

How to submit a comment on the Department of Education’s proposed rule, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” (comments are due by 09/12/2022)

- 1) **Click on link below** to directly access the form or copy/paste the link into a web browser <https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>
- 2) Click on “**Submit a Formal Comment**”
- 3) Write your comment in the “**Comment**” section.
 - a. You can write your own comment, outlining the reasons why you oppose the proposed mandatory reporting requirements for institutions of higher education and your suggestions for change OR we have provided a template below that you can edit and copy/paste into the comment section.
 - b. If you want to submit supplementary files, add them under “Add a file.” You can attach up to 20 files (max size 10MB); word docs or searchable PDFs are preferred
- 4) If you would like submission confirmation, enter your email address under “**Email Address**”
- 5) Complete the information in “**Tell us about yourself! I am...**”
 - a. If you are an individual and would like to submit your first and last name with your comment, select “An Individual”
 - b. If you are commenting on behalf of an organization, select “An Organization”
 - c. If you would like to submit an anonymous comment, select “Anonymous”
- 6) Click “**Submit Comment**”
 - a. Comments may become available for public viewing on the web, so do NOT include identifiable information about yourself in your comment or attachment(s) that you are uncomfortable making publicly available and do NOT include any identifiable information about someone other than yourself.

-----Edit and Copy/Paste the Text Below in the Comment Section -----

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,

I am [briefly describe yourself, such as “a college student,” “a professor,” “an advocate”] and I am 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.

Specifically, I am deeply concerned about the proposed requirements on mandatory reporting for institutions of higher education (§ 106.44(c) "notification requirements") that would result in most employees being required to report any possible sex discrimination they learn about (including sexual harassment and assault) to the Title IX Coordinator, even if the victim/survivor does not want or consent to the report. These requirements directly contradict research on such policies and trauma-informed responses to disclosures and will be more harmful for victims/survivors than the Trump administration regulations they are replacing.

[Insert here any information about why the proposed requirements matter to you, e.g., if you are a student and these requirements would negatively affect your education, or if you are a faculty/staff member and these requirements would negatively affect your job, or if you are engaged in advocacy on your campus or nationally and have seen the negative effects, etc.]

In addition, I have read the comment that research experts for the Academic Alliance for Survivor Choice in Reporting Policies (ASC) have written regarding § 106.44(c) and are submitting as a public comment (submitted by Dr. Kathryn Holland), and I am in complete agreement with their concerns about the proposed mandatory reporting policy and support their evidence-based recommendations for change. I would like to underscore the following:

--The broad mandatory reporting policy that was proposed in § 106.44(c) "notification requirements" is rooted in the unfounded assumption that mandatory reporting is both necessary and effective for addressing sex discrimination (including sexual harassment and assault); there is little to no evidence that broad mandatory reporting policies are effective, and the evidence that we do have suggests that broad mandatory reporting policies can cause harm (see, for example, Holland, Cortina, & Freyd, 2018; Holland, Hutchison Ahrens, & Torres, 2021).

--Regaining a sense of autonomy and control is essential to recovery and healing after people experience sexual assault and harassment (e.g., Bryant-Davis, 2011). When people take control away from victim/survivors (e.g., forcing them to report), there is an increase in posttraumatic stress, depression, and anxiety (e.g., Dworkin et al., 2019). Broad mandatory reporting policies can discourage victim/survivors from seeking help and disclosing to employees they trust (such as their teachers, advisors, and colleagues), and victim/survivors prefer policies that grant them autonomy and control over the decision to report (e.g., Holland, Cipriano & Huit, 2021).

--The scope of information that must be reported under the proposed rule—requiring employees to report any possible sex discrimination (including sexual harassment/assault) they learn about by any means—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.

--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 a move towards mandatory supporting, rather than mandatory reporting (Freyd, 2016; Holland, Hutchison, Ahrens, Torres, 2021; Weiner, 2018).

--Based on empirical evidence, for institutions of higher education, the Department of Education should amend § 106.44(c), including:

- 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 (on campus or in the community), and (c) inform that person about other confidential services on campus.
- 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.
- 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.

--In addition, the following changes are needed to enable a mandatory supporting approach

- Retain the definition/categories of “confidential employees” (§ 106.2) and confidential employee requirements (§ 106.44(d)(1) and § 106.44(d)(2)).
- Add a third confidential employee 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) and allow confidential employees/resources on campus to participate in the offering and coordinating of supportive measures (§ 106.44(d)).

- 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) (§ 106.8(d))

If the Department will not enable mandatory reporting policies that are grounded in evidence and center victim/survivors through these 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).

Sincerely,

[Add your name if you are comfortable with it being in a public comment. Anonymous comments will also be reviewed by DOE.]

References

- Bryant-Davis, T. (2011). *Surviving sexual violence: A guide to recovery and empowerment*. Rowman & Littlefield.
- 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., & 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>
- Weiner, M. H. (2018). A principled and legal approach to Title IX reporting. *Tenn. L. Rev.*, 85, 71.