

END RAPE ON CAMPUS

September 12, 2022

Dr. Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20202

Catherine E. Lhamon
Assistant Secretary, Office for Civil Rights
U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20202

Submitted via www.regulations.gov

Re: ED Docket No. ED-2021-OCR-0166, RIN 1870-AA16 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Financial Assistance.

Dear Secretary Cardona and Assistant Secretary Lhamon,

The following comment is submitted on behalf of End Rape On Campus to the Department of Education (ED) in response to the proposed rule regarding the enforcement of Title IX in cases of campus sexual violence.¹ While we are pleased to see broader definitions of sex discrimination to be inclusive of sex-based discrimination, gender identity, sexual orientation, and pregnant and parenting students, we believe there are voices and experiences of student survivors that are left out of the proposed rule based on their protected identity or status. Some of the proposed provisions would continue to be barriers to equitable and violence-free education.

Who We Are:

End Rape On Campus (EROC) is a national initiative of Civic Nation, working to ensure the rights of students who experience sexual violence in an educational context. EROC was founded by survivors of campus sexual violence who experienced violations of their Title IX rights as students. The voices and experiences of survivors and students continue to lead our work today.

What We Do:

¹ Dep't of Educ., Office for Civil Rights, *The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment* (June 23, 2022), <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment>.

We work to end campus sexual violence through our Centering the Margins framework,² by aiming to center and uplift the voices of historically marginalized student survivors of campus sexual violence. We proudly work to ensure equal access to education for all survivors, celebrating their identities and the experiences they bring. Ultimately, we seek to build a world free from sexual violence. Until then, we focus on centering survivor voices, reforming systems that harm them, and holding systems and individuals accountable. We do this through three pillars:

- *Survivor Support*: EROC assists student survivors and their communities. Our work includes, but is not limited to, establishing support networks, connecting to resources such as lawyers and victim advocates, providing information to students about their civil rights to help them navigate campus Title IX proceedings, and mentoring student activists. We help students organize for change on campus, connect survivors to the growing network of our Student Survivor Caucus, and assist students in working with administrators to ensure best practices are in place and enforced.³
- *Education*: Through our education-based initiatives, EROC trains and develops resources for staff, students, groups, and individuals on how to prevent sexual assault and support survivors, as well as the rights of students under applicable federal and state laws.⁴
- *Policy Reform*: EROC advocates for fair and equitable sexual assault and interpersonal violence policies and legislation on the campus, local, state, and federal levels. We support reforms that ensure holistic support for all survivors, statewide affirmative consent standards, and federal accountability for Title IX, Title II, and Clery Act enforcement.⁵

The Critical Need for Title IX

Campus sexual assault is a public policy and public health crisis, which impacts the lives of students across the country.⁶ In the United States, 26% of undergraduate women, and more than 6% of men, and 23% of trans and gender-nonconforming students will experience sexual assault in college.⁷ Sexual violence can affect both a student's physical and mental health which can impact their ability to socialize and develop professionally. Nearly 40% of survivors who report sexual violence to their schools experience a range of education-related financial burdens as a result of sexual violence including a decline in academic performance that can lead to financial aid and scholarship loss, academic probation, taking time off, and dropping out, and

² End Rape On Campus. (2022, January 31). Centering The Margins. End Rape on Campus. <https://endrapeoncampus.org/centering-margins/>

³ End Rape On Campus. (2022b, July 12). About Us. End Rape on Campus. <https://endrapeoncampus.org/about/>

⁴ *Id.*

⁵ *Id.*

⁶ Hackman, C. L., Bettergarcia, J. N., Wedell, E., & Simmons, A. (2020). Qualitative Exploration of Perceptions of Sexual Assault and Associated Consequences Among LGBTQ+ College Students. *Psychology of Sexual Orientation and Gender Diversity*. Advance online publication. <http://dx.doi.org/10.1037/sgd0000457>

⁷ AAU Campus Climate Survey (2019).. Association of American Universities (AAU). <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>

long-term impact on employment and graduate school opportunities.⁸ For students from historically marginalized populations, these challenges are often exacerbated. Sexual violence is the most underreported crime and, again, even more so among student populations of color⁹, transgender students of color,¹⁰ students with disabilities,¹¹ immigrant and undocumented students.¹²

Compounding these challenges is the fact that most higher education institutions choose to approach sexual assault from a risk-management perspective: how can the institution protect its own reputation (and, in some cases, the reputation of the perpetrating student) after a survivor has reported an incident of sexual assault has occurred? Instead, the focus should be on both supporting the student who experienced harm and preventing the incident in the first place.¹³

Over the last decade, survivors of campus sexual assault have come together to support one another, demand accountability, and shift our culture to one of prevention, safety, and respect.¹⁴ The current generation of advocates (students, parents, and alumni, alike) have shown us how pushing for institutional transparency and accountability can lead to meaningful, long-term changes. They have called for and deserve comprehensive, student-informed plans for how institutions both work to prevent and respond to reports of sexual violence.¹⁵

The “Red Zone” is the period of time between the beginning of the semester and Thanksgiving break when more than 50% of college sexual assaults occur. This past fall (2021), the Red Zone was intensified by the number of new students arriving at college campuses across the country for the first time following the COVID-19 pandemic school closures and remote learning.¹⁶ During those same months, we saw students standing up against the way their campuses handled sexual assaults. These college and high school students led more than 300 protests and demonstrations demanding change from their school administrators, who have the power to hold themselves and perpetrators accountable and protect students, survivors, and their community, writ large.¹⁷ In order to fully combat the epidemic of sexual violence on college

⁸ Know Your IX. (2021, March). *Know Your IX The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout*. [Www.Knowyourix.Org](https://www.knowyourix.org/thecostofreporting/). <https://www.knowyourix.org/thecostofreporting/>

⁹ See, e.g., Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 *Harv. J.L. & Gender* 1, 16, 24-29 (2018); Georgetown Law Center on Poverty and Inequality, *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, 1 (2018), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>.

¹⁰ See, e.g., Griner, S. B., Vamos, C. A., Thompson, E. L., Logan, R., Vázquez-Otero, C., & Daley, E. M. (2017). *The Intersection of Gender Identity and Violence: Victimization Experienced by Transgender College Students*. *Journal of Interpersonal Violence*, 35(23-24), 5704-5725. ; Coulter, R. W. S., Mair, C., Miller, E., Blossnich, J. R., Matthews, D. D., & McCauley, H. L. (2017). *Prevalence of Past-Year Sexual Assault Victimization Among Undergraduate Students: Exploring Differences by and Intersections of Gender Identity, Sexual Identity, and Race/Ethnicity*. *Prevention Science*, 18(6), 726-736. <https://doi.org/10.1007/s11121-017-0762-8>;

¹¹ National Council on Disability. (2018, January). *Not on the Radar Sexual Assault of College Students with Disabilities*.

https://ncd.gov/sites/default/files/NCD_Not_on_the_Radar_Accessible.pdf

¹² Great Valley Publishing Company, Inc. (2014, May). *Immigration and Sexual Abuse — Protecting Undocumented Children*.

<https://www.socialworktoday.com/Archive/031714p22.Shtml>.

¹³ See e.g., Shroff, K. (2022, February 11). *New lawsuit, old story: Harvard undermines victims of sexual assault | Cognoscenti*. [WBUR.Org](https://www.wbur.org/cognoscenti/2022/02/11/john-comaroff-harvard-sexual-assault-kaivan-shroff).

<https://www.wbur.org/cognoscenti/2022/02/11/john-comaroff-harvard-sexual-assault-kaivan-shroff>

¹⁴ See e.g., Ott, H. (2020, December 8). *Students join forces to fight campus sexual assault as Instagram accounts reveal disturbing pattern*. *CBS News*.

<https://www.cbsnews.com/news/campus-sexual-assault-students-united-states-united-kingdom/>

¹⁵ *Id.*

¹⁶ See e.g., Nittle, N. (2021, December 2). *A ‘double red zone’: Alarms raised at many universities over sexual assault reports*. *The 19th*.

<https://19thnews.org/2021/12/universities-sexual-assault-red-zone/>

¹⁷ *End Rape On Campus*. (2022c, August 17). *Action Events*. *End Rape on Campus*. <https://endrapeoncampus.org/action-center/action-events/>

campuses, colleges must implement both comprehensive and ongoing community-centered prevention education efforts and inclusive survivor-centered, culturally responsive reporting mechanisms and support services for when violence does occur.

We have a shared goal: holistically addressing the epidemic of college sexual assault. The proposed Title IX regulations are a substantial step toward that goal. In order to realize it fully and meaningfully impact the experiences of all survivors, the proposed rule requires adjustments in four key areas: mandatory reporting; investigation timelines; religious exemptions; and the standard of evidence for sexual harassment investigations.

Why Centering the Margins in Title IX Matters

Title IX states that “No 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.”¹⁸ While the original intent of this law was applied to ensure that there was equitable access to facilities, athletics, classes, or programs for female students,¹⁹ guidance has since been provided to ensure that students are protected from sexual violence. Following the #MeToo movement,²⁰ it has become clear that students are targeted for sexual harassment not only because of their sex and gender, but also because of their race, citizenship status, faith, socio-economic status, disability/neurodivergence, and more.²¹ Sexual harassment can look different when it is aimed at these intersecting identities, and students must be protected from all of its forms.

However, under the current proposed rule, there is no mention as to how these regulations are applicable to students of protected identities other than gender/sex.²² While Title II, Title VI, and Title VII may serve as federal civil rights laws that prohibit discrimination against people based on their disability status, on the basis of race, color, or national origin, and as they seek employment, respectively,²³ what is unclear is how students, whose multiple, intersectional identities may fall under two or more of these protected classes, are protected from all forms of sexual harassment under Title IX. For instance, when a Latinx student is catcalled walking by a fraternity house with “come on over, we need more Mexican girls to keep the brothers happy,” that student is experiencing racialized sexual harassment. While the act itself is definitely an act of sexual harassment, it is also decidedly race-based in nature. In examples like this one, it is impossible to separate out the impacts of discrimination based on sex from those of

¹⁸ US Department of Education (ED). (2021, August 20). Title IX and Sex Discrimination.

https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html

¹⁹ Alexander v. Yale Univ., 631 F.2d 178 (2d Cir. 1980)

²⁰ Get To Know Us | History & Inception. (2020, July 16). Me Too. Movement. <https://metoomvmt.org/get-to-know-us/history-inception/>

²¹ See e.g. DelGreco, M., Denes, A., Davis, S., & Webber, K. T. (2021). Revisiting Attribution Theory: Toward a Critical Feminist Approach for Understanding Attributions of Blame. *Communication Theory*, 31(2), 250–276. <https://doi.org/10.1093/ct/ctab001>; Slatton, B. C., & Richard, A. L. (2020). Black Women’s experiences of sexual assault and disclosure: Insights from the margins. *Sociology Compass*, 14(6). <https://doi.org/10.1111/soc4.12792>

²² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg 41390-41579 (proposed July 12, 2022) to be codified at 34 C.F.R., pt. 106 [hereinafter Proposed Rules], available at: <https://federalregister.gov/d/2022-13734> (proposed 34 C.F.R. § 106.10)

²³ U.S. Department of Justice Civil Rights Division. (2016, October 11). Nondiscrimination on the Basis of Disability in State and Local Government Services. https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm; Title VI, Civil Rights Act of 1964. (n.d.). U.S. Department of Labor. <https://www.dol.gov/agencies/oasam/regulatory/statutes/title-vi-civil-rights-act-of-1964>; Title VII of the Civil Rights Act of 1964. (n.d.). US EEOC. [https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964#:~:text=Title%20VII%20prohibits%20employment%20discrimination,Pay%20Act%20of%202009%20\(Pub.](https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964#:~:text=Title%20VII%20prohibits%20employment%20discrimination,Pay%20Act%20of%202009%20(Pub.)

discrimination based on race. For that reason, it is imperative that Title IX explicitly takes into account all of a student's protected identities when providing regulations for addressing sexual harassment.

Additionally, over the years, media coverage of campus sexual assault has primarily focused on predominately white institutions (PWIs) such as Ivy League colleges and universities, Big Ten schools, and schools with large athletic budgets.²⁴ This focus reinforces the myth that sexual violence doesn't occur on other campuses. EROC explicitly includes and supports Centering the Margins (CTM) schools: Historically Black Colleges and Universities, Tribal-Serving Institutions, Hispanic-Serving Institutions, Rural-Serving Institutions, and Community Colleges. Unfortunately, we know that sexual violence takes place at all institutions of higher education.²⁵ While these CTM schools offer unique strengths to their communities (e.g., providing nurturing, familial, and supportive environments), they are impacted by a lack of financial resources and support to hire appropriate staff and train personnel, along with other critical factors, which contribute to underreporting and mishandling of sexual assault cases by campus administrators at these schools at the same rate as at their PWI counterparts.²⁶

In the proposed rule, the ED clearly recognizes the applicability of Title IX to gender identity. Throughout, the new rule explicitly includes gender identity as a protected category. However, the Department has chosen to conduct a separate rule-making process for the question of transgender athletes' participation in single-gender sports. EROC shares the ED's recognition of the necessity to include protections based on gender identity in the new rule. We know that transgender, genderqueer, and gender non-conforming students face some of the highest rates of both sexual violence and sexual harassment in college populations.²⁷ Like the examples of race-based sexual harassment above, transgender students are often targeted in ways that are directly connected to their gender identity. We also know that segregation and discrimination are some of the foundational building blocks of violence. Barring a student from participating in an educational activity consistent with their gender identity is explicitly prohibited in the new rule. Barring a student from participating in a school-sponsored athletics program that is consistent with their gender identity should fall into that category and also be prohibited. Considering this matter in a separate rule-making process is both unnecessary and inappropriate, and it artificially separates the questions of segregation and violence, when we know the two are inexorably linked.

The proposed rule must be explicitly inclusive of all protected identities, as sexual violence knows no bounds. Anyone, regardless of their identity, can experience sexual violence,

²⁴ Brubaker, S. J., Keegan, B., Guadalupe-Diaz, X. L., & Beasley, B. (2017). Measuring and reporting campus sexual assault: Privilege and exclusion in what we know and what we do. *Sociology Compass*, 11(12), e12543. <https://doi.org/10.1111/soc4.12543>

²⁵ AAU Campus Climate Survey (2019). (2019, October 15). Association of American Universities (AAU). <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>

²⁶ Palmer, J. E., & St. Vil, N. M. (2017). Sexual Assault Disclosure by College Women at Historically Black Colleges and Universities and Predominantly White Institutions. *NASPA Journal About Women in Higher Education*, 11(1), 33–55. <https://doi.org/10.1080/19407882.2017.1367696>

²⁷ AAU Campus Climate Survey (2019). (2019, October 15). Association of American Universities (AAU). <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>; Griner, S. B., Vámos, C. A., Thompson, E. L., Logan, R., Vazquez-Otero, C., & Daley, E. M. (2020). The Intersection of Gender Identity and Violence: Victimization Experienced by Transgender College Students. *Journal of Interpersonal Violence*, 35(23-24).

and many times the intersections of those identities are explicitly targeted in complex ways. The below section details our concerns about the proposed rule and the inevitable adverse outcomes and effects it will have on students, especially those from historically marginalized backgrounds and identities. We note specific suggestions to address these concerns and further strengthen the proposed rule in order to minimize those adverse consequences.

Our Concerns and Recommendations

Our concerns regarding the proposed rule are as follows:

- 1. Allowing the implementation of universal mandatory reporting will undoubtedly cause harm, perpetuate retraumatization, and increase pre-existing distrust in campus administrators, staff, faculty, and other designated authorities.**

Sexual violence, including sexual harassment, is about one person taking control away from another through an act of violence. Whereas sexual assault removes power and control from the person being assaulted, effective responses provide information and choices to survivors so that they may take back control over their own bodies and lives.²⁸ Advocates have long known that the key to processing and moving through the trauma of interpersonal violence is empowerment, which encourages survivors to practice their own agency.²⁹ Agency can be activated through the vast array of minute acts and decisions that are made in the aftermath of an assault. When survivors make small and large decisions about how to respond to the violence they experienced, how their stories get told, and to whom, they can build back control over their own lives. Mandatory reporting often halts the incremental progression of survivor agency.

Importantly, individual agency is not sufficient on its own for a person to take control over their lives. Empowerment of an individual requires a corresponding shift in the systems with which individuals interact,³⁰ meaning that colleges and universities need to be responsive to survivors who are exercising power over their own lives. When survivors of interpersonal violence feel in control of interactions with systems (law enforcement, courts, and non-profit victim services) they report greater satisfaction,³¹ engage in more reporting of abuse,³² and experience higher rates of overall wellbeing.³³ This is especially true for survivors of color, survivors who experience discrimination based on their gender identity and/or sexual orientation, and other survivors whose identities are marginalized. These groups of survivors very rarely experience universities as responsive to their need to exercise their own agency.

When a survivor discloses an experience of violence and that person is required to make a report, the survivor loses control of their story. Their story gets shared, often with a Title IX Coordinator, whether they want it to be or not. Regardless of how the Coordinator responds (by offering support, resources, an overwhelming menu of options, or even lack of a response), the survivor is no longer in charge of who gets to know what happened to them. In some cases,

²⁸ Herman, J. (1992). *Trauma and recovery*. Basic Books.

²⁹ Sullivan, C. M. (2016). *Theory of change: How do domestic violence programs promote survivors' social and emotional well-being?* National Resource Center on Domestic Violence. <https://www.dvevidenceproject.org/wp-content/uploads/DVEvidence-Services-ToC-2016.pdf>

³⁰ Masterson, S., & Owen, S. (2006). Mental health service user's social and individual empowerment: Using theories of power to elucidate far-reaching strategies. *Journal of Mental Health, 15*(1), 19–34. <https://doi.org/10.1080/09638230500512714>

³¹ Cattaneo, L. B., & Goodman, L. A. (2015). What is empowerment anyway? A model for domestic violence practice, research, and evaluation. *Psychology of Violence, 5*(1), 84–94. <https://doi.org/10.1037/a0035137>

³² Hotaling, G. T., & Buzawa, E. S. (2003). *Forgoing Criminal Justice Assistance: The Non-Reporting of New Incidents of Abuse in a Court Sample of Domestic Violence Victims: (300602003-001)* [Data set]. American Psychological Association. <https://doi.org/10.1037/e300602003-001>

³³ Perez, S., Johnson, D. M., & Wright, C. V. (2012). The Attenuating Effect of Empowerment on IPV-Related PTSD Symptoms in Battered Women Living in Domestic Violence Shelters. *Violence Against Women, 18*(1), 102–117. <https://doi.org/10.1177/1077801212437348>

survivors also lose control of what happens next. For instance, in cases where multiple survivors report the same alleged perpetrator, there may be a duty to warn that allows an investigation to go forward with or without the consent of each individual survivor. If the goal of the proposed Title IX rule is to holistically address the epidemic of college sexual assault, that must include effectively responding to survivors as they work to regain control over their lives. Universal mandated reporting will have the opposite effect.

Many students will likely find themselves in the situations described above - having disclosed without realizing the control they were giving up by doing so. Others, however, will avoid disclosing their experiences to anyone. This is especially likely to be true for survivors whose identities reside at the margins. Only between 5-28% of college sexual assaults are ever reported to college officials.³⁴ There are many reasons why survivors do not report or seek help in the aftermath of an assault, not least of which is fear of hostile treatment or disbelief by authorities.³⁵ The expectation of fair treatment by authorities varies by race, gender, and other characteristics.³⁶ Additionally, expecting and/or experiencing other forms of institutional betrayal³⁷ (including covering up violence, failing to take preventative measures, etc) also contributes to underreporting, and is experienced at high rates by minority college students.³⁸ When acknowledging that the majority of student survivors don't report, it is important to recognize that non-report rates and reasons for not reporting are not equivalent across race and other protected identities.

Instead of implementing universal mandatory reporting, the rule should designate both confidential resources and resources/employees that are mandated to report. The delineation of these two groups must be explicit and students must be repeatedly informed which resources are confidential. Confidential resources should be truly confidential and exempt from Clery reporting requirements. Survivors deserve the ability to share their stories, learn about available resources, and make choices about their own lives without losing control of what happens to them next. When survivors of interpersonal violence work with confidential advocates, they are more likely to formally report, less likely to be treated negatively, and less likely to experience additional distress and retraumatization.³⁹ Universal mandatory reporting eliminates the possibility of the important process of survivors exercising agency and regaining control.

2. The lack of clear timeframes for investigations will continue to allow impermissible delays.

The proposed rule does not provide any clarification on a clear timeline that will enable schools to investigate complaints in a timely manner.⁴⁰ The proposed rule states that schools would have to “conduct prompt investigations and set a reasonably prompt timeframe” for all critical stages of the investigation process for sex-based harassment.⁴¹ Schools are allowed to impose delays in the grievance processes or an extension to the timeframe if there is “good

³⁴ Cantor, D., Fisher, B., Chibnall, S., Townsend, R., Lee, H., Bruce, C., & Thomas, G. (2017). *Report on the AAU campus climate survey on sexual assault and sexual misconduct*. The Association of American Universities.

<https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf>

³⁵ Krebs, C. P., Lindquist, C. H., Warner, T. D., Fisher, B. S., & Martin, S. L. (2007). *The Campus Sexual Assault (CSA) Study* (p. 111). National Institute of Justice.

³⁶ *NPR/PBS NewsHour/Marist Poll Results: Race Relations in the United States*. (p. 13). (2020). Marist Institute for Public Opinion.

http://maristpoll.marist.edu/wp-content/uploads/2020/06/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables_2006041039.pdf#page=3

³⁷ Smith, C. P., & Freyd, J. J. (2013). Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma. *Journal of Traumatic Stress*, 26(1), 119–124. <https://doi.org/10.1002/jts.21778>

³⁸ Gomez, J.M. (2021). Gender, Campus Sexual Violence, Cultural Betrayal, Institutional Betrayal, and Institutional Support in U.S. Ethnic Minority College Students: A Descriptive Study. *Violence Against Women*, 00(0), 1-14.

³⁹ Campbell, R. (2006). Rape Survivors' Experiences With the Legal and Medical Systems: Do Rape Advocates Make a Difference? *Violence Against Women*, 12(1), 30-45. <https://doi.org/10.1177/1077801205277539>.

⁴⁰ Proposed Rules, 87 Fed. Reg at 41468 34 C.F.R. 106.45(b)(4)

⁴¹ *Id.*

cause,” yet the proposed rule change would not provide any examples or definition of what constitutes “good cause”.⁴² While the proposed rule seeks to make this change in order to avoid inadvertently suggesting that an extension is mandatory in certain situations,⁴³ leaving “good cause” undefined leaves survivors without guarantee of transparency or accountability in the investigation process.

With a clear rule about the length of time that investigations should take, survivors could check in with Title IX coordinators, investigators, and hearing officers and have a rough timeline to use to help get information about their case. Yet, without a clear timeframe, cases can be drawn out indefinitely, affecting all parties involved. This creates a situation where schools can regularly tell survivors that they are “working” on the case or that the case needs to be delayed. Survivors have no mechanism within the Title IX guidelines to hold their institutions accountable to conduct a timely investigation. Cases could be delayed until complainants or respondents graduate, transfer to another institution,⁴⁴ or involuntarily withdraw from a class or drop out completely.⁴⁵ This will effectively give schools an easy way to do nothing and provide no remedy for a complainant while still saying that action is underway, shielding schools from legal liability at great risk to complainants’ education.

For example, a student who recently graduated from a university located in Arkansas reported the sexual assault, harassment, and retaliation they experienced by their professor in their junior year to their Title IX Coordinator. . The student sought out information from their Title IX office several times since filing a report only to have the office delay, extend, and deny any information regarding the investigation. Days before graduating, this student was faced with a defamation suit against their professor. This student was violated by their professor, who they entrusted to guide them through their academic studies, and betrayed by the institution⁴⁶ that is federally obligated and responsible to investigate and protect the rights of students. This student comes from a low-socioeconomic background and was not able to hire a lawyer to support their ability to engage in civil litigation.

Students should not be forced to wait months or years until their investigation is completed in order to seek resolution from their schools. Nor should students have to endure processes blindly, prior to or post-graduation, and engage in legal processes that they are not equipped to handle alone. Student survivors who also experience institutional betrayal are more susceptible to experiencing higher levels of posttraumatic symptoms, such as dissociation, anxiety, sleep problems, sexual dysfunctions, and depression.⁴⁷

The new Title IX rule must provide a timeframe within which investigations must be completed, including benchmarks within the process. The rule must give students a timeline that both provides transparency in the process and is a tool for holding their schools accountable.

⁴² *Id.*

⁴³ 87 FR 41390-01

⁴⁴ See e.g., Jacoby, K. (2019, December 16). NCAA looks the other way as college athletes punished for sex offenses play on. USA Today. <https://eu.usatoday.com/in-depth/news/investigations/2019/12/12/ncaa-looks-other-way-athletes-punished-sex-offenses-play/4360460002/>

⁴⁵ See e.g., S. S. (2022, May 5). The trouble with false promises: Prolonged Title IX investigations leave some students devastated. The Brown and White. <https://thebrownandwhite.com/2022/05/04/the-trouble-with-false-promises/>; Shalby, C., & Lopez, R. J. (2022, June 28). State will investigate CSU sex harassment scandals. Los Angeles Times. <https://www.latimes.com/california/story/2022-06-27/state-lawmakers-approve-independent-audit-of-csu-handling-of-sexual-harassment-cases>

⁴⁶ Smith, C. P., & Freyd, J. J. (2014). Institutional betrayal. *American Psychologist*, 69(6), 575–587. <https://doi.org/10.1037/a0037564>

⁴⁷ Smith, C. P., & Freyd, J. J. (2013). Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma. *Journal of Traumatic Stress*, 26(1), 119–124. <https://doi.org/10.1002/jts.21778>

3. No revisions or considerations were made around permitting schools to claim a religious exemption.

We submitted commentary in 2019⁴⁸ under the former administration’s notice for the proposed rule-making process that addressed, among many other topics, the process for permitting schools to claim a religious exemption. Seeing that the current administration’s proposed regulations make no reference to possible considerations for change, we wish to reassert and underscore the importance of reinstating the former requirement of a formal application for religious exemption.⁴⁹ The current Title IX regulations have removed the requirement for schools that wish to claim religious exemptions to notify the Department in writing and identify which Title IX provisions conflict with their religious tenets. Thus, permitting schools to opt out of Title IX without notice of warning to the Department or its students. This will continue to allow schools to retroactively conceal their intent to discriminate, exposing students to harm, and retaliation, especially women and girls, LGBTQ students, pregnant or parenting students (including those who are unmarried), and students who access or attempt to access birth control or abortion.

Further, the Department’s proposed assurances directly conflict with the current and proposed rule requiring that each covered educational institution “notify” all applicants, students, employees, and unions “that it does not discriminate on the basis of sex.”⁵⁰ By requiring a school to tell students that it does not discriminate while simultaneously allowing it to opt out of anti-discrimination provisions whenever it chooses, the Department is creating a system that enables schools to actively mislead students. This bait-and-switch practice demonstrates that the Department is more interested in protecting schools from liability when they discriminate than in protecting students from discrimination.

Liberty University is a real-life and recent example of religious exemption being used as a means to weaponize religion to justify punishing a survivor for violating the university’s code of conduct following the student’s report of being sexually assaulted by another student.⁵¹ The proposed rule gives schools a free pass to discriminate and block access to civil rights protections for transgender and queer students. The Department’s no-notice religious exemption is an escape hatch—schools claim the exemption after a report and evade any responsibility. This provision should be eliminated, and accountability for religious exemptions should remain in the form of a formal application for an exemption. This tried and true method allows students a modicum of accountability while not infringing on the religious freedom of schools or unfairly burdening recipients with needless paperwork.

⁴⁸ End Rape On Campus participated and submitted a comment in the Federal Register as part of the 2019 Notice for Proposed Rulemaking Process under the Trump Administration: <https://endrapeoncampus.org/blog/comment-on-devos-title-ix-rule/>

⁴⁹ 34 C.F.R. § 106.12(c).

⁵⁰ 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.8(b)(1)

⁵¹ See ProPublica. (2022, January 27). “The Liberty Way”: How Liberty University Discourages and Dismisses Students’ Reports of Sexual Assaults. ProPublica. <https://www.propublica.org/article/the-liberty-way-how-liberty-university-discourages-and-dismisses-students-reports-of-sexual-assaults>

4. Schools being able to choose which standard of evidence to investigate sexual harassment may enable schools to impose a more burdensome standard in sexual assault cases.

The Department's proposed rule would require schools to use the preponderance standard unless the school currently uses the "clear and convincing" standard for other "comparable" investigations.⁵² However, the Department does not explain what "comparable" investigations entail, aside from harassment and discrimination.⁵³ When a school uses one standard for individuals who perpetrate physical assault or engage in discriminatory conduct but adopts a higher standard for "comparable" harassment and discrimination, the school has discriminated by imposing different burdens on victims of similarly serious campus misconduct.

Unlike the criminal justice process (which uses a higher burden) the Title IX complaint process does not exist for the purpose of punishing accused students. Instead, it exists to ensure the complainant's right to an education.⁵⁴ In this framework, both parties (respondent and complainant) face the same risk-- the loss of educational opportunity.⁵⁵ Where both parties face a similar loss it is most fair to impose a burden of persuasion that requires similar production from both parties. The preponderance standard, which requires adjudicators to find for whoever's version of events is supported by 51% or more of the evidence, comes closest to placing the complainant and the respondent on a level playing field.⁵⁶

Furthermore, the use of any standard other than the preponderance standard would be inconsistent with the standard used for other school discipline procedures. Preponderance has been the recommended standard for use in all student discipline cases for nearly thirty years.⁵⁷ If the preponderance standard were used for a plagiarism investigation and a clear and convincing standard used for a Title IX investigation, the result would be that it is easier for a student to get removed from school for plagiarism than it is for violence against another student. This is inconsistent and unfair.

The use of the clear and convincing standard would be inconsistent with the enforcement of similar civil rights legislation. The burden imposed in adjudicating other civil rights complaints including Title II and Title VII has historically been the preponderance standard.⁵⁸ The burden imposed in adjudicating claims not related to sexual violence under Title IX has always been preponderance.⁵⁹ There is no reason that complainants seeking relief for this certain class of violations under this particular civil rights statute should face greater burdens than complainants under other civil rights laws.

⁵² Proposed Rules, 87 Fed. Reg. at 41576 (proposed 34 C.F.R. § 106.45(h)(1)).

⁵³ *Id.*

⁵⁴ 20 U.S.C.A. § 1681 (West)

⁵⁵ Respondent may lose educational opportunity if disciplined while complainant may face loss of educational opportunity if presence of a harasser or abuser inhibits their ability to learn or causes them to leave campus. See e.g., Nancy Chi Cantalupo, Address: The Civil Rights Approach to Campus Sexual Violence, 28 Regent U. L. Rev. 185 (2016).

⁵⁶ Loschiavo, C. & Waller, J. L. Association for Student Conduct Administration. *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes.*

⁵⁷ Loschiavo, C. & Waller, J. L. citing Stoner, E. N. II, & Cerminara, K. L. (1990). Harnessing the "spirit of insubordination": A model student disciplinary code. *Journal of College and University Law*, 17(2), 89-114.

⁵⁸ Title IX & the preponderance of the evidence: a white paper 7-8 (Aug. 7, 2016), citing Letter from Fatima Goss Graves, Vice President of Educ. and Emp't at the Nat'l Women's Law Ctr., to Catherine Lhamon, Assistant Sec. for Civil Rights 7-10 (Nov. 21, 2013).

⁵⁹ *Id.*

Finally, the use of a standard besides the preponderance standard is inconsistent with the manner the civil court system adjudicates analogous complaints. Were a complainant under Title IX to file suit against a respondent for assault and battery, the claim would be decided under the preponderance of evidence standard used in most civil courts.⁶⁰

For these reasons, the preponderance of the evidence standard is most consistent with the goals of Title IX enforcement and adjudication of similar and related claims. We suggest that the new rule adopt the preponderance of the evidence standard as the burden to be used on all campuses.

Conclusion

While the Department of Education's proposed rule is a step toward progress, there are several provisions that remain detrimental to students' access to equitable and violence-free education. The sections above provide a clear illustration that there is more to consider and to integrate into the regulations in order to ensure that the lived experiences of students, school administrators, Title IX personnel, and most importantly, survivors, especially those from historically marginalized communities, who are affected by Title IX every day are seen, heard, believed, and respected.

In addition to our above concerns and recommendations, End Rape On Campus also signed onto the National Women's Law Center's (NWLC) "sign-on" comment for advocacy groups.

If you have any questions or concerns, please contact Kenyora Parham, Executive Director of End Rape On Campus, at eroc@civcnation.org.

Thank you,
End Rape On Campus

⁶⁰ Loschiavo, C. & Waller, J. L. citing Chmielewski, A. (2013). *Defending the preponderance of the evidence standard in college adjudications of sexual assault*. B.Y.U. Education and Law Journal, 143, 150-158.