General of California, sued DeVos and the Department, citing the rule as “revers[ing] decades of effort to end the corrosive effects of sexual harassment on equal access to education” (*Commonwealth of Pennsylvania et al. v. Elisabeth DeVos* 2020). Albeit, a separate group of 14 Attorneys General from more conservative states released an amicus brief that summarizes the legal obligations of colleges and universities in complying with the Final Rule, additionally citing men’s rights cases won nationally.

Despite intense efforts by feminist survivors, advocates, and administrators to resist the new regulations, the UC began preparing to comply with an interim policy for August 2020. Under co-opted compliance, men’s rights interest groups shape the meaning of compliance to Title IX, and schools are obligated to comply, even when they believe the new provisions of the law are immoral, unjust, and in conflict with the intended function of the law. Where Title IX staff had discretion in constructing Title IX policies and procedures before, they now have much less. And, men’s rights groups now have control over the “compliance toolbox” – they are able to mobilize OCR complaints and private right of action to “hold schools accountable” to their conception of the law. Survivors, on the other hand, have a severely weakened ability to mobilize OCR complaints and lawsuits as a mechanism to push schools towards a feminist, survivor-centered conception of Title IX. Men’s rights not only co-opted the language of civil rights movements for marginalized populations, they gained power over how Title IX should be implemented in schools and enforced by the courts.

## DISCUSSION AND CONTRIBUTION TO SOCIO-LEGAL THEORY

In this section, I introduce theory on the conditions under which co-opted compliance of progressive civil rights law in higher education is most likely to occur. Drawing from my analysis of the legal history of Title IX, I posit that co-opted compliance is most likely to occur:

- When existing formal law is ambiguous.
- When progressive activists exclusively focus on constructing the “compliance toolbox,” neglecting to address ambiguities in formal law on how organizational procedures should be constructed and implemented.
- When administrators are progressives, and identify with the views of the progressive social movement that fought for the law. These administrators may show an unwillingness to adopt “managerialized” or business ideals, or may demonstrate a desire to defend the interests of rights claimants over the interests of the institution.
- When there is a lack of contestation about how procedures are constructed between progressive activists and administrators. Contestation over a procedure is generally what brings about legal activity (for example, suing, or lobbying), which allows for an opportunity to codify law through case law, statutory law, or administrative law. Because of a lack of contestation between survivor activists and administrators over how investigation procedures were implemented, survivor activists did not take legal action. Therefore, activists missed an opportunity to codify the priorities of the movement.
- When administrators who are progressives are restricted from shaping formal law, or are barred from voicing their opinions on the formal law.

- When administrative agencies that specify ambiguities in civil rights law do not give their communications the weight of legal obligation, for example, only publishing Guidances and letters that do not go through formal rulemaking processes.
- When conservative groups perceive administrators as biased in favor of a progressive agenda.
- When conservative groups believe law in organizations – the policies and procedures – is constructed in favor of the members of the progressive social movement that fought for the law.
- When conservative groups co-opt the language of progressive civil rights movements to appeal to conservative judges and lawmakers, who interpret and codify the law in alignment with counter-movement rhetoric.
- When conservative counter-movements use the formal law to fill in the specifics of how procedures in schools should be carried out, changing the structure of school-level procedures in accordance with the agenda of the counter-movement (for example, protecting those who discriminate or harass).

#### APPLICABILITY OF THE THEORY AND DIRECTIONS FOR FUTURE RESEARCH

This research is intended to help progressive social movement activists and university administrators understand how to prevent the co-optation of civil rights law in higher education by right wing groups. The concept of co-opted compliance and the stages by which co-opted compliance occurred may apply to laws beyond Title IX, like hate speech and affirmative action laws. In the United States, hate speech and affirmative action laws have historically hung in the balance of power struggle between progressive groups, university administrators responsible for

their implementation, and right-wing counter-movements, including white supremacist and male supremacist groups. Further research is needed to understand how other laws intended to offer equal opportunity to historically marginalized populations may become subjected to co-opted compliance. Finally, research is needed to understand how co-opted compliance affects rights mobilization by survivors of SVSH and other forms of discrimination, not just in higher education, but in K-12 schools as well.

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**Workshop K: Obstacles to  
responding to and preventing sexual  
harassment in schools**

*Workshop K (January 30th):*

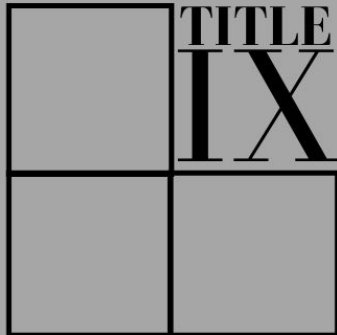
# Obstacles to Responding to and Preventing Sexual Harassment in Schools

Bill Kidder, moderator (UCLA Civil Rights Project; UCSC)

Annie Rosenthal (CARE Advocate -- UC Hastings Law)

Mercy Wambua (Secretary, CEO -- Law Society of Kenya)

Brenda Star Adams (Senior Counsel -- Equal Rights Advocates)



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# Social and ecological obstacles in colleges/schools

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# Psychosocial Obstacles to Reporting

- Individual concerns
  - Shame ([Boyle, K. M., & Clay-Warner, J., 2018](#))
  - Not wanting to be seen as “a victim”
- Interpersonal concerns
  - Fear of retaliation
  - Not wanting to get perpetrator in trouble (often happens in IPV cases)
  - Concerns about fracturing friend group
  - For some communities, fear of playing into harmful stereotypes



# What happens to “lower levels” of harm?

- Not all harm meets a policy definition
  - We see this especially in sexual harassment cases
  - New regulations have a higher standard for what constitutes SH
- What impact does this have?
  - Lots of harm goes unaddressed
  - Harmful to those who experience these “lower levels,” as they are told that the harm isn’t serious
  - Leads to institutional betrayal and has implications for the culture of the institution



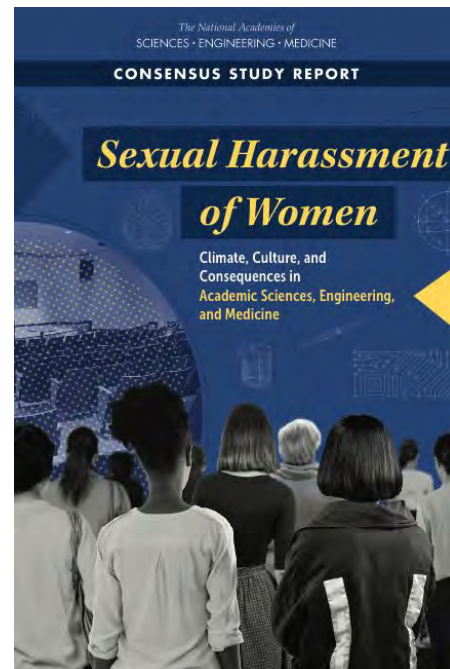
# Why focus on grad students and trainees (e.g., law clerks, postdocs, STEM)?: Situations with power disparities and tight-knit communities

- Grad school has higher stakes than undergraduate context (Braxton et al., 2011); a small number of faculty can greatly influence future academic and career prospects/networks
  - Tight-knit disciplinary communities; close, long-term and intense mentoring relationships (Cantalupo & Kidder, 2017)
  - Faculty charismatic authority + grad students' investment in the world of ideas
  - Similar in scientific research labs and field work (Clancy et al. 2014, Sekreta 2006)
- 
- Law students: Can be similar disparities in power, faculty role w/ rec. letters for judicial clerkships and law firm jobs (Cantalupo & Kidder, 2017; Lerman 2006; Rosenthal et al. 2016 survey)



# Key findings in the U.S. National Academies' *Sexual Harassment of Women* consensus report (2018)

- The two characteristics most associated with higher rates of sexual harassment are (a) male-dominated gender ratios and leadership; and (b) an organizational climate that communicates tolerance of sexual harassment
- Organizational climate is, by far, the greatest predictor of the occurrence of sexual harassment, and ameliorating it can prevent people from sexually harassing others.



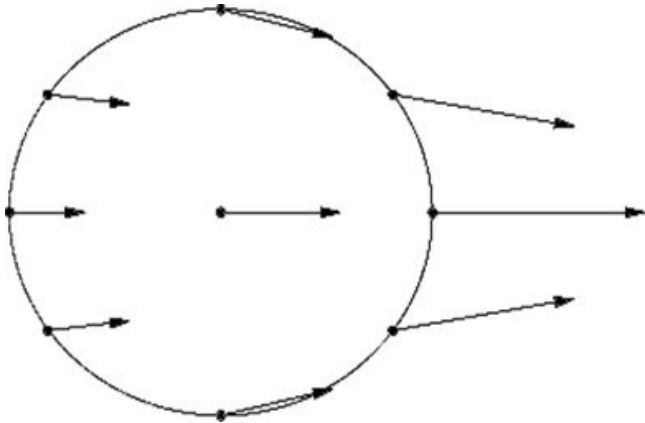
<http://nationalacademies.org/SexualHarassment>



# Change in our culture and norms, not just laws



# Our history of “rape exceptionalism” exerts pull on our norms, values and internalized assumptions



- Belief that sexual/gender violence is *sui generis*, and should be treated differently than other types of student misconduct
- Posture of greater skepticism and concern about false reporting (by women) corresponds with added procedural protections
- Deep roots in many criminal law systems around the world (not just Anglo-American rape laws)



# Additional research: Intersectional identities and #MeToo

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- Nancy Chi Cantalupo, *And even more of us are brave: intersectionality & sexual harassment of women students of color*, 42 Harvard J.L. & Gender 1-81 (2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3168909](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3168909)
- Jamillah Williams, *Maximizing# MeToo: Intersectionality and the Movement*, Boston College Law Review (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3620439](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3620439)
- Panknin, Lucile, and Ida Rudolph. "The invisible victims." *Espacios transnacionales: revista latinoamericana-europea de pensamiento y acción social* 7, no. 13 (2019): 64-71 (addresses sexual and gender violence against women with disabilities) [http://espaciostransnacionales.org/wp-content/uploads/2018/09/ET13\\_Pnaknin.pdf](http://espaciostransnacionales.org/wp-content/uploads/2018/09/ET13_Pnaknin.pdf)
- AAU (2015, 2019) SVSH Climate Surveys, 1 in 10/11 U.S. women grad students say they were SH'ed by faculty, higher rates for transgender/TGQN: <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>  
<https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>



# Spotlighting structural and procedural obstacles







# Legal Obstacles to Responding to and Preventing Sexual Harassment

- California requires live hearings for sexual assault/DV cases where credibility is “central” + severe sanction
  - *Doe v. Westmont College* (2019) 34 Cal.App.5th 622, 637 (live hearings required w/key witnesses)
  - *Doe v. Occidental College* (2019) 40 Cal.App.5th 208, 224 (permit cross-exam of witnesses whose credibility critical)
  - *Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1069 (live hearing and cross req'd where credibility central)
  - *Doe v. Univ. Southern Cal.* (2018) 29 Cal.App.5th 1212, 1233 (single adjudicator physically observe each and every witness whose credibility may be key)

**\*\*We are challenging the practice of excluding survivors from the writ process - please contact [badams@equalrights.org](mailto:badams@equalrights.org) if you are interested amici!\*\***

- California applies higher standards + more onerous procedures **only** for gender-based misconduct by students
  - *Doe v. University of Southern California* (2018) 28 Cal.App.5th 26 (no cross was okay for cheating/suspension case)
  - *Patel v. Touro University* (Cal. Ct. App. 2015) 2015 WL 8827888 (no cross okay for stalking of prof. in expulsion case)
  - *Berman v. Regents of University of California* (2014) 229 Cal.App.4th 1265 (no hrg okay in physical assault/suspension case)
  - *Wells v. Biola University, Inc.* (Cal. Ct. App. 2006) 2006 WL 1633475 (no cross okay in intoxication/expulsion case)
  - *Viriyapanthu v. Regents of University of California* (Cal. Ct. App. 2003) 2003 WL 22120968 (no cross okay in plagiarism/suspension)
- **Boermeester v. Carry - Cal. Supreme Court will take this issue up this year!** (Contact Brenda to sign on to ERA's amicus brief)



# Changes to Federal Regulations - Final Title IX Rule (34 C.F.R. § 106 et seq.)

- Narrows the definition of sexual harassment (34 C.F.R. § 106.30)
  - Prior: “unwelcome conduct of a sexual nature that is severe, persistent, or pervasive”
  - New: “unwelcome conduct that a reasonable person would determine is so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to education.”
- Mandatory notice of presumption of non-responsibility (34 C.F.R. § 106.45(b)(1)(iv) & (2)(B))
- Requires actual notice to Title IX coordinator “or any official of the recipient who has authority to institute corrective measures on behalf of the” school (34 C.F.R. § 106.30) (for elementary/secondary school, any employee suffices)
- Requirement of live hearing (34 C.F.R. § 106.45(b)(6)(i))
- No admission of evidence unless the declarant subjects to **direct** cross-examination (34 C.F.R. § 106.45(b)(6)(i))
- No prohibition on harassing or repetitive questions (34 C.F.R. § 106.45(b)(6)(i))
- Allows for clear and convincing evidence standard (34 C.F.R. § 106.45(b)(1)(vii))
- Mandatory dismissal of certain complaints (off-campus assaults; exchange program complainants) (34 C.F.R. § 106.45(b)(3)(i)) and permissive dismissal of others (respondent graduates/leaves) (34 C.F.R. § 106.45(b)(3)(ii))



# Why might extra “process” be a bad thing in these cases?

- The assertion that additional process is needed in these cases (as opposed to plagiarism, or physical assault case) is rooted in the mistaken and **biased assumption that women lie about sexual harassment, sexual assault, and relationship abuse.**
  - Rate of false accusation of sexual violence is no greater than any other crime and is between 2-7% ([Lisak, David, et al. \(2010\) “False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases”](#))
- Process causes **victim-blaming, disbelief, invalidation**, which chills reporting and results in institutional trauma and/or institutional betrayal (see [The Center for Institutional Courage](#))
- Process becomes a force for **retraumatization, new trauma, and delayed healing from original trauma**
- Process does not account for the neurobiological effects of trauma on the brain:
  - Fragmented, non-chronological memory; sensory memory
  - Flat affect or extreme emotion
  - Flight, fright, or *freeze*
  - Lack of memory re: tangential events
- This “process” (i.e. cross) is no longer universally accepted as the best way to get to the truth.

# Additional legal scholarship on “rape exceptionalism” and “credibility discounting” of women

Behre, Kelly Alison. "Rape Exceptionalism Returns to California: Institutionalizing a Credibility Discount for College Students Reporting Sexual Misconduct." 73 *Okla. L. Rev.* 101 (2020), <https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=2080&context=olr>

Anderson, Michelle J. "Campus sexual assault adjudication and resistance to reform." 125 *Yale L.J.* 125 1940 (2016), <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5761&context=yli>

Brodsky, Alexandra. "A rising tide: Learning about fair disciplinary process from Title IX." 66 *J. Legal Educ.* 822 (2017), <https://jle.aals.org/cgi/viewcontent.cgi?article=1517&context=home>

Cantalupo, Nancy Chi. "Decriminalizing campus institutional responses to peer sexual violence." 38 *J. College & Univ. L.* 481 (2012), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jcolunly38&div=20&id=&page=>

Epstein, Deborah, and Lisa A. Goodman. "Discounting women: Doubting domestic violence survivors' credibility and dismissing their experiences." 167 *U. Pa. L. Rev.* 399 (2018), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9644&context=penn\\_law\\_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9644&context=penn_law_review)





# Achieving Culture Change v. Legal Compliance in Settlement Agreements

- Climate surveys
- Identify and address internal barriers (ex. Funding; conflicts; insufficient time; insufficient # of social workers/advocates; etc.)
- Expansive and inclusive policies (i.e. broaden term “intimate body part;” include trans/GNC students)
- Student-led and interactive trainings
- Trauma-informed practices
- Transformative and restorative justice v. punitive models
- Incentivize anti-racist and anti-patriarchal conduct (ex. Incorporate into employee evaluations and goal-setting)
- Increase diversity (of all kinds) of staff and student body
- Adopt affirmative consent
- Eliminate dress codes
- Protect victims from discipline for tangential violations (i.e. alcohol violation during sexual assault)

# Re-examining cross-examination in SVSH cases

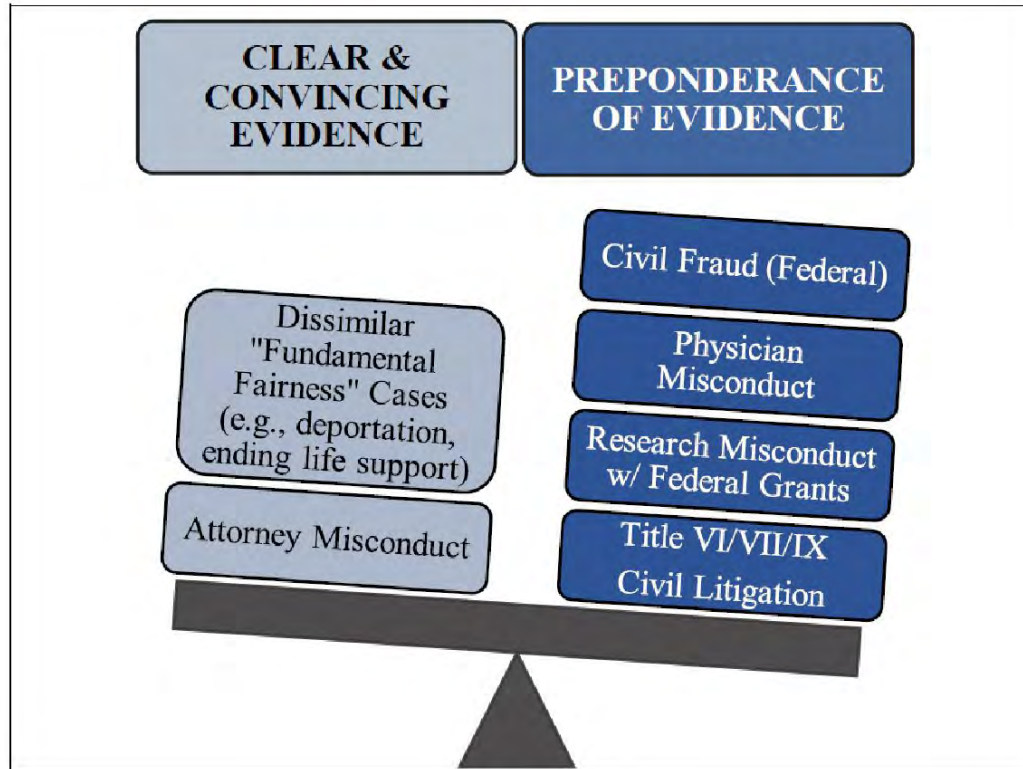
Rachel Zajac & Paula Cannan, *Cross-examination of sexual assault complainants: A developmental comparison*, 16 *PSYCHIATRY, PSYCHOLOGY AND LAW* supp. S36, S50 (2009) (“[A] growing body of research is casting doubt on whether cross-examination is an effective means of obtaining accurate eyewitness reports.”)

Sarah Zydervelt et al., *Lawyers’ strategies for cross-examining rape complainants: Have we moved beyond the 1950s?*, 57 *BRITISH JOURNAL OF CRIMINOLOGY* 551, 565 (2016) (“Tactics leveraging rape myths were common. Cross-examining lawyers frequently invoked stereotypes about complainants’ behaviour.”)

Daisy A. Segovia et al., *Trauma memories on trial: is cross-examination a safeguard against distorted analogue traumatic memories?*, 25 *MEMORY* 95, 97 (2017) (“Moreover, adult sexual assault complainants tend to endure long, emotionally draining, linguistically challenging, and coercive cross-examinations.”)



# Standard of evidence used in multiple U.S. contexts



William C. Kidder, 45 *J. College & Univ. Law* 1, 26 (2020),  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3323982](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3323982)



# **Workshop L: Sexual Harassment as a public health issue**



## Tanzania Laws that Guide Sexual Harassment.

### Opportunities and Gaps

POLICY / LAW	OPPORTUNITY	GAPS/ CHALLENGES
<p>1. EMPLOYMENT AND LABOUR RELATION ACT 2004.</p>	<ul style="list-style-type: none"> <li>• Section 7 (1) Requires employers to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practices</li> <li>• <b>Section 30 (1) 7 (2)</b> Employer to register with the labor commissioners a plan to promote equal opportunities and eliminate discrimination</li> <li>• <b>Section 7 (3)</b> Labor commission has discretion to require employer to reform the same law</li> <li>• <b>Section 7 (5)</b> Address Harassment Read together code of good practice rule of law.</li> <li>• <b>Section 7 (4)</b></li> <li>• <b>Section 7 (6)</b> room for improvement of measures to improve equality and eliminate discrimination in work place</li> <li>• <b>Section 7 (7)</b> Has declared discrimination (harassment) as an offence read together with section <b>102 (3)</b></li> <li>• Follow up measure on registration plan to promote equal employment opportunities and eliminate discrimination</li> </ul>	<ul style="list-style-type: none"> <li>• The plan suggests resolve rather than preventing</li> <li>• Lack of awareness on the protection accorded in the law</li> <li>• Lack procedures</li> <li>• It's hard to prove sexual harassment especially for applicants</li> <li>• Lacks specification on what amount to sexual harassment</li> <li>• No specific terms to be included in the plan registered to labour commissions on elimination on discrimination</li> <li>• The penalty of offence encourages this practice S. 102 (4)</li> </ul>

	<ul style="list-style-type: none"> <li>Section 7 (8) (c) Labor court shall consider the plan registered</li> </ul> <p>Section 7 (9) (a), (b) and (c)</p>	
<p>2. <b>The Prevention And Combating Of Corruption Act</b></p>	<ul style="list-style-type: none"> <li><b>Section 20-</b> It balance</li> </ul> <p>The existence of this section by itself it is an opportunity towards pushing the implementation of it to a woman as more vulnerable.</p> <p>The session balance both gender by it existence it stands as an opportunity toward pushing implementation of it to women who are more vulnerable together with section 25</p> <ul style="list-style-type: none"> <li><b>Section 15-</b> it defined corruption</li> <li><b>Section 39-</b> and PCCA regulation gives out duty to give information to the victim of sexual harassment</li> </ul>	<ul style="list-style-type: none"> <li><b>Section 20-</b> Punishment</li> <li><b>Section 25</b></li> <li><b>Section 31</b></li> <li><b>Section 52</b></li> </ul> <p>No section set forth about investigation and searching for sexual harassment</p> <ul style="list-style-type: none"> <li>Lack of awareness</li> <li>Poor evidence management</li> <li>Victimization of the sexual harassment victim from the society</li> </ul> <ul style="list-style-type: none"> <li>Section 20,25 and 31, the punishment stated is very small compare to the crime/ offence</li> </ul>
<p>3. Tanzania Penal Code- <b>Sexual Offences Special Provisions Act, 1998</b></p>	<ul style="list-style-type: none"> <li><b>Section 130 (2) (e),</b> Advocacy needed on prohibition of child marriage</li> <li>Awareness Creation in all sectors both public and private on acts amounting to sexual abuse/ harassment</li> <li><b>Section 130 (3) (a),</b> Promotion of women in leadership to reduce sexual harassment due to power variance</li> </ul>	<ul style="list-style-type: none"> <li><b>Section 130 (2) (e)</b> Encourages child marriages</li> <li><b>Section 130 (4) (b), Contraction Section 130 (2) (b)</b></li> </ul> <p>Contractions with regard to physical injury as proof of consent</p> <ul style="list-style-type: none"> <li>DNA Testing current not used as proof of rape</li> <li><b>Section 130 (2) (e), Section 138 (1) (a)</b> Harmonization of laws on</li> </ul>

	<ul style="list-style-type: none"> <li>•</li> </ul>	<p>definition of child</p> <ul style="list-style-type: none"> <li>• Rape to children is billable offence</li> <li>• No compensation to victims leads to unlawful agreements/ conciliation between parties</li> </ul>
<p>4. <b>The Whistleblower and Witness Protection Act, 2015</b></p>	<ul style="list-style-type: none"> <li>• <b>Section 4: (c)</b> in public institutions there has been, there is likely to be waste, misappropriation or mismanagement of public resources or abuse of the office</li> <li>• <b>Section 4 (e)</b> The public environment has been degraded, is being degraded or is likely to be degraded</li> <li>• <b>Section 5 (i)</b> The use of sign language to disclose a misconduct is an opportunity as gives people with disability (who are also victims of sexual harassment) to report incidents.</li> <li>• <b>Section (7) (3)</b> it opens a door for a step to be taken against perpetrator</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Section 4 (a):</b> Lack of definition of abuse of office, can be interpreted otherwise.</li> <li>• <b>Section 4 (e):</b> has been disgraced, is being disgraced in likely to disgraced, therefore, how can be interpreted by lawyers to ensure it protects and promotes the rights?</li> <li>• <b>Section 8 (3):</b> No time limitation for investigation which may include the life of whistleblower and witness</li> </ul>

Most of Tanzania Institutions have very good gender policies which address direct sexual harassment compare to national sexual harassment policies and laws for instance, University of Dar es Salaam (UDSM), MUHAS, KAMPALA University among the universities in Tanzania.

In some studies of sexual harassment Of Tanzania reveals that that only 22% of employed women in public institutions are aware of sexual harassment policies while only 13% men are aware of this laws.

Tanzania there is no policy or law that is direct based on sexual harassment.

Employment and Labour Relation Act No. 5, addresses the punishment for a person who commits an offence relating to sexual harassment at work place is responsible to pay the victim

Tanzania shillings five million (TZS 5,000,000). But only if is committed within the working place, based on participant's observation the compensation is unfair compare to the crime which an offender committed.

Most of Tanzania Laws and Policies regarding sexual harassment do not address fair compensation to a victims except the Prevention and Combating Corruption Act No. 11, 2006 (the amended Act),which provides punishment for an offender especially those in managerial post where the punishment is treason or imprisonment for 30 years.

Sexual harassment do not taken as a serious issue of public health due to low efforts on the issue. Gender activists do not take relate Sexual harassment incidences has much effects on Sexual and reproductive health and Rights such as;

1. Child pregnancies
2. Child marriages
3. Contamination with infectious diseases such as STDs and HIV/AIDS
4. Unwanted Pregnancies
5. Unsafe abortion



# **Prosperous Health Life Initiative (PHLI).**

Sexual Harassment as Public Health issue. A presentation to a CLE Workshop at California University- Berkeley, USA. On 29 to 30<sup>th</sup> January 2021

**Prepared and Presented by:** Adv. Hilda Stuart Dadu, Executive Director,  
Secretary of the Coalition of WHRDs Tanzania.

# About PHLI

## What is it all about?

- ❑ Prosperous Health Life Initiative (PHLI) is a local Non-Governmental Organization (NGO) based in Dar es Salaam, Tanzania. The organization, which was started in September 2016 and acquired full legal registration in December 2018, with registration number ooNGO0009983.
- ❑ PHLI aim at supporting local communities to improve their health and livelihoods. Specifically, PHLI works towards transforming lives by enhancing knowledge and creating awareness to ensure social inclusion of the marginalized groups and individuals. Our mission is to support local communities, through participatory processes, in acquire knowledge and enjoy better healthcare, have access to quality education and enjoy human rights.

# PHLI Thematic Area

## ❑ **Promote Health Rights and Justices;**

To advocate for the increase of accessibility, availability and affordability of sexual and reproductive health rights and services for key vulnerable population especially women and youths.

## ❑ **Men Engagement;**

To enhance for men involvement in reproductive health care services, rights and justices

## ❑ **Girls and women empowerment;**

To provide legal, education and economic empowerment; to empower girls to attain better education, to empower women in economic activities and provision of legal support for key vulnerable populations

## ❑ **Civic Participation;**


To promote women and young women to engage in decision making positions

## ❑ **Eliminate SGBV;**

To advocate for elimination of Sexual Gender- based violence and discrimination of women and girls in acquiring opportunities. Advocate for ending sexual harassment among women, young women and children.

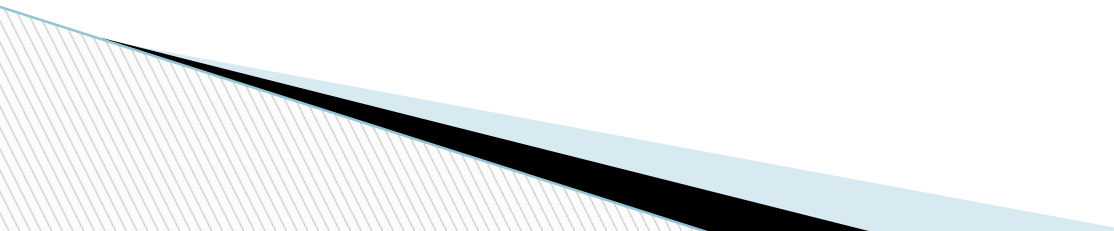
# Planned Activities under AESHI Project in Tanzania

## Activities

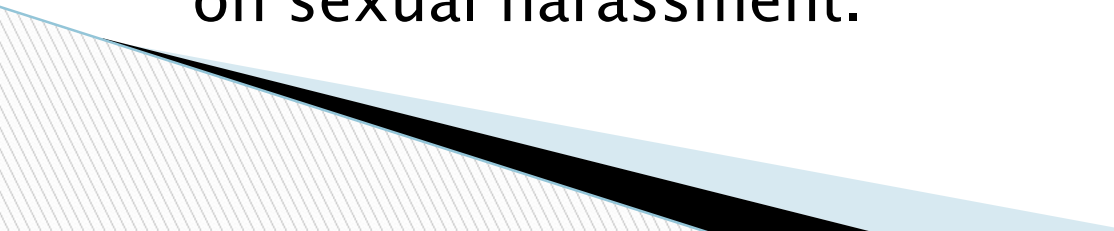
- ❑ Round table discussion of legal and policy frame work relating to Sexual harassment.
  - ❑ Review Laws in Tanzania Related to Sexual harassment
  - ❑ Research on issues of Sexual Harassment at school and work places.
  - ❑ Documenting case studies of Sexual Harassment
  - ❑ Organize Regional Meeting to discuss country situations of Sexual harassments
  - ❑ Participate in writing benchmark book on Sexual harassments
  - ❑ Advocate for the law model in Africa.
- 



# TANZANIAN LAWS RELATING TO SEXUAL HARASSMENT

- i. Sexual Offences Special Provisions Act No 8, 1998;
  - ii. Employment and Labor Relationship Act No. 11, 2005;
  - iii. Prevention and Combating Corruption Act No. 11, 2007;
  - iv. Whistle Blowers and Witness Protections Act of 2015;
  - v. Discrimination and Sexual Harassment Policy;
  - vi. The Code of Ethics and Conduct for Public Servants
  - vi. Law of marriage Act of 1971
- 

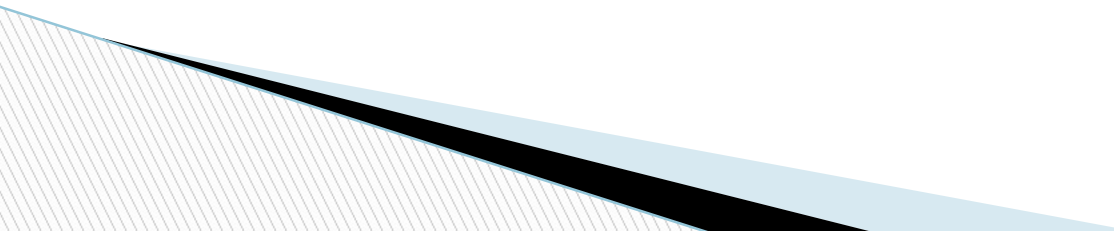
# Legal Opportunities and g

- ❑ Most of Tanzania Institutions have very good gender policies which address direct sexual harassment compare to national sexual harassment policies and laws for instance, University of Dar es Salaam (UDSM), MUHAS, KAMPALA University among the universities in Tanzania. However, most of students do not aware of the existing of these policies in their universities.
  - ❑ In some studies of sexual harassment Of Tanzania reveals that that only 22% of employed women in public institutions are aware of sexual harassment policies while only 13% men are aware of this laws.
  - ❑ Tanzania there is no policy or law that is direct based on sexual harassment.
- 

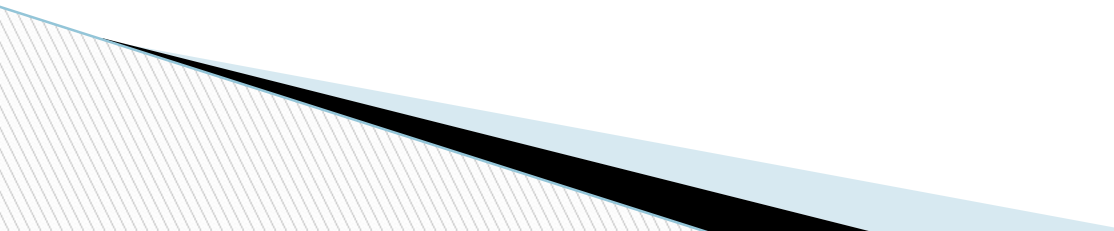
# Gaps.....

- ❑ Employment and Labour Relation Act No. 5, addresses the punishment for a person who commits an offence relating to sexual harassment at work place is responsible to pay the victim Tanzania shillings five million (TZS 5,000,000). But only if is committed within the working place, based on participant's observation the compensation is unfair compare to the crime which an offender committed.
- ❑ Most of Tanzania Laws and Policies regarding sexual harassment do not address fair compensation to a victims except the Prevention and Combating Corruption Act No. 11, 2006 (the amended Act), which provides punishment for an offender especially those in managerial post where the punishment is treason or imprisonment for 30 years

# Sexual Harassment as a Public Health issue

1. Child pregnancies
  2. Child marriages
  3. Infectious diseases such as STDs and HIV/AIDS
  4. Unwanted Pregnancies
  5. Unsafe abortion
  6. Mental Health Problems
- 

# Advocacy activities

- ❑ Formation of school Clubs in secondary and Higher learning Institutions.
  - ❑ Advocacy on review of the laws related to SRHR and Sexual Harassments
  - ❑ Raising awareness on Sexual harassment at schools and higher learning Institutions in Tanzania
  - ❑ Share Sexual harassment information with WRO and Key relevant Stakeholders
- 

# School Clubs of Sexual Gender Based Violence and Sexual and Reproductive Health and Rights Education.



Looking into intersectional sexual harassment and mental health - Link to article

**“Can Law Address Intersectional Sexual Harassment? The Case of Claimants with Personality Disorders”**

<https://www.mdpi.com/2075-471X/8/4/34/htm>

# 4

## SOCIAL DETERMINANTS OF HEALTH AND THE ROLE OF LAW

Isabel Karpin and Karen O'Connell

### Introduction

Social determinants of health are the contextual factors – environmental, relational, institutional, economic – that impact upon health status and outcomes, shaping access to services, and experiences of health. Law or legal structures, as socially constituted institutions, also form a crucial component of the social determinants of health. Law plays a direct and indirect role in shaping the conditions in which other social determinants of health might be created, amplified or mitigated.

Given the extraordinary complexity of the characteristics that make up the social determinants of health, and given the even more complex interaction between them, and how they might change over time and place, it is impossible to give a comprehensive overview in one short chapter. Rather, in this chapter we provide a snapshot of the way in which some social determinants of health within Australia lead to inequities that law might redress. In the first part, we examine the impact of select laws that either directly or indirectly determine health outcomes, with a focus on equality laws that are aimed at redressing social and health inequities. In the second part, we examine how social determinants of health differ for Indigenous Australians, women, and the embryo/fetus. While this last category is not viewed as a legal person with equality rights, we consider it here because significant regulatory and policy work is expended on the health and wellbeing of the embryo/fetus through the concept of the welfare of the future child. In the third part, we consider what constitutes both harm and health, as determined by social and biomedical markers. In the final part of the chapter, we consider some recent legislative measures that have been put in place to deal more effectively with social determinants of health.

### Social determinants of health in a legal context: social inequities and equality law

Social determinants are the factors that influence health, such as education, socio-economic status, employment and access to (publicly funded) healthcare. The WHO defines social determinants of health as:

the conditions in which people are born, grow, work, live, and age, and the wider set of forces and systems shaping the conditions of daily life. These forces and systems include economic policies and systems, development agendas, social norms, social policies and political systems.<sup>1</sup>

The WHO sees these issues as so important that it has a specific program focused on social determinants and has worked with the United Nations (UN) Member States to have the Rio Political Declaration at the World Conference on Social Determinants of Health<sup>2</sup> endorsed by the World Health Assembly (WHA). With a focus on five specific areas, the Declaration

<sup>1</sup> WHO, *Social Determinants of Health* <[www.who.int/social\\_determinants/en](http://www.who.int/social_determinants/en)>.

<sup>2</sup> WHO, *Rio Political Declaration on Social Determinants of Health* (October 2011) <[www.who.int/sdhconference/declaration/en](http://www.who.int/sdhconference/declaration/en)>.



broadly encompasses taking action on governance of health, reducing health inequities and monitoring progress<sup>3</sup>

The list of social determinants of health is not closed, and apart from those mentioned above, includes social policy considerations such as economic stability, as well as public goods, such as access to greenery<sup>4</sup> and unpolluted air, transportation and adequate public services. Time is also a crucial factor in determining health. Adversity in the early years may impact on a person's health throughout their life, while a decline in financial security in older age, for example, can undermine earlier positive experiences.<sup>5</sup> Further, as scientific knowledge about the causes of poor health expands into new fields, understanding of the social determinants of health has correspondingly expanded. So, for example, the health impact of discrimination in the form of racism, sexism, cultural exclusion and stigmatisation has taken on a new significance in recent years. Though viewed as moral wrongs in most progressive societies, discrimination and prejudice were not generally included in lists identifying the social causes of ill-health.<sup>6</sup> Recent research in the area of epigenetics may, however, change this perception, with increasing evidence that:

The health consequences of racism and discrimination can be persistent and passed from one generation to the next through the body's 'biological memory' of harmful experiences<sup>7</sup>

The mechanism for transmission is not DNA mutations – for which we might screen – but rather occurs through the regulation of gene expression, that is, epigenetically. Waggoner and Uller describe epigenetics as 'the study of how environmental exposures (including those internal to the organism) alter gene activity without changing the genetic makeup of the individual'.<sup>8</sup> The most commonly discussed epigenetic mechanism is DNA methylation (methylation), which has as one of its functions, modification of gene expression.<sup>9</sup> Recent studies claim that exposure to environmental stress or trauma in one generation may cause a gene to turn on or off in the next generation, or even across several generations. These are heritable changes in gene expression, rather than changes to the gene or DNA itself. What is interesting about this new research is that it suggests that some social disparities in

3 The Rio Political Declaration, see above n 2, was endorsed by WHO Member States at the 65th WHA in May 2012. For details of the five specific areas, see WHO, *What Are Social Determinants of Health?* <[www.who.int/social\\_determinants/sdh\\_definition/en](http://www.who.int/social_determinants/sdh_definition/en)>

4 Nicholas Bakalar, 'Living Near Greenery May Help You Live Longer', *New York Times*, 14 April 2016

5 Roxanne Mykitiuk and Jeff Nisker, 'Social Determinants of "Health" of Embryos' in Jeff Nisker et al. (eds), *The 'Healthy' Embryo* (CUP, 2010) 116.

6 Roxanne Mykitiuk et al., 'The Legal Construction and Regulation of the Gendered Body and of Disability in Health Law and Policy', *Commissioned Reports and Studies*, Paper 104, The National Network on Environments and Women's Health (2002); Mark Siegler and Richard Allen Epstein, 'Organizers' Introduction to the Conference on Social Determinants of Health and Disease' (2003) 46 Supp 3 *Perspectives in Biology and Medicine* S1; Dennis Raphael, 'Introduction to the Social Determinants of Health' in Dennis Raphael (ed.), *Social Determinants of Health: Canadian Perspectives* (Canadian Scholar's Press Inc, 2004).

7 Bridget J Goosby and Chelsea Heidbrink, 'The Transgenerational Consequences of Discrimination on African-American Health Outcomes' (2013) 7(8) *Sociology Compass* 630–43

8 Miranda R Waggoner and Tobias Uller, 'Epigenetic Determinism in Science and Society' (2015) 34(2) *New Genetics and Society* 177

9 Ibid 179

health that appear across generations derive from systemic forms of discrimination. If this is the case, then anti-discrimination and human rights laws may not just serve the moral good of ensuring all people are equal, but may also be good for your health.<sup>10</sup>

Law forms a framework that intersects with social determinants of health, with the aim of protecting individuals from discriminatory harms, and preserving non-discriminatory access to health services.<sup>11</sup> At the same time, law may also permit differential provision of services where this is warranted as a result of past disadvantage.<sup>12</sup> While we suggest that law can do this, we also acknowledge that it currently does not. The equality framework in the Australian legal system (and in many other jurisdictions of which we might take note, such as the UK) is not consistent or reliable, since it is geared towards individuals bringing claims of harm with quite difficult hurdles of proof. It is difficult, for example, for an Aboriginal man to claim that his poor health is a result of racial discrimination, despite the fact that we know Aboriginal and Torres Strait Islander men have a life expectancy 11.5 years less than non-Aboriginal men in Australia.<sup>13</sup> A legal remedy directed at an individual is of limited use in addressing social determinants of health that may impact whole communities and are complex interactions of disparate elements over time.

Laws which are aimed more broadly at social inequities have also not fared well in guaranteeing positive health outcomes. For example, our positive obligations to provide universal health services are not entrenched in law in Australia. Recent cuts to Medicare bulk billing and a freeze on general practitioner (GP) rebates may also have a negative effect on communities with the least economic resources.<sup>14</sup> As outlined in Chapter 5, Australia lacks a stand-alone human rights legal framework that provides a right to health for all people. This is despite the fact that Australia is a signatory to many important international human rights treaties, including the Convention on the Rights of Persons with Disabilities (CRPD), the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), all of which work towards achieving the highest attainable standard of physical and mental health. In many respects, these international treaties remain aspirational, with significant components not having been enacted into enforceable legal rights.

Moreover, even where there are enforceable legal equality rights, other social factors may inhibit activation of those rights. For example, people may have a theoretical right to enforce their access to health services, through anti-discrimination law. However, people who are socially disadvantaged – whether through poor education, socio-economic status

10 See Chapter 5 for a detailed discussion of the relationship between health and human rights law.

11 See, for example, *McBain v Victoria* (2000) 99 FCR 116 (IVF Case) where the Court relied on section 22 of the *Sex Discrimination Act 1984* (Cth) to overcome then Victorian ART legislation restricting the provision of IVF services to unmarried women. It was upheld on appeal to the High Court, see *Re McBain* (2002) 209 CLR 372.

12 See, for example, *Proudfoot v Australian Capital Territory Board of Health* (1992) EOC 92–417, where the Commission also relied on the *Sex Discrimination Act 1984* (Cth) to find that women's health services were not discriminatory in part because they were a 'special measure' aimed at ameliorating women's disadvantage.

13 Australian Bureau of Statistics (ABS), *4704.0 – The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* (October 2010) <[www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter218Oct+2010](http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter218Oct+2010)>.

14 See Chapter 6 for an overview of the regulatory framework for health in Australia, which includes a discussion of Medicare and how it works.

or belonging to a health 'risk' group, such as Indigenous people – are less likely to access both appropriate health services and law. Indeed, as outlined in Chapter 21, in the case of Indigenous peoples, their compromised social and health status may bring them into contact with the punitive arm of the law rather than trigger access to remedial support. It is impossible to trace every way that law interacts with social determinants of health. However, it is clear that disadvantage – social, legal and identity-based – compounds the problem. At the same time, existing poor health can result in a feedback loop, where being sick means that a person cannot access the social and institutional support that may assist in overcoming illness.

Some of this disadvantage has been tackled through policy measures. The Commonwealth Department of Health has embraced the idea of social determinants of health in areas such as indigenous health,<sup>15</sup> women's health,<sup>16</sup> and men's health.<sup>17</sup> The creation of distinct policies based on sex and race is potentially problematic and yet may be necessary to address health inequalities. Such policies become problematic if the chosen categories are treated as biological categories, as this undermines the social component of their construction and thus their susceptibility to positive regulatory interventions. As Krieger and Fee have noted with respect to US health policy:

Vital statistics present health information in terms of race and sex and age conceptualized only as biological variables – ignoring the social dimensions of gender and ethnicity.<sup>18</sup>

Once the social component of these variables is unpacked, we can see that cultural stereotypes, as well as discrimination based on sex and race, determine health behaviours and limit access to services. The effects of race and sex discrimination extend to lower socio-economic status, but lower socio-economic status is also in and of itself a social determinant of health.

## Interaction of law and social determinants of health: some examples

### Indigenous health<sup>19</sup>

A key consequence of identifying social determinants of health is that these necessarily expand the responsibility for health well beyond the institutions and relationships conventionally associated with health, such as hospitals, doctors and the health system. The

15 Department of Health, *Aboriginal and Torres Strait Islander Health Performance Framework* (9 June 2015) <[www.health.gov.au/indigenous-hpf](http://www.health.gov.au/indigenous-hpf)>.

16 Department of Health, *National Women's Health Policy* (10 June 2013) <[www.health.gov.au/internet/main/publishing.nsf/Content/national%20womens%20health-1](http://www.health.gov.au/internet/main/publishing.nsf/Content/national%20womens%20health-1)>.

17 Department of Health, *National Male Health Policy* (30 June 2014) <[www.health.gov.au/internet/main/publishing.nsf/Content/national%20mens%20health-1](http://www.health.gov.au/internet/main/publishing.nsf/Content/national%20mens%20health-1)>.

18 Nancy Krieger and Elizabeth Fee, 'Man-Made Medicine and Women's Health: The Biopolitics of Sex/Gender and Race/Ethnicity' in Nancy Krieger (ed.), *Embodying Inequality: Epidemiologic Perspectives* (Baywood Publishing Company, 2005) 239, 244.

19 See Chapter 21 for a detailed discussion of Indigenous health and the law.

National Aboriginal and Torres Strait Islander Health Plan 2013–2023 (Health Plan) takes on board the advice of the Close the Gap Steering Committee that it is:

important to address the social and cultural determinants of health as there are many drivers of ill health that lie outside the direct responsibility of the health sector.<sup>20</sup>

The Health Plan notes that a large proportion of the life expectancy gap between Indigenous Australians and non-Indigenous Australians is due to social determinants of health.<sup>21</sup>

One startling example offered in the Health Plan shows the significant difference education and employment makes to the formation of life-shortening habits. It states that: 'Aboriginal and Torres Strait Islander adults are less likely to smoke if they have completed Year 12, are employed and if they have higher incomes'.<sup>22</sup> Clearly then, direct discrimination based on race is one factor that leads to poorer health, but indirect discrimination in the form of persistent intergenerational deprivation leading to poverty, lack of schooling and lack of access to health services, is also a key factor in determining whether or not an individual is healthy.

As part of the Health Plan, state and territory governments, as well as that of the Commonwealth, must develop implementation plans. Interestingly, the Commonwealth implementation plan does not include any specific legal strategies.<sup>23</sup> However, it does refer to the National Indigenous Law and Justice Framework 2009–2015 (Framework), which includes seven principles of recognition and six principles of action. The fourth principle of recognition states:

4 Aboriginal and Torres Strait Islander peoples have the right to live free from victimisation, racism and discrimination.

The second principle of action (the ninth in the combined list) requires governments to agree to:

9. Comprehensively respond to factors contributing to violent and criminal behaviour in Indigenous communities in particular mental health issues and the misuse and abuse of alcohol and other substances.<sup>24</sup>

20 Department of Health, *National Aboriginal and Torres Strait Islander Health Plan 2013–2023* (27 June 2013) <[www.health.gov.au/internet/publications/publishing.nsf/Content/oatsih-healthplan-toc-determinants](http://www.health.gov.au/internet/publications/publishing.nsf/Content/oatsih-healthplan-toc-determinants)>, quoting Close the Gap Steering Committee 2012, *Submission to the Australian Government for the development of a National Aboriginal and Torres Strait Islander Health Plan*.

21 Department of Health, *National Aboriginal and Torres Strait Islander Health Plan 2013–2023* (27 June 2013) <[www.health.gov.au/internet/publications/publishing.nsf/Content/oatsih-healthplan-toc-determinants](http://www.health.gov.au/internet/publications/publishing.nsf/Content/oatsih-healthplan-toc-determinants)>.

22 Department of Health, *National Aboriginal and Torres Strait Islander Health Plan 2013–2023* (27 June 2013) <[www.health.gov.au/internet/publications/publishing.nsf/Content/oatsih-healthplan-toc-determinants](http://www.health.gov.au/internet/publications/publishing.nsf/Content/oatsih-healthplan-toc-determinants)> quoting Australian Health Ministers' Advisory Council 2012, *Aboriginal and Torres Strait Islander Health Performance Framework 2012*.

23 Department of Health, *National Indigenous and Torres Strait Islander Health Plan Implementation Plan 2013–2023* <[www.health.gov.au/internet/main/publishing.nsf/Content/indigenous-implementation-plan](http://www.health.gov.au/internet/main/publishing.nsf/Content/indigenous-implementation-plan)>.

24 Standing Committee of Attorneys-General Working Group on Indigenous Justice, *National Indigenous Law and Justice Framework 2009–2015* <[www.cabinet.qld.gov.au/documents/2009/sep/scag%20national%20indigenous%20law%20and%20justice%20framework/Attachments/NationalIndigenousLawandJusticeFramework.pdf](http://www.cabinet.qld.gov.au/documents/2009/sep/scag%20national%20indigenous%20law%20and%20justice%20framework/Attachments/NationalIndigenousLawandJusticeFramework.pdf)>.

With respect to health, the Framework specifically notes that: 'health, substance misuse and wellbeing are issues closely linked to indigenous violence, offending and incarceration',<sup>25</sup> Strategies to redress these concerns are included in the Framework,<sup>26</sup> but there has been limited success. In 2008, it was noted by the Australian Bureau of Statistics that:

Nearly one-third (32 per cent) of the Aboriginal and Torres Strait Islander people aged 18 years and over had experienced high/very high levels of psychological distress, which was more than twice the rate for non-Indigenous people.<sup>27</sup>

As outlined in Chapter 21, evidence of the ongoing significantly higher levels of incarceration of Indigenous peoples compared to the general population suggest that standard mental health diversionary strategies and support systems are not effective. In 2015, Aboriginal and Torres Strait Islanders accounted for just over a quarter of the total Australian prison population, despite the fact that they make up only 2 per cent of the general Australian population.<sup>28</sup> The Australian Institute of Health and Welfare (AIHW) reports that:

[N]on-Indigenous prison entrants were more likely than Indigenous prison entrants to have ever been told that they have a mental health disorder (51 per cent and 44 per cent, respectively), but the proportions taking mental health related medication was the same.<sup>29</sup>

It is clear that in the case of Aboriginal and Torres Strait Islander people, it is not sufficient to simply respond to mental health issues by intervening once an incident has occurred or a mental health issue has been recognised. Instead, there needs to be a fundamental strategy to address the long-term consequences of entrenched and systemic racism stemming from historic harms, such as dispossession and the unjust removal of children. This is in addition to more contemporary harms such as exclusion from social goods, poverty, and poor educational opportunities. By taking an approach that acknowledges that social context is a significant determinant of health, we can thus see that equality measures in law need to be developed in areas that are not immediately identified as health-related areas. These include the criminal law and employment law, as well as laws dealing with equality of opportunity and affirmative measures for redressing past harms and inequities.

Indigenous health issues in Australia also demonstrate that what are considered social determinants of health will vary by group and culture and over time. For example, past

25 Ibid 24.

26 Ibid 18. To this end the Framework includes implementation strategies such as: 2.3.3a Develop and implement specialised training to enable police to better identify Aboriginal and Torres Strait Islander people with mental health issues; 2.3.3b Develop and implement appropriate referral pathways to enable police to better respond to Aboriginal and Torres Strait Islander people with mental health issues; 2.3.3c Review court-based mental health initiatives to identify and promote culturally competent good practice; 2.3.3d Increase use of effective court-based mental health diversionary options; 2.3.3e Review current mental health care in corrective settings and develop and implement culturally competent mental health through care programs.

27 ABS, above n 13.

28 ABS, *4517.0 Prisoners in Australia (2015)* <[www.abs.gov.au](http://www.abs.gov.au)>.

29 Australian Institute for Health and Welfare (AIHW), 'Mental Health of Prison Entrants' <[www.aihw.gov.au/prisoner-health/mental-health](http://www.aihw.gov.au/prisoner-health/mental-health)>.

government practice involved the removal of Aboriginal children from their families, based on the idea that it was better for the child (particularly if they had some non-Indigenous heritage) to be brought up away from Aboriginal culture and community. These very factors were identified in the *Bringing Them Home Report* as leading to terrible and ongoing health effects for Aboriginal people.<sup>30</sup> Citing the *Report*, the Closing the Gap Clearinghouse has recently observed that:

The effects of colonisation and trauma surrounding forced removal from natural family has contributed to disadvantaged socio-economic conditions such as overcrowding, inadequate housing and unemployment in many Indigenous communities.<sup>31</sup>

Keeping Aboriginal children in their communities and connected to their culture wherever possible is now recognised as best for such children. The Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) is an overarching principle that establishes child removal as a last resort, and requires that a child's connection to family and culture be supported if the child is removed.<sup>32</sup> This Principle has been enacted in various forms in every state and territory's child protection legislation.<sup>33</sup> What is accepted in government policy as social determinants of health for an Aboriginal child has thus changed drastically over time, and kinship and culture are now viewed as essential to an Aboriginal child's flourishing. However, it is important to note that this area remains contested, with concerns that the Principles are not upheld in practice. As the Secretariat of National Aboriginal and Islander Child Care (SNAICC) has observed: '[the] implementation of the ATSICPP remains grossly inadequate to promote and respect the rights of our children to family and cultural connection',<sup>34</sup>

## Women's health

The National Women's Health Policy (NWHP) provides a statement on the social factors affecting women's health and wellbeing.<sup>35</sup> These factors are to be taken into account when framing public policy on women's health and include such factors as intersecting social status (eg. Aboriginal and Torres Strait Islander women experience much worse health outcomes than non-Indigenous women, and this is exacerbated by living in remote locations)<sup>36</sup>

30 Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (HREOC, 1997).

31 Sarah Wise, *Improving the Early Life Outcomes of Indigenous Children: Implementing Early Childhood Development at the Local Level*, Issues Paper No. 6, produced for the Closing the Gap Clearinghouse (December 2013).

32 Clare Tilbury et al., *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and core elements* (Secretariat of National Aboriginal and Islander Child Care [SNAICC], 2013).

33 Ibid Table 2, 17–18.

34 SNAICC, <[www.snaicc.org.au/aboriginal-and-torres-strait-islander-child-placement-principle](http://www.snaicc.org.au/aboriginal-and-torres-strait-islander-child-placement-principle)>.

35 Department of Health and Ageing, *National Women's Health Policy 2010* (27 April 2016) 85 <[www.health.gov.au](http://www.health.gov.au)>.

36 AIHW, *Spatial Variation in Aboriginal and Torres Strait Islander Peoples' Access to Primary Health Care* (21 July 2015) <[www.aihw.gov.au/publication-detail/?id=60129551602](http://www.aihw.gov.au/publication-detail/?id=60129551602)>.

and socially constructed gender roles which can inhibit access to appropriate healthcare. The NWHF states that:

Gender roles and gender relations can affect women's capacity to access resources such as income, education and employment, which themselves promote health. These inequalities can create, maintain or exacerbate exposure to risk factors that endanger health. For example, gender can contribute to differences between and among women and men in financial security, paid and unpaid caring work and experiences of violence.<sup>37</sup>

This makes it clear that there is a wide range of laws that will impact the social determinants of women's health, including social security laws, labour laws (which allow for flexible work practices) and family violence laws. Each of these laws interacts with other practices, and institutions, to form a very complex picture of what is required to improve women's health outcomes.

To take one example, domestic and family violence directly impacts women's health through physical injury and has a cumulative impact on women's mental health. The risk factors for domestic and family violence, such as alcohol and drug abuse and childhood abuse, and the high at-risk groups (women with disabilities, Indigenous women, rural and remote women)<sup>38</sup> are already markers for poor health, which is then exacerbated by the long-term impact of such violence. Law reform in many areas of law has attempted to address domestic and family violence and to improve the protections offered to women (in particular) who experience such violence.

Examples include creating a statutory definition of 'consent' in NSW that requires a reasonable belief that a person is consenting to sex;<sup>39</sup> implementing quasi-criminal measures to prevent violence through apprehended family violence orders;<sup>40</sup> and putting in place a host of legal institutional measures (liaison officers, court support) to support women who seek and obtain such orders. More recently, workplace law and policy reforms, such as allowing workplace leave in situations of domestic and family violence,<sup>41</sup> as well as making being a 'victim of domestic violence' a protected attribute in discrimination law,<sup>42</sup> have extended again the range of laws that are aimed at tackling what is (also) a health issue. In order to address domestic and family violence, therefore, a whole host of laws in quite disparate areas, ranging from criminal laws to the laws of evidence, as well as workplace and discrimination laws, need to be engaged.

37 See Department of Health and Ageing, above n 35, 86.

38 Janet Phillips and Penny Vandenbroek, *Domestic, Family and Sexual Violence in Australia: An Overview of the Issues*, Research Paper Series 2014-15, Parliamentary Library, Parliament of Australia (2014) <[www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1415/ViolenceAust](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/ViolenceAust)>.

39 *Crimes Amendment (Consent - Sexual Assault Offences) Act 2007* (NSW).

40 These were first introduced in NSW in 1982, and are now contained in the *Crimes (Domestic and Personal Violence) Act 2007*.

41 In collective bargaining agreements, for an assessment of the introduction of domestic violence clauses in workplace agreements, see Ludo McFerran, Natasha Cortis and Tahlia Trijbetz, *Gendered Violence & Work Domestic and Family Violence Clauses in your Workplace: Implementation and Good Practice*, Social Policy Research Centre & Centre for Gender Related Violence Studies University of New South Wales (2013) <[www.arts.unsw.edu.au/media/FASSFile/Domestic\\_and\\_Family\\_Violence\\_Clauses\\_in\\_your\\_Workplace\\_Implementation\\_and\\_good\\_practice.pdf](http://www.arts.unsw.edu.au/media/FASSFile/Domestic_and_Family_Violence_Clauses_in_your_Workplace_Implementation_and_good_practice.pdf)>.

42 For a discussion of how anti-discrimination laws are beginning to be used to provide support and protection for victims of family violence, see Belinda Smith and Tashina Orchiston, 'Family Violence Victims at Work: A Role for Anti-Discrimination Law?' (2012) 25(3) *Australian Journal of Labour Law* 209.

For women, sex-based inequality has clear, although complex, impacts on health outcomes. When we turn our attention to men, the strongest social determinants of health come from vulnerabilities other than sex. The Commonwealth government has developed a policy on men's health which lists some of the social determinants of health for men, such as socio-economic status, which is exacerbated by unemployment, a lack of educational achievement and indigeneity. Where people are offered sex-specific services in health, such as women's health services, they are not discriminatory under Commonwealth anti-discrimination law, if they are 'special measures' designed to bring about equality.<sup>43</sup> Where a disadvantage has come about as a consequence of a privileged social status, as it arguably has in the case of some men's health issues, it is harder to argue that it is an issue of inequality that should be protected by law.<sup>44</sup>

### Future children (embryos and fetuses)

Social determinants of health will change over the lifecycle and, in fact, begin before a person's birth. Moreover, some social determinants will have an intergenerational impact on people. For example, the conditions required to produce a healthy embryo or fetus often focus on policing women's bodies, both before and during pregnancy. Indeed, women may be held responsible for creating, out of the material of their own bodies, an optimally healthy environment for future and not-yet-conceived children. For example, the Royal Australasian College of Physicians and the Royal Australian and New Zealand College of Psychiatrists recently published an Alcohol Policy that recommended that there be 'routine screening and early interventions for women of reproductive age who misuse or have alcohol dependency'.<sup>45</sup> Significantly, the language applies to all women who are capable of pregnancy, not just women who are planning to have children. In such policy framing, women are characterised as both the conduit for potential harm to future children and the target for intervention.

As noted earlier in this chapter, current and emerging research on epigenetics suggests that intergenerational harm may be traced back to the way the body registers the impact of environmental stressors.<sup>46</sup> While these scientific findings represent an important

43 *Proudfoot v Australian Capital Territory Board of Health* (1992) EOC 92-417.

44 Will Courtenay, 'Theorising Masculinity and Men's Health' in Alex Broom and Philip Tovey (eds), *Men's Health: Body, Identity and Social Context* (Wiley-Blackwell, 2009) 9, 14.

45 The Royal Australasian College of Physicians and The Royal Australian and New Zealand College of Psychiatrists, 'Alcohol Policy' (15 March 2016) 37 <[www.ranzcp.org/News-policy/News/RACP-and-RANZCP-release-updated-Alcohol-Policy.aspx](http://www.ranzcp.org/News-policy/News/RACP-and-RANZCP-release-updated-Alcohol-Policy.aspx)>.

46 Megan Warin et al, 'Epigenetics and Obesity: The Reproduction of Habitus Through Intracellular and Social Environments' (2016) 22(4) *Body & Society* 53; Maurizio Meloni, 'Heredity 2.0: The Epigenetics Effect' (2015) 34(2) *New Genetics and Society* 117; Hannah Landecker and Aaron Panofsky, 'From Social Structure to Gene Regulation, and Back: A Critical Introduction to Environmental Epigenetics for Sociology' (2013) 39 *Annual Review of Sociology* 333; Shannon Sullivan, 'Inheriting Racist Disparities in Health: Epigenetics and the Transgenerational Effects of White Racism' (2013) 1(2) *Critical Philosophy of Race* 190; Arline Geronimus, 'Deep Integration: Letting Epigenome Out of the Bottle Without Losing Sight of the Structural Origins of Population Health' (2013) 103(S1) *American Journal of Public Health* S56; Michael Rutter, 'Gene-Environment Interdependence' (2012) 19(1) *European Journal of Developmental Psychology* 391; Mark A Rothstein, Yu Cai and Gary E Marchant, 'The Ghost in our Genes: Legal and Ethical Implications of Epigenetics' (2009) 19(1) *Health Matrix* 1.

development in knowledge about the determinants of health, there is a danger that the immediate regulatory effect will be a greater policing of women's bodies, since women are the node where the complex network of intergenerational harm transmission and intergenerational repair meet. Women then become even more responsible for health outcomes, particularly in relation to their offspring. This is despite the fact that men also transmit heritable epigenetic harms.

This is particularly noticeable in the new area of research that has come to be known as developmental origins of health and disease (DOHaD), which refers to the developmental environment of the embryo or fetus and that of its mother. While clearly DOHaD should also take into account paternal environmental development, in fact DOHaD research is overwhelmingly focused on the maternal side. According to Richardson, DOHaD theory is mobilised to 'model how the mother's social and environmental context during her own development – including social class – may be transmitted to the growing fetus, conditioning it for a life of inequality even before birth'.<sup>47</sup> Mykitiuk and Nisker argue that a social determinants approach to embryo health requires us to pay attention to the social environments in which women, men and embryos exist, rather than locating health and illness exclusively within a particular body – be it an embryonic body or that of a person.<sup>48</sup> At the same time, it must be remembered that any emphasis on particular social environments – such as those affecting the mother – when responding to such arguments may inadvertently reinforce gender inequality.<sup>49</sup>

## Emerging biomedical approaches to social determinants of health

Social and biomedical determinants of health are increasingly intertwined. However, when considering what constitutes a social determinant of health, it is important to remember that there are two components to this question: first, what is a social determinant? (which has already been addressed in this chapter); and second, what is health? As health itself is a social construct, answering this second part of the question is not simple. In order to shed some light on the complexity of this construct, we now turn briefly to consider some interesting questions which are raised by a fascinating but problematic area of current health research: the identification of biomarkers for socially undesirable behaviours.

Research in this area is still in the early stages, but genetic markers for antisocial behaviour are already being enthusiastically sought. As Niv and Baker point out, 'several candidate genes related to antisocial and aggressive behaviour have emerged and have been

47 Sarah S Richardson, 'Maternal Bodies in the Postgenomic Order' in Sarah S Richardson and Hallan Stevens (eds), *Postgenomics Perspective on Biology after the Genome* (Duke University Press, 2015) 210, 222.

48 Mykitiuk and Nisker, above n 5, 121.

49 For a comprehensive discussion, see Isabel Karpin, 'Regulatory Responses to the Gendering of Transgenerational Harm' (2016) 31 *Australian Feminist Studies* 139.

supported in numerous studies'.<sup>50</sup> They go on to note that even the genes most implicated in anti-social behaviours are impacted by other factors, such as 'childhood adversity':

MAOA's [monoamine oxidase A gene] influence on aggressive behaviour has been found to interact significantly with adverse environment; that is, gene expression depending heavily upon environmental conditions.<sup>51</sup>

By seeking biomarkers for social and behavioural conditions, health is correlated with good citizenship and biological 'flaws' with delinquency. At the same time, epigenetics and neuroscience are providing fascinating insights into the biological impact of social harm. For example, neuroscience is highlighting the impact on brain development of early childhood abuse, including exposure to violence. However, it does so in a way that biologises the harm of abuse within the individual child's body. Further, once disadvantage is understood as biological, the affected child is less likely to be construed as remediable than if the harm is viewed as having a more transitory social and circumstantial effect.<sup>52</sup>

While neuroscience examines the immediate impact of violence on children, epigenetics posits a transgenerational effect. For example, there have been studies exploring the transgenerational impact of intimate partner violence (IPV) on methylation (see earlier) that suggest that maternal stress due to IPV has an impact on epigenetic modifications that occur in utero. The epigenetic effect claimed is the production of socially aggressive children and grandchildren.<sup>53</sup> Socially undesirable behaviours are thus associated both with historical inequality and with an abiding state of poor neurological and genetic health that seemingly takes such behaviour outside the ambit of law. We await further research developments in this area, while at the same time recognising its significant limitations.

## Health in all policies? Advancing social determinants of health policy in Australia

While this chapter has focused on the difficulties associated with legal attempts to bring about health equalities, there are some current attempts to take a broader legal and policy approach to improving social determinants of health. In 2013, the Senate Community Affairs References Committee published a report in response to the WHO's Commission on Social Determinants of Health, *Closing the Gap in a Generation Report (WHO Report)* (Senate Committee Report).<sup>54</sup> While the Senate Committee Report's list of recommendations

50 Sharon Niv and Laura A Baker, 'Genetic Markers for Antisocial Behaviour' in Christopher R Thomas and Kayla Pope (eds), *The Origins of Anti-Social Behaviour: A Developmental Perspective* (OUP, 2012) 3.

51 Ibid 13.

52 Karen O'Connell, 'Unequal Brains: Disability Discrimination Laws and Children with Challenging Behaviour' (2016) 24(1) *Medical Law Review* 76–98.

53 Maria Isabel Cordero et al., 'Evidence for Biological Roots in the Transgenerational Transmission of Intimate Partner Violence' (2012) 2 *Translational Psychiatry* e106.

54 Senate Community Affairs References Committee, Parliament of Australia, *Australia's Domestic Response to the World Health Organisation's (WHO) Commission on Social Determinants of Health report 'Closing the Gap Within a Generation'* (2013) <[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Completed\\_inquiries/2010-13/socialdeterminantsofhealth/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2010-13/socialdeterminantsofhealth/report/index)>.

is written in broad terms and is mostly aimed at administrative and policy changes, it also highlights some interesting legal measures adopted by Australian states to address the social determinants of health, a number of which we highlight here.

In SA, the concept of social determinants of health has been incorporated into government policy. So, for example, the Minister for Health and Ageing specifically referred to the WHO Report in his second reading speech for the *Public Health Act 2011* (SA), noting that:

[The legislation] 'in part provides for South Australia's response to this challenge' and includes principles of sustainability, partnerships, equity and prevention, providing a mandate for working together and recognising that the social determinants of health are fundamental to improving population health outcomes.<sup>55</sup>

Specifically, the SA *Public Health Act* now includes an 'Equity Principle' which states:

Decisions and actions should not, as far as is reasonably practicable, unduly or unfairly disadvantage individuals or communities and, as relevant, consideration should be given to health disparities between population groups and to strategies that can minimise or alleviate such disparities.<sup>56</sup>

In the Senate Committee Report, it was noted that arguments had been put forward that the approach taken in SA should not be adopted at the federal level, with the Commonwealth Department of Health noting in its supplementary submission to the Committee that:

In the case of both the South Australian Government and Tasmanian Health in All Policies Collaboration, key drivers have been established through legislation; in particular Public Health Acts, as well as state based strategic plans and/or targets. Duplication of such approaches at a national level could add further complexity to an already complicated environment without a clear mandate for action.<sup>57</sup>

Nevertheless, the Senate Committee Report ultimately recommended that the Commonwealth government adopt a similar mechanism to the SA 'Health in All Policies' (HiAP) approach in relation to government action. Specifically it required the adoption of comprehensive measures 'that incorporate health as a shared goal across all parts of Government and addresses complex health challenges through an integrated policy response across portfolio boundaries'.<sup>58</sup> The Report also recommended that the Commonwealth government 'adopt the WHO Report and commit to addressing the social determinants of health relevant to the Australian context'.<sup>59</sup> Once such recommendations have been adopted there will need to be follow-up research to determine whether they are effective in achieving better health outcomes for people with unequal social resources.

55 Ibid 28.

56 *Public Health Act 2011* (SA) s 13.

57 Senate Community Affairs References Committee, Parliament of Australia, *Australia's domestic response to the World Health Organization's (WHO) Commission on Social Determinants of Health report 'Closing the gap within a generation'* (2013) <[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Completed\\_inquiries/2010-13/socialdeterminantsofhealth/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2010-13/socialdeterminantsofhealth/report/index)>.

58 Ibid 38.

59 Ibid.

## Conclusion

It is clear that social determinants of health and disparities in the distribution of health resources play a very significant role in health outcomes. What we have shown in this chapter are a number of ways in which social determinants of health raise important issues for consideration in law. This has included consideration of the role of equality laws which aim to address social and health inequities; an exploration of the impact of social determinants on different communities; and a critical analysis of the way in which health is socially constructed, rather than being just a matter for biomedical determination. We have also presented a range of examples of the way in which the law has been used, with varying degrees of success, to create or amplify positive social determinants and to mitigate negative ones. Such examination offers a springboard for much-needed discussion about the important role law can play in redressing social inequities arising from disparities in the distribution of the social goods that lead to poor health.