

Miguel Cardona, Ed.D.
Secretary of Education
United States Department of Education
400 Maryland Avenue, SW
Washington, District of Columbia 20202

RE: Docket ID ED-2021-OCR-0166

Dear Secretary Cardona,

We are research experts on the issue of campus sexual harassment and assault and are writing to provide comments in response to the Department of Education's July 12, 2022, proposed rulemaking amending the regulations implementing Title IX of the Education Amendments of 1972 (Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance), Docket ID ED-2021-OCR-0166.

I. Introduction

As research experts on the issue of campus sexual harassment and assault, we support many of the proposed changes to Title IX regulations and believe they will be essential for addressing sexual harassment/assault in institutions of higher education and protecting the rights of students and employees who experience harassment/assault. In particular, we applaud revisions that include expanding the definition of sexual harassment, requiring a response to harassment that takes place off campus, and removing the requirement for live cross-examination in grievance procedures. However, the proposed requirements on mandatory reporting (§ 106.44(c) "notification requirements") will result in nearly all employees being required to report any possible sexual harassment/assault they learn about to a university official even if the victim/survivor does not want or consent to such a report. These requirements directly contradict research on such policies and trauma-informed responses and will be more harmful for victims/survivors than the Trump administration regulations they are replacing.

We have previously expressed our concerns about broad mandatory reporting policies (like the one proposed) in both written and oral comments submitted to the Department of Education during the public hearings on implementing regulations of Title IX in June 2021. In this letter, we explain our concerns with the proposed policy and our recommendations for change based on empirical evidence, but to briefly summarize, we are concerned that the policy would:

- Eliminate institutional discretion about how employees must respond when they learn about possible sexual harassment/assault experienced by a student, and severely limit institutional discretion about how employees must respond when they learn about possible sexual harassment/assault experienced by another employee.
- Include in the category of those required to report not only those employees who are clearly positioned and obligated to initiate a formal response to possible sexual harassment/assault as part of their institutional role (e.g., with authority to institute corrective measures or administrative leaders), but also all employees holding teaching or advising roles, as well as student employees.

- Require employees to report any instance of possible sexual harassment/assault that they learn about in any way, either directly (e.g., witnessing, being told directly by the victim/survivor) or indirectly (e.g., overhearing, receiving information from a third party, writing in a class assignment, seeing a social media post, attending activist events).
- NOT require employees to provide any information about confidential resources to the victim/survivor and NOT require institutions to train their employees on how to respond to disclosures in a trauma-informed manner.

The Department claims that this broad mandatory reporting approach will be the “most effective way to ensure that a recipient’s program or activity is free from sex discrimination” (p. 175), but this flagrantly disregards empirical evidence. Most colleges and universities have already been implementing broad mandatory reporting policies like this (Holland, Cortina, & Freyd, 2018), but rates of sexual harassment/assault have not declined (see any study of campus sexual harassment/assault in the past 30 years); fewer than 5% of victim/survivors voluntarily report to the university and fewer than 25% seek help from campus supports (see Holland et al., 2021 and Holland & Cipriano, 2021 for a review); reports to the Title IX office rarely result in formal institutional actions (e.g., grievance procedures) or meaningful supportive measures for victim/survivors (Cipriano, Holland, O’Callaghan, & Riger, under review; Know Your IX, 2021; Richards, 2019; Richards et al., 2021); and victim/survivors routinely experience additional trauma and institutional betrayal when they come into contact with the Title IX office (Know Your IX, 2021; Smith & Freyd, 2014).

The broad mandatory reporting policy that was proposed in the new Title IX regulations (and has already been tried by many institutions) is rooted in the unfounded assumption that mandatory reporting is both necessary and effective for addressing sexual harassment and assault. This assertion assumes that requiring most employees to report anything that may constitute harassment/assault will surface more cases, enable institutions to identify perpetrators (especially repeat perpetrators), and ensure that institutions respond promptly and effectively to remedy the problem (e.g., initiating grievance procedures, offering supportive measures). However, there is little to no evidence to support these assumptions, and the evidence that we do have suggests that broad mandatory reporting policies can cause harm (see Holland et al., 2018 for review).

II. Comments on Specific Requirements in § 106.44(c) "notification requirements"

The proposed regulations would require nearly all employees to report any instance of possible sexual harassment/assault experienced by a student that they learn about to the Title IX Coordinator. Those mandated to report would not only include those employees who are clearly positioned and obligated to initiate a formal response to possible sexual harassment/assault as a part of their institutional role—including those with the authority to institute corrective measures and administrative leaders (e.g., administrators, deans, chairs, public safety supervisors, coaches, housing directors)—but also any employee with teaching or advising roles (e.g., full-time, part-time, and adjunct faculty members; graduate student instructors; academic advisors; advisors for clubs) and student employees. Additionally, if these employees learn about possible sexual harassment/assault experienced by another employee, institutions must decide whether they want these employees to (a) report it to the Title IX coordinator regardless of that person’s wishes or (b) tell that person how they can contact the Title IX coordinator and report.

What does this mean? First, the Department of Education asserts that any instance of possible harassment/assault experienced by a student must always be reported because students “may be less capable of self-advocacy” (p. 181). College students are not children and have the right to make possibly life altering decisions for themselves. Students are also very capable of self-advocacy. In fact, student activists have been at the forefront of advocacy to improve Title IX policy (Pérez-Peña, 2013). Second, the Department of Education is giving institutions the power to decide what will happen when nearly any employee learns about another employee’s experience of possible harassment/assault—rather than the person who actually experienced it. Again, employees are not children and have the right to decide if a report will be made.

Why is this a problem? Fundamental principles of a trauma-informed approach to working with victim/survivors are *empowerment, voice and choice* (SAMHSA, 2014). Regaining a sense of autonomy and control is essential to recovery and healing after individuals experience sexual assault and harassment (Bryant-Davis, 2011; Frazier, 2003). Evidence is clear that when people take control away from victim/survivors (e.g., forcing them to report), there is an increase in posttraumatic stress, depression, and anxiety (Dworkin et al., 2019). Broad mandatory reporting policies that compel disclosures can discourage victim/survivors from seeking help and disclosing to employees they trust, including to their teachers and advisors (Freyd, 2016; Holland et al., 2018; 2020; 2021; Richards et al., 2021). Moreover, research consistently finds that victim/survivors, as well as the victim advocates and other support providers who work closely with them, do not support broad mandatory reporting policies, preferring instead policies that grant them autonomy and control over the decision to report (Holland et al., 2018, Holland, Cipriano, & Huit, 2020; Holland, Cipriano, & Huit, 2021; Newins & White, 2018).

Another aspect of the recommended changes to reporting that will increase harm to victim/survivors, as well as employees, is the scope of information that must be reported. Under the proposed regulations, nearly all employees will be required to report when: they have information about conduct that could reasonably be understood to constitute sexual harassment and assault because they witnessed it, heard about it from a complainant or witness, received information about it from someone other than the complainant (including another student, a parent, a member of the local community, or the media), or learned about it “by any other means” (p. 186), including indirectly learning of conduct via flyers, posts on social media or online platforms, assignments, and class-based discussions. The only exception to these reporting requirements is if an employee is conducting IRB-approved human subjects research, and then their exemption applies only to violations they learn about via the research study itself.

Moreover, the Department explicitly chose not to make exceptions for employees who learn of possible harassment/assault at an activist event like Take Back the Night (§ 106.44(c)). Although the Department acknowledges the benefits of participating in awareness raising events, they state that if employees don’t want to have to report what they learn, “nothing...obligate[s] a postsecondary institution’s employees to attend public awareness events” (p. 196). Their meaning—if you don’t like it, you don’t have to attend. However, attending awareness events is an important way that faculty, advisers, and other employees can demonstrate commitment to a violence-free campus and foster an environment in which people will voluntarily come forward with experiences of harassment and assault. The scope of information that must be reported

under the proposed rule would eliminate victim/survivors' privacy and opportunities to speak openly, find community, and build solidarity; sever trusting relationships and pedagogical ties between students, staff, and faculty; and do nothing to foster actual campus safety.

The Department acknowledges that most employees with teaching and advising roles (including student employees) don't actually have the authority to address possible harassment/assault, but still claims that that "it is likely that a student would view these employees as persons who would have the authority to redress sex discrimination or to whom they could provide information regarding sex discrimination with the expectation that doing so would obligate the recipient to act" (p. 180). This is simply untrue, unless there are policies (like the one proposed) that turn teachers and advisors into de facto arms of the Title IX office. Consider the following:

- What student will believe that writing about an experience of sexual harassment or assault in a reflection paper or discussion post to connect their lived experiences to the class content means that their professor or graduate student instructor is then able to "redress" sexual harassment and that the institution is obligated to act?
- What student will believe that their academic advisor who happens to view a tweet they posted means that the advisor is then able to "redress" sexual harassment and that the institution is obligated to act?
- What student will believe that telling a faculty member about an experience of sexual harassment to explain why they are interested in doing an honors thesis on the topic of sexual harassment means that the faculty member is then able to "redress" sexual harassment and that the institution is obligated to act?
- We could go on.

The proposed regulations make catastrophically problematic assumptions about victim/survivors' intentions when discussing harassment/assault, as well as their expectations as a result of such discussions. Victim/survivors may in fact discuss harassment/assault for a variety of reasons: (a) in ways that simply allow them to share their experiences in the world (e.g., to say how they connected to a course reading, to raise general public awareness about the problem via social media or an activist event, to describe why they are interested in pursuing a career in a particular field), (b), seeking support or guidance about sexual harassment or assault by directly and intentionally telling someone about a personal experience, and (c) reporting sexual harassment or assault to initiate institutional action.

What might this look like in practice? In the case of a direct, intentional disclosure—such as a student telling their professor during office hours to explain why they need an extension on an exam—some students may want that employee to help them initiate official action, some students may want that employee to tell them about confidential resources, and some students may just want the extension. If they want institutional action, then that employee should be required to report it. If they want information about confidential resources, then that employee should be required to provide that information. If they just want the extension, then that employee should give them an extension.

These proposed regulations offer few options for victim/survivors to openly speak about experiences of sexual harassment/assault or control what happens to their personal information when employees learn about those experiences. There will be a serious chilling effect if we now

must warn students and employees that if they speak about harassment/assault in classes, on social media, at activist events, in an interview, (and other ways), and an employee learns about it, their personal information will be reported to university officials. Lack of consent lies at the heart of much sex discrimination addressed under Title IX (e.g., sexual harassment/assault). Rather than violating victim/survivor consent again, an evidence-based, trauma-informed, and survivor-centered approach would require employees to provide victim/survivors with information—including their reporting options and confidential resources—so they can make informed choices about how to proceed. And their choice may not involve the Title IX office.

However, the proposed mandatory reporting requirements combined with the proposed requirement that a Title IX Coordinator be responsible for offering and coordinating supportive measures (§ 106.44(g)(6)) creates serious problems for victim/survivor autonomy. The Title IX office is not the best place to centralize and monopolize the provision of information and support after an employee learns about possible sexual harassment/assault. By the Department of Education's own rulemaking, Title IX Coordinators' institutional role is to "serve impartially" (as well as investigators, decisionmakers, and those implementing grievance procedures), which renders them incapable of offering the support that may be most needed in response to possible sexual harassment/assault allegations: advocacy. A confidential advocate will have nothing but the victim/survivors' interests and needs in mind when providing information, offering resources, explaining reporting options, and answering questions. Plus, victim advocates are beneficial for enabling formal reporting, as victim/survivors who work with a victim advocate are more likely to follow through with formal reporting and report more positive experiences during formal reporting processes (Campbell, 2006; Nightingale, 2022; Patterson & Tringali, 2015; Patterson & Campbell, 2010).

The Department claims to "recognize the importance of complainant autonomy" (p. 179) regarding mandatory reporting policies for institutions of higher education and, in the table summarizing the "Major Provisions of the Department of Education's Title IX Notice of Proposed Rulemaking," assert that they are "respecting complainant autonomy" by requiring institutions to educate students and employees about the mandatory reporting policy and the confidential resources on campus. Educating students and employees about mandatory reporting requirements does not respect autonomy. Compelling students and employees into contact with the Title IX coordinator via mandated reports does not respect autonomy, because even if the victim/survivor asks them not to pursue the report, the Department's regulations grant institutions the power to override this request if they decide "that the potential harm from ongoing sex discrimination outweighs the complainant's interest in not initiating the grievance procedures" (p. 320). At a time when women and people with uteruses have been stripped of bodily autonomy through the overturning of *Roe v Wade*, our school's policies must not further limit their autonomy and control.

Thus, the Department of Education must reassess what it would really mean to support victim/survivors and guarantee their access to education under Title IX. This requires a move towards mandatory supporting, rather than mandatory reporting (Freyd, 2016; Holland, Hutchison, Ahrens, Torres, 2021; Weiner, 2018). What effective supporting would require is that most university employees—including employees with responsibility for teaching and advising—be required to listen to and respect victim/survivors' intentions when they disclose, which may or may not include making a report to the Title IX coordinator.

III. Evidence-Based Recommendations for Changes to § 106.44(c) (notification requirements); § 106.44(d) and § 106.44(g) (implementation of supportive measures); and § 106.8(d) (training requirements) to Enable Mandatory Supporting

Based on the empirical evidence, for institutions of higher education, the Department of Education should:

- Require only employees who institutions have determined to have true “authority to institute corrective measures” and who serve in positions of administrative leadership (e.g., administrators, deans, chairs, public safety supervisors, coaches, housing directors) to (a) notify the Title IX Coordinator when the employee has information about possible sex discrimination experienced by a student or employee (which would establish “actual knowledge”), (b) refer that person to a confidential victim advocate (either on campus or in the community), and (c) inform that person about other confidential services on campus. Amend § 106.44(c)
- Retain the definition/categories of “confidential employees” (§ 106.2): “(1) an employee of a recipient whose communications are privileged under Federal or State law associated with their role or duties for the institution; (2) an employee of a recipient whom the recipient has designated as a confidential resource for the purpose of providing services to persons in connection with sex discrimination...; or (3) an employee of a postsecondary institution who is conducting an Institutional Review Board-approved human-subjects research study designed to gather information about sex discrimination.”
- Retain confidential employee requirements § 106.44(d)(1) and § 106.44(d)(2)—“(1) A recipient must notify all participants in the recipient’s education program or activity of the identity of any confidential employee; (2) A recipient must require a confidential employee to explain their confidential status to any person who informs the confidential employee of conduct that may constitute sex discrimination under Title IX and must provide that person with contact information for the recipient’s Title IX Coordinator and explain how to report information about conduct that may constitute sex discrimination under Title IX”—and add a third requirement that institutions must create and/or expand confidential employees/services, including confidential victim advocates, mental health providers trained in trauma recovery, and ombuds services. Amend § 106.44(d)
- Require, or at least allow, institutions to involve confidential employees/services (e.g., victim advocacy, trauma response team) in the offering and coordinating of supportive measures, so that students and employees can receive supportive measures without having to involve the Title IX office. Amend § 106.44(d) and § 106.44(g)
- Require all other employees who directly learn about possible sex discrimination experienced by a student or employee to provide supportive intervention. Institutions may choose between different supportive intervention options, such as...
 - Option 1: employees must (a) inform that person about how to report to the Title IX coordinator, (b) ask if they want to report—without attempting to discourage or encourage reporting—and make a report if they give consent, (c) refer them to

- a confidential victim advocate (either on campus or in the community), and (d) inform them about other confidential employees/services on campus;
 - Option 2: employees must (a) inform that person about how to report to the Title IX coordinator and (b) contact a designated confidential employee/service trained in victim/survivor support that will then be responsible for connecting with that person, providing expert support, and ensuring they can make informed decisions about reporting and/or seeking supportive measures. Amend § 106.44(c)
- Institute exceptions so that employees are not forced to provide supportive intervention when there is no intentional disclosure, including situations where employees learn about possible sex discrimination indirectly...
 - at public awareness events on campus (e.g., Take Back the Night, candlelight vigils, protests, speak outs),
 - in social media posts or online forums (e.g., using #metoo),
 - in academic classes and work products (e.g., in an assignment),
 - in hiring or admissions processes (e.g., personal statements, interviews),
 - in IRB-approved human subjects research,
 - in campus climate surveys. Amend § 106.44(c)
- Expand training requirements for employees, including
 - Require training for all employees on responding to disclosures of sexual harassment/assault (and other forms of sex-discrimination) in a trauma-informed and inclusive manner (i.e., inclusive of gender, race, ethnicity, sexuality, culture). Add to § 106.8(d)(1)
 - Require training for investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures on (a) responding to disclosures of sexual harassment/assault (and other forms of sex-discrimination) in a trauma-informed and inclusive manner (i.e., inclusive of gender, race, ethnicity, sexuality, culture) and (b) conducting trauma-informed interviewing. Add to § 106.8(d)(2)
 - Require training for facilitators of informal resolution process on responding to disclosures of sexual harassment/assault (and other forms of sex-discrimination) in a trauma-informed and inclusive manner (i.e., inclusive of gender, race, ethnicity, sexuality, culture). Add to § 106.8(d)(3)

The empirical evidence makes clear that a mandatory supporting approach will be far more likely to fulfill the goal of addressing sexual harassment/assault and ensuring equal access to education. If the Department will not enable mandatory reporting policies that are grounded in evidence and center victim/survivors by following our evidence-based recommendations, we ask that the Department revise the proposed regulations on notification requirements (§ 106.44(c)) to allow institutions more flexibility in setting mandatory reporting policies, including which employees are required to report and when/what they are required to report (e.g., having reporting exceptions for information learned at an activist event or in a class assignment). At least then institutions that have implemented policies that are evidence-based and survivor-centered (e.g., University of Oregon, University of Washington) will not be required to implement a policy that

would harm victims/survivors and their campus community, given that the mandatory reporting approach proposed by the Department of Education has already been tried and has failed to effectively address sex discrimination.

Sincerely,

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References

- Bryant-Davis, T. (2011). *Surviving sexual violence: A guide to recovery and empowerment*. Rowman & Littlefield.
- Campbell, R. (2006). Rape survivors' experiences with the legal and medical systems: Do rape victim advocates make a difference? *Violence Against Women, 12*(1), 30-45.
<https://doi.org/10.1177/1077801205277539>
- Cipriano, A. E., Holland, K. J., O'Callaghan, E. & Rieger, A. (under review). "I had no power whatsoever": Graduate students' experiences disclosing sexual harassment to mandatory reporters. Preprint: <https://osf.io/u9f5c/>
- Dworkin, E. R., Brill, C. D., & Ullman, S. E. (2019). Social reactions to disclosure of interpersonal violence and psychopathology: A systematic review and meta-analysis. *Clinical Psychology Review, 72*, 101750.
<https://doi.org/10.1016/j.cpr.2019.101750>
- Freyd, J.J. (2016, April 25) The problem with "required reporting" rules for sexual violence on campus. Huffington Post, <https://www.huffingtonpost.com/jennifer-j-freyd/the-problem-with-required-b-9766016.html>
- Holland, K. J., & Cipriano, A. E. (2021). Does a Report = Support? A Qualitative Analysis of College Sexual Assault Survivors' Title IX Office Knowledge, Perceptions, and Experiences. *Analyses of Social Issues and Public Policy, 21*(1), 1054-1081.
<https://doi.org/10.1111/asap.12271>
- Holland, K. J., Cipriano, A. E. & Huit, T. Z. (2020). "The fear is palpable": Service providers' perceptions of sexual assault mandatory reporting policies in higher education. *Analyses of Social Issues and Public Policy, 20*(1), 66-89. <https://doi.org/10.1111/asap.12193>
- Holland, K. J., Cipriano, A. E., & Huit, T. Z. (2021). "A victim/survivor needs agency": Sexual assault survivors' perceptions of mandatory reporting policies in institutions of higher education. *Analyses of Social Issues and Public Policy, 21*(1), 488-508.
<https://doi.org/10.1111/asap.12226>

- Holland, K. J., Cortina, L. M., & Freyd, J. J. (2018). Compelled disclosure of college sexual assault. *American Psychologist*, 73(3), 256-268. <https://doi.org/10.1037/amp0000186>
- Holland, K. J., Hutchison, E. Q., Ahrens, C. E., & Torres, M. G. (2021) Reporting is Not Supporting: Why the Principle of Mandatory Supporting, not Mandatory Reporting, Must Guide Sexual Misconduct Policies in Higher Education. *Proceedings of the National Academies of Sciences*, 118(52), 1-4. <https://doi.org/10.1073/pnas.2116515118>
- Holland, K. J., Wheeler, L. A., Tyler, K. A., & Cipriano, A. E. (2021). Development of and preliminary evidence for a psychological service barriers measure among college sexual assault survivors. *Violence Against Women*, 27(14), 2791-2814. <https://doi.org/10.1177/1077801221996467>
- Know Your Title IX. (2021). The cost of reporting: Perpetrator retaliation, institutional betrayal, and student survivor pushout. Retrieved from <https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf>
- Newins, A.R. & White, S.W. (2018) IX sexual violence reporting requirements: Knowledge and opinions of responsible employees and students. *Journal of Aggression, Conflict and Peace Research*, 10(2), 74–82. <https://doi.org/10.1108/JACPR-04-2017-0282>
- Nightingale, S. D. (2022). An exploratory analysis of factors related to reporting sexual assault to college officials by LGBTQ student survivors. *Journal of American College Health*, 1-9. <https://doi.org/10.1080/07448481.2022.2090843>
- Patterson, D., & Campbell, R. (2010). Why rape survivors participate in the criminal justice system. *Journal of Community Psychology*, 38(2), 191-205. doi: 10.1002/jcop.20359
- Patterson, D., & Tringali, B. (2015). Understanding how advocates can affect sexual assault victim engagement in the criminal justice process. *Journal of Interpersonal Violence*, 30(12), 1987-1997. <https://doi.org/10.1177/0886260514552273>
- Pérez-Peña, R. (2013, March 19). College groups connect to fight sexual assault. *New York Times*. Retrieved March 20, 2017 from <http://www.nytimes.com/2013/03/20/education/activists-at-colleges-network-to-fight-sexual-assault.html>
- Richards, T. N. (2019). No evidence of “weaponized title IX” here: An empirical assessment of sexual misconduct reporting, case processing, and outcomes. *Law and Human Behavior*, 43(2), 180-192. <https://doi.org/10.1037/lhb0000316>.
- Richards, T. N., Branch, K. A., Pinchevsky, G. M., & Hayes, B. E. (2021). Walking the Tightrope: Navigating Faculty Status as a Mandatory Reporter in the# MeToo Era. *Journal of Criminal Justice Education*, 32(3), 375-389. <https://doi.org/10.1080/10511253.2021.1962377>
- Richards, T. N., Gillespie, L. K., & Claxton, T. (2021). Examining incidents of sexual misconduct reported to Title IX coordinators: Results from New York’s institutions of higher education. *Journal of school violence*, 20(3), 374-387. <https://doi.org/10.1080/15388220.2021.1913599>
- Substance Abuse and Mental Health Services Administration. (2014). *SAMHSA’s concept of trauma and guidance for a trauma-informed approach*. Washington, DC: Author. Retrieved from https://ncsacw.acf.hhs.gov/userfiles/files/SAMHSA_Trauma.pdf
- Weiner, M. H. (2018). A principled and legal approach to Title IX reporting. *Tenn. L. Rev.*, 85, 71.