



September 12, 2022

Submitted via www.regulations.gov

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

Re: Docket ID ED–2021–OCR–0166, RIN 1870–AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Secretary Cardona and Assistant Secretary Lhamon:

As we begin a new academic year, It's On Us is pleased to submit this comment in response to the Department of Education's proposed regulations under Title IX of the Education Amendments of 1972 ("Title IX"). In addition to this comment, It's On Us has also signed onto the National Women's Law Center's (NWLC) "sign on" comment for advocacy groups, and supports the content of NWLC's sign-on comment. It's On Us has chosen to submit this additional comment to highlight specific areas of concern not reflected in NWLC's sign on comment or to underscore the urgency for addressing topics put forward in the sign on comment.

It's On Us appreciates the Department's efforts to undo the harmful changes to Title IX enacted by the previous administration by proposing new regulations to effectuate the law's broad and remedial purpose, as Congress intended when it passed Title IX in 1972. In our review of the proposed rule, we have identified areas for strengthening the proposed rule through the following changes and additions.

Notice of Harassment

Under the proposed regulations on notice of harassment (106.44(c)) regarding students enrolled in institutions of higher education, It's On Us is concerned the requirements will result in nearly all employees being required to report any possible act of sex-based discrimination they learn about to university officials, regardless of whether or not the student wants or consents to such a report. It's On Us is concerned that the mandatory reporting requirement would result in harms against student and the climate surrounding reporting of sex-based discrimination and harassment, such as, but not limited to:

- Students being unaware of the mandatory reporting requirements and making a disclosure of sex-based discrimination or harassment to an otherwise trusted faculty or staff member in an effort to seek guidance or support services, only to have that otherwise trusted individual be forced to report the disclosure to the institution's Title IX office against the wishes of the student;

- Student survivors who are aware of the mandatory reporting requirements creating a chilling effect on survivors of survivors of sex-based harassment seeking support from mentors within the campus community;
- Unintentional or forced “outing” of LGBTQIA+ students who face sex-based discrimination because of their sexuality or gender-identity if they share an incident of sex-based discrimination with an otherwise trusted faculty or staff member; and,
- Under the current political climate surrounding abortion care restrictions, pregnant students in certain states facing criminalization if they share an incident of pregnancy-based discrimination and later are no longer pregnant due to termination or miscarriage.

It’s On Us would recommend the Department simplify reporting obligations and to acknowledge the confidentiality and autonomy of students in higher education, as they are typically adults. It’s On Us would like to see the rule provide guardrails for schools to be able to more clearly define and delineate between employees who are mandatory reporters with the “authority to institute corrective measures” and confidential employees who could support students in learning about their reporting options and seek support services. It’s On Us would also like to see the rule create responsibilities for employees to clearly indicate their mandated reporter status, through, for example, their email signatures, website profiles, directories, syllabi, and other relevant locations.

Restrictive versus Disciplinary Measures

It’s On Us is pleased to see that under the proposed rule, institutions of higher education are granted more flexibility than under the current regulation to determine if a respondent is a serious enough threat to safety to be subject to emergency removal; however, It’s On Us is concerned that the proposed rule change does not adequately address the current challenges institutions of higher education face in regard to imposing restrictive versus disciplinary measures against students accused of sex-based discrimination or harassment (e.g. respondents) and how Title IX intersects with Clery Act emergency removal provisions. It’s On Us is also concerned that the current delineation between the restrictive versus disciplinary measures that can be imposed upon respondents under the current Title IX rule places investigations of sex-based harassment in a category separate and apart from investigations into other similarly egregious acts of student misconduct. It’s On Us is concerned that these provisions in the current rule are based off of harmful rape-myths that men must be protected from false allegations of rape, and therefore, investigations into reports of sex-based harassment are being held to a different standard than other investigations into student misconduct.

While institutions have discretion to temporarily suspend a student from campus over an allegation of a hate-motivated act of violence while it is being investigated, they may be hesitant to enact emergency removal against a respondent in a Title IX investigation as their doing so could be challenged under the existing Title IX rule as disciplinary action. Institutions ultimately fear litigation by respondents, and therefore may not enact emergency removal, leaving campus community members at risk for future harm. For example, in 2021, Brown University suspended two student lacrosse players who were reported to the institution for sex-based harassment before a Title IX investigation into the reports made against them had been completed by enacting their emergency removal rights under the Clery Act.¹ The respondents sued Brown University, claiming the institution violated their Title IX rights as they believed their suspension was a form of disciplinary action rather than a necessary emergency removal measure to

¹Go Local Prov News Team. Go Local Prov. “Two Brown Lacrosse Players Accused of Sexual Assault Are Suing the University.” January 21, 2022. <https://www.qolocalprov.com/news/two-brown-lacrosse-players-accused-of-sexual-assaults-are-suing-the-univers>

restore and preserve campus safety. The judge presiding over the case sided with the respondents, and the students were permitted back onto campus.

It's On Us is also concerned that the lack of clarity of what constitutes a restrictive or disciplinary measure is affecting the culture and climate of campus subcommunities. For example, it has been documented that athletic coaches are frustrated with what they feel to be a lack of ability on their part to restrict a student athlete accused of sexual misconduct from participating in practice or competition as their institution or the student athlete may interpret such actions as a disciplinary measure.² Meanwhile, that same coach has the discretion to bar a student athlete from practice or competition for a less minor offense such as underage drinking.

Therefore, It's On Us would like to see the Department put forward either through the final rule or separate guidance more substantive definitions of what constitutes a restrictive versus a disciplinary measure under Title IX, what agents of the institution without Title IX enforcement responsibilities can or cannot do vis a vis restricting a respondent from participating in an institution-sponsored activity or program while an investigation is completed, under what circumstances institutions have more or less discretion or flexibility institutions to enact emergency removal to prevent ongoing harm from occurring before a Title IX investigation is completed, and how these aspects of a final Title IX rule will intersect with Clery Act requirements to restore and preserve campus safety.

Ongoing Prevention Education and Training

It's On Us is pleased to see the proposed regulations highlight the need for institutions to provide ongoing prevention education and training for students, faculty and staff. It is not enough to address the harms of sexual violence after it has occurred, but unfortunately, the importance of prevention is often overlooked. Therefore, through either a final rule or guidance, It's On Us would like to see the Department issue evidence-based best practices for institutions to provide comprehensive and culturally relevant prevention education to all members of a campus community, and highlight example models for institutions to modify and apply within their own campuses. These best practices should both underscore and bolster requirements that already exist under the Clery Act.

Thank you for considering our recommendations. If you have any questions or concerns, please contact Tracey Vitchers, Executive Director, It's On Us at contact@itsonus.org.

Thank you,
It's On Us

² Lavigne, Paula. ESPN. "Why critics say a Trump-era Title IX rule hurts coaches' ability to discipline athletes accused of sexual misconduct". March 4, 2022. https://www.espn.com/college-sports/story/_/id/33405557/why-critics-say-trump-era-title-ix-rule-hurts-coaches-ability-discipline-athletes-accused-sexual-misconduct