



**Testimony of Emily J. Martin
Chief Program Officer, National Women's Law Center**

**U.S. House of Representatives Committee on Natural Resources' Subcommittee
on Oversight and Investigations & Committee on Education and the Workforce's
Subcommittee on Higher Education and Workforce Development**

**"Investigating How the Biden Administration Ignored Cries for
Help from Students at Haskell Indian Nations University"**

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I. Introduction

The National Women's Law Center ("NWLC") is a nonprofit organization that has worked since 1972 to combat sex discrimination and expand opportunities for women and girls in every facet of their lives, including education. NWLC is committed to eradicating all forms of sex discrimination in school, specifically including discrimination against pregnant and parenting students, LGBTQI+ students, and students who are vulnerable to multiple forms of discrimination, such as Black and brown girls and disabled girls. This work includes a deep commitment to eradicating sex harassment, including sexual assault, as a barrier to educational success. We equip students with the tools to advocate for their own rights at school, assist policymakers in strengthening protections against sex harassment and other forms of sex discrimination, and litigate on behalf of students whose schools fail to adequately address their reports of sex harassment. Founded the same year Title IX of the Education Amendments of 1972 was enacted, NWLC has participated in all major Title IX cases before the Supreme Court as counsel¹ or amici.

As attorneys representing those who have been harmed by sexual violence and other forms of sex harassment, we know that too often when students seek help from their schools to address the harassment or assault, they experience retaliation, including being pushed out of school altogether. We also know how important it is for schools to take action to prevent harassment and to intervene promptly and effectively when students are sexually harassed, before it escalates in severity or leaves students no longer feeling safe in school.

The sexual violence that students at Haskell Indian Nations University (HINU) report having had to endure without meaningful support or response from their school is precisely the kind of discrimination NWLC has long been dedicated to fighting. When schools fail to take steps to prevent and address sexual assault and other forms of harassment, they deeply traumatize students, jeopardize their education, put other students at risk of victimization, and fall short of their legal and moral obligations to protect students from discrimination.

Thank you for the opportunity to submit testimony to the Subcommittees to explain how schools should seek to prevent sexual assault and other forms of sex harassment, should provide support to students who experience such harassment, and should implement procedures to promptly and effectively respond to harassment, so that no student's education is derailed by it.

II. Campus Sexual Assault Is Common Yet Underreported, and Survivors Are Often Ignored or Punished Instead of Being Helped.

Students in college experience high rates of sexual harassment and sexual assault. More than one in four women, more than one in five transgender and gender-nonconforming students, and one in 15 men are sexually assaulted during their time in college.² In addition, one in seven women, one in 10 men, and more than one in five transgender and gender-nonconforming students experience dating violence in college, while one in 10 women, one in 33 men, and more than one in six transgender and gender-nonconforming students are victims of stalking.³

Native American/Indigenous college students in particular experience high rates of sexual harassment and assault. In a 2019 survey of students at 27 colleges and universities, 43% of Indigenous women and men and 39% of transgender, non-binary, and gender nonconforming Indigenous students reported experiencing sexual harassment during college.⁴ Moreover, Indigenous students reported experiencing sexual assault at a higher rate than any other racial demographic surveyed.⁵

Despite its prevalence, sexual assault is greatly underreported.⁶ Only 12% of college women who are sexually assaulted reported it to their school.⁷ Students often do not report sexual assault to their schools because they believe their abuse will not be taken seriously, because they are embarrassed or ashamed, because they think no one would believe them, or because they fear retaliation, including negative academic, social, and professional consequences.⁸ Common stereotypes that blame victims for sexual assault because of how they acted or dressed, or because they drank alcohol, only exacerbate underreporting. Survivors may also be unwilling to report to law enforcement because they believe the criminal legal process is unlikely to lead to meaningful accountability or helpful solutions, or even because they fear being retraumatized, abused, or otherwise victimized by police officers when reporting.⁹ This fear may be especially pronounced for Indigenous students, as Indigenous people are killed by police at a higher rate than any other racial group—five times higher than white people and three times higher than Black people.¹⁰ Perceived and actual non-responsiveness by law enforcement to violence against Indigenous women may also lead to Indigenous women's reluctance to report sexual assault to police.¹¹

Unfortunately, those students who do report sexual assault to their schools too often face hostility because of false and offensive stereotypes about survivors. Schools often minimize or discount sexual harassment reports because of the myth that survivors are to blame for assault and other harassment they experience.¹² The myth that it is common for women and girls to make false accusations of sexual assault¹³—when in fact men and boys are far more likely to be victims of sexual assault than to be falsely accused of it¹⁴—can also lead schools to assume that complainants are likely being less than truthful and to dismiss their claims. Too often, when students report, they are encouraged to leave school until their assailants have graduated,¹⁵ discouraged from filing formal disciplinary reports or telling others, and denied essential accommodations like dorm changes to allow them to live separately from their assailants.¹⁶ Survivors also sometimes face severe retaliation when they report, such as suspension or expulsion for speaking out about the abuse they faced or for fighting back in self-defense.¹⁷ Schools also often fail to protect students reporting sexual assault from retaliatory harassment by peers who are loyal to the assailant. Furthermore, women of color (especially Black and Indigenous women), LGBTQI+ students, and disabled students who report sexual harassment are especially likely to be ignored, blamed, or punished due to discriminatory stereotypes that label them as “promiscuous,” “deviant,” and/or less credible.¹⁸

When schools fail to respond promptly and effectively to sexual assault, survivors' educations are often derailed. When student survivors do not receive the appropriate support and responsiveness from their schools, sexual assault and other forms of harassment cause survivors to miss class, receive lower grades, withdraw from extracurricular activities, abandon majors, drop to part-time enrollment, drop to a two-year degree, pay extra tuition to retake courses, graduate late, or leave school altogether.¹⁹ In fact, 34 percent of college student survivors of sexual assault withdraw from school.²⁰

III. HINU Is Legally Required Protect Students from Sexual Harassment.

As a federally-operated educational program, HINU is legally required to protect its students from sex discrimination, including sex harassment.²¹ Executive Order 13160 requires federally-conducted education programs to “hold [themselves] to *at least* the same principles of nondiscrimination in educational opportunities as [the federal government] applies to the education programs and activities of State and local governments, and to private institutions receiving Federal financial assistance,” under Title IX of the Education Amendments of 1972 (Title IX).²² Echoing Title IX, the Executive Order states that “[n]o individual, on the basis of . . . sex . . . shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination in, a Federally conducted education or training program or activity.”²³ The Department of Justice’s guidance on how federally-operated educational programs should comply with the Executive Order makes indisputable that it protects against harassment on the basis of sex.²⁴ In short, Executive Order 13160 requires institutions such as HINU to provide protections against sexual assault and other forms of sex harassment that are at least as robust as those required by Title IX.²⁵ In addition, students at federally-operated schools enjoy the right to be free from sex harassment in their educational setting under the equal protection guarantee of the Constitution.²⁶

IV. To Comply with Federal Law and Enable Their Students to Succeed and Thrive, Schools Should Commit Themselves to Preventing and Effectively Responding to Sexual Assault and Other Sex Harassment.

Taking sex harassment seriously is a necessary part of ensuring that students can learn and thrive. It is also a legal obligation for both federally-operated and federally-funded educational institutions. The Biden administration’s recent changes to the Department of Education’s Title IX regulations provide a clear framework and robust foundation for schools in regard to prevention efforts, grievance procedures, and support given to students in the wake of victimization.²⁷ Specifically, the Biden regulations strengthen protections for student survivors by facilitating their ability to report and get help for sex harassment and assault from their schools, by requiring equitable and fair school grievance procedures to address sex harassment, and by requiring schools to respond promptly and effectively to sexual assault and other forms of sex harassment. The requirements set out in those regulations inform the recommendations below. (While some courts have temporarily blocked the federal government from enforcing the new rule against schools in certain states, nothing prevents schools in any state or district from voluntarily complying with the rule.)

In developing their policies and procedures to address sexual assault and harassment, schools should consult with student survivors and advocacy organizations that provide direct services to, or otherwise support, survivors of sexual violence. This engagement should specifically include organizations that serve the same communities that students are part of, including organizations that serve Black, brown, and Indigenous survivors, LGBTQI+ survivors, women and girls, and disabled survivors.

A. Schools should adopt strategies to prevent sex harassment.

A comprehensive program to address sex harassment must include strategies to prevent harassment from occurring in the first place. To that end, schools should train students and staff on sex harassment; conduct regular climate surveys; prioritize the creation of a safe and inclusive learning community; and adopt policies to protect transgender, nonbinary, and intersex students.

1. Train students and staff on sex harassment.

Schools should provide training to all students and staff on how to recognize, report, and respond to sex harassment, and about consent and healthy relationships. This recommendation is consistent with the Biden administration's Title IX regulations, which require all school staff to be trained on recognizing and reporting sex discrimination.²⁸ It is also consistent with research showing that offering comprehensive sex education that emphasizes consent and healthy relationship dynamics for students from an early age creates a lower risk of sexual or dating violence, because it better equips students to identify unsafe sexual behavior and unhealthy relationship dynamics.²⁹ Trainings should also ensure employees understand how trauma may impact survivors' responses to assault differently and that there is no single way in which survivors act and present. Trainings should also uncover and address any biases employees may have when receiving reports so that they do not respond to survivors in harmful ways. In addition, trainings should include bystander intervention strategies that give both students and staff the tools and confidence to recognize and interrupt harassing behavior by peers and colleagues.

2. Conduct regular climate surveys.

Schools should conduct a campus climate survey every one to two years to assess students' experiences with and perspectives on sex harassment.³⁰ Climate surveys help schools get a better sense of the ways in which harassment is affecting students and the barriers students face in seeking help, enabling schools to craft more effective and targeted prevention and response strategies. These anonymous surveys should include questions on students' attitudes about and perceptions of harassment at school, whether students have experienced sex harassment (including sexual assault, dating violence, and stalking), whether the student reported the harassment (and if not, why not), the impact of the harassment on students' access to education, their perceptions of the effectiveness of the school's responses to harassment, and their awareness of the school's harassment policies and procedures. The surveys should include voluntary demographic questions for students, including race, ethnicity, gender, transgender status, intersex status, sexual orientation, disability, and religion, to enable schools to better understand the ways that student experience may vary across communities and to take this into account in their prevention and response strategies as well. Schools should make the survey data available online in an accessible and usable format for all students and staff.

3. *Make clear that creating safe and inclusive learning environments is a core priority.*

Schools can make their campuses safer for all students by making clear at every level of leadership that creating a safe and inclusive learning environment is a core value for the institution. By setting high expectations for student and staff behavior towards each other, modeling that behavior, and committing to policies and practices that reflect respect and care for students, schools can foster a culture that lessens the likelihood of harassment.

Ultimately, it is the responsibility of leadership at educational institutions to make systemwide changes to ensure schools are safe and inclusive spaces for all students. Leadership should be explicit about its intention to prevent sexual harassment and support survivors, and be transparent about the steps it will take to change the climate, including any revised policies and procedures for handling reports of sexual harassment. Everyone within the institution should know that maintaining an equitable environment is a priority of the leadership, as that is also the foundation for engendering trust from the school community.

4. *Protect transgender, nonbinary, and intersex students.*

Prevention requires mitigating the risk of harassment and assault for students who are at an increased risk of victimization, including transgender, nonbinary, and intersex students. As survivor advocates have noted³¹ and research affirms, transgender, nonbinary, and intersex individuals, including students, experience higher rates of sexual abuse when they face discriminatory policies that single them out for mistreatment, such as bans on the bathrooms or locker rooms they can use, the student housing they can reside in, or the sports teams they can play on.³² To promote a safe educational environment free from sex harassment and sexual assault for all students, schools should maintain policies that ensure transgender, nonbinary, and intersex students can access sex-separated facilities and activities—including bathrooms, housing, locker rooms, and sports—consistent with their affirmed gender.³³

B. *Schools should respond to sex harassment with prompt and effective action.*

Schools should respond to sex harassment, including sexual assault, by taking “prompt and effective” action to end the harassment, prevent it from recurring, and remedy its effects on all those harmed—as the Department of Education required in its Title IX implementing regulations from 1997 to 2020³⁴ and as the Biden Title IX rule reinstates.³⁵ To abide by this standard, schools should remove barriers to reporting harassment, offer a wide range of supportive measures to all reporting students, protect students from retaliation, and offer students the option of using a restorative process to address harassment and sexual assault. This includes responding to conduct that occurs off campus. One study found that 33.7 percent of rapes of college students occurred on campus, while 66 percent occurred off campus,³⁶ but the educational impact of off-campus assaults is no less significant for the survivor.

Nor should schools’ response to sexual assault turn on whether a survivor reports the assault to the police. A student may choose not to seek arrest or criminal prosecution of their assailant for a variety of good reasons, and is entitled to a prompt and effective response from the educational institution regardless of whether they do so. When a student does report a sexual assault to the police and a concurrent law enforcement investigation is initiated, schools must still conduct their own separate informal resolutions or formal investigations of sex harassment complaints based on the survivor’s choice of process. Law enforcement investigations are separate from the civil rights obligations imposed on schools to prevent and remedy sex discrimination. While law enforcement investigations are focused on punishment of criminal behavior, schools’ civil rights obligations are centered on protecting students’

equal access to education. When schools fail to undertake their own responsibilities to protect students' civil rights and instead defer to and depend on criminal processes to address sexual assault, student survivors are unable to get the support and prompt resolution they need--and deserve--from their schools.

1. *Remove barriers to reporting harassment.*

Schools should enable their students to easily report harassment. To do so, they must identify barriers to reporting and address those barriers, as the Biden rule requires schools to do.³⁷ For example, schools can conduct climate surveys (see **IV.A.2**) or focus groups on the prevalence of harassment and the barriers students face in reporting it.³⁸ The types of barriers students experience should inform the solutions schools implement. To ease reporting, a school might, for example, conduct trainings for a specific department where many harassment complaints have arisen, more prominently display information about how to contact its Title IX coordinator, or, if it finds that fear of discipline deters many survivors from reporting, adopt amnesty policies for survivors for assault-related violations of drug, alcohol, or other school policies (see **IV.B.3**).³⁹

In addition to reporting mechanisms that trigger formal investigations, schools should offer confidential mechanisms for disclosure that protect survivor autonomy and privacy. Preserving a survivor's choice and sense of control in the wake of sexual assault is critical in allowing them to heal, and research suggests that schools undertaking assault investigations and disciplinary actions against survivors' wishes can lead to educational disengagement, including withdrawal from extracurricular activities, campus life, and academic and honor societies.⁴⁰ Thus, schools should designate one or more confidential employees, such as a counselor or advisor, with whom survivors can privately discuss their victimization, without fear that conversation might trigger a formal response. The identities of such employees should be widely known so that students are aware whether the person to whom they are making a disclosure is required to initiate a formal process or is a confidential resource.

2. *Offer a wide range of supportive measures.*

Schools should provide students who report sexual assault and harassment ("complainants") with a wide range of supportive measures that help them feel safe and learn,⁴¹ as required by both the new Biden Title IX rule and the previous Title IX rule; these supportive measures must be offered whether or not a complainant wishes to pursue a formal investigation,⁴² and, if they do pursue an investigation, regardless of whether their complaint is dismissed.⁴³ For example, if a complainant feels unsafe on campus, schools can and should issue a no-contact order against the named harasser and make reasonable schedule changes so that the parties do not share classes, hallway routes, dining halls, buses, dorms, or campus workplaces.⁴⁴ If a complainant has difficulty studying or attending class as a result of the harassment, schools can and should offer free counseling, excused absences, online or recorded classes, free tutoring, or extra time to submit an assignment or take an exam.⁴⁵ And if the harassment has hurt a complainant's grades, attendance, or enrollment status, schools can adjust the complainant's transcript; reimburse tuition for an unfinished class; or preserve the complainant's eligibility for any activity, leadership position, campus job, or scholarship that has a grade, attendance, or credit requirement.⁴⁶ These are simple measures that schools can take to restore and preserve student survivors' access to education, and most of them do not affect the harasser's educational experience, but could make a difference as to whether or not a student survivor can stay in school at all.

3. *Protect complainants from retaliation.*

Schools should protect student survivors from retaliation, including retaliatory discipline. At NWLC, we have represented student survivors who, horrifyingly, were suspended or expelled when they came forward, because they were disbelieved—underscoring the need for effective training and responses to survivors, but also for stronger anti-retaliation policies. Title IX regulations prohibit schools from retaliating against students who report sexual harassment and assault.⁴⁷ In order to provide robust protection from retaliation, schools should adopt a policy that prohibits school officials from disciplining a complainant for making a false statement based solely on a school finding in favor of a respondent in a harassment investigation.⁴⁸ In addition, schools should not discipline complainants for conduct related to an incident of harassment or assault, such as alcohol or drug use or violence undertaken in self-defense. Nor should complainants be disciplined for conduct that is a result of the emotional, psychological, and physical impacts of harassment or assault (*e.g.*, unexcused absences, expression of trauma symptoms). Furthermore, schools should protect complainants from meritless, retaliatory charges, such as a complaint filed by a respondent who has been found responsible and disciplined for sexual assault or dating violence alleging that the complainant was the actual assailant or abuser. Schools should not require a complainant to leave the school after reporting harassment. Nor should schools require a student to enter into a confidentiality agreement in order to assert their right to be free from harassment.

4. *Offer the option of a restorative process.*

Schools should offer complainants and respondents the option of entering a restorative process—a voluntary, nonpunitive process with roots in First Nations, Māori, and other Indigenous traditions.⁴⁹ A restorative process brings together a victim and harmer to acknowledge the harm that occurred, center the victim’s needs, and repair the harm caused by the wrongdoer.⁵⁰ To begin a restorative process, the harmer must first voluntarily admit that they caused harm. The victim’s needs are then centered as they work together to determine how the harmer can take accountability, make amends, and change their future behavior. Studies show that when well implemented, restorative processes make victims of sexual harm feel safe and respected and enable harmers to understand what they did wrong better than through a traditional disciplinary process, meaning they are less likely to repeat the harm.⁵¹

The Biden Title IX regulations, as well as their predecessor regulations, allow schools to use informal resolution processes, such as restorative processes, as long as participation in those processes is wholly voluntary.⁵² However, schools should not use mediation as an informal process to resolve complaints of sexual assault; mediation is a strategy often used in schools to resolve peer conflict, where both sides must take responsibility for their actions and come to a compromise. Mediation is never appropriate for resolving sexual assault, even on a voluntary basis, because of the power differential between assailants and victims, the potential for re-traumatization, and the implication that survivors somehow share “partial” responsibility for their own assault. Indeed, more than 900 mental health experts have written to the Department of Education opposing the use of mediation to resolve sexual assault because it “perpetuate[s] sexist prejudices that blame the victim” and “can only result in further humiliation of the victim.”⁵³

C. *Schools should conduct fair investigations.*

When a student makes a complaint of sex harassment and seeks a formal resolution process, schools should follow the investigation procedures detailed in the Biden administration’s new Title IX rule⁵⁴. This includes questioning the parties through a neutral official or panel and applying a preponderance of the evidence standard to determine whether harassment occurred. Regardless of the type of investigatory or

hearing process the school uses to formally resolve complaints of sex harassment, schools should ensure that their procedures are reliable, prompt, equitable, and fair to all parties involved. Students should have equal rights in presenting witnesses and evidence, an opportunity to respond to allegations and evidence provided in an investigation, and equal appeal rights.

1. Use a neutral school official or panel to question the parties and witnesses.

In investigations of sexual harassment, institutions of higher education should require a neutral school official or panel to question the parties and witnesses, whether in individual meetings or in a live hearing. However, the parties' advisors should not be permitted to cross-examine the other party and witnesses. Requiring survivors of sexual assault and dating violence to answer detailed, personal, and humiliating questions from a hostile questioner—which is not required in investigations of complaints of any other type of student or staff misconduct in schools—reinforces gender stereotypes and rape myths that survivors tend to lie about or are to blame for their own victimization.⁵⁵ This communicates the toxic and sexist message that those alleging sexual assault or other forms of sex harassment—most commonly women and girls—are uniquely unreliable and untrustworthy and therefore deserving of additional scrutiny.

The Biden administration's Title IX rule appropriately allows institutions of higher education the flexibility to choose a method of questioning parties and witnesses to assess their credibility in a way that does not retraumatize victims and that respects the due process rights of all parties.⁵⁶ In addition, six of eight circuit courts to consider the issue have held that adversarial cross-examination is not required to satisfy due process or fundamental fairness in campus disciplinary proceedings, and that a neutral hearing officer or panel may question the parties instead.⁵⁷ Indeed, the Supreme Court has not required any form of cross-examination in disciplinary proceedings in public schools under the Due Process clause and has explicitly said that a 10-day suspension does not require "the opportunity ... to confront and cross-examine witnesses."⁵⁸ By allowing institutions the flexibility to choose a process that does not rely on cross-examination, the Biden Title IX rule seeks to prevent students—survivors and witnesses alike—from being discouraged from participating in sexual harassment investigations.⁵⁹

Finally, while cross-examination "is problematic for all institutions, regardless of size and resources available,"⁶⁰ it is particularly difficult for community colleges, vocational schools, and other smaller institutions, which often lack the hefty resources required for conducting quasi-trials with cross-examination. Using neutral school officials to question students instead of allowing adversarial cross-examination helps ensure that institutional efforts to address sexual assault are both efficient and cost-effective, bringing a speedy and fair resolution to all parties.

2. Apply a preponderance of the evidence standard.

In investigations of sexual assault and other types of sex harassment, schools should always apply a preponderance of the evidence standard to determine whether the harassment occurred. The preponderance standard is the only evidentiary standard that treats both sides equally and properly balances complainants' and respondents' interests.⁶¹

The preponderance standard is also the appropriate standard because school harassment investigations are not criminal proceedings. In a criminal prosecution, the defendant's very liberty (or life) is at stake, and there is an immense power differential between the state and the defendant; that is why the state must prove criminal charges beyond a reasonable doubt. School misconduct proceedings do not threaten the respondent with incarceration, nor do complainants exercise anything remotely like the enormous

power of the state. School disciplinary proceedings are instead much more analogous to civil legal proceedings, where the preponderance standard is the evidentiary standard nearly always used.⁶² While sexual assault and dating violence can also constitute criminal conduct, school investigations of gender-based violence do not require criminal standards, because they do not impose criminal penalties. After all, schools already regularly respond to other types of student misconduct that also amount to crimes (e.g., physical assault, theft, arson), and we rightfully recognize that schools do not have to conduct quasi-criminal trials meeting a criminal standard of proof to impose discipline in those situations.

V. Conclusion

All students deserve meaningful support and responses from their school in the wake of sexual assault or harassment. Going without this essential support can traumatize students, put them at risk of further victimization, and jeopardize their ability to learn in safety and continue in their education. To disrupt a culture of deliberate indifference to sexual violence and to ensure students are able to learn in safety, schools, including HINU, must adopt and consistently implement policies to prevent and effectively respond to harassment. The recommendations outlined above are consistent with students' demands for support and accountability, as well as all schools' obligations under federal law to protect students from sex discrimination.

Federal, state, and local lawmakers also have an important role to play and should commit themselves to enforcing and safeguarding the rights of students to be free from sexual assault and harassment. Unfortunately, the House majority has instead chosen to do the opposite, recently passing a resolution disapproving the very Title IX regulations dedicated to strengthening protections for student survivors of sexual assault.⁶³ This is appalling, and survivors deserve better. Whether they learn in federally-operated schools or federally-funded schools, every student should be able to rely on robust, enforceable legal protections against sex harassment. Lawmakers have an obligation to ensure that they can.

Thank you for the opportunity to submit this testimony to explain how all schools can prevent, address, and investigate all forms of sex harassment and assault, as well as provide meaningful support to survivors—so that no student's education is derailed by their victimization.

¹ E.g., *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999).

² David Cantor *et al.*, Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct* ix (Oct. 15, 2019), <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>.

³ *Id.* at 52, 54.

⁴ *Id.* at A7-83, A7-88.

⁵ *Id.* at A7-36 (14.7% of white students, 12.7% of Black students, 6.9% of Asian students, 18.7% of American Indian and Alaskan Native students, 11.9% of Native Hawaiian students, and 14.5% of other or multiracial students reported experiencing sexual assault).

⁶ *Id.* at 59.

⁷ *Id.* at A7-27, A7-30.

⁸ *Id.* at A7-27

⁹ Because survivors are so frequently disbelieved when reporting sexual assault to law enforcement, many survivors have faced criminal charges—including for filing a false report—when seeking help. See Lisa Avalos, *Prosecuting Rape Victims While Rapists Run Free: The Consequences of Police Failure to Investigate Sex Crimes in Britain and the United States*, 23 MICH. J. GENDER & L. 1 (2016), available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1054&context=mjgl>.

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- ¹⁰ Ted McDermott, *Native people killed by police 3-5 times more than others*, ICT (Apr. 26, 2024), <https://ictnews.org/news/native-people-killed-by-police-3-5-times-more-than-others> (citing Centers for Disease Control and Prevention data).
- ¹¹ See, e.g., Peyton Cross, *Governmental Inadequacies Concerning Missing and Murdered Native American Women in the United States*, 1 LINCOLN MEMORIAL UNIV. L. REV. 10 (2022), available at <https://digitalcommons.lmunet.edu/cgi/viewcontent.cgi?article=1180&context=lmulrev> (explaining that, despite the epidemic of violence against Native American women, law enforcement consistently fail to investigate the hate rates of disappearances and murders of Native American women).
- ¹² See e.g., Bethonie Butler, *Survivors of sexual assault confront victim blaming on Twitter*, WASH. POST (Mar. 13, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/03/13/survivors-of-sexual-assault-confront-victim-blaming-on-twitter/>.
- ¹³ David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16(12) VIOLENCE AGAINST WOMEN 1318–1334 (2010), available at <https://doi.org/10.1177/1077801210387747>.
- ¹⁴ E.g., Tyler Kingkade, *Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It*, HUFFINGTON POST (Dec. 8, 2014) [last updated Oct. 16, 2015], https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html.
- ¹⁵ Dana Bolger, *Where Rape Gets a Pass*, N.Y. DAILY NEWS (July 6, 2014), <http://www.nydailynews.com/opinion/rape-pass-article-1.1854420>.
- ¹⁶ Sage Carson & Sarah Nesbitt, Know Your IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 12, 15-16, 24 (2021), <https://www.advocatesforyouth.org/wp-content/uploads/2024/06/Know-Your-IX-2021-Cost-of-Reporting.pdf> [hereinafter KYIX Report].
- ¹⁷ *Id.* at 15-16.
- ¹⁸ Shiwali Patel, Elizabeth X. Tang, & Hunter F. Iannucci, *A Sweep as Broad as Its Promise: 50 Years Later, We Must Amend Title IX to End Sex-Based Harassment in Schools*, 83 LA. L. REV. 939, 961–64 (2023), <https://bit.ly/3UZYpxk>.
- ¹⁹ KYIX Report, *supra* note 16, at 4-9, 11.
- ²⁰ Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), available at <https://doi.org/10.1177/1521025115584750>.
- ²¹ HINU is federally owned, funded, and operated. *Parrish v. MSPB*, 485 F.3d 1359, 1360 (Fed. Cir. 2007). One federal court has held that a Title IX lawsuit could not proceed against HINU because the federal government has not waived sovereign immunity as to actions for money damages under Title IX. *Doe H. v. Haskell Indian Nations Univ.*, 266 F.Supp.3d 1277, 1282 (D. Kan. 2017). The court did not address the availability of injunctive relief against HINU pursuant to Title IX.
- ²² E.O. 13160, Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally-conducted Education and Training Programs, 65 Fed. Reg. 39,775 (Sec. 1-101) (June 23, 2000) (emphasis added).
- ²³ *Id.* at Sec. 1-101, 1-102. Notably, the Executive Order’s language is almost identical to Title IX, which says “[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.” 20 U.S.C. § 1681. This similarity in language further underscores the similarity between the obligations of a federally-operated educational program and recipient of federal funding under Title IX.
- ²⁴ Executive Order 13160 Guidance Document: Ensuring Equal Opportunity in Federally-conducted Education and Training Programs, 66 Fed. Reg. 5398, 5398 (Jan. 18, 2001).
- ²⁵ *Id.*
- ²⁶ See, e.g., *Strickland v. United States*, 32 F.4th 311, 356-59 (4th Cir. 2022) (holding federal entities violate the Fifth Amendment’s equal protection guarantee when they are deliberately indifferent to complaints of sexual harassment and when they retaliate against complainants for discriminatory reasons); *Fitzgerald v Barnstable School Committee*, 555 U.S. 246, 257-58 (2009) (holding the Equal Protection Clause of the Fourteenth Amendment is violated when a student experiences sex harassment as a result of municipal custom, policy or practice); *Murrell v. School District No. 1*, 186 F.3d 1238, 1250 (10th Cir. 1999) (holding principal and teachers violate the Equal Protection Clause of the Fourteenth Amendment when they are deliberately indifferent to sex harassment of a student by another student).
- ²⁷ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474 (finalized Apr. 29, 2024, effective Aug. 1, 2024) (to be codified at 34 C.F.R. pt. 106), <https://www.federalregister.gov/documents/2024/04/29/2024-07915/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal> [hereinafter “Biden Rule”].
- ²⁸ 34 C.F.R. § 106.8(d) (eff. Aug. 1, 2024).
- ²⁹ John S. Santelli et al., *Does sex education before college protect students from sexual assault in college?* (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6235267/>; Medeline Schneider & Jennifer S. Hirsh, *Comprehensive sexuality education as a primary prevention strategy for sexual violence perpetration*, 21 Trauma, Violence, & Abuse 439 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6283686/>; Rebekah Rollston, *Comprehensive Sex Education as Violence*

Prevention, Harvard Medical Center for Primary Care (May 29, 2020),

<https://info.primarycare.hms.harvard.edu/perspectives/articles/sexual-education-violence-prevention>.

³⁰ The Violence Against Women Reauthorization Act of 2022 requires the Department of Education to develop such a climate survey for institutions of higher education to collect data on the prevalence of sexual harassment, sexual assault, domestic violence, dating violence, and stalking. 20 U.S.C. § 11611–6.

³¹ National Task Force to End Sexual and Domestic Violence Against Women, *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community* (Apr. 21, 2016), <https://endsexualviolence.org/wp-content/uploads/2017/09/STATEMENT-OF-ANTI-SEXUAL-ASSAULT-AND-DOMESTIC-VIOLENCE-ORGANIZATIONS-IN-SUPPORT-OF-EQUAL-ACCESS-FOR-THE-TRANSGENDER-COMMUNITY.pdf>.

³² Movement Advancement Project, *Separation and Stigma: Transgender Youth and School Facilities 2* (2017),

<https://www.lgbtmap.org/file/transgender-youth-school.pdf> (“Singling out transgender students and telling them they must use separate restrooms is humiliating and discriminatory, adding to the bullying and mistreatment so many transgender youth already face.”); GLSEN, *The 2021 National School Climate Survey: The Experience of LGBTQ+ Youth in Our Nation’s Schools*, 41 (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf#page=64> [hereinafter “GLSEN 2021 Report”]; Diane Ehrensaft & Stephen M. Rosenthal, *Sexual Assault Risk and School Facility Restrictions in Gender Minority Youth*, 143 *PEDIATRICS* e20190554 (2019), <https://bit.ly/48CIfwU>.

³³ Research shows that when LGBTQI+ youth are supported by inclusive policies, such as those that permit them to access bathrooms, locker rooms, and sports teams that match their affirmed gender, they are less likely to experience victimization and more likely to report feeling safer at school. See GLSEN 2021 Report, *supra* note 32, at 73, 74.

³⁴ U.S. Dep’t of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence 1* (issued Apr. 29, 2014; rescinded Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter: Sexual Violence*, 16 (issued Apr. 29, 2011; rescinded Sept. 22, 2017),

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; 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*, 10-12, 14 (issued Jan. 19, 2001; rescinded Aug. 26, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>; U.S. Dep’t of Educ., Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12039, 12040, 12041, 12042 (issued Mar. 13, 1997; rescinded Jan. 19, 2001), <https://www.govinfo.gov/content/pkg/FR-1997-03-13/pdf/97-6373.pdf>. See also U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying 2* (issued Oct. 26, 2010),

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (regarding sex, race, and disability harassment).

³⁵ 34 C.F.R. § 106.44(f)(1) (eff. Aug. 1, 2024).

³⁶ Bonnie Fisher et al., *The Sexual Victimization of College Women*, U.S. Dep’t of Justice 18-20 (2000), <http://www.ojp.gov/pdffiles1/nij/182369.pdf>.

³⁷ 34 C.F.R. § 106.44(b) (eff. Aug. 1, 2024).

³⁸ Biden Rule, at 33564–65, 33847.

³⁹ *Id.* at 33565, 33827.

⁴⁰ Weiner Article, at 76; Carly P. Smith, Marina N. Rosenthal, & Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Campus Survey 34-36* (Oct. 24, 2014), <https://dynamic.uoregon.edu/jjf/campus/SmithRosenthalFreydGSU22-24October2014.pdf>.

⁴¹ See Nat’l Women’s L. Ctr. & Know Your IX, *FAQs on Title IX and Supportive Measures for Students in K-12 and Higher Education* (2021), <https://bit.ly/49wWGnK> [hereinafter Supportive Measures FAQ].

⁴² 34 C.F.R. § 106.44(a) (eff. Aug. 14, 2020); see also 34 C.F.R. §§ 106.2 (defining “supportive measures”), 106.44(g) (eff. Aug. 1, 2024).

⁴³ *Id.* at § 106.45(d)(4)(i).

⁴⁴ Supportive Measures FAQ, *supra* note 41, at 5–6.

⁴⁵ *Id.* at 6–7.

⁴⁶ *Id.* at 7.

⁴⁷ 34 C.F.R. § 106.71 (eff. Aug. 14, 2020); see also 34 C.F.R. §§ 106.2 (defining “retaliation”), 106.71 (eff. Aug. 1, 2024).

⁴⁸ *Id.* at § 106.45(h)(5).

⁴⁹ See, e.g., International Institute for Restorative Practices, *Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part One* (Apr. 27, 2004), <https://www.iirp.edu/news/restorative-justice-practices-of-native-american-first-nation-and-other-indigenous-people-of-north-america-part-one#endnote1> to.; Restorative Justice 101, *Reviving Indigenous Justice: Authentic Restorative Māori Processes in New Zealand*, <https://restorativejustice101.com/reviving-indigenous-justice-authentic-restorative-maori-processes-in-new-zealand/> [last visited July 19, 2024].

⁵⁰ David Karp & Kaaren Williamsen, *NASPA Student Aff. Admins. in Higher Educ., Five Things Student Affairs Administrators Should Know About Restorative Justice and Campus Sexual Harm 5–6* (2020), <https://bit.ly/430BKtJ>.

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- ⁵¹ *Id.* at 10-11. See also Madison Orcutt, *Restorative Justice Approaches to the Informal Resolution of Student Sexual Misconduct*, 45 J. COLL. & UNIV. L. 1, 31-37, <https://bit.ly/42YJDsL> (providing samples of agreements between parties, schools, and local prosecutors).
- ⁵² 34 C.F.R. § 106.45(b)(9) (eff. Aug. 14, 2020); see also 34 C.F.R. § 106.44(k) (eff. Aug. 1, 2024).
- ⁵³ Letter from 902 Mental Health Professionals to Dep't of Educ. 3 (Jan. 30, 2019), <https://nwlc.org/wp-content/uploads/2019/01/Title-IX-Comment-from-Mental-Health-Professionals.pdf>.
- ⁵⁴ 34 C.F.R. § 106.46 (eff. Aug. 1, 2024).
- ⁵⁵ Sarah Zydervelt et al., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s?*, BRITISH JOURNAL OF CRIMINOLOGY, 57(3), 551-569 (2016).
- ⁵⁶ 34 C.F.R. §§ 106.45(f), 106.46(g) (eff. Aug. 1, 2024).
- ⁵⁷ *Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1693 (2021); *Doe v. Univ. of Ark.*, 974 F.3d 858, 867 (8th Cir. 2020); *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019); *Doe v. Colgate Univ.*, 760 F. App'x 22, 27, 33 (2d Cir. 2019); *Doe v. Loh*, No. CV PX-16-3314, 2018 WL 1535495, at *7 (D. Md. Mar. 29, 2018), *aff'd*, 767 F. App'x 489 (4th Cir. 2019); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987). *Contra Doe v. Univ. of Scis.*, 961 F.3d 203, 215 (3d Cir. 2020) (fundamental fairness requires private universities to provide cross-examination if credibility is at issue); *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (due process requires public universities to provide cross-examination if credibility is at issue and serious sanctions are possible).
- ⁵⁸ *Goss v. Lopez*, 419 U.S. 565, 583 (1975).
- ⁵⁹ See, e.g., Eliza A. Lehner, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 YALE J. OF LAW & FEMINISM 207 (2018) (“rape victims avoid or halt the investigatory process” due to fear of “brutal cross-examination”); Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 932-936-37 (2001) (decision not to report (or to drop complaints) is influenced by repeated questioning and fear of cross-examination). As one defense attorney recently acknowledged, “Especially when the defense is fabrication or consent—as it often is in adult rape cases—you have to go *at* the witness. There is no way around this fact. Effective cross-examination means exploiting every uncertainty, inconsistency, and implausibility. More, it means attacking the witness’s very character.” Abbe Smith, *Representing Rapists: The Cruelty of Cross-Examination and Other Challenges for a Feminist Criminal Defense Lawyer*, 53 AM. CRIM. L. REV. 255, 290 (2016).
- ⁶⁰ E.g., Letter from Liberty University to Sec’y Elisabeth DeVos at 4 (Jan. 24, 2019), <http://www.liberty.edu/media/1617/2019/jan/Title-IX-Public-Comments.pdf>.
- ⁶¹ Contrary to what some have argued, schools should not use the clear and convincing evidence standard when investigating sexual harassment and assault. The Supreme Court has only required the clear and convincing evidence standard in a handful of civil proceedings, where the litigants are the state and an individual, and profound deprivations of life or liberty are at stake—e.g., deportation, termination of parental rights, involuntary psychiatric commitment, or withdrawal of medical life support. *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261 (1990); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Addington v. Texas*, 441 U.S. 418 (1979); *Woodby v. INS*, 385 U.S. 276 (1966). School disciplinary proceedings are nothing like these cases.
- ⁶² Cornell L. Sch., Legal Info. Inst., *Burden of Proof*, <https://bit.ly/3OZ3G11> (last visited July 18, 2024).
- ⁶³ H.J. Res. 165 – 118th Congress (2023-2024); Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Department of Education relating to “Nondiscrimination on the Basis of Sex in Education Program or Activities Receiving Federal Financial Assistance.”