I am attaching our comments, but for ease I am also including below. Thank you!

U.S. Department of Education
Office for Civil Rights

June 10, 2021

Dear Office of Civil Rights,

The Department of Education received a record-breaking number of public comments during the 2019 public comment period for the then-proposed Title IX regulations. Unfortunately, many of the fears that survivors, advocates, and educators expressed in their comments have come to fruition since the adoption of the final Title IX regulations.

We are deeply concerned that these regulations are having a chilling effect on students reporting violence and seeking help. It is well-documented that reporting rates for sexual violence have historically been low both inside and outside of higher education. Many campus survivors feared being disbelieved or not taken seriously (Holland & Cortina, 2017). The new regulations minimize the recourse available to victims to address the impact of sexual harassment or assault on their education, making it harder for them to stay in school. The regulations shifted from an equal standard to tipping the scales in favor of those accused of harassment. The regulations require schools to adopt adjudication processes which are not trauma-informed, making it even less likely that survivors will be able to seek recourse. Victims may not feel as safe now to come forward and report sexual misconduct, and it will be important to monitor reporting rates that are published in institutions’ annual Title IX reports and Clery crime statistics.

When our institution held the Violence Against Women Act Campus Grant to Reduce Sexual Assault, Dating Violence, Domestic Violence and Stalking from 2011-2014 and again fro 2014-2017, grant administrators from the Office on Violence Against Women shared with grantees that it is common for campuses to receive more reports of sexual violence after implementing grant programs. This is a healthy outcome because it means more victims feel safer reporting misconduct, and trust that their case will be appropriately handled and yield a fair outcome. Similarly, after schools implemented changes in response to the 2011 and 2014 Title IX guidance, campuses saw increases in reporting. Evidence of this could be found in Title IX
annual reports. It will be interesting to compare to 2020-21 Title IX annual reports when they are released. Of course, because the majority of students attended school through virtual platforms and were not necessarily on campus, this has surely played a role in reporting rates. Nevertheless, campuses had to be in compliance with the new regulations by August 14, 2020 and it will be interesting to consider the impact of new campus policies on reporting rates and case resolution rates.

The state of Delaware has made a commitment to be a trauma-informed state. Yet because of the new Title IX regulations, the schools in Delaware are required to engage in adjudication practices that are not trauma-informed. The regulations fail to account for the devastating and extensive impact of sexual harassment, sexual assault, dating/domestic violence, sexual exploitation, or stalking. (The Rape, Abuse & Incest National Network offers compiled data about the long-term effects of sexual violence on victims.) The current Title IX regulations make it even harder for schools to appropriately support survivors and to hold those who harm them accountable.

**Definition of Sexual Harassment:**
Under the new rule, all forms of sexual assault, dating or domestic violence, and stalking as defined by the Clery Act are considered violations of Title IX, as is quid pro quo harassment. However, all other forms of “unwelcome conduct” must be “so severe, pervasive, and objectively offensive that it effectively denies a person equal access” to an educational program. This definition requires schools to ignore and dismiss some harassment, fostering a culture that is permissive of harm. The regulations said:

> The Department understands that research shows that even “less severe” forms of sexual harassment may cause negative outcomes for those who experience it. The Department believes, however, that severity and pervasiveness are needed elements to ensure that Title IX’s non-discrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom, and that recipients are not held responsible for controlling every stray, offensive remark that passes between members of the recipient’s community. (p. 470-71)

Severe is a subjective term. What makes harassment “severe” may be understood very differently by someone who has experienced harm, versus someone with no experience with or training about harassment. While this term imposes a standard through which to view the misconduct, it doesn’t take into account how the misconduct impacts the victim.

Requiring that misconduct be “severe, pervasive and objectively offensive” requires institutions to ignore and dismiss many forms of harassment that can cause a victim to experience fear and trauma, and to exist in a hostile environment. Survivors of intimate partner violence who experience emotional abuse, verbal abuse, manipulation, and gaslighting already had little recourse; this rule makes it even harder.
**Location of the Offense:**
Under the new rule, schools are only required to respond to reports of violence that took place either on campus or within an education program or activity. Schools could opt to ignore harassment or violence that occurs outside of the United States -- including on school-sponsored trips or study abroad programs, that occurs in off-campus student rental housing, that occurs in unrecognized fraternity or sorority houses, or online harassment. This is a double standard of the rule. On one hand schools must address sexual harassment and prevent discrimination, but on the other hand they are permitted to ignore certain acts of violence due to location. Those schools that decided they would still prohibit off campus harassment between students had to construct a conduct process parallel to the Title IX process to do so. *Addressing violence should not be optional.* All schools should be required to process complaints that take place in off-campus locations because it creates a hostile environment for the victim on-campus, and the perpetrator could be a repeat offender who is a threat to other students.

Expecting these cases to be referred to local law enforcement removes the school’s responsibility to address student misconduct. Because the standard of proof in criminal proceedings -- beyond a reasonable doubt -- is the highest and most difficult to reach, the process is long and re-traumatizing for victims. Many do not feel they have the emotional capacity to participate. Even when victims report, more often these cases are not pursued criminally because of the complicated nature of word-on-word cases, or the difficulty proving non-consent when alcohol or drugs were involved. By contrast, when schools utilize the investigative model, the campus conduct process provides a pathway to accountability that is more accessible; and the outcome is often more relevant to victims, providing safety and remediation directly in their campus life. Many victims say their goal in reporting is to have the respondent learn from it and not repeat the behavior, and to protect other students from harm. Campus conduct sanctions typically include educational components and have a developmental approach rather than the punitive sentences in the criminal justice process.

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court proceedings, including protection order proceedings. As public/private entities, colleges have the right to hold students to standards of conduct which they determine, and to enforce policies using the preponderance standard. As previously mentioned, many criminal behaviors which are truly dangerous both to the victim involved and to public safety, are not pursued in criminal court because proving that the crime occurred “beyond a reasonable doubt” can be difficult to accomplish. Schools should be allowed to use a lower burden of proof precisely because there is no threat to anyone’s liberty. Making the threshold lower doesn’t mean that respondents will be found responsible for policy violations with no evidence. With the safety of so many students at risk, a preponderance of the evidence should be enough for a school to take protective steps.

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Given the limits of mediation, and the critical differences between mediation and restorative justice, mediation should not be allowed as a recourse under Title IX regulations.

Live Hearings with Cross-Examination:
At many schools, the number of sexual misconduct cases increased significantly after the 2011 guidance, and we fear that the new regulations have significantly decreased the number of cases. Many survivors are unwilling to engage in the formal complaint process because of the requirement of live hearings. Every time a survivor has to re-tell their story, it has the potential to be re-traumatizing. Secondary trauma can also happen when questions are asked that imply the survivor was at fault, was lying, or consented to what happened. Thus, many survivors opt not to report to avoid having to go through this re-traumatizing process. Some survivors do not feel safe being in the same room with the respondent or believe they will be triggered by seeing the respondent. Especially with intimate partner violence, there is a risk that the respondent will be able to intimidate the victim through facial expressions, physical gestures, or by using words or phrases that hold a certain meaning or threat as only understood by the two parties.

Similarly, requiring cross-examination and allowing that to be carried out by an “advisor” who could be an attorney gives an unfair advantage to parties that can afford an attorney.
Complainants may not feel they need a lawyer, just as victims’ concerns in a criminal case are represented by the state’s prosecutor. Yet respondents are more likely to hire an attorney. If hearings continue to be required, it would be better if: (1) DOE requires that questions posed by either party are screened by the Hearing Officer first for appropriateness and relevance, and that appropriate questions are asked by the Hearing Officer. (2) DOE should limit who can serve in the role of advisor. Allow both parties access to similar sets of trained campus professionals to serve as complainant advisor or respondent advisor. (3) DOE should define the role of the advisor so that this is not left up to the interpretation of the institutions.

Society constantly shames survivors for not reporting, and yet the requirement of live hearings and cross-examinations makes it more difficult for survivors to report and seek accountability. We can’t have it both ways. If we want survivors to report and hold those who harm them accountable, then we have to provide processes that protect survivors and make it safe for them to move forward.

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2011 Guidance required schools “to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation.” The new regulations require schools to offer supportive measures which “may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.” But the regulations do not allow a school to take any interim measures that may be construed as disciplinary, punitive, or unreasonably burdensome to respondents. This means that even if a school believes a respondent poses an immediate danger, it cannot temporarily remove that student from a residence hall, dining hall, classroom, or ban them from any campus spaces until an outcome is reached in their campus conduct case. This fails to address the potential danger that a respondent may pose to the victim’s safety and to campus safety, and places undue stress on complainants at a time when they are in crisis.

Responsibility to Investigate:
We support the shift in the new regulations to a model in which only reports to certain parties with corrective authority are required to be investigated because requiring all faculty to be mandatory reporters may have deterred survivors from disclosing their experiences and miss the opportunity to be referred to resources. This change may have been welcomed by college faculty, especially those who teach on the topics of Sexual Violence, Domestic Violence, Trauma, Women’s Studies, Criminal Justice, Sociology, Psychology because students disclose their victimization experiences at higher rates in these classes. However, the new regulations removed the list of specific employees who were considered “responsible employees” and left it up to each school to determine who would be mandated reporters. At our institution, faculty are still mandated reporters. Thus, there is no consistency nationwide around these practices, and we continue to be concerned about the impact on student disclosures.
**Time Frame for Resolution of Cases:**
The elimination of the 60-day time frame for resolution of cases may be viewed as a positive change by Title IX Coordinators and institutions. However, advocates were concerned when these regulations were proposed that removal of the time frame would allow schools to let investigations drag on for months and in some cases avoid adjudication altogether, which is unacceptable. For example, if an investigation is conducted slowly over many months, and the respondent is close to graduation, the respondent may graduate before the case is resolved. Once the student has received their degree, even if the evidence supports a responsible finding, the institution’s ability to hold the student accountable is greatly reduced. Furthermore, when a case drags on for months, it extends the stress and emotional turmoil and may impact academic performance for all parties involved. Unfortunately, this seems to be playing out since the rule changed in August 2020. While some flexibility in timeline is reasonable to deal with unforeseen circumstances that cause delays, all parties would benefit from a requirement that the school resolve cases within a reasonable time frame. Perhaps the DOE could conduct an audit of schools regarding resolution time for cases to better understand how this rule has impacted resolution times.

**Presumption of Not Responsible:**
The requirement that schools submit a letter to respondents indicating a presumption that the accused is not responsible is unnecessary and reflects a bias on the DOE’s part toward accused students. “Presumption of innocence” is a legal term for criminal cases and need not be applied in private proceedings. This reflects an underlying belief that victims frequently lie, when research tells us the opposite is true. There should not be a bias toward either party.

**Religious Exemption:**
Religious schools wishing to secure the religious exemption should be required to seek assurance of its religious exemption by submitting a written request for the assurance to the Assistant Secretary, as was true under past guidance. Under the new rule, if DOE investigates a Title IX investigation of a school, the school could claim a religious exemption at that time, rather than identifying this exemption in advance. This change gives schools an out for not providing Civil Rights to all students. Claiming a Religious Exemption has been used in the past as justification to discriminate against Lesbian, Gay, Bisexual, Transgender, and Non-Binary students, and to deny women’s reproductive rights. While a school should be allowed to claim a Religious Exemption, if receiving federal funds they should not be allowed to use this as a means to engage in discrimination based on sexual orientation.

**Accountability:**
It seems imprudent and unwise to disempower the DOE from being able to hold schools accountable for not meeting their Title IX requirements to investigate incidents of sexual misconduct. Limiting the DOE’s capacity to hold schools accountable only when they are “deliberately indifferent” to sexual harassment sends a message that Title IX compliance is unimportant. It also puts students who have complaints against their schools at risk, with less protection and hope for recourse when institutions fail them.
As outlined in an article in the *Chronicle of Higher Education*, the role of the Title IX Coordinator is a “pressure cooker.” It requires balancing compliance with federal law, ensuring a trauma-informed process that supports victims appropriately while also providing appropriate support for respondents, managing the concerns of staff in opposing roles, and managing the pressures or concerns of the institution about reputation. The article presents situations where it is alleged that institutions put pressure on Title IX Coordinators to take action that was in violation of Title IX and counter to the needs of victims, and/or were fired for not acting as instructed. These examples illustrate the need for clear, consistent Title IX guidance and oversight. Even schools that are legitimately trying to comply with Title IX regulations have had a difficult time hiring and retaining permanent Title IX Coordinators. Many have had interim staff in this role for a lengthy period and/or have to contract with a private consulting firm to fill the position. The article cites a 2018 survey of over 500 institutions by the Association of Title IX Administrators (ATIXA) which found that two-thirds of Title IX coordinators say they had been in their jobs for less than three years, and one-fifth had held their positions for less than a year. The lack of stability and consistency of staff in these positions contributes to the fear and distrust of the reporting process that victims already felt, and impacts the confidence of campus employees who respond to the needs of survivors in other areas of the institution.

**Conclusion:**
The 2011 and 2014 Title IX guidance pushed schools to address the gender inequality created by campus sexual harassment and sexual violence that have for years been an obstacle for women seeking a college education. We needed these actions because, as an enormous body of research verifies, women experience all forms of sexual harassment and abuse at much higher rates than men; those who commit sexual harassment and violence are much more often men; and perpetrators are rarely held accountable. The new Title IX regulations make it even harder for women to address these obstacles. A March 2021 report by Know Your IX discusses the costs of reporting. The survey found that “39% of survivors who reported sexual violence to their schools experienced a substantial disruption in their educations.” 27% of survivors who reported took a leave of absence, 20% transferred to another school, and nearly 10% dropped out of school entirely. 35% of survivors said their school explicitly encouraged them to take time off. The report goes on to say that 15% said that they were threatened with or faced punishment for coming forward, and of those, 62% either took a leave of absence, transferred, or dropped out (Nesbitt & Carson, 2021). This report highlights the devastating impact of Institutional Betrayal. As defined by J. Freyd, Institutional Betrayal “occurs when trusted and powerful institutions act or fail to take action in ways that harm those who are dependent upon them for safety and wellbeing.” (Freyd and Smith, 2014).

As described above, the current Title IX regulations have shifted the scales in the direction of accused students, made it harder for survivors to seek accountability, and disempowered the ability of the DOE to hold schools accountable when they fail to comply with Title IX, so the risk that survivors will experience institutional betrayal is greatly enhanced.

Thank you for the opportunity to comment on the new regulations.
Respectfully,

The members of the Center for the Study and Prevention of Gender Based Violence
University of Delaware
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violation of Title IX and counter to the needs of victims, and/or were fired for not acting as instructed. These examples illustrate the need for clear, consistent Title IX guidance and oversight. Even schools that are legitimately trying to comply with Title IX regulations have had a difficult time hiring and retaining permanent Title IX Coordinators. Many have had interim staff in this role for a lengthy period and/or have to contract with a private consulting firm to fill the position. The article cites a 2018 survey of over 500 institutions by the Association of Title IX Administrators (ATIXA) which found that two-thirds of Title IX coordinators say they had been in their jobs for less than three years, and one-fifth had held their positions for less than a year. The lack of stability and consistency of staff in these positions contributes to the fear and distrust of the reporting process that victims already felt, and impacts the confidence of campus employees who respond to the needs of survivors in other areas of the institution.

Conclusion:

The 2011 and 2014 Title IX guidance pushed schools to address the gender inequality created by campus sexual harassment and sexual violence that have for years been an obstacle for women seeking a college education. We needed these actions because, as an enormous body of research verifies, women experience all forms of sexual harassment and abuse at much higher rates than men; those who commit sexual harassment and violence are much more often men; and perpetrators are rarely held accountable. The new Title IX regulations make it even harder for women to address these obstacles. A March 2021 report by Know Your IX discusses the costs of reporting. The survey found that “39% of survivors who reported sexual violence to their schools experienced a substantial disruption in their educations.” 27% of survivors who reported took a leave of absence, 20% transferred to another school, and nearly 10% dropped out of school entirely. 35% of survivors said their school explicitly encouraged them to take time off. The report goes on to say that 15% said that they were threatened with or faced punishment for coming forward, and of those, 62% either took a leave of absence, transferred, or dropped out (Nesbitt & Carson, 2021). This report highlights the devastating impact of Institutional Betrayal. As defined by J. Freyd, Institutional Betrayal “occurs when trusted and powerful institutions act or fail to take action in ways that harm those who are dependent upon them for safety and wellbeing.” (Freyd and Smith, 2014).

As described above, the current Title IX regulations have shifted the scales in the direction of accused students, made it harder for survivors to seek accountability, and disempowered the ability of the DOE to hold schools accountable when they fail to comply with Title IX, so the risk that survivors will experience institutional betrayal is greatly enhanced.

Thank you for the opportunity to comment on the new regulations.

Respectfully,

The members of the Center for the Study and Prevention of Gender Based Violence
University of Delaware
www.wgs.udel.edu/gbv
U.S. Department of Education  
Office for Civil Rights  

June 11, 2021  

Dear Office for Civil Rights,

The Department of Education received a record-breaking number of public comments during the 2019 public comment period for the then-proposed Title IX regulations. Unfortunately, many of the fears that survivors, advocates, and educators expressed in their comments have come to fruition since the adoption of the final Title IX regulations.

We are deeply concerned that these regulations are having a chilling effect on students reporting violence and seeking help. It is well-documented that reporting rates for sexual violence have historically been low both inside and outside of higher education. Many campus survivors feared being disbelieved or not taken seriously (Holland & Cortina, 2017). The new regulations minimize the recourse available to victims to address the impact of sexual harassment or assault on their education, making it harder for them to stay in school. The regulations shifted from an equal standard to tipping the scales in favor of those accused of harassment. The regulations require schools to adopt adjudication processes which are not trauma-informed, making it even less likely that survivors will be able to seek recourse. Victims may not feel as safe now to come forward and report sexual misconduct, and it will be important to monitor reporting rates that are published in institutions’ annual Title IX reports and Clery crime statistics.

When our institution held the Violence Against Women Act Campus Grant to Reduce Sexual Assault, Dating Violence, Domestic Violence and Stalking from 2011-2014 and again from 2014-2017, grant administrators from the Office on Violence Against Women shared with grantees that it is common for campuses to receive more reports of sexual violence after implementing grant programs. This is a healthy outcome because it means more victims feel safer reporting misconduct, and trust that their case will be appropriately handled and yield a fair outcome. Similarly, after schools implemented changes in response to the 2011 and 2014 Title IX guidance, campuses saw increases in reporting. Evidence of this could be found in Title IX annual reports. It will be interesting to compare to 2020-21 Title IX annual reports when they are released. Of course, because the majority of students attended school through virtual...
platforms and were not necessarily on campus, this has surely played a role in reporting rates. Nevertheless, campuses had to be in compliance with the new regulations by August 14, 2020 and it will be interesting to consider the impact of new campus policies on reporting rates and case resolution rates.

The state of Delaware has made a commitment to be a trauma-informed state. Yet because of the new Title IX regulations, the schools in Delaware are required to engage in adjudication practices that are not trauma-informed. The regulations fail to account for the devastating and extensive impact of sexual harassment, sexual assault, dating/domestic violence, sexual exploitation, or stalking. (The Rape, Abuse & Incest National Network offers compiled data about the long-term effects of sexual violence on victims.) The current Title IX regulations make it even harder for schools to appropriately support survivors and to hold those who harm them accountable.

**Definition of Sexual Harassment:**
Under the new rule, all forms of sexual assault, dating or domestic violence, and stalking as defined by the Clery Act are considered violations of Title IX, as is quid pro quo harassment. However, all other forms of “unwelcome conduct” must be “so severe, pervasive, and objectively offensive that it effectively denies a person equal access” to an educational program. This definition requires schools to ignore and dismiss some harassment, fostering a culture that is permissive of harm. The regulations said:

*The Department understands that research shows that even “less severe” forms of sexual harassment may cause negative outcomes for those who experience it. The Department believes, however, that severity and pervasiveness are needed elements to ensure that Title IX’s non-discrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom, and that recipients are not held responsible for controlling every stray, offensive remark that passes between members of the recipient’s community.* (p. 470-71)

Severe is a subjective term. What makes harassment “severe” may be understood very differently by someone who has experienced harm, versus someone with no experience with or training about harassment. While this term imposes a standard through which to view the misconduct, it doesn’t take into account how the misconduct impacts the victim.

Requiring that misconduct be “severe, pervasive and objectively offensive” requires institutions to ignore and dismiss many forms of harassment that can cause a victim to experience fear and trauma, and to exist in a hostile environment. Survivors of intimate partner violence who experience emotional abuse, verbal abuse, manipulation, and gaslighting already had little recourse; this rule makes it even harder.

**Location of the Offense:**
Under the new rule, schools are only required to respond to reports of violence that took place either on campus or within an education program or activity. Schools could opt to ignore
harassment or violence that occurs outside of the United States -- including on school-sponsored trips or study abroad programs, that occurs in off-campus student rental housing, that occurs in unrecognized fraternity or sorority houses, or online harassment. This is a double standard of the rule. On one hand schools must address sexual harassment and prevent discrimination, but on the other hand they are permitted to ignore certain acts of violence due to location. Those schools that decided they would still prohibit off campus harassment between students had to construct a conduct process parallel to the Title IX process to do so. *Addressing violence should not be optional.* All schools should be required to process complaints that take place in off-campus locations because it creates a hostile environment for the victim on-campus, and the perpetrator could be a repeat offender who is a threat to other students.

Expecting these cases to be referred to local law enforcement removes the school’s responsibility to address student misconduct. Because the standard of proof in criminal proceedings -- beyond a reasonable doubt -- is the highest and most difficult to reach, the process is long and re-traumatizing for victims. Many do not feel they have the emotional capacity to participate. Even when victims report, more often these cases are not pursued criminally because of the complicated nature of word-on-word cases, or the difficulty proving non-consent when alcohol or drugs were involved. By contrast, when schools utilize the investigative model, the campus conduct process provides a pathway to accountability that is more accessible; and the outcome is often more relevant to victims, providing safety and remediation directly in their campus life. Many victims say their goal in reporting is to have the respondent learn from it and not repeat the behavior, and to protect other students from harm. Campus conduct sanctions typically include educational components and have a developmental approach rather than the punitive sentences in the criminal justice process.

Allowing schools to ignore off-campus violence also creates disparities between institutions because of their vastly different makeup. Victims who attend commuter schools and community colleges may have no means of addressing the hostile environment they experience on campus because another student harmed them off campus. Without a conduct process that addresses off-campus harassment, the victim cannot seek measures to limit campus contact with the person who harmed them.

**Standard of Evidence:**
The DOE allows schools to choose between the Preponderance of the Evidence Standard and the Clear and Convincing Standard. However, it limits this choice by requiring that if schools use the Clear and Convincing Standard in any other place, it must also be used in sexual harassment/assault cases. Use of the preponderance of evidence standard in higher education conduct proceedings has been in place for many years. This is the same standard used in civil court proceedings, including protection order proceedings. As public/private entities, colleges have the right to hold students to standards of conduct which they determine, and to enforce policies using the preponderance standard. As previously mentioned, many criminal behaviors
which are truly dangerous both to the victim involved and to public safety, are not pursued in criminal court because proving that the crime occurred “beyond a reasonable doubt” can be difficult to accomplish. Schools should be allowed to use a lower burden of proof precisely because there is no threat to anyone’s liberty. Making the threshold lower doesn’t mean that respondents will be found responsible for policy violations with no evidence. With the safety of so many students at risk, a preponderance of the evidence should be enough for a school to take protective steps.

**Mediation:**
In the new rule, schools may allow mediation as a recourse, even in cases of dating and sexual violence between students. Mediation is not a recommended practice in sexual misconduct cases and is a dangerous option in some situations. Restorative Justice is a best practice that many institutions have incorporated through the option of Informal Resolution. However, schools that use Restorative Justice for sexual misconduct cases have specific stipulations, such as:

- the process is trauma-informed and victim-centered;
- the goal is to be “restorative” – to facilitate healing and resolution while also allowing for accountability;
- the respondent must be willing to take responsibility for their actions;
- it does not have to include a face-to-face meeting between the parties;
- the most dangerous acts of misconduct are not eligible for informal resolution.

Given the limits of mediation, and the critical differences between mediation and restorative justice, mediation should not be allowed as a recourse under Title IX regulations.

**Live Hearings with Cross-Examination:**
At many schools, the number of sexual misconduct cases increased significantly after the 2011 guidance, and we fear that the new regulations have significantly decreased the number of cases. Many survivors are unwilling to engage in the formal complaint process because of the requirement of live hearings. Every time a survivor has to re-tell their story, it has the potential to be re-traumatizing. Secondary trauma can also happen when questions are asked that imply the survivor was at fault, was lying, or consented to what happened. Thus, many survivors opt not to report to avoid having to go through this re-traumatizing process. Some survivors do not feel safe being in the same room with the respondent or believe they will be triggered by seeing the respondent. Especially with intimate partner violence, there is a risk that the respondent will be able to intimidate the victim through facial expressions, physical gestures, or by using words or phrases that hold a certain meaning or threat as only understood by the two parties.

Similarly, requiring cross-examination and allowing that to be carried out by an “advisor” who could be an attorney gives an unfair advantage to parties that can afford an attorney. Complainants may not feel they need a lawyer, just as victims’ concerns in a criminal case are represented by the state’s prosecutor. Yet respondents are more likely to hire an attorney.
If hearings continue to be required, it would be better if: (1) DOE requires that questions posed by either party are screened by the Hearing Officer first for appropriateness and relevance, and that appropriate questions are asked by the Hearing Officer. (2) DOE should limit who can serve in the role of advisor. Allow both parties access to similar sets of trained campus professionals to serve as complainant advisor or respondent advisor. (3) DOE should define the role of the advisor so that this is not left up to the interpretation of the institutions.

Society constantly shames survivors for not reporting, and yet the requirement of live hearings and cross-examinations makes it more difficult for survivors to report and seek accountability. We can’t have it both ways. If we want survivors to report and hold those who harm them accountable, then we have to provide processes that protect survivors and make it safe for them to move forward.

Supportive Measures:
2011 Guidance required schools “to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation.” The new regulations require schools to offer supportive measures which “may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.” But the regulations do not allow a school to take any interim measures that may be construed as disciplinary, punitive, or unreasonably burdensome to respondents. This means that even if a school believes a respondent poses an immediate danger, it cannot temporarily remove that student from a residence hall, dining hall, classroom, or ban them from any campus spaces until an outcome is reached in their campus conduct case. This fails to address the potential danger that a respondent may pose to the victim’s safety and to campus safety, and places undue stress on complainants at a time when they are in crisis.

Responsibility to Investigate:
We support the shift in the new regulations to a model in which only reports to certain parties with corrective authority are required to be investigated because requiring all faculty to be mandatory reporters may have deterred survivors from disclosing their experiences and miss the opportunity to be referred to resources. This change may have been welcomed by college faculty, especially those who teach on the topics of Sexual Violence, Domestic Violence, Trauma, Women’s Studies, Criminal Justice, Sociology, Psychology because students disclose their victimization experiences at higher rates in these classes. However, the new regulations removed the list of specific employees who were considered “responsible employees” and left it up to each school to determine who would be mandated reporters. At our institution, faculty are still mandated reporters. Thus, there is no consistency nationwide around these practices, and we continue to be concerned about the impact on student disclosures.

Time Frame for Resolution of Cases:
The elimination of the 60-day time frame for resolution of cases may be viewed as a positive
change by Title IX Coordinators and institutions. However, advocates were concerned when these regulations were proposed that removal of the time frame would allow schools to let investigations drag on for months and in some cases avoid adjudication altogether, which is unacceptable. For example, if an investigation is conducted slowly over many months, and the respondent is close to graduation, the respondent may graduate before the case is resolved. Once the student has received their degree, even if the evidence supports a responsible finding, the institution's ability to hold the student accountable is greatly reduced. Furthermore, when a case drags on for months, it extends the stress and emotional turmoil and may impact academic performance for all parties involved. Unfortunately, this seems to be playing out since the rule changed in August 2020. While some flexibility in timeline is reasonable to deal with unforeseen circumstances that cause delays, all parties would benefit from a requirement that the school resolve cases within a reasonable time frame. Perhaps the DOE could conduct an audit of schools regarding resolution time for cases to better understand how this rule has impacted resolution times.

**Presumption of Not Responsible:**
The requirement that schools submit a letter to respondents indicating a presumption that the accused is not responsible is unnecessary and reflects a bias on the DOE’s part toward accused students. “Presumption of innocence” is a legal term for criminal cases and need not be applied in private proceedings. This reflects an underlying belief that victims frequently lie, when research tells us the opposite is true. There should not be a bias toward either party.

**Religious Exemption:**
Religious schools wishing to secure the religious exemption should be required to seek assurance of its religious exemption by submitting a written request for the assurance to the Assistant Secretary, as was true under past guidance. Under the new rule, if DOE investigates a Title IX investigation of a school, the school could claim a religious exemption at that time, rather than identifying this exemption in advance. This change gives schools an out for not providing Civil Rights to all students. Claiming a Religious Exemption has been used in the past as justification to discriminate against Lesbian, Gay, Bisexual, Transgender, and Non-Binary students, and to deny women’s reproductive rights. While a school should be allowed to claim a Religious Exemption, if receiving federal funds they should not be allowed to use this as a means to engage in discrimination based on sexual orientation.

**Accountability:**
It seems imprudent and unwise to disempower the DOE from being able to hold schools accountable for not meeting their Title IX requirements to investigate incidents of sexual misconduct. Limiting the DOE’s capacity to hold schools accountable only when they are “deliberately indifferent” to sexual harassment sends a message that Title IX compliance is unimportant. It also puts students who have complaints against their schools at risk, with less protection and hope for recourse when institutions fail them.

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Co-Directors and Internal Advisory Board Members of the Center for the Study and Prevention of Gender Based Violence
University of Delaware
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Submitted on behalf of the Center by Internal Advisory Board Member, Angela DiNunzio Seguin

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