



September 8, 2022

Submitted via: [www.regulations.gov](http://www.regulations.gov)

Dr. Miguel Cardona  
Secretary of Education  
Department of Education  
400 Maryland Avenue SW  
Washington DC, 20202

Catherine E. Lhamon  
Assistant Secretary for Civil Rights  
Department of Education  
400 Maryland Avenue 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,

I am writing on behalf of the Illinois Coalition Against Sexual Assault (“ICASA”) in response to the Department of Education’s (“the Department”) Notice of Proposed Rulemaking (“proposed rules”) to express our support of and request enhancements to the Department’s proposal to amend the rules implementing Title IX of the Education Amendment Act of 1972 (“Title IX”) as published in the Federal Register on July 12, 2022.

## INTRODUCTION

ICASA is a not-for-profit corporation comprised of the 30 community-based rape crisis centers in Illinois working together to end sexual violence. Each center provides 24-hour crisis intervention services, counseling, and advocacy for victims of sexual assault and their significant others. Each center also presents prevention education programs in Illinois schools and communities. ICASA’s rape crisis centers support survivors throughout Illinois, from the large metropolitan area of Chicago to the very rural areas in the southern part of the state.

Our advocates, counselors, and prevention educators work with victims of sexual assault and sexual harassment in schools, community colleges, colleges, and universities throughout Illinois. ICASA also works with state and local lawmakers to improve legal and systemic responses to sexual violence. To that end, Illinois has a law addressing sexual assault and harassment on campus: the Illinois Preventing Sexual Violence in Higher Education Act (“PSVHE Act”).<sup>1</sup>

ICASA’s experience working with students and lawmakers places us in a unique position to understand the importance of Title IX for protecting survivors’ rights to full participation in federally-supported education programs and activities. We are pleased that the proposed rules will enhance the protections of Title IX and clearly include protections from discrimination on the basis of sexual orientation and gender identity. The proposed rules will help ensure that survivors of sexual assault and sexual harassment can continue to access the benefits of education.

ICASA joined the comments submitted by the National Alliance to End Sexual Violence and the National Women’s Law Center, and we endorse the positions taken in those comments. ICASA submits this separate comment to address issues specific to Illinois. ICASA appreciates the significant improvements in the Department’s proposed rules, and respectfully requests several additional revisions to even better support survivors, as detailed below.

**I. The proposed rules should require use of the preponderance of the evidence standard.**

Proposed rule §106.45(h)(1) would require that a school<sup>2</sup> use the preponderance of the evidence standard of proof for Title IX proceedings unless the school uses the clear and convincing evidence standard of proof in all other comparable proceedings. ICASA objects to allowing the higher standard of proof to be applied in Title IX education proceedings.

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<sup>1</sup> 110 ILCS 155/1 et seq.

<sup>2</sup> This comment uses the word “school” to refer to the entities defined as “recipients” in the Title IX proposed rules.

In Illinois, the PSVHE Act requires that the individual(s) resolving a complaint of sexual harassment in education “shall use a preponderance of the evidence standard to determine whether the alleged violation . . . occurred.” 110 ILCS 155/25(b)(5).

Prior to the most recent changes to the Title IX rules, the Department had a longstanding practice requiring that schools use a “preponderance of the evidence” standard, which means “more likely than not,” in Title IX cases to decide whether sexual harassment occurred.<sup>3</sup>

Under proposed rule §106.45(b) schools could elect to use the more demanding “clear and convincing evidence” standard in sexual harassment matters if they use that standard in other similar proceedings. The Department’s decision to allow schools to impose a more burdensome standard is inappropriate for Title IX proceedings.

The preponderance of the evidence standard is used by courts in all civil rights cases.<sup>4</sup> This standard is “fully consistent with the requirements and

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<sup>3</sup> The Department required schools to use the preponderance standard in Title IX investigations since as early as 1995. For example, its April 1995 letter to Evergreen State College concluded that its use of the clear and convincing standard “adhere[d] to a heavier burden of proof than that which is required under Title IX” and that the College was “not in compliance with Title IX.” U.S. Dep’t of Educ., Office for Civil Rights, *Letter from Gary Jackson, Regional Civil Rights Director, Region X, to Jane Jervis, President, The Evergreen State College* (Apr. 4, 1995), at 9, available at [http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed\\_ehd\\_1995.pdf](http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf). Similarly, the Department’s October 2003 letter to Georgetown University provided a copy of the Evergreen letter and reiterated that “in order for a recipient’s sexual harassment grievance procedures to be consistent with Title IX standards, the recipient must . . . us[e] a preponderance of the evidence standard.” U.S. Dep’t of Educ., Office for Civil Rights, *Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University* (Oct. 16, 2003), at 1, also available at [http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed\\_ehd\\_1995.pdf](http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf).

<sup>4</sup> Katharine Baker et al., *Title IX & the Preponderance of the Evidence: A White Paper* (July 18, 2017), available at <http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-10.3.16.pdf> (signed by 90 law professors).

spirit of civil rights laws, as well as OCR’s past enforcement of Title IX.”<sup>5</sup> It is the only standard of proof that treats both sides equally and is consistent with Title IX’s requirement that grievance procedures be “equitable.” By allowing schools to use a “clear and convincing evidence” standard, the proposed rule would tilt investigations in favor of respondents and against complainants.

Title IX experts support using the preponderance of the evidence standard. The position of the Association of Title IX Administrators is that “any standard higher than preponderance advantages those accused of sexual violence (mostly men) over those alleging sexual violence (mostly women). It makes it harder for women to prove they have been harmed by men. The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. *No other evidentiary standard is equitable.*”<sup>6</sup>

The Association for Student Conduct Administration (ASCA) agrees that schools should “[u]se the preponderance of evidence (more likely than not) standard to resolve all allegations of sexual misconduct.”<sup>7</sup> “ASCA recommends it because it is the only standard that reflects the integrity of equitable student conduct processes which treat all students with respect and fundamental fairness.”<sup>8</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> Association of Title IX Administrators, *ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence*, at 4 (Feb. 17, 2017), available at <https://cdn.atixa.org/website-media/atixa.org/wp-content/uploads/2017/02/12192935/2017February-Final-ATIXA-Position-Statement-on-Colleges-Addressing-Sexual-Violence.pdf>.

<sup>7</sup> Association for Student Conduct Administration, *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses*, at 2 (2014), available at [https://president.uoregon.edu/sites/president1.uoregon.edu/files/asca\\_2014\\_gold\\_standard\\_report.pdf](https://president.uoregon.edu/sites/president1.uoregon.edu/files/asca_2014_gold_standard_report.pdf).

<sup>8</sup> Chris Loschiavo & Jennifer L. Waller, *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes*, ASSOCIATION FOR STUDENT CONDUCT ADMIN, at Conclusion (2015) available at <https://docslib.org/doc/3475817/the-preponderance-of-evidence-standard-use-in-higher-education-campus-conduct-processes-by-chris-loschiavo-jd-and-jennifer-l>.

ICASA respectfully requests that the Department return to its longstanding requirement, which aligns with Illinois law, that schools use the preponderance of the evidence standard to resolve all Title IX complaints.

**II. The proposed rule's requirement that a respondent be presumed not responsible is inequitable and inappropriate.**

Under proposed rule §106.45(b)(3), schools would be required to start with “a presumption that the respondent is not responsible for the alleged conduct.” This presumption favors the respondent and presumes the complainant is lying. It also exacerbates rape myths, especially the myth that women and girls often lie about sexual assault.”<sup>9</sup>

The presumption of innocence is a criminal law principle, incorrectly imported into this context.<sup>10</sup> Criminal defendants are presumed innocent until proven guilty because their very liberty is at stake and they may go to prison if found guilty. There is no such principle in civil law or civil rights proceedings. Title IX is a civil rights law that ensures that sexual harassment does not result in loss of access to education.

The Illinois PSVHE Act does not require a presumption that the respondent is not responsible. The presumption is also in conflict with other provisions of the current Title IX rules<sup>11</sup> and other proposed rules,<sup>12</sup> which require that schools treat the parties “equitably” and provide “equitable” resolution of complaints. A presumption in favor of one party against the other is not equitable.

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<sup>9</sup> See, e.g., Tyler Kingkade, *Males Are More Likely to Suffer Sexual Assault Than To Be Falsely Accused Of It*, HUFFINGTON POST (Dec. 8, 2014) [last updated Oct. 16, 2015], [https://www.huffingtonpost.com/2014/12/08/false-rape-accusations\\_n\\_6290380.html](https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html) (“False rape reports are rare. And the men and boys who are victims in sexual assault cases are far more likely to have been the targets of abuse themselves than to have been falsely accused of sexual violence.”).

<sup>10</sup> See, e.g., *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes*, supra note 8 (“Campus disciplinary systems are not meant to replace criminal processes.”).

<sup>11</sup> 34 C.F.R. §§106.8(c), 106.44(a), and 106.45(b)(1)(i).

<sup>12</sup> Proposed rules §§106.8(b)(2), 106.44(f)(1), 106.45(b)(1), and 106.46(a).

The current rules and the proposed rules both require schools to train Title IX coordinators and investigators on “avoiding prejudgment of the facts at issue.”<sup>13</sup> Starting with the assumption that the allegations are false is at odds with avoiding prejudgment.

This presumption is also in conflict with proposed rule §106.45(b)(1)(ii), which states that “credibility determinations may not be based on a person’s status as a complainant, respondent or witness.” However, the required “not responsible” presumption establishes a response to the complaint that must, at least initially, assume the respondent is credible and the complainant is not.

By requiring that investigators begin by presuming the respondent is not responsible, the proposed rules ignore Title IX’s nondiscrimination and equitable treatment mandates and buy into negative stereotypes regarding complainants. ICASA encourages the Department to withdraw Section 106.45(b)(3) and not propagate this harmful presumption.

**III. The proposed rules should require schools to provide confidential employees to assist students and distinguish between confidential employees and appointed advisors.**

**A. Each school should provide confidential employees to assist students in making complaints and seeking support.**

Confidential resources are critical in creating safe spaces for survivors of sexual violence. The Illinois PSVHE Act established the role of a confidential advisor to support sexual assault survivors at colleges and universities.<sup>14</sup> Some states, including Illinois, also elevate the importance of confidentiality for survivors by recognizing a legal privilege for communication between survivors and on-campus confidential advisors.<sup>15</sup>

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<sup>13</sup> 34 C.F.R. §106.45(b)(1)(iii); proposed rules §106.8(d)(2)(iii).

<sup>14</sup> 110 ILCS 155.

<sup>15</sup> 735 ILCS 5/8-802.1; see also, CA Evid. Code §1035.2(b) and §1035.8; N.H. Rev. Stat. §188-H:8; Mass. Gen. Laws Chapter 6, §168E(l); Oregon Rev. Stat. 507-1; Rev. Code Wash. Ann. §28B.112.030.

ICASA is pleased that the proposed rule in §106.2 defines a “confidential employee.” We ask that the Department go one step further to support survivors and require that each school offer access to confidential employees to assist students in considering options, making complaints, and requesting supportive measures.

In ICASA’s experience, access to the services of a confidential advisor is beneficial to students and helps them continue their education while dealing with the trauma of sexual harm. We encourage the Department to include a requirement that schools provide confidential employees similar to the confidential advisors required by the Illinois PSVHE Act.

The PSVHE Act provides for “confidential advisors” who are “employed or contracted by a higher education institution to provide emergency and ongoing support to student survivors of sexual violence . . .”<sup>16</sup> Each institution of higher education in Illinois is required to have confidential advisors to assist students, and some schools contract with their local rape crisis center to provide this service. Confidential advisors are extremely helpful to students. They provide students with an avenue for seeking assistance that does not require a formal complaint or investigation and places a premium on protecting confidentiality.

The PSVHE Act requires that confidential advisors “shall, at a minimum, do all of the following:

1. Inform the survivor of the survivor’s choice of possible next steps regarding the survivor’s reporting options and possible outcomes, including without limitation reporting pursuant to higher education institution’s comprehensive policy and notifying law enforcement.
2. Notify the survivor of resources and services for survivors of sexual violence, including but not limited to, student services available on campus and through the community-based resources, including without limitation sexual assault crisis centers, medical treatment facilities, counseling services, legal

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<sup>16</sup> 110 ILCS 155/5.

resources, medical forensic services, and mental health services.

3. Inform the survivor of the survivor's rights and the higher education institution's responsibilities regarding orders of protection, no contact orders, or similar lawful orders issued by the higher education institution or a criminal or civil court.
4. Provide confidential services to and have privileged, confidential communications with survivors of sexual violence in accordance with [Code of Civil Procedure Section establishing a legal privilege between survivors and confidential advisors].
5. Upon the survivor's request and as appropriate, liaise with campus officials, community-based sexual assault crisis centers, or local law enforcement and, if requested, assist the survivor with contacting and reporting to campus officials, campus law enforcement, or local law enforcement.
6. Upon the survivor's request, liaise with the necessary campus authorities to secure interim protective measures and accommodations for the survivor."<sup>17</sup>

ICASA recommends that the Department add a similar requirement to the Title IX rules. Survivors deserve confidential support on campuses to help them navigate their options and continue their education.

**B. The proposed rules should clarify that confidential employees may not be appointed by schools as advisors.**

ICASA supports including a definition of "confidential employee" in the proposed rules. As described above, Illinois requires that each institution of higher education provide a "confidential advisor" to support student survivors, and some schools contract with their local rape crisis center to provide the confidential advisor services on campus. Rape crisis counselors in Illinois have an absolute privilege, and there is also a

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<sup>17</sup> 110 ILCS 155/20.



privilege for confidential advisors.<sup>18</sup> Therefore, all Illinois confidential advisors would meet the definition of a “confidential employee” under proposed rule §106.2.

Unfortunately, there has been confusion and a failure to distinguish between a PSVHE Act confidential advisor and the Title IX advisor provided by the school when a party does not have one. On a number of occasions it has been reported that a school has appointed the student survivor’s confidential advisor as their advisor for the Title IX hearing.

The confidential advisor is an employee or contractor of the school, but their primary duty is to provide confidential support to the student. Confidential advisors are trained to provide the victim-centered services listed above in III.A. They are not attorneys, nor are they trained to question witnesses. Also, requiring a confidential employee to participate in a hearing may negatively impact legal privileges that attach to their confidential communications with the student. It is inappropriate for a school to appoint a confidential employee as the hearing advisor.

If the student wishes to have a confidential employee act as their Title IX hearing advisor, that is the student’s choice. However, the school should not be allowed to intrude on that confidential relationship by requiring that a confidential employee serve as the hearing advisor charged with questioning witnesses on behalf of the survivor.

ICASA encourages the Department to remove the option for cross examination and adopt the PSVHE Act process, which allows parties to suggest questions to be posed by the individual(s) resolving the complaint. However, if the Department continues to allow live questioning by the parties’ advisors, it should clarify that the school cannot appoint as the advisor a confidential employee who has worked with the survivor.

ICASA asks that the Department clearly distinguish the roles of confidential employee and advisor in the proposed rules. We encourage the Department to add a restriction that a confidential employee may not be appointed by the school to serve as a party’s advisor unless the party specifically requests it.

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<sup>18</sup> 735 ILCS 5/8-802.1 (Confidentiality of statements made to rape crisis personnel); 735 ILCS 5/8-804 (Confidential advisor).

#### **IV. The proposed rules should explicitly allow restorative justice practices as an option for informal resolution.**

In proposed rule §106.44(k), a school is allowed to offer an informal resolution process in some circumstances. ICASA works to expand options for survivors and advocates for survivors to have opportunities to participate in restorative justice practices, if that is what they choose. ICASA requests that the Department revise the proposed rule to explicitly allow restorative justice practices as a Title IX informal resolution process.

As part of an Office on Violence Against Women (OVW) Legal Assistance for Victims (LAV) grant, ICASA partners with the Chicago Alliance Against Sexual Exploitation (CAASE) to offer legal services to survivors of sexual violence in Cook County, Illinois. One part of the LAV grant includes CAASE exploring ways to represent survivors in restorative justice practices on college campuses.

The Illinois General Assembly has also recognized restorative justice “as a powerful tool in addressing the needs of victims, offenders, and the larger community in the process of repairing the fabric of community peace,” and it “encourages residents of [Illinois] to employ restorative justice practices, not only in justiciable matters, but in all aspects of life and law.”<sup>19</sup> In 2021, the General Assembly passed a law “to encourage the use of restorative justice practices by providing a privilege for participation in such practices.”<sup>20</sup>

Restorative justice practices are more trauma-informed and victim-centered than mediation.<sup>21</sup> Restorative justice practices, such as restorative conferences, are “used when an accused student acknowledges engaging in the harmful behavior (although they may not grasp the full impact) and

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<sup>19</sup> 735 ILCS 5/804.5(a).

<sup>20</sup> *Id.*

<sup>21</sup> See *Campus PRISM Project Brief Distinguishing Campus Restorative Justice from Mediation*, August 2016, <https://www.sandiego.edu/soles/documents/center-restorative-justice/RJ-vs-Mediation-Brief4.pdf>; Patricia Madison Orcutt, Patricia M. Petrowski, David R. Karp, Jordan Draper, *Restorative Justice Approaches to the Informal Resolution of Student Sexual Misconduct*, <https://jcul.law.rutgers.edu/wp-content/uploads/2020/06/RESTORATIVE-JUSTICE-APPROACHES-TO-THE-INFORMAL-RESOLUTION-OF-STUDENT-SEXUAL-MISCONDUCT-POSTED.pdf>.

commits to taking responsibility for the misconduct and its resulting harms.”<sup>22</sup> Whereas mediation and other informal resolution processes may not include the accused student taking responsibility.

ICASA encourages the Department to explicitly name restorative justice practices as a type of informal resolution process allowed under Title IX, and encourage schools to develop effective restorative justice programs for addressing sexual misconduct as a voluntary option for survivors.

## CONCLUSION

The Department’s proposed rules are positive in many ways, and ICASA supports their adoption. ICASA also encourages the Department to make several improvements to the proposed rules, including: (1) requiring use of the preponderance of the evidence standard; (2) removing the presumption that the respondent is not responsible for the alleged conduct; (3) requiring schools to provide confidential employees to support students and prohibiting those employees from being appointed as the hearing advisor; and (4) explicitly listing and encouraging restorative justice practices as an appropriate informal resolution process.

Thank you for the opportunity to submit comments on the proposed rules. Please do not hesitate to contact me at 217-753-4117 or [sbeuning@icasa.org](mailto:sbeuning@icasa.org), if you have questions or would like ICASA to provide additional information.

Respectfully submitted,



Illinois Coalition Against Sexual Assault  
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<sup>22</sup> *Id.* at 2.