



SAGE
Student Advocates for
Graduate Education

To Whom It May Concern:

As graduate student advocates, we are acutely aware of the difficulties that graduate students overcome to achieve success in higher education. The SAGE coalition is deeply concerned by the changes to Title IX proposed by Secretary DeVos. A large body of work has shown that sexual misconduct continues to be a crisis on campuses nationwide.¹ A staggering 21-38% of college students will experience faculty/staff-perpetrated sexual harassment and 39-64.5% experience student-perpetrated sexual harassment during their time at their university.^{2,3} Graduate students are a uniquely vulnerable population and protections currently provided under Title IX are vital for access to education and success in their programs.² Title IX addresses sexual harassment, sexual violence, sexual misconduct, and gender-based discrimination; SAGE firmly believes that Secretary DeVos's proposed rules will deleteriously impact the success and safety of graduate students, ultimately denying graduate students access to educational benefits and opportunities.³ Several of the proposed changes weaken or abolish these protections and, should they be implemented, will create an unsafe environment for students and restrict access to educational programs.

Here, we provide evidence that the proposed changes will negatively impact victims and enable the university to avoid involvement, deny responsibility, and impede survivors' access to education based on sex discrimination (including sexual harassment). We believe that these proposed changes to Title IX will undermine the

¹ Some studies show more than one in every three women as being sexual assault survivors, with graduate students victimized at frighteningly high rates, see DeKeseredy, W. S., Hall-Sanchez, A., & Nolan, J. (2018). College campus sexual assault: The contribution of peers' proabuse informational support and attachments to abusive peers. *Violence against women*, 24 (8), 922-935.

² 38% of women and 23% of men in graduate or professional school have been victimized by sexual harassment from members of their institution's faculty or staff. Rosenthal, M. N., Smidt, A. M., & Freyd, J. J. (2016). Still Second Class: Sexual Harassment of Graduate Students. *Psychology of Women Quarterly*, 40(3), 364-377. <https://doi.org/10.1177/0361684316644838>
34.1% of students who have experienced sexual assault dropout of college, higher than the overall dropout rate for college students. ("Violence Victimization on a College Campus," Mengo & Black, 2015).

³ Data shows that there is a higher risk for assault while attending institutions of higher education, see Bachar, K., & Koss, M. (2001). From prevalence to prevention. *Sourcebook on violence against women*, 117-142.



spirit of Title IX and allow sexual harassment to be further institutionalized and increase traumatization of victims from these abuses.

The proposed rules would require schools to ignore Title IX complaints if the harassment took place off-campus. Most graduate students live off campus, and are often required to participate in activities that take place off campus but directly impact our educational pursuits (e.g., fieldwork, internships, off-campus service). Implementing this rule would remove vital protections for graduate students from discrimination on the basis of sex (including sexual harassment). Furthermore, the vast majority of sexual assaults take place in survivors' homes⁴. It is critical that Title IX investigations are empowered to address all complaints, and universities are compelled to respond to sexual harassment complaints of students both on and off-campus.

The proposed rules that narrow the definition of sexual harassment and require schools to ignore harassment unless it is "severe and pervasive" and "objectively offensive". This definition is inadequate to describe sexual harassment, and creates a different standard for these types of complaints. It is inappropriate to define such actions in institutions of higher education or any scenario other than between minors and peer-inflicted, as described by the Supreme Court in *Davis v. Monroe*, (1999). SAGE believes that the language proposed by Secretary DeVos erroneously broadens the Supreme Court's definition that was described in *Davis v. Monroe* (1999), which explicitly described sexual harassment between peers, (student-on-student harassment) and between minors (5th grade students). This definition should not be applied to sexual harassment other than in scenarios that are reflective of the circumstances the Court described. This definition does not protect students from harassment perpetrated by faculty, staff, student teaching assistants, who are both faculty and student at the same time. Graduate students are both employees and mentors, while also being students. This definition should not be applied to institutions of higher education, unless the relationships between graduate students, undergraduates, mentors, and employees will be explicitly described and guidance given on cases of harassment for each relationship. This includes what definition should apply when someone holds multiple roles, as a large number of graduate students do. When delivering the opinion of the court in *Davis v. Monroe*, Justice O'Connor wrote:

"Whether gender-oriented conduct is harassment depends on a constellation of surrounding circumstances, expectations, and relationships *Oncale v. Sundowner Offshore Services, Inc.*, [523 U.S. 75](#), 82, including, but not limited to, the harasser's and victim's ages and the number of persons involved. Courts must also bear in mind that

⁴ Perpetrators of Sexual Violence: Statistics," RAINN, at <https://www.rainn.org/statistics/perpetrators-sexual-violence>.

Data shows that 87% of college students live off-campus Hill, C. & Kearn, H. (2011). "Crossing the line": Sexual harassment at school. AAUW.



schoolchildren may regularly interact in ways that would be unacceptable among adults. Moreover, that the discrimination must occur “under any education program or activity” suggests that the behavior must be serious enough to have the systemic effect of denying the victim equal access to an education program or activity.”

SAGE asserts that using a definition of sexual harassment that defines behavior of school-aged children and directs the courts to “...bear in mind that schoolchildren may regularly interact in ways that would be unacceptable among adults,” is not appropriately applied to peer harassment that takes place between adults in institutions of higher learning.

Narrowing the definition of sexual harassment will make survivors less likely to come forward, exacerbating the well-documented crisis of underreporting. Only 5-20% of student victims report sexual assault. Common reasons for not reporting include thinking nothing will be done about it, or feeling “embarrassed, ashamed”.^{7,8,9} The proposal recognizes “...sexual harassment continues to present serious problems across the nation’s campuses,” yet further narrowing of this definition and underplaying the travesty of sexual harassment risks making victims less likely to report, increasing the likelihood of further and possibly escalated levels of harassment through emboldening perpetrators. Implementing this change will effectively deny a person equal access to the recipients education program and make campus more dangerous for graduate students.

Over 30 years ago, the Supreme Court of the United States recognized sexual harassment as a form of discrimination in *Meritor Savings Bank v. Vinson* (1986). In that ruling, the Supreme Court favorably cites the Equal Employment Opportunity Commission (EEOC) policy and guidelines on sexual harassment. The EEOC states, “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature constitutes sexual harassment when the conduct explicitly or implicitly affects an individuals employment, unreasonably interferes with an individual's work performance or creates an intimidating or hostile, or offensive work environment.” Moreover, in 2014, The White House Task Force to Protect Students from Sexual Assault defines sexual harassment as “**unwelcome conduct of a sexual nature, including unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal or physical conduct of sexual nature.**” **We believe this definition should be added to the proposed definition of sexual harassment.** SAGE calls on the Department of Education to protect graduate students from retaliation and facilitate reporting by accurately defining sexual harassment as described by the White House Task Force to Protect Students.

The proposal further deters survivors from coming forward to report by forcing institutions of higher learning to “conduct live hearings” and force survivors to submit to cross-examination. This cross-examination can be performed by whomever the perpetrator chooses. This could be a lawyer, parent, or roommate. This creates an adversarial model, yet fails to provide protections that



are necessary when such models are implemented in a courtroom.⁵ There are no protections built into the system to ensure the cross-examiner has knowledge or training, nor is there a clause to ensure both parties have equal access to competent and equivalent representation. This institutionalizes re-traumatization of victims and skews the outcome due to implicit bias.⁶ These biases are systematically exploited by representation strategies that have been proven ineffective repeatedly in adversarial courts of law.^{10, 11} Needless to say, our universities are not a court of law and should be focused on creating a safe environment, free of discrimination. Title IX should not impose an adversarial model where power dynamics, unregulated/inequitable access to resources, and bias determine the outcome of an investigation.

The combination of the proposed change 1) to assume no harassment has taken place and 2) allowing schools to delay investigations for good cause will endanger students. The proposed changes that state Title IX procedures must include “...a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process,” may result in survivors having to endure further sexual harassment and trauma and delay preventative or intervening measures. By disallowing universities to apply prompt measures, which ensure access to a discrimination-free education, while investigations are ongoing compromises the very safety of students. Combining this with the proposed rule allowing schools to create “temporary delays” or “limited extensions” for “good cause” will force students to endure harassment and abuse while investigations are delayed. SAGE believes this is in direct conflict with the purpose of Title IX intended by Congress. We suggest that specific protective measures are described that do not unfairly place victims in proximity to their abusers while investigations are ongoing.

While delivering the opinion of the Supreme Court ruling on *Meritor Savings Bank v. Vinson* (1986), Justice Rehnquist wrote: “The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome.” 29 CFR 1604.11(a) (1985) Yet, the proposed rule changes do not emphasize the key issue of conduct that are unwelcome, but rather they focus on conduct that has already become so “Severe, pervasive, and objectively offensive” that it most certainly has already destroyed the survivor’s educational opportunities. We are perplexed that the Department of Education would chose to frame their guidelines in a reactionary rather than preventive manner. Title IX provides a protection from sex-based discrimination, including sexual harassment, and the Department of Education

⁵ Additionally, data shows that these processes are excessively traumatic for victims and despite policy changes, and lengthier cross-examinations, courtroom cross-examination policies for sexual assault cases have changed little since the 1950s. Zydervelt, S., et al., *Lawyers’ Strategies for Cross-examining Rape Complainants: Have We Moved Beyond the 1950s?* The British Journal of Criminology, 2017. 57(3): p. 551-569.

⁶ “...if one set out intentionally to design a system for provoking symptoms of traumatic stress it would look very much like a court of law”.Herman, J. L. (2005). Justice From the Victim’s Perspective. *Violence Against Women*, 11(5), 571–602. <https://doi.org/10.1177/1077801205274450>

should strive for the prevention of sexual harassment. In the case where these protections fail, the remedy should be focused on creating systems to keep sexual harassment from happening to other students, and not focus on mitigating liability of the institution.

Student Advocates for Graduate Education (SAGE) is a coalition of Graduate Student Organizations from leading U.S. public research universities who are committed to improving the quality of graduate student life at their own campuses, and promoting access, quality, and opportunity for graduate and professional students at the federal level. This statement has the support of graduate student leaders from:

The Ohio State University

Rutgers University

Texas A&M University

University of Arizona

University of California-Berkeley

University of California-Davis

University of California-Irvine

University of California-San Diego

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