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Written comment of The Ohio Alliance to End Sexual Violence

RE: Office of Civil Rights hearing pursuant to Executive Order 14021, *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*
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The Ohio Alliance to End Sexual Violence (OAESV) submits this comment as testimony to inform the Department of Education’s review of regulations, guidance, and other agency actions under Title IX, and to respectfully request changes to the rule entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.” OAESV also submitted comment to the Department in 2019 in opposition to the Department’s Notice of Proposed Rulemaking concerning Title IX of the Education Amendments of 1972, as published in the Federal Register on November 29, 2018. OAESV is a federally-designated sexual violence coalition and service provider for Ohio’s 34 rape crisis centers – programs that span across 77 counties. Advocates, counselors, and staff from these agencies provide essential services to our K-12 and college students in Ohio, all of whom rely on safe and fair options to address sexual violence in educational programs and activities.

Reestablish Protections for All Student Survivors

Under the current Title IX regulations, survivors receive arbitrary and at times harmful responses from their educational institutions after reporting experiences of sexual harassment. This is troubling given that many survivors are already subjected to disproportionate amounts of violence and discrimination – Black women and girls, for example, are at a higher risk for sexual violence, lethal intimate partner violence, and psychological abuse than women overall.¹ Additionally, LGBTQ students are affected by sexual assault and harassment at a greater rate, and the stigma that many LGBTQ people face can make it more difficult for survivors to report. Studies suggest that nearly half of bisexual women have been raped² and half of transgender people will experience sexual violence at some point in their lifetimes.³ These barriers are exacerbated by the 2020 regulations, which prevent already vulnerable survivors from coming forward and seeking support in fear they will face retaliation, further harm, and discriminatory processes.

The training required for Title IX coordinators, investigators, and adjudicators does not include crucially important training on cultural humility and awareness, sexual violence within vulnerable populations and communities, or on disabilities and sexual violence. Training must not only include educate Title IX personnel on nuanced cultural differences that impact the response to sexual violence, but also on the realities for vulnerable populations on campus.

¹ DuMonthier, A., Childers, C., Milli, J. (2017). *The status of black women in the United States*. Institute for Women’s Policy Research.

² Walters, M.L., Chen J., & Breiding, M.J. (2013). *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation*. National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf

³ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The report of the 2015 U.S. transgender survey*. National Center for Transgender Equality.

- Black, Indigenous, and People of Color (BIPOC) are less likely to seek mental health care after sexual assault due to economic barriers and cultural norms about sexual violence. The live cross-examination requirement instilled in 2020 further traumatizes survivors. Thus, BIPOC deal with even more untreated post-traumatic symptoms.
- The 2020 regulations do not require institutions to collect data on the racial impact of their disciplinary actions. Without this requirement, institutions cannot be effectively held accountable for the experiences described by so many students of color. For instance, Black men report being punished at a much higher rate than their white counterparts and the punishments that they receive are harsher.⁴
- Lack of diversity in Title IX offices can further distrust and fear of reporting. In 2018, 70% of Title IX coordinators were white women.⁵ The lack of diversity in hearing panels can create disproportionate sanctions and fear of engaging in the grievance process.
- While Black women face higher rates of sexual assault, they are much less likely to report the incident.⁶ Further, Black women who defend themselves against their harassers are more likely to be stereotyped as the aggressor. This leads to the punishment of Black women who defend themselves or report harassment.
- Immigrant and undocumented students are less likely than their peers to report sexual assault to the police in fear of being subjected to police violence or deportation. The rescinded 2014 Q&A explicitly protected documented and undocumented immigrant students from deportation if they filed a Title IX complaint.⁷ The Department must reinstate these protections for immigrant and undocumented students, which violate Title IX's protections against retaliation.
- Language barriers and immigration status are additional barriers in seeking support in Title IX cases. These barriers may prevent Asian American and Pacific Islander survivors from seeking out resources or impose greater barriers to support. The rescinded 2014 Q&A also stated that schools must ensure that trainings, reporting forms, and other information are fully accessible to English language learners, as well as provide information about the "U" nonimmigrant status and the "I" nonimmigrant status. We recommend the restoration of this guidance for all educational programs and activities.
- Asian American survivors are more likely than their white counterparts to have high levels of self-blame and suicidal ideation.⁸ They are also more likely to use drugs and alcohol to cope with the assault.⁹ The 2020 Title IX regulations do not adequately address schools' responsibilities in providing supportive measures to student survivors, including the additional barriers and vulnerabilities faced by Students of Color. We strongly recommend that supportive measures be returned to the guidance established prior to the 2020 rule: the survivor should be allowed more complete access to supportive measures; if there is a conflict because a measure would burden both parties, the resulting decision should favor the survivor. For example, if a survivor shares a work-

⁴ Riddle, T., & Sinclair, S. (2019). Racial disparities in school-based disciplinary actions are associated with county-level rates of racial bias. *Proceedings of the National Academy of Sciences of the United States of America*, 116(17), 8255–8260.

<https://doi.org/10.1073/pnas.1808307116>

⁵ Association of Title IX Administrators [ATIXA]. *2018 survey summary*. https://cdn.atixa.org/website-media/o_atixa/wp-content/uploads/2012/01/18120441/2018-Member-Survey-Final.pdf

⁶ Tillman, S., Bryant-Davis, T., Smith, K., & Marks, A. (2010). Shattering silence: exploring barriers to disclosure for African American sexual assault survivors. *Trauma, violence & abuse*, 11(2), 59–70. <https://doi.org/10.1177/1524838010363717>

⁷ The 2014 Q&A stated: “[a] school should also be aware that threatening students with deportation or invoking a student’s immigration status in an attempt to intimidate or deter a student from filing a Title IX complaint would violate Title IX’s protections against retaliation.”

⁸ Rao, K., DiClemente, R. J., & Ponton, L. E. (1992). Child sexual abuse of Asians compared with other populations. *Journal of the American Academy of Child and Adolescent Psychiatry*, 31(5), 880–886. <https://doi.org/10.1097/00004583-199209000-00016>

⁹ Tsong, Y., & Ullman, S. E. (2018). Asian American women sexual assault survivors' choice of coping strategies: The role of post-assault cognitive responses. *Women & Therapy*, 41(3-4), 298–315. <https://doi.org/10.1080/02703149.2018.1430340>

study location with the respondent and a change in location would burden both parties, the decision should be made to move the respondent rather than the survivor.

Prohibit Retaliation Against Complainants

Title IX prohibits retaliation against complainants who report experiences of sex discrimination.¹⁰ However, many students who report sexual assault and other forms of sexual harassment to their school experience retaliation for coming forward.

Women and Girls of Color in particular face discriminatory discipline due to race and gender stereotypes. Schools are more likely to ignore, blame, and punish Women and Girls of Color who report sexual harassment due to harmful race and gender stereotypes; as a result, schools are likely to treat their reports of sexual harassment with less seriousness, and more likely to place blame on Black girls for their victimization. Similarly, LGBTQ students are less likely to be believed and more likely to be blamed due to stereotypes about hypersexuality, as well as discriminatory beliefs that discourage and punish queer sexual contact and intimate relationships. Students with disabilities, too, are less likely to be believed because of stereotypes about people with disabilities having less credibility and because they may have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability. In order to be inclusive of LGBTQ students and students with disabilities' particular experiences and needs, effective Title IX policies must be mandated to include that all survivors who experience and/or report sexual harassment have the same rights under the policy as other survivors.

The new rule should establish that student survivors are not punished for demonstrating symptoms of trauma; students should instead be given supportive measures by their schools to guarantee they are able to complete their education with as little adverse impact as possible. To that end, the Department should provide clear definitions of prohibited retaliation, including but not limited to:

- Disciplining complainants for collateral conduct violations that must be disclosed in order to report sexual harassment, dating violence, domestic violence, or stalking; that is disclosed in the investigation (e.g., alcohol or drug use, consensual sexual contact, reasonable self-defense, or presence in restricted parts of campus); or that occurs as a result of the reported harassment (e.g., nonattendance);
- Disciplining complainants for false reports based solely on the school's conclusion that there wasn't sufficient evidence to support a finding of harassment;
- Disciplining complainants for prohibited sexual conduct in school based on the school's conclusion that the reported sexual harassment was instead welcomed sexual contact;
- Disciplining a complainant for discussing the sex-based harassment report; and
- Disciplining a victim for charges the school knew or should have known were brought by a third party for the purpose of using the disciplinary process to retaliate against a victim of sex-based harassment.
- Allowing institutions to dismiss, without a full investigation, complaints of sexual harassment, dating violence, domestic violence, and stalking that are patently retaliatory (e.g., where a student is reported for sexually assaulting a classmate, insists the contact was consensual, and then, after being found responsible, files a counter-complaint that their victim in fact sexually assaulted them).

Require Schools to Address Complaints Regardless of Location

The majority of post-secondary students experience sexual harassment, particularly sexual assault, by other students in off-campus environments.¹¹ Although the physical location of the sexual harassment occurs off

¹⁰ Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005).

¹¹ National Institute of Justice. (2007, October). *The campus sexual assault (CSA) study*. <https://www.ojp.gov/pdffiles1/nij/grants/221153.pdf>

campus in these instances, survivors still confront the impacts of the sexual harassment while on campus. The 2020 final rule is particularly impactful for students attending smaller institutions and graduate students, who nearly always live in off-campus housing and frequently attend classes with the same small number of peers continually for the life of their program. And just as COVID-19 has exacerbated many existing social issues, this rule has become extremely dangerous during the pandemic since unprecedented amounts of students shifted to off-campus housing. The pandemic has also highlighted the violence and harassment faced by students in off-campus settings in online and digital settings. It's not about the location of the abuse – it's about the impact it has on survivors.

- **Digital Abuse**

The new 2020 Title IX regulations fail to address cyber sexual violence in technology-facilitated abuse, such as non-consensual sharing of pornography or sexually explicit images in mandatory remote educational settings, heightened cases of cyber stalking, and more. The Department should address the impact of cyber harassment, which frequently originates off campus and outside of school activities. This addition should be seamless, as the courts have deemed cyber harassment that is reasonably calculated to impact the school environment to be actionable harassment.

Ensure Fair Processes

For decades, the Department asserted that school disciplinary processes for sexual harassment must be fair to all parties. The 2020 regulations shift disciplinary procedures for sexual harassment to differ from other civil procedures. In this regard, new regulations should ensure:

- **Promptness**

The new rule should provide clear expectations regarding promptness rather than allowing schools to subjectively prolong Title IX cases, in some cases more than a year, before a resolution is reached. Investigations should have transparent timelines. Students, particularly students without the resources for legal and familial support, should not be asked to put their education on pause or endure the uncertainty and re-traumatization of a case longer than is absolutely necessary. Specifically, the Department should require schools to provide timely, clear notice of parties' rights and responsibilities as well as the timeline for the completion of an investigation.

- **Equitable Access to Processes**

Survivors are in the unique position of navigating an often-complicated quasi-legal process while experiencing the significant impacts of trauma, stress, and other concerns. In order to create truly equitable access to the disciplinary process, parties should be able to have a support person of their choice in addition to an advisor of choice; the support person would be able to attend all meetings and hearings associated with the process, serving the separate function of supporting parties' emotional and social needs.

- **Review Cross-Examination & Eradicate Evidence Loophole**

The current guidance on cross-examination must be clarified by the Department. While the shift to third-party cross-examination in Ohio has been a helpful change for some survivors (prior to the change, parties had to directly cross-examine each other beginning in 2018), live cross-examination during campus proceedings are not overseen by judges, nor do they have rules of evidence.

Additionally, requiring cross-examination by third parties effectively limits this role to be performed by attorneys, lest another person assist and commit unauthorized practice of law. In the past, victim advocates and other support persons were permitted to attend hearings with survivors for assistance; a number of schools have implemented the new rule so that only one individual may attend a hearing with a survivor – their advisor of choice, which is now recommended to be filled by an attorney due to the current rule's set up for cross-examination. This is clearly an inequitable arrangement. Very

few students are able to obtain legal assistance for their Title IX cases, and many students are wary to seek out legal assistance for an administrative process at their school. Simply put, requiring cross-examination to be performed by third parties without allowing for equitable access to legal support for the cross-examination role and additional support persons for parties results in unequal access to the Title IX process, and discourages many survivors from ever reporting.

Moreover, schools are currently required to disregard statements made by parties if they refuse to attend a hearing and agree to be cross-examined. This means that survivors who wish to spare themselves the trauma of being questioned live in front of the respondent cannot move their case forward unless they participate. It also means that respondents can decline to participate in cross-examination after providing statements with admissions of responsibility. This loophole constructs barriers for survivors, who bear an already disproportionate level of trauma and stress in the process, while allowing respondents extra options regarding their participation in the process.

- **Safe Informal Resolutions**

Adequate training and support during this process is essential. Survivors should have the right to choose their path to healing and accountability and expect safety and transparency in an informal resolution process. The Department should research options for informal resolution processes that center survivor safety and choice, consulting experts in different forms of informal resolution processes. Effective processes must be at a minimum:

- Voluntary, free from coercion or pressure from school employees, perpetrators, or third parties
- Subject to termination at any time, allowing survivors to stop the process and re-engage in a formal adjudication process if they wish to do so
- Run by adequate, impartial facilitators without conflicts of interest

Deliberate Indifference

Prior to 2020, schools had long been held responsible for all sexual harassment of students by teachers. That changed with Devos' Title IX regulations. Now, schools are only liable if they were "deliberately indifferent" to "severe and pervasive" harassment of which they had "actual knowledge" – all of which mean that schools now have every incentive to bury their heads in the sand so as to not learn about teachers' abuse.

Furthermore, it is up to the Office of Civil Rights to determine whether a school had acted "deliberately indifferent." In order to seek this determination by OCR, a student must file an OCR complaint and engage in yet another investigative process. The deliberate indifference standard, in effect, allows OCR to make a cursory finding that a school did not violate Title IX regulations as long as they so much as responded to a complaint of sexual misconduct. Under the new regulations, Title IX coordinators are required to respond to a complainant right away after actual knowledge of the complaint. As long as the coordinator responds to that complainant with the initially required information, OCR can find a lack of deliberate indifference - no matter how indifferent and ineffective the school's response to the sexual violence was following the first email.

What does this mean for vulnerable student populations, like K-12 students and students with disabilities? The already insurmountable barriers to reporting and seeking help to stop abuse become impossible to surpass.

K-12 Students

The new rules pose unique threats to the safety of K-12 survivors. K-12 student survivors are nearly incapable of escaping the perpetrator when that perpetrator is a fellow classmate. K-12 survivors are typically in the same building every day as the perpetrator. When the survivor and the perpetrator are in the same

grade level or involved in similar academic or extracurricular pursuits, the frequency of close interaction is even greater.

The new regulations take away a K-12 institution's ability to effectively protect student survivors whatsoever. Because a school may only offer equal supportive measures to a complainant, the resulting options are effectively meaningless. A school cannot remove a respondent from a class, lunch period, club, or hallway area. Thus, a complainant is forced to continue to see and interact with the perpetrator every single school day. The alternative measures offered to sate often obtuse and unreasonable. No K-12 student who has been subjected to sexual violence wants even more attention drawn to them. They do not want adult monitors in shared classes or escorts between classes. Nor do they want to be forced to take classes online rather than in person to avoid the perpetrator. Online courses are difficult for already struggling survivors to keep up with. Studying from home is not ideal for the mental health of many survivors already feeling isolated.

Additionally, K-12 survivors deserve protection when they report different forms of sexual harassment to their schools. All K-12 schools should be mandated to enforce and make public amnesty policies for survivors, witnesses, and reporters of sexual harassment - students who come forward should never be punished for alcohol and drug use, consensual sexual conduct, or other student conduct violations that do not involve harassment, discrimination, or violence. Schools with policies that bar sexual activity have used these policies against survivors who report sexual harassment for "participating" in sexual activity.¹² Students of color are particularly impacted adversely by these policies.¹³ All K-12 students should, at a minimum, have the expectation that they will not be punished when they report sexual harassment to their schools.

Mandate Transparency for Title IX Exemptions

The 2020 regulations significantly reduced transparency for students and community members about opportunities to access their civil rights via Title IX. To guarantee that all students have equal access to their education, the Department must increase transparency on Title IX exemptions and restore the long-established policies on religious exemptions prior to 2020.

- The Department of Education should publish and maintain a complete list of schools that claim an exemption from Title IX on its website, including the reasoning behind an exemption request and which provisions the schools are explicitly exempt from.
- The Department of Education should mandate that schools that have claimed an exemption report that they have an exemption on their school's Title IX webpage in an accessible location.
- The Department of Education should also provide better transparency about which religious and nonreligious private K-12 schools receive federal funding and thus are subject to Title IX.

On behalf of survivors and the 34 rape crisis centers in Ohio, we strongly encourage the Biden-Harris administration to reverse elements of the 2020 Title IX regulations that have created inequitable access to education, imbalanced investigations, adjudication options, and supportive measures, and reduced accountability for institutions to do right by survivors and their communities. We welcome any opportunity to provide additional input and information toward this effort.

¹² Kitchener, C. (2019, August 26) *She Reported Her Sexual Assault. Her High School Suspended Her for 'Sexual Impropriety.* The Lily. <https://www.thelily.com/shereported-her-sexual-assault-her-high-school-suspended-her-for-sexual-impropriety/>

¹³ Kingkade, T. (2019, August 6). *Schools Keep Punishing Girls — Especially Students of Color — Who Report Sexual Assaults, and the Trump Administration's Title IX Reforms Won't Stop It.* The 74. <https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it/>