

Dear Secretary Cardona,

We are faculty and doctoral students associated with the University of Michigan 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.

We wish to express deep concerns about portions of the proposed Title IX regulations. Our observations are informed by our systematic content analysis of the student-facing web pages of a nationally-representative random sample of 381 colleges and universities. We examined the online information student-survivors could access about their schools' policies around reporting and resources as of 2017 and 2022. The resulting study, which is currently under peer review (and attached to this comment), highlights the following issues with the proposed regulations:

**1a. Wide-net employee reporting obligations may cause survivors harm.** The proposed regulations are written with the goal of channeling as many reports of sex discrimination as possible to the Title IX Coordinator, with no attention to the fact that many students may want to prevent information about the harms they have experienced from reaching the Title IX office to avoid the possibility of an investigation they do not want. In pursuit of reports, the proposed regulations require that most employees 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. As Title IX Coordinators may initiate investigations without the consent of the victim/survivor, there is a substantial risk of the individual becoming embroiled in processes they do not want. Lack of control over institutional responses is one of the most damaging possible consequences of reporting or disclosure, perhaps because it mirrors the lack of autonomy experienced during the assault (Bryant-Davis, 2011; Dworkin et al., 2019; Frazier, 2003; Gidycz et al., 2015). Survivors often experience additional trauma and institutional betrayal when they come into contact with Title IX offices (Know Your IX, 2021; Smith & Freyd, 2014). The proposed wide-net reporting requirements undermine survivor agency (Holland et al., 2018; Weiner, 2017).

**1b. Wide-net reporting policies—particularly those with punitive sanctions associated with failure to report—will likely have disparate impacts on employees.** Disparate impacts of this facially neutral policy are likely because university employees are not equally likely to receive disclosures. Women, BIPOC individuals, graduate students, resident advisors, others in more junior positions, and those teaching women's/sexuality/gender studies courses are among those more likely to receive disclosures of possible sex discrimination. These individuals are thus more likely to be put in situations of moral and legal precarity, where they have to choose between respecting a victim/survivor's desire for confidentiality and protecting themselves against possible institutional or legal sanction.

The regulations should: 1) allow institutions greater flexibility in assigning reporting responsibilities to employees, 2) discourage reporting policies where most or all employees are required to report, and 3) recognize that vulnerable employees are more likely to receive disclosures, and thus punitive sanctions for failure to report may lead to discriminatory outcomes and thus should be avoided.

**2. The proposed regulations do not (as far as we could discern) require schools to improve communication to students about employee reporting obligations.** Our research suggests that the risks to students of being unwillingly drawn into adjudication processes are substantial because many schools do not clearly communicate employee reporting obligations on their websites. Our analysis found that roughly a third of schools' websites did not mention these policies (even when universities required almost all employees to report). Furthermore, of the schools that mentioned employee reporting obligations on student-facing webpages, many did not explain what would happen once a sexual assault was disclosed to an employee with a reporting obligation. Many schools' explanations were confusing or used legalistic language that students might not understand. These results suggest that it may be difficult for survivors to know the implications of their disclosures, increasing the chances of an unintended and/or unwanted report.

In general, we found that the language on schools' student-facing webpages on campus sexual assault was often missing, confusing, and even contradictory. In some cases, schools even used ED's regulatory language directly, leading to legalistic wording that might be confusing to students. This suggests that schools need encouragement and support to translate policies into student-friendly materials.

Although the regulations *do* specify that each school "must ensure that its grievance procedures are widely disseminated and written in clear, accessible, easily understood language that is tailored to the age and background of those impacted by the grievance procedures," the proposed regulations do not require schools to communicate clearly about employee reporting obligations. In the preamble, it is clear that ED *intends* for schools to provide students with clear information to inform their decision-making. There is text that reads: "To make informed decisions about reporting sex discrimination, individuals must understand how to report such conduct and which employees will provide information they receive about such conduct to the recipient's Title IX Coordinator." Yet providing students with clear information about employee reporting obligations is not a requirement.

The regulations should require schools to clearly, consistently, and publicly inform students about employee reporting obligations. Schools should be required to publish online information on employee reporting obligations in language that a first-year student is likely to understand (including students whose first language is not English). ED should provide support for schools to construct student-facing online materials.

**3. The proposed regulations do not require that schools provide confidential resources.** We like Proposed § 106.44(d)(1) which requires a recipient to inform students and any other participants in the recipient's education program or activity of the identity of any confidential employees. BUT this text does not require schools to designate confidential employees or to offer their contact information as the first point of contact. Access to confidential support is crucial for survivor agency, as a confidential resource can assist a victim/survivor in working through what they need and whether or not they want Title IX to be put on notice of the sex discrimination. As survivors who talk to a confidential resource can later report, but those who directly report cannot retract the report, confidential resources should be promoted on websites and other student-facing materials as the first point of contact. In addition, while we found that the vast majority (roughly 85 percent) of schools provided information on confidential resources on their websites, this means that 15% of schools did not, suggesting that unless mandated to provide such resources, a substantial minority of schools will not.

The regulations should require schools to provide confidential resources and to promote confidential resources as the first point of contact for survivors.

**4. The proposed regulations make access to supportive measures contingent upon reporting.**

The proposed regulations would more tightly link supportive measures for survivors to Title IX offices. ED's 2011 DCL stated that "Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation. The school should undertake these steps promptly once it has notice of a sexual harassment or violence allegation" (p. 15). Although this implicitly ties interim (supportive) measures to investigations, this language did not prevent schools from providing supportive measures outside of Title IX investigatory processes. Similarly, ED's 2014 *Questions and Answers* listed "determining appropriate interim measures for a complainant upon learning of a report or complaint of sexual violence" as an "additional" responsibility that schools "may" give Title IX coordinators (p. 11). This shifted in 2020, with the regulations stating that "the Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures" (ED, 2020, p. 30574). The proposed regulations would maintain this as the Title IX Coordinator's responsibility (ED, 2022, pp. 116-118).

As an investigative arm of the university, Title IX offices must remain neutral, making them ill-equipped to provide survivors with the emotional support and advocacy that they may need. By contrast, confidential advocates are better equipped to provide emotional support to survivors and can provide such support to students who do not wish to make a formal report or participate in an investigation. Linking reporting and resources therefore undermines resources' focus on survivor agency and well-being.

We found that schools varied in how they handled the expectation that the Title IX office provided supportive measures. Some schools clearly made supportive measures contingent on a report to the Title IX office and some schools attempted to separate the two, but in many cases it was not completely transparent whether a survivor was required to notify the Title IX office in order to receive supportive measures.

The proposed regulations should allow schools to allow confidential resources the ability to provide supportive measures independently of the reporting process and the Title IX office. Students should be able to receive supportive measures without the Title IX office being put on notice of the possible sex discrimination. Schools should be required to clearly identify confidential resources for survivors and explicitly state that they are separate from formal reporting processes.

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