

**WHEN PEDESTALS BECOME CAGES: EXPANSIVE  
MANDATORY REPORTING REQUIREMENTS  
UNDER TITLE IX**

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I. INTRODUCTION .....	597
II. BACKGROUND .....	601
A. <i>Overview of the History and Purpose of Title IX</i> .....	601
B. <i>Reporting of Sexual Harassment Within Title IX's         Administrative Enforcement Scheme</i> .....	603
1. <i>Scope of Reporting Requirements</i> .....	605
2. <i>Individuals Required to Report Sexual Harassment</i> .....	607
3. <i>Department of Education Guidance Documents Clarifying             Reporting Requirements</i> .....	609
III. ANALYSIS .....	615
A. <i>Expansive Mandatory Reporting Models Harm Survivors</i> .....	615
B. <i>The Impact of Expansive Mandatory Reporting Models on         Survivor Reporting</i> .....	620
C. <i>Alternative Approaches to Mandatory Reporting</i> .....	622
1. <i>Mandatory Referring</i> .....	623
2. <i>Mandatory Supporting</i> .....	628
IV. CONCLUSION.....	631

I. INTRODUCTION

I lived my life imprisoned by his actions, and he just lived his life.  
Anonymous<sup>1</sup>

Never once did I think it would happen to me.  
Haley Collins<sup>2</sup>

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1. Anonymous, *I Didn't Know I Could Be Raped and Still Look Normal*, 34<sup>TH</sup> STREET, <https://dailypenn.github.io/old.projects.34st.com/2017/12/assault-narratives/still-look-normal.html> (last visited Jan. 3, 2024) [<https://perma.cc/YJ7Y-2W3J>].

2. Haley Collins, *Til It Happens to You*, 34<sup>TH</sup> STREET, <https://dailypenn.github.io/old.projects.34st.com/2017/12/assault-narratives/til-it-happens-to-you.html> (last visited Jan. 3, 2024) [<https://perma.cc/5EJL-AXFX>].

I've seen how shame corrodes us—how we internalize the sense of rot and dread and fear, until it becomes a part of who we are.

Dani Blum<sup>3</sup>

These are the words of just three sexual assault survivors, yet they paint a haunting picture of the sexual assault crisis plaguing college campuses nationwide. At a time when nearly one in five female college students are survivors of sexual assault,<sup>4</sup> students, activists, and survivor advocates are calling for increased accountability from institutions of higher education.<sup>5</sup> In response, many colleges have created victim centers that provide community-based resources to survivors<sup>6</sup> and engaged in events designed to raise awareness of the prevalence of sexual assault on campuses.<sup>7</sup>

To further demonstrate their commitment to combatting this crisis, colleges and universities have also published information on their websites detailing their processes for responding to reports of sexual misconduct on their campuses.<sup>8</sup> These processes are a critical component of an effective campus response to sexual harassment, as the decision to disclose or report

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3. Dani Blum, *It Has Taken Years*, 34<sup>TH</sup> STREET, <https://dailypenn.github.io/old.projects.34st.com/2017/12/assault-narratives/taken-years.html> (last visited Jan. 3, 2024) [<https://perma.cc/YPM2-GKW2>].

4. *Statistics*, KNOW YOUR IX, <https://www.knowyourix.org/issues/statistics/> (last visited Jan. 3, 2024) [<https://perma.cc/6ATN-YRZP>] (reporting that 19% of women will be sexually assaulted while at college).

5. Brooke Migdon, *Student Survivor Group Rolls Out New National Tool to Track Campus Assaults, Hold Schools Accountable*, THE HILL (Jan. 25, 2023), <https://thehill.com/changing-america/enrichment/education/3829752-student-survivor-group-rolls-out-new-national-tool-to-track-campus-assaults-hold-schools-accountable/> [<https://perma.cc/GAA8-L2SF>]; See Sydney Clark,  *Holding Universities Accountable for Sexual Assault*, BEST COLLEGES (Dec. 6, 2021), <https://www.bestcolleges.com/blog/student-sexual-assault/> [<https://perma.cc/RWW2-S2D6>]; See also Julianne McShane, *Stanford Students Call for Accountability After Second Alleged Rape Reported in Two Months*, NBC NEWS (Oct. 14, 2022, 3:52 PM), <https://www.nbcnews.com/news/us-news/stanford-students-call-accountability-second-alleged-rape-reported-two-rcna52270> [<https://perma.cc/YK6R-75BP>].

6. See Rebecca Hayes Smith & Justin Hayes Smith, *A Website Content Analysis of Women's Resources and Sexual Assault Literature on College Campuses*, 17 CRITICAL CRIMINOLOGY 109, 110 (2009).

7. See Julia Marie Wooden, *Sexual Assault in Our Society: Women (and Men) Take Back the Night* (2000), <https://dr.lib.iastate.edu/entities/publication/6e9628f0-ed18-4387-87e5-055d494bcf23> [<https://perma.cc/5UPT-76TT>] (Master's thesis at 3, Iowa State University) (on file with Iowa State University Digital Repository).

8. See Hayes Smith, *supra* note 6, at 118–19.

is deeply personal for many survivors.<sup>9</sup> In the wake of a sexual assault, many survivors describe feelings of guilt, depression, and anxiety.<sup>10</sup> Studies have repeatedly shown that empowering survivors to report sexual assault on their own terms plays a pivotal role in restoring their sense of agency and bodily autonomy.<sup>11</sup> Conversely, forcing survivors to report against their will can result in decreased educational performance as well as heightened symptoms associated with post-traumatic stress disorder (PTSD).<sup>12</sup> More nuanced policies detailing employees' obligations to report sexual harassment are essential to ensuring students feel both safe and supported at school.<sup>13</sup>

Title IX's principal purpose is to prohibit discrimination on the basis of sex in educational programs or activities operated by recipients of federal funds.<sup>14</sup> Sex-based discrimination includes sexual harassment, which encompasses both sexual harassment and sexual violence.<sup>15</sup> Although institutions have taken varied approaches to identify and respond to sexual harassment,<sup>16</sup> Title IX outlines the minimum requirements institutions must meet to receive federal funding.<sup>17</sup> The Department of Education has engaged in a process known as notice and

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9. See Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 88–89 (2017).

10. See Nicholas J. Parr, *Sexual Assault and Co-Occurrence of Mental Health Outcomes Among Cisgender Female, Cisgender Male, and Gender Minority U.S. College Students*, 67 J. ADOLESCENT HEALTH 722, 725 (2020); See also Karen Rothman et al., *Sexual Assault Among Women in College: Immediate and Long-Term Associations with Mental Health, Psychosocial Functioning, and Romantic Relationships*, 36 J. INTERPERSONAL VIOLENCE 9600, 9602 (2019).

11. Justine A. Dunlap, *Harmful Reporting*, 51 N.M. L. REV. 1, 13 (2021); See Kathryn J. Holland et al., *Mandatory Reporting is Exactly Not What Victims Need*, CHRON. HIGHER EDUC. (July 22, 2022), <https://www.chronicle.com/article/mandatory-reporting-is-exactly-not-what-victims-need> [<https://perma.cc/7857-RT76>]; See also Denise E. Elliot et al., *Trauma-Informed or Trauma-Denied: Principles and Implementation of Trauma-Informed Services for Women*, 33 J. CMTY. PSYCH. 461, 465–66 (2005).

12. See Weiner, *supra* note 9, at 93–94.

13. See Weiner, *supra* note 9, at 187–88.

14. See 20 U.S.C.A. § 1681; 34 C.F.R. pt. 106.

15. See *Davis v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 629, 650 (1999); See also *Sex-based Harassment*, U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS. (Jan. 16, 2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue01.html> [<https://perma.cc/S9MG-EYRL>].

16. See Linda M. Williams et al., *Responding to Sexual Assault on Campus: A National Assessment and Systematic Classification of the Scope and Challenges for Investigation and Adjudication*, NAT'L INST. OF JUST., OFF. OF JUST. PROGRAMS, 26 (Mar. 23, 2020), <https://www.ojp.gov/pdffiles1/nij/grants/254671.pdf> [<https://perma.cc/929E-HNKD>].

17. 20 U.S.C.A. § 1681; 34 C.F.R. pt. 106; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) [hereinafter 2020 NPRM Final Rule].

comment rulemaking<sup>18</sup> twice in recent years to revise Title IX's requirements.<sup>19</sup> These changes have included modifications to the categories of employees who are considered mandated reporters of sexual harassment.<sup>20</sup> The 2022 Notice of Proposed Rulemaking (NPRM) designated several categories of employees as mandatory reporters, including the Title IX coordinator, any employee in a teaching or advising role, and student employees.<sup>21</sup> The 2022 NPRM expanded upon the 2020 NPRM Final Rule<sup>22</sup> which listed only the Title IX coordinator and those capable of instituting corrective action as mandatory reporters.<sup>23</sup>

Great legal minds have warned that laws passed for the benefit of members of vulnerable populations risk putting those individuals “not on a pedestal, but in a cage.”<sup>24</sup> Expansive mandatory reporting requirements, like those in the 2022 NPRM,<sup>25</sup> will have a similar effect by inhibiting Title IX's purpose of prohibiting discrimination on the basis of sex in educational programs operated by recipients of federal funds.<sup>26</sup> Broad mandatory reporting models, which require nearly all university

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18. Administrative agencies, like the Department of Education, make modifications to rules through a process known as notice and comment rulemaking. *See* Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 604 (2018). Through this process, the agency publicizes its proposed modifications to a rule and allows the public an opportunity to provide comments and feedback regarding the proposals. *Id.* at 604–05. At the conclusion of the comment period, the agency must review and address the comments prior to publishing its completed “final rule.” *Id.* at 605.

19. *Sex Discrimination: Overview of the Law*, U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS. (Jul. 12, 2022), <https://www2.ed.gov/about/offices/list/ocr/sexoverview.html#:~:text=Title%20IX%20states%20%E2%80%9CNo%20person,provide%20grants%20of%20financial%20assistance> [https://perma.cc/CFJ7-4V8T].

20. *See* Katherine Knott, *Title IX Mandatory Reporting Expansion Under Fire*, INSIDE HIGHER ED (Sept. 26, 2022), <https://www.insidehighered.com/news/2022/09/27/title-ix-mandatory-reporting-expansion-criticized#:~:text=Current%20Title%20IX%20rules%2C%20issued,that%20is%20not%20deliberately%20indifferent.%E2%80%9D> [https://perma.cc/2E4M-49DU].

21. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (Jul. 12, 2022) [hereinafter 2022 NPRM].

22. *See* 2020 NPRM Final Rule, 85 Fed. Reg. 30026.

23. *See* 2020 NPRM Final Rule, 85 Fed. Reg. 30039.

24. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); Brief for Appellant at 21, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) WL 133596.

25. *See* 2022 NPRM, 87 Fed. Reg. 41390.

26. *See* Holland et al., *supra* note 11; Dunlap, *supra* note 11, at 14; *See also* Sara Nesbitt, et al., *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout*, KNOW YOUR IX, 12, <https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf> (last visited Jan. 3, 2024) [https://perma.cc/4YNK-DZD5] (describing the negative impact that an institution's reporting process can have on survivors).

employees to report sexual harassment, negatively impact a survivor's sense of bodily autonomy and adversely affect their equal access to educational opportunities.<sup>27</sup> Additionally, these models will likely have a chilling effect on survivor reporting at institutions of higher education, further limiting these institutions' ability to address the sexual assault crisis ravaging campuses nationwide.<sup>28</sup>

This Note begins by discussing the history and purpose of Title IX.<sup>29</sup> Next, it considers the reporting of sexual harassment under Title IX's administrative enforcement scheme and the requirements for mandatory reporters under both the 2020 and 2022 NPRM.<sup>30</sup> Finally, this Note proposes an alternative approach resembling a mandatory referral model that would maintain survivors' sense of autonomy and encourage survivors to report sexual harassment to their colleges or universities.<sup>31</sup> As of this writing, the Department of Education is reviewing the public comments to the 2022 NPRM but has not yet issued its final rule.<sup>32</sup> This makes the need to embrace an alternative reporting approach particularly relevant as the 2022 NPRM, and the topic of mandatory reporting, remain active legal issues.

## II. BACKGROUND

### A. Overview of the History and Purpose of Title IX

In relevant part, Title IX reads: "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 . . . ."<sup>33</sup> As the text of the statute suggests, Title IX's principal purpose is to ensure that all students have equal access to educational opportunities, regardless of their sex.<sup>34</sup> Congress passed Title IX under its Spending Power.<sup>35</sup> To receive federal

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27. See *infra* Part III.A.

28. See *infra* Part III.B.

29. See *infra* Part II.A.

30. See *infra* Part II.B.

31. See *infra* Part III.C.

32. See Kayla Jimenez, *Biden Administration Will Release New Title IX Rules in May. What to Expect*, USA TODAY (Feb. 8, 2023), <https://www.usatoday.com/story/news/education/2023/02/08/biden-administration-release-new-title-ix-rules-may/11163003002/> [<https://perma.cc/DQN3-EVC6>].

33. 20 U.S.C.A. § 1681; 34 C.F.R. pt. 106.

34. *Id.*

35. *Davis v. Monroe Cnty. Bd. of Educ.*, 120 F.3d 1390, 1397 (11th Cir. 1997), *rev'd sub nom. Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (concluding that "[t]he legislative history of Title IX indicates that Congress

funds, institutions must adhere to Title IX's requirements and prohibit discrimination based on sex in educational activities.<sup>36</sup>

Title IX is an attempt to remedy the pernicious effects of sex-based discrimination within educational programs or activities.<sup>37</sup> Achieving this goal serves two principal purposes: "avoid[ing] the use of federal resources to support discriminatory practices" and "provid[ing] individual citizens effective protection against those practices."<sup>38</sup> As the legislative history to Title IX indicates, preventing sex-based discrimination in education is of critical importance because educational opportunities form the foundation for future career opportunities.<sup>39</sup> Unsuccessful attempts to prevent sex-based discrimination in education, therefore, can have a lifelong impact on students.<sup>40</sup>

Those seeking relief under Title IX may proceed through two different channels. First, they may pursue an "implied private cause of action" pursuant to the Supreme Court's holding in *Cannon v. University of Chicago*.<sup>41</sup> Subsequent Supreme Court decisions concluded that this private right of action enabled an individual to seek monetary damages for sexual harassment.<sup>42</sup> Alternatively, an individual may seek administrative enforcement of Title IX's regulations through the U.S. Department of Education's Office for Civil Rights (OCR).<sup>43</sup> Each of these two channels operate parallel to one another, and the standards an individual must meet to establish a claim under each are not necessarily the same.<sup>44</sup> OCR's

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intended to impose upon recipients of federal educational assistance a requirement of non-discrimination on the basis of sex. The Spending Clause authorized Congress to impose this condition.").

36. *Id.*

37. *Trs. of Univ. of Del. v. Gebelein*, 420 A.2d 1191, 1196 (Del. Ch. 1980).

38. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

39. *See* 118 Cong. Rec. 5806-07 (1972).

40. *See id.*

41. *See Cannon*, 441 U.S. at 703.

42. *See Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992).

43. *Taking Legal Action Under Title IX*, KNOW YOUR IX, <https://www.knowyourix.org/legal-action/taking-legal-action-title-ix/#:~:text=to%20be%20included,-How%20to%20File,or%20not%2C%20by%20snail%20mail> (last visited Jan. 3, 2024) [<https://perma.cc/5URA-8RP7>].

44. When OCR investigates a Title IX complaint, it provides recommendations to schools regarding policies or procedures that violate the statute. *See How the Office for Civil Rights Handles Complaints*, U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., <https://www2.ed.gov/about/offices/list/ocr/complaints-how.html#:~:text=During%20the%20investigation%2C%20OCR%20is,are%20support%20by%20the%20evidence> (last visited Jan 3, 2024) [<https://perma.cc/L27T-ECHT>]. OCR does not institute additional, punitive measures until after a school has had the opportunity to bring its policies and procedures into compliance. *See id.* Consequently, "its substantive standards for what a school must do to comply are higher and more exacting" than substantive standards established through court-based enforcement of Title IX. *See Nancy Chi Cantalupo*,

revised sexual harassment guidance notes that the Department of Education's procedure for addressing reports of sexual harassment differs from the private right of action established through Supreme Court precedent.<sup>45</sup> The remainder of this Note will focus exclusively on OCR's enforcement of Title IX.

*B. Reporting of Sexual Harassment Within Title IX's Administrative Enforcement Scheme*

The administrative enforcement of Title IX relies primarily on survivors reporting sexual harassment to the institution.<sup>46</sup> This type of survivor-initiated reporting fulfills Title IX's purpose of protecting "individual citizens" from sexual harassment or assault.<sup>47</sup> However, because Title IX's objective is to protect "individual citizens"<sup>48</sup> rather than the public at large, the results of OCR investigations of potential Title IX violations are not publicly accessible without a Freedom of Information Act request.<sup>49</sup> This contributes to a lack of transparency regarding the prevalence of sexual harassment on campuses.<sup>50</sup> A lack of clarity is

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*Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 651 (2009). See also *Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations*, CONG. RSCH. SERV. (Apr. 12, 2019), <https://sgp.fas.org/crs/misc/R45685.pdf> [<https://perma.cc/CQ9H-55KR>].

45. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., iii (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/FXW9-AG8K>] [hereinafter 2001 Guidance].

46. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005) ("Title IX's enforcement scheme also depends on individual reporting because individuals and agencies may not bring suit under the statute unless the recipient has received "actual notice" of the discrimination."); See generally, Briana M. Moore & Thomas Baker, *An Exploratory Examination of College Students' Likelihood of Reporting Sexual Assault to Police and University Officials: Results of a Self-Report Survey*, 33 J. INTERPERSONAL VIOLENCE 3419, 3431 (2018) (explaining that one of the greatest challenges institutions face when addressing sexual harassment is the lack of reporting).

47. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

48. See *id.*

49. See Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. UNIV. CHI. L.J. 205, 236–37 (2011) (explaining that "the only way that anyone other than a complainant or the school being investigated can see the resolution of most cases is through filing a Freedom of Information Act ("FOIA")").

50. Zoe Ridolfi-Starr, *Transformation Requires Transparency: Critical Policy Reforms to Advance Campus Sexual Violence Response*, 125 YALE L.J. 2156, 2173–74 (2016).

particularly concerning because an appropriate response to sexual harassment on campuses requires effective and transparent reporting.<sup>51</sup>

Several additional factors related to the reporting of sexual harassment further complicate the effective administrative enforcement of Title IX. First, the Supreme Court and the Department of Education did not formally extend Title IX's protections against discrimination to include sexual harassment until the 1990s, over two decades after Congress passed Title IX in 1972.<sup>52</sup> Additionally, confusion regarding the meaning of the phrase "sexual harassment" persists today.<sup>53</sup> Studies evaluating sexual misconduct on campuses also suggest that universities frequently underreport instances of sexual harassment.<sup>54</sup> What is most concerning, however, is the fact that as many as 90% of campus sexual assault survivors choose not to report at all.<sup>55</sup> Their reasons for not reporting are varied and range from uncertainty regarding university processes to fear of negative repercussions for themselves or the individual who assaulted them.<sup>56</sup> The result of these combined factors is a grossly inaccurate understanding of the prevalence of sexual harassment on college and university campuses.<sup>57</sup>

Reporting that reflects the well-documented rates of sexual harassment occurring on campuses nationwide is a persistent and perennial obstacle to achieving the goals of federal statutes designed to

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51. See *id.* at 2160–61; See also *Title IX Fails the Very Group It Seeks to Protect: Survivors of Campus Sexual Violence*, GEORGETOWN VOICE (Apr. 16, 2021), <https://georgetownvoice.com/2021/04/16/title-ix-fails-survivors/> [<https://perma.cc/4M2Q-S429>].

52. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999); See also Alvin Powell, *How Title IX Transformed Colleges, Universities Over Past 50 Years*, HARV. GAZETTE (June 22, 2022), <https://news.harvard.edu/gazette/story/2022/06/how-title-ix-transformed-colleges-universities-over-past-50-years/> [<https://perma.cc/RDV9-AX9N>].

53. See Kirk Rumberger, *Title IX: How Do Colleges and Universities Comply?*, JD SUPRA (Nov. 17, 2022), <https://www.jdsupra.com/legalnews/title-ix-how-do-colleges-and-7378682/> [<https://perma.cc/9NH6-37DB>].

54. See Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Evaluation*, 21 PUB. POL'Y & L., 1, 6 (2015).

55. *Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RES. CTR. (2015), [https://www.nsvrc.org/sites/default/files/publications\\_nsvrc\\_factsheet\\_media\\_packet\\_statistics-about-sexual-violence\\_0.pdf](https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_statistics-about-sexual-violence_0.pdf) [<https://perma.cc/YCU5-ZEHJ>]; Bonnie S. Fisher et al., *The Sexual Victimization of College Women*, U.S. DEP'T OF JUST. NAT'L INST. OF JUST. 23 (Dec. 2000) (finding that only fewer than five percent of women surveyed reported a completed or attempted rape to law enforcement), <https://www.ojp.gov/pdf/files1/nij/182369.pdf> [<https://perma.cc/8DYY-UR9U>].

56. See Chelsea Spencer et al., *Why Sexual Assault Survivors Do Not Report to Universities: A Feminist Analysis*, 66 FAMILY RELATIONS 166, 173–75 (2017).

57. See *An Underreported Problem: Campus Sexual Misconduct*, AAUW, <https://www.aauw.org/resources/article/underreported-sexual-misconduct/> [<https://perma.cc/G5E8-J6HC>].



protect against sex-based discrimination.<sup>58</sup> When survivors do not come forward, institutions cannot hold perpetrators of sexual harassment responsible, and the cycle of violence continues.<sup>59</sup> Additionally, without access to data regarding the rates of sexual harassment occurring on campuses, policymakers lack the necessary information to craft sexual harassment policies or statutes that are uniquely tailored to the scope of the problem.<sup>60</sup> Part of the challenge of ensuring effective administrative enforcement of Title IX lies in the difficulty of defining what information must be reported and which of the institution's employees are required to report it. United States Supreme Court cases, Department of Education guidance documents, and modifications to Title IX completed through the notice and comment rulemaking process offer some clarification.

### *1. Scope of Reporting Requirements*

Although the language of Title IX refers only to sex discrimination,<sup>61</sup> Department of Education guidance documents clarify that sex-based discrimination includes sexual harassment.<sup>62</sup> Sexual harassment, in turn, encompasses both “verbal, nonverbal, or physical conduct of a sexual nature” and sexual violence.<sup>63</sup> In 1997, the Department of Education published its first set of guidance on the scope of the phrase sexual

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58. See Ridolfi-Starr, *supra* note 50, at 2161–62; See generally Cantalupo, *supra* note 44, at 680 (explaining that survivor reporting is a critical component to reducing or eliminating campus sexual violence); Although beyond the scope of this Note, issues involving effective and transparent reporting of sexual harassment also occur under other federal statutes like the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”). The Clery Act takes a completely different approach to addressing gender-based violence in higher education. See Cantalupo, *supra* note 44, at 632–33. However, aspects of the Clery Act, like its provision excepting many faculty members from the list of employees required to report a crime, frustrate its ability to accurately reflect the prevalence of sexual harassment on campuses. See Cantalupo, *supra* note 49, at 249. This has led many universities to engage in “campus climate” reporting, which occurs when the university collects anonymous reports of sexual harassment on campus in response to a university-wide survey. See Kathleen H. Krause et al., *Measuring Campus Sexual Assault and Culture: A Systematic Review of Campus Climate Surveys*, 9 PSYCH. VIOLENCE 611, 611–12 (2019). The anonymous nature of this type of reporting allows universities to gather information regarding the prevalence of sexual harassment on campuses in a context where survivors are reluctant to report. *Id.*

59. See Cantalupo, *supra* note 49, at 219.

60. See Ridolfi-Starr, *supra* note 50, at 2160.

61. 20 U.S.C.A. § 1681; 34 C.F.R. pt. 106.

62. See *Sex-based Harassment*, U.S. DEP’T OF EDUC. OFF. FOR CIV. RTS. (Jan. 16, 2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue-01.html> [<https://perma.cc/S9MG-EYRL>]; See also Davis, 526 U.S. at 650.

63. See *Sex-based Harassment*, *supra* note 62.

harassment.<sup>64</sup> The guidance document explained that sexual harassment constitutes sex-based discrimination.<sup>65</sup> It also included both quid pro quo harassment<sup>66</sup> and hostile environment harassment<sup>67</sup> in its definition of sexual harassment. Finally, the 1997 guidance explained that the sexual harassment must be “sufficiently severe, persistent, or pervasive and directed at individuals because of their sex” to be considered sex discrimination.<sup>68</sup>

Although court-based enforcement of Title IX differs from administrative enforcement of Title IX, Supreme Court cases decided after the Department of Education released its 1997 guidance provide additional context regarding the broader legal landscape of Title IX.<sup>69</sup> In *Gebser v. Lago Vista Independent School District*, the Court concluded that schools were liable for sexual harassment involving teacher-on-student interactions where the school had actual notice of the harassment and demonstrated deliberate indifference in its response.<sup>70</sup> In reaching this conclusion, the Court emphasized the severe, negative impact teacher-on-student harassment has on a student’s ability to benefit from educational opportunities or activities.<sup>71</sup> However, the Court refused to assign liability for teacher-on-student sexual harassment where the school lacked actual notice of the harassment and demonstrated a reasonable response after receiving notice.<sup>72</sup> The Court reasoned that assigning liability under either of those circumstances would be an impermissible extension of Title IX’s scope.<sup>73</sup>

The Court’s holding in *Davis v. Monroe County Board of Education* established that Title IX’s prohibition against sex-based discrimination

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64. *Sexual Harassment Guidance 1997*, U.S. DEP’T OF EDUC. OFF. FOR CIV. RTS. (1997), <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> [hereinafter 1997 Guidance] [<https://perma.cc/7N9P-LZQJ>].

65. *See id.*

66. Quid pro quo harassment occurs where “a school employee explicitly or implicitly conditions a student’s participation in an education program or activity or bases an educational decision on the student’s submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature.” 1997 Guidance, *supra* note 64.

67. Hostile environment harassment results from “harassment that is sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from the education program or to create a hostile or abusive educational environment.” 1997 Guidance, *supra* note 64.

68. *Id.*

69. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998); *Davis*, 526 U.S. at 632.

70. *See Gebser*, 524 U.S. at 292–93.

71. *See id.* at 292.

72. *See id.* at 292.

73. *See id.* at 287–89.

also includes student-on-student sexual harassment.<sup>74</sup> The Court reasoned that student-on-student sexual harassment constituted a behavior that limits students' access to educational benefits or their ability to participate in educational activities.<sup>75</sup> However, the Court acknowledged that students, particularly elementary and secondary students, often engage in name-calling or other similar behavior.<sup>76</sup> Consequently, the Court limited its holding to harassment which was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."<sup>77</sup> The Court reasoned that this limitation struck a balance between protecting students' equal access to educational opportunities and allowing school officials the necessary flexibility to respond to harassment on their campuses.<sup>78</sup>

## 2. Individuals Required to Report Sexual Harassment

Title IX requires all recipients of federal funding to designate an employee as the Title IX coordinator.<sup>79</sup> The Title IX coordinator is an employee who is responsible for implementing and overseeing the institution's Title IX procedures.<sup>80</sup> This includes investigating formal complaints of sexual harassment.<sup>81</sup> Despite the fact that the Title IX coordinator has been a required component of Title IX's protections since 1975,<sup>82</sup> legal scholars suggest that these employees are often a form of "symbolic compliance that [are] largely ineffective."<sup>83</sup> One study found that 67% of Title IX coordinators surveyed fulfilled their roles on a part-

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74. See *Davis*, 526 U.S. at 651 ("[A] plaintiff must establish sexual harassment... that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.").

75. See *id.* at 650.

76. See *id.* at 651–52.

77. *Id.* at 650.

78. See *id.* at 648.

79. 34 C.F.R. § 106.8(a).

80. *Title IX Resource Guide*, U.S. DEP'T. OF EDUC. OFF. FOR CIV. RTS. 2 (Apr. 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf> [<https://perma.cc/H483-MFJN>].

81. See Brian A. Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance With the Laws Governing Campus Sexual Misconduct*, 52 TULSA L. REV. 121, 122 (2016).

82. See Iram Valentin, *Title IX: A Brief History*, EQUITY RES. CTR., 2 (August 1997).

83. Michele Landis Dauber & Meghan O. Warner, *Legal and Political Responses to Campus Sexual Assault*, 15 ANN. REV. L. & SOC. SCI. 311, 322–23 (2019). See also Pappas, *supra* note 81, at 163 ("The picture of university Title IX compliance is one motivated more by symbolic enforcement . . .").

time basis.<sup>84</sup> This same study also concluded that while many coordinators completed Title IX investigations within 48 days, some took up to 270 days to complete an investigation,<sup>85</sup> nearly five times the 60-day limit strongly recommended in OCR guidance under the Obama administration, which enforced Title IX's sexual harassment prohibition more strictly than any previous administration.<sup>86</sup>

To maintain compliance with Title IX, universities also designate responsible employees who are legally obligated to report instances of sexual harassment.<sup>87</sup> As a practical matter, the phrase "responsible employee" is synonymous with "mandatory reporter," and OCR expects these employees to report any sexual harassment disclosed to them to the Title IX coordinator.<sup>88</sup> In its 2001 revised guidance document, The Department of Education attempted to clarify the obligations of "responsible employees" and their relation to the Title IX coordinator.<sup>89</sup> The 2001 revised guidance includes the first reference to the term "responsible employee."<sup>90</sup> The guidance document defines a responsible employee as:

Any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or any individual who a student could reasonably believe has this authority or responsibility.<sup>91</sup>

Finally, Title IX guidance issued prior to the 2020 NPRM also encouraged institutions to provide students with information regarding which employees do not have a legal obligation to report sexual

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84. Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCIS. 1, 7 (2018).

85. *Id.*

86. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleague, 12 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter 2011 Dear Colleague Letter] [<https://perma.cc/6N6H-F79A>]; See also Max Larkin, *The Obama Administration Remade Sexual Assault Enforcement on Campus. Could Trump Unmake It?*, WBUR (Nov. 25, 2016) <https://www.wbur.org/news/2016/11/25/title-ix-obama-trump> [<https://perma.cc/NFA7-2JLV>].

87. See Weiner, *supra* note 9, at 72.

88. See Dunlap, *supra* note 11, at 2.

89. See 2001 Guidance, *supra* note 45, at 13.

90. See Dunlap, *supra* note 11, at 19.

91. See 2001 Guidance, *supra* note 45, at 13.

harassment or assault.<sup>92</sup> Survivor advocates include these employees, typically referred to as “confidential employees,” on the list of resources which contribute to victim-centered policies and the effective administrative enforcement of Title IX.<sup>93</sup> However, the 2020 NPRM, which represents the most current version of Title IX until the Department of Education finalizes the 2022 NPRM, does not reference confidential employees.<sup>94</sup>

### *3. Department of Education Guidance Documents Clarifying Reporting Requirements*

In an attempt to clarify institutions’ responsibility for addressing sexual harassment on campuses, the Department of Education issued additional guidance in 2011 regarding Title IX’s protections in a Dear Colleague Letter.<sup>95</sup> Although the Department of Education noted that the *2011 Dear Colleague Letter* was meant to supplement the 2001 revised guidance, it did not provide additional explanation regarding the obligations of responsible employees.<sup>96</sup> Instead, it stressed the need for institutions to provide adequate training on “how to identify and report sexual harassment and violence.”<sup>97</sup> The letter further specified a list of employees who should receive this training, including “teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.”<sup>98</sup> This comprehensive list of employees that were “likely to witness or receive reports of sexual harassment and violence”<sup>99</sup> arguably laid the groundwork for the expanded definition of responsible employees in subsequent policy documents.<sup>100</sup>

The *2011 Dear Colleague Letter* reiterated the importance of adhering to Title IX’s requirement to prohibit sex-based discrimination in educational activities or programs.<sup>101</sup> However, in the years following the

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92. *Q&A on Title IX and Sexual Violence*, U.S. DEP’T OF EDUC. OFF. FOR C.R. 15 (Apr. 24, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/MF6U-CJHN>] [hereinafter 2014 Guidance].

93. See Cantalupo, *supra* note 44, at 681.

94. See 2020 NPRM Final Rule, 85 Fed. Reg. 30026.

95. See 2011 Dear Colleague Letter, *supra* note 86.

96. *Id.* at 2.

97. *Id.* at 4.

98. *Id.*

99. *Id.*

100. See Dunlap, *supra* note 11, at 23.

101. See 2011 Dear Colleague Letter, *supra* note 86, at 1.

letter's release, many activists led large-scale public protests<sup>102</sup> criticizing federal funding recipients' failure to engage in the "prompt, thorough, and impartial" investigations of sexual harassment the *2011 Dear Colleague Letter* recommended.<sup>103</sup> During this same period, OCR initiated investigations into complaints filed regarding at least fifty-five federally funded institutions' responses to reports of sexual harassment on their campuses.<sup>104</sup> In response, many institutions began adopting a broad definition of "responsible employee" that included all university employees.<sup>105</sup>

Following the release of the *2011 Dear Colleague Letter*, the Department of Education released two additional guidance documents. These documents focused on other aspects of Title IX's enforcement but briefly acknowledged the roles and obligations of responsible employees. The *2014 Q&A on Title IX* did not significantly modify the definition of responsible employee. Rather, it relied on the 2001 definition of responsible employee without providing additional explanation regarding the scope of this term.<sup>106</sup> Additionally, the *2017 Guidance on Sexual Misconduct on Campuses* reiterated that federal funding recipients must designate one employee as the institution's Title IX Coordinator.<sup>107</sup> The *2017 Guidance* also permitted the institution to designate additional employees who are legally required to report instances of sexual harassment.<sup>108</sup> The evolution of the phrase "responsible employee" and its impact on the reporting of sexual harassment laid the foundation for the portions of both the 2020 and 2022 NPRM that address mandatory reporting.

#### 4. *Changes to the Mandatory Reporting Requirements Under the 2020 and 2022 NPRM*

Following the 2016 presidential election, the Trump administration issued a series of policies oriented toward discouraging survivors from

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102. See Allie Grasgreen, *Enforcement for the Enforcers*, INSIDE HIGHER ED. (July 16, 2013), <https://www.insidehighered.com/news/2013/07/16/sexual-assault-activists-protest-level-federal-title-ix-enforcement> [<https://perma.cc/BCH8-T7ZF>].

103. See 2011 Dear Colleague Letter, *supra* note 86, at 5.

104. See Nick Anderson, *55 Colleges Named in Federal Inquiry into Handling of Sexual Assault Cases*, WASH. POST (May 1, 2014), [https://www.washingtonpost.com/local/education/federal-government-releases-list-of-55-colleges-universities-under-title-ix-investigations-over-handling-of-sexual-violence/2014/05/01/e0a74810-d13b-11e3-937f-d3026234b51c\\_story.html](https://www.washingtonpost.com/local/education/federal-government-releases-list-of-55-colleges-universities-under-title-ix-investigations-over-handling-of-sexual-violence/2014/05/01/e0a74810-d13b-11e3-937f-d3026234b51c_story.html) [<https://perma.cc/GXP9-KNZQ>].

105. See Dunlap, *supra* note 11, at 23.

106. *2014 Guidance*, *supra* note 92, at 15.

107. *Q&A on Campus Sexual Misconduct*, U.S. DEP'T OF EDUC. OFF. FOR C.R. 2 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.cc/4P2S-YR8G>].

108. *Id.*

reporting sexual harassment on college campuses.<sup>109</sup> The administration discounted the severe and wide-reaching impact of sexual assault and reinforced long-held stereotypes that question the credibility of survivors who report.<sup>110</sup> For instance, *The New York Times* quoted Candice E. Jackson, then-President Trump's first Acting Assistant Secretary for Civil Rights, as saying, "the accusations—90 percent of them—fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'"<sup>111</sup> These comments reflect the Trump administration's general disinterest in combatting the sexual assault crisis on college campuses.<sup>112</sup> Against this backdrop, it is hardly surprising that many considered the 2020 NPRM an evisceration of Title IX's protections.<sup>113</sup>

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109. See Brett Sokolow, *New Federal Rules on Campus Sexual Misconduct Will Only Make Things Worse*, L.A. TIMES (Jan. 21, 2020), <https://www.latimes.com/opinion/story/2020-01-21/colleges-sexual-misconduct-titleix-discrimination> [<https://perma.cc/RX5N-DED5>]; see also Erica L. Green, *Sex Assault Rules Under DeVos Bolster Defendants' Rights and Ease College Liability*, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/us/politics/betsy-devos-title-ix.html#:~:text=Education%20Secretary%20Betsy%20DeVos%20unveiled,right%20to%20cross%2Dexamine%20their> [<https://perma.cc/5XHT-QQLW>].

110. See Bonnie Stabile et al., "She Lied": *Social construction, rape myth prevalence in social media, and sexual assault policy*, 2 SEXUALITY, GENDER & POL'Y 80, 84 (2019); See also Allison Leotta, *I Was a Sex-Crimes Prosecutor. Here's Why 'He Said, She Said' Is a Myth*, TIME (Oct. 3, 2018), <https://time.com/5413814/he-said-she-said-kavanaugh-ford-mitchell/> [<https://perma.cc/6USA-KWKL>].

111. Erica L. Green & Sheryl Gay Stolberg, *A Review of Campus Rape Policy After Complaints by the Accused*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html> [<https://perma.cc/NBR2-NR6D>].

112. See Nicole Bedera, *Trump's New Rule Governing College Sex Assault Is Nearly Impossible for Survivors to Use. That's the Point*, TIME (May 14, 2020), <https://time.com/5836774/trump-new-title-ix-rules/> [<https://perma.cc/ZGL6-K8JF>]; see generally Jake New, *Campus Sexual Assault in a Trump Era*, INSIDE HIGHER ED. (Nov. 10, 2016), <https://www.insidehighered.com/news/2016/11/10/trump-and-gop-likely-try-scale-back-title-ix-enforcement-sexual-assault> [<https://perma.cc/FPX9-5NVE>] (describing the sexual assault allegations against former President Trump and the Trump administration's plans to scale back Title X or eliminate the Office of Civil Rights, the body responsible for enforcing Title IX).

113. See Heather Hollingsworth, *Campus Sexual Assault Policies Fall Short, Prompting Overhaul Call*, AP NEWS (June 16, 2022), <https://apnews.com/article/politics-sports-donald-trump-education-5ae8d4c03863cf98072e810c5de37048> [<https://perma.cc/QX5T-PLBC>]; see also Thomas Dircks et al., *Overwhelming Opposition: the American Public's Views on the DeVos Title IX Rulemaking of 2018-2020 2* (2022) (unpublished manuscript) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4152477](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4152477) [<https://perma.cc/FL97-PKML>].

Under the 2020 NPRM, the Department of Education considers only the institution's Title IX Coordinator and employees who have the authority to institute corrective action to be mandatory reporters.<sup>114</sup> Regulations.gov, the website administrative agencies frequently use to collect public comments during the notice of proposed rulemaking process,<sup>115</sup> recorded over 124,000 comments<sup>116</sup> during the open comment call period in response to the 2018 NPRM proposals<sup>117</sup> that were later codified in the 2020 NPRM Final Rule.<sup>118</sup> An overwhelming majority of commenters vehemently opposed many of the proposed modifications to Title IX.<sup>119</sup> These comments included criticism that the mandatory reporting model was under-inclusive and detrimental to the goal of efficient and accurate reporting of sexual harassment on campuses.<sup>120</sup> For instance, one commenter, who identified herself as a student and outreach volunteer for victims of sexual assault, expressed concern that the proposals would “require victims to navigate complex school bureaucracies in order to file a report.”<sup>121</sup> When the Department of Education codified the 2018 NPRM proposals in the 2020 NPRM Final Rule, it made minimal changes in response to the public comments.<sup>122</sup> Notably, the 2020 NPRM Final Rule did not modify the 2018 language regarding mandatory reporters.<sup>123</sup>

In an attempt to correct for many of the public criticisms of the 2020 NPRM, the Biden administration proposed modifications to Title IX in July of 2022.<sup>124</sup> Regarding the mandatory reporting model, the proposals state that “[t]he Department continues to recognize the importance of complainant autonomy.”<sup>125</sup> However, the proposals ultimately establish

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114. See 2020 NPRM Final Rule, 85 Fed. Reg. 30026.

115. See Kochan, *supra* note 18, at 604–05.

116. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV, <https://www.regulations.gov/docket/ED-2018-OCR-0064> (last visited Oct. 8, 2022) [<https://perma.cc/UK4X-YNLQ>] [hereinafter 2018 Regulations.Gov comments].

117. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61462 (Nov. 29, 2018) [hereinafter 2018 NPRM Proposals].

118. See 2020 NPRM Final Rule, 85 Fed. Reg. 30026.

119. See Dircks, *supra* note 113, at 2.

120. *Id.* at 16–17.

121. Student, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Dec. 1, 2018), <https://www.regulations.gov/comment/ED-2018-OCR-0064-0513> [<https://perma.cc/JS8H-LAMG>].

122. See Dircks, *supra* note 113, at 33.

123. See 2020 NPRM Final Rule, 85 Fed. Reg. 30026.

124. See 2022 NPRM, 87 Fed. Reg. 41390.

125. See *id.*



that “any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising in a recipient’s education program or activity” is considered a mandatory reporter.<sup>126</sup>

Where the 2020 NPRM identified only a minority of employees as mandatory reporters, the 2022 NPRM sweeps nearly all college or university staff into the definition.<sup>127</sup> Specifically, the 2022 NPRM categorizes the Title IX coordinator, any employee in a teaching or advising role, and student employees as mandatory reporters of sexual harassment.<sup>128</sup> The public comments submitted in response to the 2022 NPRM highlight some concerns regarding this approach. A keyword search<sup>129</sup> on Regulations.gov for comments that mentioned mandatory reporting revealed nearly 160 comments submitted by survivors,<sup>130</sup> law professors,<sup>131</sup> university faculty,<sup>132</sup> and other mental health professionals.<sup>133</sup> Overwhelmingly, the commenters opposed the 2022 NPRM’s changes to the mandatory reporting requirements. Although the number of comments which addressed mandatory reporting is small in comparison to the total number of comments available (224,000+), it

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126. *Id.*

127. *Id.*

128. *See id.*

129. *See Bulk Data Download*, REGULATIONS.GOV, <https://www.regulations.gov/bulk/download> [<https://perma.cc/Z6Q2-W48D>]. Individuals may download a copy of all comments submitted in response to a rulemaking docket. The rulemaking docket for the 2022 NPRM is ED-2021-OCR-0166. After downloading the comments, it is possible to conduct a keyword search to review comments which reference that keyword (e.g., “mandatory reporting”).

130. *See* Survivor, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 12, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-223866> [<https://perma.cc/PW7E-WPGL>].

131. *See* Law Professor, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 9, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-188763> [<https://perma.cc/R2LS-PP2G>].

132. *See* University Faculty, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 6, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-238258> [<https://perma.cc/WU6H-ZJLH>].

133. *See* Mental Health Professional, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 12, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-232265> [<https://perma.cc/7U4P-JFDH>].

remains significant that nearly all commenters who referenced this topic opposed such a broad expansion of mandatory reporting requirements.<sup>134</sup>

Several commenters acknowledged that the proposals are a marked improvement over the existing Title IX protections.<sup>135</sup> However, they expressed concern that the language regarding mandatory reporters under the new proposals is an overcorrection to the 2020 NPRM's nearly nonexistent reporting requirements.<sup>136</sup> A commenter who identified herself as a doctoral student in psychology explained that the broad mandatory reporting requirements "directly contradict research on...policies and trauma-informed responses to disclosures and will be more harmful for victims/survivors than the Trump administration regulations they are replacing."<sup>137</sup> The remainder of this Note will consider the implications of the 2022 NPRM and offer an alternative model that will more appropriately protect survivor autonomy while simultaneously encouraging survivor reporting of sexual harassment.

Two such alternatives include a "mandatory referral" model and the "mandatory supporting" approach. Under a mandatory referral model, only the Title IX coordinator and any other college or university staff filling an administrative leadership position would be considered a mandatory reporter.<sup>138</sup> An additional subset of employees would serve as "confidential resources." The mandatory referral model does not require these confidential resources to file reports of sexual harassment.<sup>139</sup> The model would consider all other employees to be mandatory referrers and would require them to provide survivors with basic information (including the name, contact information, and obligations to maintain survivors'

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134. See *Bulk Data Download*, *supra* note 129 (explaining the process used to review comments to the 2022 NPRM which discuss mandatory reporting).

135. See Kathryn Holland, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV 1 (Sept. 5, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-75977> [<https://perma.cc/PR6E-95UJ>] [hereinafter Holland Comment]; see also Merle Weiner, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Aug. 15, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-110498> [<https://perma.cc/V25P-T9WK>] [hereinafter Weiner Comment].

136. See Holland Comment, *supra* note 135; see also Weiner Comment, *supra* note 135.

137. Student, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Aug. 12, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-103098> [<https://perma.cc/AW78-GTQU>].

138. See Nancy Chi Cantalupo, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV 2 (Sept. 12, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-218496> [<https://perma.cc/C989-JZJ8>] [hereinafter Cantalupo Comment].

139. *Id.*

confidentiality) about both the Title IX coordinator and confidential employees.<sup>140</sup> Survivors could then choose which resources to access, if any, based on their preference.<sup>141</sup>

The mandatory supporting model builds on the mandatory referral approach by slightly expanding the number of mandatory reporters and incorporating other voluntary or anonymous reporting options.<sup>142</sup> This approach may be more appropriate for institutions that desire more structure. Both the mandatory referral and mandatory supporting models stand to better protect survivor autonomy while also ensuring that federal funding recipients are held accountable for the rates of sexual harassment on their campuses.

### III. ANALYSIS

#### *A. Expansive Mandatory Reporting Models Harm Survivors*

Expansive mandatory reporting models, like those included in the 2022 NPRM, pose numerous risks to survivors' physical and mental health.<sup>143</sup> This includes feelings of institutional betrayal<sup>144</sup> and a general loss of control over the recovery process.<sup>145</sup> Expansive mandatory reporting requirements also impact survivors' ability to determine when or how to pursue a formal remedy for their injuries under Title IX.<sup>146</sup> These models risk exacerbating the well-documented negative impact of sexual harassment on survivors' academic performance and access to educational opportunities and programs.<sup>147</sup> As a result, survivors across the country will experience sex-based discrimination under the very statute the government designed to protect their rights.

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140. *Id.*

141. *Id.*

142. See Weiner, *supra* note 9, at 188; see also Kathryn J. Holland et. al., *Reporting is Not Supporting: Why the Principle of Mandatory Supporting, not Mandatory Reporting, Must Guide Sexual Misconduct Policies in Higher Education*, 118 PROCS. OF THE NAT'L ACADS. SCIS. 1, 3 (2021).

143. See Dunlap, *supra* note 11, at 2.

144. See Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 122–23 (2013).

145. See Holland et al., *supra* note 142, at 2; see also Weiner, *supra* note 9, at 92–93.

146. See Weiner, *supra* note 9, at 92.

147. See Carol E. Jordan et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 TRAUMA, VIOLENCE & ABUSE 191, 196 (2014); Taylor D. Molstad et al., *Sexual Assault as a Contributor to Academic Outcomes in University: A Systematic Review*, 24 TRAUMA, VIOLENCE & ABUSE, 218 at 221, 225 (2023).

Sexual harassment involves complex power dynamics where perpetrators attempt to assert their dominance over their victims.<sup>148</sup> Survivors often report that they experience a lack of control during an assault which persists in the days, months, or years that follow.<sup>149</sup> Further, survivors who lack a sense of autonomy or control following a traumatic event typically demonstrate higher levels of depression, post-traumatic stress disorder, and other signs of psychological distress.<sup>150</sup> These consequences significantly impact survivors' education, as post-traumatic stress disorder or other mental illnesses resulting from sexual harassment often lead to decreased academic performance.<sup>151</sup> Policies designed to promote survivors' equal access to educational opportunities under Title IX must consider these consequences and avoid reinforcing existing trauma.

The comments submitted in response to the 2022 NPRM express similar concerns regarding survivors' sense of control and autonomy.<sup>152</sup> Specifically, commenters explained that the changes would disempower survivors or otherwise strip them of their control over their recovery. One commenter wrote, "[s]exual harassment and assault are so destabilizing in part because they take agency away from the person who experiences them. Mandatory reporting risks taking away victims' agency a second time. . . ."<sup>153</sup> The prevalence of comments expressing concern for survivors' sense of control suggests that the 2022 NPRM largely discounts the role autonomy plays in ensuring survivors' equal access to educational opportunities.

Broad mandatory reporting, like the approach proposed in the 2022 NPRM, also poses a serious threat to survivors' sense of safety and security at school. Many survivors report a feeling of institutional betrayal when a trusted university employee has filed a report of sexual harassment

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148. See Lyn Yonack, *Sexual Assault is About Power*, PSYCH. TODAY (Nov. 14, 2017), <https://www.psychologytoday.com/us/blog/psychoanalysis-unplugged/201711/sexual-assault-is-about-power> [<https://perma.cc/CAK4-TNBQ>].

149. *Id.*

150. See Ryan M. Walsh & Steven E. Bruce, *The Relationship Between Perceived Levels of Control, Psychological Distress, and Legal System Variables in a Sample of Sexual Assault Survivors*, 17 VIOLENCE AGAINST WOMEN 603, 604 (2011).

151. See Jordan et al., *supra* note 147, at 196.

152. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV <https://www.regulations.gov/search/comment?filter=ED-2021-OCR-0166> (last visited Feb. 25, 2023) [<https://perma.cc/RF69-7JTP>] [hereinafter 2022 NPRM Comments].

153. Professor, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV 1 (Aug. 15, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-114912> [<https://perma.cc/2WSD-A2JE>].

against their wishes.<sup>154</sup> A student may disclose a sexual assault to a trusted employee for a number of reasons that have nothing to do with filing a formal report.<sup>155</sup> However, when an institution employee's response—filing a formal report—diverges from a survivor's expectations of confidentiality, the survivor loses trust in both the employee and the institution in general.<sup>156</sup> This typically reinforces the trauma of the initial assault and results in heightened feelings of anxiety, depression, or post-traumatic stress disorder.<sup>157</sup> Loss of control and the resulting psychological distress from this type of institutional betrayal further compromises survivors' academic performance<sup>158</sup> and discourages survivors from utilizing available on-campus supports.<sup>159</sup> Rather than prioritizing survivors' continued access to educational opportunities, the 2022 NPRM undoubtedly frustrates Title IX's objectives by negatively impacting survivors' ability to participate in educational programs and access the resources necessary for their continued academic success.

Several individuals who submitted comments in response to the 2022 NPRM raised concerns regarding the negative impact on survivors' sense of security at their schools.<sup>160</sup> Specifically, the comments noted that the

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154. See Parnitzke Smith & Freyd, *supra* note 144, at 122–23.

155. See Kaitlin Walsh Carson et al., *Why Do Women Talk About It? Reasons for Disclosure of Sexual Victimization and Associated Symptomology*, 27 VIOLENCE AGAINST WOMEN 3114, 3126 (2021) (explaining that survivors will disclose sexual misconduct to receive socioemotional support, obtain tangible aid, or achieve catharsis following a traumatic experience); Jennifer J. Freyd, *The Problem with "Required Reporting" Rules for Sexual Violence on Campus*, HUFFPOST (Apr. 25, 2016), [https://www.huffpost.com/entry/the-problem-with-required\\_b\\_9766016](https://www.huffpost.com/entry/the-problem-with-required_b_9766016) [<https://perma.cc/HJ2P-2XQ7>].

156. See Colleen Flaherty, *Endangering a Trust*, INSIDE HIGHER ED. (Feb. 03, 2015), <https://www.insidehighered.com/news/2015/02/04/faculty-members-object-new-policies-making-all-professors-mandatory-reporters-sexual> [<https://perma.cc/4ZU4-W9PM>].

157. See Emily Suski, *Institutional Betrayals as Sex Discrimination*, 107 IOWA L. REV. 1685, 1688–89 (2022).

158. See Molstad et al., *supra* note 147, at 226.

159. See Claudia Rivera Cotto, *Mandated Reporting on Colleges Can Rob Sexual Assault Survivors of Autonomy*, COLUMBIA MISSOURIAN (Sept. 11, 2022), [https://www.columbiamissourian.com/news/higher\\_education/mandated-reporting-on-colleges-can-rob-sexual-assault-survivors-of-autonomy/article\\_e2b7e576-2e0a-11ed-b838-3ff7fe691a95.html](https://www.columbiamissourian.com/news/higher_education/mandated-reporting-on-colleges-can-rob-sexual-assault-survivors-of-autonomy/article_e2b7e576-2e0a-11ed-b838-3ff7fe691a95.html) [<https://perma.cc/26UP-G4ZP>]; Kathryn J. Holland et al., "A Victim/Survivor Needs Agency": *Sexual Assault Survivors' Perceptions of University Mandatory Reporting Policies*, 21 ANALYSES SOC. ISSUES & PUB. POL'Y 488, 496 (2021); See also Nancy Chi Cantalupo, *Title IX Symposium Keynote Speech: Title IX & the Civil Rights Approach to Sexual Harassment in Education*, 25 ROGER WILLIAMS U. L. REV. 225, 230 (2020) (discussing Professor Douglas Beloof's use of the phrase "victim's veto" to describe survivors' reluctance to report sexual harassment to campus officials).

160. See e.g., Domestic Violence Advocate, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 1, 2022), <https://www.regulations.gov/>

expansive mandatory reporting requirements would likely eliminate trust between survivors and university employees.<sup>161</sup> One commenter poignantly described this consequence as follows: “Opening up to a teacher, advisor, or coworker about an assault or experience of harassment is a courageous thing to do and indicates trust. That trust will be violated if the teacher, advisor, or coworker reports what they’ve learned to campus authorities without the survivor’s consent.”<sup>162</sup> Other comments referenced the negative impact of the 2022 NPRM on survivors’ academic performance or access to other educational programs or activities as a result of this institutional betrayal.<sup>163</sup> The comments suggest that these proposals, if finalized, risk undermining the very purpose of Title IX by negatively impacting survivors’ ability to participate in educational opportunities.<sup>164</sup>

The expansive mandatory reporting requirements also deprive survivors of their right to decide whether or not to pursue corrective action through the legal system or Title IX investigation process.<sup>165</sup> Within the context of higher education, survivors of sexual assault are almost always adults who are entitled to legal autonomy.<sup>166</sup> This includes the right to determine whether to seek a formal remedy for their injury.<sup>167</sup> However,

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comment/ED-2021-OCR-0166-69164 [<https://perma.cc/RK7Z-LGFU>]; Student, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 7, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-81704> [<https://perma.cc/W8TJ-28KU>]; Professor, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 12, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-230110> [<https://perma.cc/55JJ-ZQE4>].

161. *See id.*

162. Professor, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV 1 (Sept. 2, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-75761> [<https://perma.cc/96U3-GJ29>].

163. *See, e.g.*, Professor, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 6, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-77866> [<https://perma.cc/6KQB-6ABD>]; Professor, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 5, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-87550> [<https://perma.cc/8QF2-5ZTZ>].

164. *See id.*

165. *See* Weiner, *supra* note 9, at 92–93.

166. *See* Dunlap, *supra* note 11, at 12–13.

167. *See generally* Doe v. Univ. of the S., 687 F. Supp. 2d 744, 759 (E.D. Tenn. 2009) (concluding that parents, as a third party, lacked standing to bring a claim for Title IX violations on behalf of their son who had reached the age of majority).

by placing the decision to file a formal report of sexual harassment in the hands of a third party (i.e., all university employees), the 2022 NPRM deprives survivors of their right to determine whether to pursue a formal remedy. Given that most survivors of sexual assault are women,<sup>168</sup> these policies also convey an unspoken and paternalistic message that women cannot make choices about critical aspects of their own lives—a premise that directly contravenes Title IX’s purpose.<sup>169</sup>

Finally, expansive mandatory reporting requirements have serious implications for members of minority communities. Studies indicate that female students of color experience sexual harassment at rates significantly higher than their white counterparts.<sup>170</sup> Although women of color also tend to report more frequently than white students, their decisions to report typically involve additional considerations.<sup>171</sup> Specifically, female students of color are often over-sexualized, leading to concern that their reports will not be taken seriously.<sup>172</sup> University administrations are also predominantly white, creating even more barriers for students who do not share these identity characteristics.<sup>173</sup> Research further suggests that responses to reports of sexual harassment which focus on community-based healing and empowering survivors play a crucial role in survivors’ recovery.<sup>174</sup> This indicates that expansive mandatory reporting models, which stand to further isolate survivors from community resources and strip survivors of their agency, will cause additional harm for students from intersectional backgrounds.

Several individuals who submitted comments to the 2022 NPRM similarly noted the disproportionate impact on members of minority communities.<sup>175</sup> For instance, commenters expressed concern that the

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168. See Hannah Muniz, *Understanding Sexual Assault on College Campuses*, BEST COLLEGES (Nov. 23, 2022), <https://www.bestcolleges.com/resources/sexual-assault-on-campus/> [<https://perma.cc/3UG5-77EE>].

169. See Weiner, *supra* note 9, at 91; see also 118 Cong. Rec. 5806–5807 (1972) (“[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers”).

170. See Haley C. Carter, *Under the Guise of “Due Process”: Sexual Harassment and the Impact of Trump’s Title IX Regulations on Women Students of Color*, 36 BERKELEY J. GENDER L. & JUST. 180, 185 (2021).

171. *Id.* at 185–86.

172. *Id.* at 185–86, 201.

173. *Id.* at 201.

174. See Jessica C. Harris et al., *Effective Modalities for Healing from Campus Sexual Assault: Centering the Experiences of Women of Color Undergraduate Student Survivors*, 91 HARV. EDUC. R. 248, 251 (2021).

175. See, e.g., Faculty at Institution of Higher Education, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 8, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-177371>

changes would have a particularly negative impact on racial minorities or members of the LGBTQ+ community.<sup>176</sup> One commenter noted, “In our world, universities marked by structural inequality from their inception are unsafe spaces for those of us who are both marginalized and most at risk for sexual violence victimization.”<sup>177</sup> The 2022 NPRM, in this commenter’s view, would only exacerbate these structural inequalities and make it that much more difficult for members of minority groups to access educational opportunities.<sup>178</sup>

### *B. The Impact of Expansive Mandatory Reporting Models on Survivor Reporting*

Studies indicate that as few as 5% of survivors report sexual harassment on college or university campuses.<sup>179</sup> The reasons survivors do not report are varied, but many describe fears of being blamed or shamed.<sup>180</sup> Others express concern that their disclosure will not remain confidential or that a report will not result in corrective action.<sup>181</sup> Survivors also cite a fear of retaliation by the perpetrator of the sexual assault.<sup>182</sup> This retaliation can take the form of threats of physical violence by a perpetrator who is made aware of a report.<sup>183</sup> Alternatively, a survivor may experience more subtle forms of retaliation, such as a professor’s refusal to provide professional references.<sup>184</sup> Policies that are designed to address sexual

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[<https://perma.cc/6K2A-K4J4>]; Student, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 11, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-208693> [<https://perma.cc/2EKR-N6ZG>]; Professor, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV 1 (Sept. 12, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-213486> [<https://perma.cc/PG5F-W6FK>].

176. *See id.*

177. Student, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV, 1 (Sept. 6, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-76739> [<https://perma.cc/RF4K-4SFS>].

178. *See id.*

179. *See* Laura Lynn Kerner et al., *Sexual Assaults on College Campuses*, 13 J. ACAD. ADMIN. HIGHER EDUC. 41, 42 (2017).

180. *See* Carrie A. Moylan, “I Fear I’m a Checkbox”: *College and University Victim Advocates’ Perspectives of Campus Rape Reforms*, 23 VIOLENCE AGAINST WOMEN 1122, 1124 (2016).

181. *Id.*

182. *See* Marjorie R. Sable et al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. COLL. HEALTH 157, 160 (2006).

183. *See* Weiner, *supra* note 9, at 97–98.

184. *See id.* at 98.



harassment on campuses have the potential to increase rates of survivor reporting if developed with an eye toward promoting survivor autonomy, preventing retaliation, and providing academic, professional, or emotional support to meet survivors' needs.<sup>185</sup>

Broad mandatory reporting requirements will have a chilling effect on the already low levels of survivor reporting.<sup>186</sup> For instance, one study found that only 5.8% of students surveyed would be "extremely likely" to report sexual harassment under an expansive mandatory reporting model.<sup>187</sup> Alternatively, the same study found that 21% of students would be "extremely likely" to report sexual harassment if institutions adopted a less expansive approach that respected students' decision-making.<sup>188</sup> In its 2014 guidance document, the Department of Education itself warned of the risk of discouraging reporting when institutions disregard survivors' requests for confidentiality.<sup>189</sup> By shrinking the pool of individuals to whom a survivor can confidentially disclose sexual harassment, the 2022 NPRM will exacerbate the fears motivating already low levels of reporting.

The consequences of this chilling effect are manifold. First, survivors who do not come forward may lack access to critical, community-based resources necessary for their physical, mental, and emotional recovery following an assault.<sup>190</sup> When survivors lack the resources necessary for their recovery, their academic performance inevitably suffers, further undermining Title IX's purpose to prevent sex-based discrimination in educational programs or activities.<sup>191</sup> A second consequence of diminished survivor reporting is that institutions are unable to hold perpetrators of sexual harassment accountable.<sup>192</sup> An institution's ability to combat rampant rates of sexual harassment on its campus depends on survivors coming forward about their experiences.<sup>193</sup> Broad mandatory reporting

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185. See Holland et al., *supra* note 142, at 3; Chelsea Spencer, et al., *Factors Related to College Students' Decisions to Report Sexual Assault*, 35 J. INTERPERSONAL VIOLENCE 4666, 4679 (2017).

186. See Knott, *supra* note 20; Angela Lawson, *Forcing Sexual Harassment Reporting on Campus Can Have a Chilling Effect*, THE HILL (Dec. 4, 2017), <https://thehill.com/opinion/education/363122-forcing-sexual-harassment-reporting-on-campus-can-have-a-chilling-effect/> [<https://perma.cc/2HQH-NFKB>].

187. See Kathryn J. Holland et al., *Compelled Disclosure of College Sexual Assault*, 73 AM. PSYCH. 253, 260 (2018).

188. See *id.*

189. See 2014 *Guidance*, *supra* note 92, at 19.

190. See Holland et al., *supra* note 158, at 499; See Weiner, *supra* note 9, at 90.

191. See *supra* notes 157–158 and accompanying text.

192. See Weiner, *supra* note 9, at 101.

193. See Cantalupo, *supra* note 44, at 680.

models, like those contained in the 2022 NPRM, unquestionably stand in the way of this objective.

The public comments to the 2022 NPRM echoed the concerns regarding the proposal's impact on already low levels of reporting of sexual harassment on campuses. For instance, several commenters felt that the proposed changes would have a chilling effect on reporting of sexual harassment. One commenter explained that "it's not that frequency of sexual assault goes down under mandatory reporting, it's that frequency of willingness to come forward and report a sexual assault goes down. It amounts to sweeping the problem under the rug."<sup>194</sup> These comments also parallel the existing scholarly research that suggest broad mandatory reporting policies do not achieve the desired increase in reporting of sexual harassment on campuses.<sup>195</sup>

### *C. Alternative Approaches to Mandatory Reporting*

Federal funding recipients are uniquely positioned to return a level of control to survivors through the procedures they use to address sexual harassment. As mentioned previously, when survivors feel they are in control of their recovery process, they demonstrate lower levels of psychological distress.<sup>196</sup> Legal scholars emphasize that this need for control is particularly relevant within the context of Title IX because psychological distress often impacts students' access to educational opportunities.<sup>197</sup> Reporting systems that more appropriately address the issues of survivor autonomy, trauma-informed care, and institutional accountability adhere more closely to Title IX's objective. Although the U.S. Department of Education has not yet recommended implementation of these systems at the national level, several states have begun incorporating elements of these approaches into their statutory requirements for reporting sexual harassment at institutions of higher education.<sup>198</sup> Such statutes demonstrate the feasibility of incorporating

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194. Individual, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV 1 (Aug. 31, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-78236> [<https://perma.cc/GD2K-9KLP>].

195. See *supra* notes 188–189 and accompanying text; see also Holland et al., *supra* note 142, at 1.

196. See Patricia M. Frazier, *Perceived Control and Distress Following Sexual Assault: A Longitudinal Test of a New Model*, 84 J. PERSONALITY & SOC. PSYCH. 1257, 1258 (2003); Walsh & Bruce, *supra* note 150, at 605.

197. See Dunlap, *supra* note 11, at 14.

198. See *infra* notes 221–235 and 252–254 and accompanying text; see also *50-State Comparison: Post-Secondary Campus Safety 2022 Campus Sexual Misconduct Policies*, EDUCATION COMMISSION OF THE STATES (October 2022), <https://reports.ecs.org/>

these approaches at the federal level under Title IX. Adopting one of these alternative approaches would be more likely to promote both survivor autonomy and survivor reporting.

Many of the individuals who submitted public comments to the 2022 NPRM advanced alternative approaches which they felt would better protect the rights of survivors while ensuring that institutions remain accountable for the rates of sexual harassment on their campuses. Specifically, many commenters emphasized the need to adopt an alternative to the 2022 NPRM that better promotes survivor autonomy and ensures institutional accountability.<sup>199</sup> They argued that rates of reporting will increase when survivors feel safe to disclose incidents of sexual harassment and have the agency to choose the path of disclosure that is most appropriate for their needs. One commenter explained:

Because higher education has systemic inequality both within its foundations and echoing through every contemporary hall, the only way to create trust between survivors and universities is to make the institution a safe place. This starts with upholding and valuing the autonomy of all members, particularly those who are marginalized both within and outside the university.<sup>200</sup>

These comments confirm that those most directly impacted by sexual harassment policies support an alternative approach to the 2022 NPRM's expansive reporting requirements.

### *1. Mandatory Referring*

A mandatory referring model offers a viable alternative to the 2022 NPRM's expansive mandatory reporting requirements. This approach balances survivors' need to maintain their sense of autonomy and control against the institution's interest in effectively addressing sexual

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comparisons/postsecondary-campus-safety-2022-02 [https://perma.cc/DFH7-J985].

199. See, e.g., Student, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 8, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-92783> [https://perma.cc/X9GE-D8EZ]; Professor, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 9, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-196527> [https://perma.cc/4X36-3SSP]; Professor, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 8, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-195981> [https://perma.cc/EDC7-DZGB].

200. *Id.*

harassment on their campuses.<sup>201</sup> Under this model, an institution would divide faculty into three categories: (1) the Title IX coordinator and other authority figures capable of instituting corrective action; (2) confidential employees; and (3) mandatory referrers.<sup>202</sup>

The first two categories of employees represent the two extremes along the reporting spectrum. The Title IX coordinator and other employees filling administrative leadership positions would be considered mandatory reporters.<sup>203</sup> That is, if a student disclosed to an employee within this first category, that employee would be required to launch a formal Title IX investigation. Designating only a limited number of employees as mandatory reporters minimizes any confusion among students regarding the institution's sexual harassment policy because universities can clearly and conspicuously identify which employees are obligated to begin a formal Title IX investigation after receiving notice of sexual harassment.<sup>204</sup> This transparency also decreases the risk that a student will unintentionally disclose to an employee who will be forced to file a report against the survivor's wishes.<sup>205</sup>

The second category includes confidential employees who would serve as an outlet for survivors who do not wish to initiate a formal Title IX investigation but would prefer to disclose confidentially. These confidential employees are one way that institutions can offer survivors the type of trauma-informed support that is critical to their recovery and continued academic success.<sup>206</sup> Providing these resources would also come at minimal additional cost as institutions can utilize resources that are likely already available on their campuses (e.g., university counseling services or campus victim centers).<sup>207</sup> Campus victim centers in particular have proven to be "one of the most effective ways of addressing the myriad challenges related to addressing peer sexual violence on campus."<sup>208</sup> By offering these types of confidential resources, institutions allow survivors

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201. See Cantalupo Comment, *supra* note 138, at 1.

202. *Id.*

203. *Id.*

204. See Weiner, *supra* note 9, at 137–38.

205. See *id.*

206. See Cantalupo, *supra* note 44, at 670.

207. *Confidential Resources*, MICH. STATE UNIV., <https://civilrights.msu.edu/file-a-report/confidential-resources.html> [<https://perma.cc/BM7M-5RT3>]; *Campus & Community Support Resources*, PRINCETON UNIV., <https://sexualmisconduct.princeton.edu/resources-reporting/resources> [<https://perma.cc/G9HU-XELZ>]; *Privacy on Campus: A Workbook for Advocates*, VICTIM RTS. L. CTR. 18–19 (2020), <https://victimrights.org/wp-content/uploads/2021/01/Privacy-on-Campus-A-Workbook-for-Advocates.pdf> [<https://perma.cc/H92Q-6HLL>].

208. See Cantalupo, *supra* note 49, at 262.

to dictate the terms of their recovery and select the type of support that best meets their needs.

The third and largest category, mandatory referrers, would include any employee who does not fall into either of the first two groups.<sup>209</sup> If a student disclosed to a mandatory referrer, that employee would advise survivors of their option to file a formal report and begin a Title IX investigation or disclose to a confidential employee and bypass the formal investigation process.<sup>210</sup> This third group of employees would enhance the institution's response to sexual harassment by ensuring that survivors are aware of their options and could select the safest, most supportive route for their situation.<sup>211</sup>

The mandatory referral model will also effectively address concerns regarding the low level of reporting of sexual harassment. As discussed earlier, significant barriers to reporting include concerns regarding who is obligated to file a formal report of sexual harassment after receiving notice as well as confusion regarding the steps involved in the reporting process in general.<sup>212</sup> Rather than risk an employee filing a formal report against their wishes, many survivors choose not to report at all.<sup>213</sup> Policies which limit the number of employees who must file a formal report reduce the risk of a survivor's disclosure resulting in an unintended report against the survivor's wishes.<sup>214</sup> Further, when policies reflect an institution's respect for complying with survivors' wishes, survivors will be more likely to disclose incidents of sexual harassment.<sup>215</sup> The mandatory referral model incorporates this type of survivor-centered approach by directing students to the appropriate channel to file a formal sexual harassment report or disclose confidentially. This more nuanced approach will encourage more survivors to come forward, which will then result in increased formal

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209. See Cantalupo Comment, *supra* note 138, at 1.

210. *Id.*

211. See Jill C. Engle, *Mandatory Reporting of Campus Sexual Assault and Domestic Violence: Moving to A Victim-Centric Protocol That Comports with Federal Law*, 24 TEMP. POL. & CIV. RTS. L. REV. 401, 415 (2015); Cantalupo *supra* note 44, at 668.

212. See Kathryn J. Holland & Allison E. Cipriano, *Does a report = support? A qualitative Analysis of College Sexual Assault Survivors' Title IX Office Knowledge, Perceptions, and Experiences*, 21 ANALYSES SOC. ISSUES PUB. POL'Y 1054, 1063 (2021); Roma Shah & Joseph Storch, *Increasing Knowledge and Campus Trust in Reporting Sexual and Interpersonal Violence: The Role of the Title IX Coordinator*, J. Am. Coll. Health 1, 2 (2023).

213. See Holland et al., *supra* note 159, at 502.

214. See Weiner, *supra* note 9, at 137.

215. See *id.* at 131; See also Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. FORUM 281, 292–93 (2016) (explaining that survivors would be more likely to report sexual harassment in circumstances where the university's Title IX policies do not resemble law enforcement policies for addressing reports of sexual violence).

reports of sexual harassment.<sup>216</sup> By offering survivors a diverse range of safe options for disclosing or reporting, the mandatory referral approach stands to encourage survivor reporting.

In addition to promoting survivor autonomy and increasing rates of reporting, the mandatory referral model offers numerous additional benefits to institutions. Title IX compliance often comes with a high price tag.<sup>217</sup> The mandatory referral model is financially attractive because institutions would have to train fewer employees in trauma-informed practices.<sup>218</sup> Less training and fewer requirements also ensures a higher likelihood of compliance.<sup>219</sup> Finally, this model would allow for increased staff participation in events like Take Back the Night<sup>220</sup> because employees in the third category would not be required to file a formal report if they inadvertently received notice of sexual harassment during these events.<sup>221</sup>

Although this alternative has not yet been implemented at a national level, several states have introduced statutes that mirror this approach.<sup>222</sup> While no state has adopted all aspects of a mandatory referral model, elements of these state statutes may serve as an example for future iterations of Title IX.<sup>223</sup> The statutes balance the need to protect and promote survivor autonomy against the challenge of combatting sexual harassment on campuses.<sup>224</sup> Significantly, the statutes represent a marked improvement over the 2022 NPRM.

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216. See Weiner, *supra* note 9, at 188.

217. See Tara García Mathewson, *Colleges Spend Millions on Title IX Compliance*, HIGHER ED DIVE (Mar. 30, 2016), <https://www.highereddive.com/news/colleges-spend-millions-on-title-ix-compliance/416525/> [<https://perma.cc/F72M-JEC2>].

218. See Cantalupo Comment, *supra* note 138, at 1.

219. See *id.*

220. Take Back the Night is a charitable organization focused on ending sexual or gender-based violence and empowering survivors. See *About Take Back the Night Foundation*, TAKE BACK THE NIGHT FOUNDATION, <https://takebackthenight.org/about-us/> (last visited Jan. 3, 2024) [<https://perma.cc/3S77-KNED>]. The organization sponsors various events designed to raise awareness regarding sexual harassment and build communities of survivors and allies. See *Take Back the Night*, STANFORD UNIV., <https://share.stanford.edu/get-informed/education-and-outreach-programs/awareness-months/april-sexual-assault-awareness-1> (last visited Jan. 3, 2024) [<https://perma.cc/NRL7-L22G>].

221. See *id.*

222. See generally Del. Code Ann. tit. 14, § 9002A (West 2017); N.H. Rev. Stat. Ann. § 188-H:7 (2021); MASS. GEN. LAWS ANN. ch. 6, § 168E (West 2021).

223. See generally Del. Code Ann. tit. 14, § 9002A (West 2017); N.H. Rev. Stat. Ann. § 188-H:7 (2021); MASS. GEN. LAWS ANN. ch. 6, § 168E (West 2021).

224. See generally Del. Code Ann. tit. 14, § 9002A (West 2017); N.H. Rev. Stat. Ann. § 188-H:7 (2021); MASS. GEN. LAWS ANN. ch. 6, § 168E (West 2021).

Several state statutes divide staff into categories of employees with varying degrees of responsibility.<sup>225</sup> For instance, Delaware classifies certain categories of employees as “responsible employees.”<sup>226</sup> These employees mirror the mandatory referrers and include faculty and other staff who have regular interactions with students<sup>227</sup> and are capable of directing survivors to the available on-campus resources and the channels through which survivors may file a formal report.<sup>228</sup> Statutes in both New Hampshire and Massachusetts emphasize the need to provide students with access to confidential advisors who can connect students with available resources or assist a survivor in filing a formal report.<sup>229</sup> New Hampshire’s statute in particular expressly prohibits the Title IX coordinator from serving as a confidential advisor.<sup>230</sup> This preserves the distinction between a Title IX coordinator who is legally obligated to begin an investigation and confidential advisors or mandatory referrers who are not. The use of categories such as “responsible employees” and “confidential advisors” in addition to the Title IX coordinator and other administrative leadership positions mirrors the three broad categories of employees identified in a mandatory referral approach.<sup>231</sup>

These statutes also emphasize the need to provide survivors with multiple channels to report sexual harassment. For instance, Delaware’s responsible employees must offer to contact law enforcement or file a formal report in addition to providing students with information regarding confidential resources.<sup>232</sup> Massachusetts similarly requires that institutions inform survivors of the types and locations of available support services (e.g., emergency health services, academic support, counseling resources, etc.) as well as the formal or legal channels through which a survivor may file a report.<sup>233</sup> Finally, New York’s statute provides additional guidance for institutions by including a script that employees must read to students upon receiving notice of sexual harassment.<sup>234</sup> This script advises students of their right to file a formal report or disclose confidentially.<sup>235</sup> These state statutes exemplify the mandatory referral approach by providing

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225. See Del. Code Ann. tit. 14, § 9002A (West 2017); N.H. Rev. Stat. Ann. § 188-H:7 (2021).

226. See Del. Code Ann. tit. 14, § 9002A (West 2017).

227. See Del. Code Ann. tit. 14, § 9001A (West).

228. See Del. Code Ann. tit. 14, § 9002A (West 2017).

229. See N.H. Rev. Stat. Ann. § 188-H:7 (2021); MASS. GEN. LAWS ANN. ch. 6, § 168E (West 2021).

230. See *id.*

231. See *supra* notes 199–201 and accompanying text.

232. See Del. Code Ann. tit. 14, § 9002A (West 2017).

233. See MASS. GEN. LAWS ANN. ch. 6, § 168E (West 2021).

234. See N.Y. EDUC. LAW § 6444 (McKinney 2015).

235. See *id.*

survivors with the option to pursue multiple avenues for disclosing sexual harassment or receiving other forms of support.

Finally, several statutes prioritize survivors' autonomy in the wake of sexual harassment. For instance, Minnesota's statute requires that institutions "allow[] sexual assault victims to decide whether to report a case to law enforcement."<sup>236</sup> California similarly mandates "detailed and victim-centered policies" as well as trauma-informed training for those employees responsible for adjudicating or investigating reports of sexual harassment.<sup>237</sup> These statutes mirror the mandatory referral approach by centering survivors' voices in the development of sexual harassment policies and providing trauma-informed training to those employees most likely to be involved with the formal disclosure process.

## 2. *Mandatory Supporting*

For institutions seeking to expand upon the mandatory referral model, the mandatory supporting approach may be more appropriate. The mandatory supporting and mandatory referral models share several similarities. For instance, like the mandatory referring approach, the mandatory supporting model focuses on increasing the confidential support services available on campus and decreasing forced disclosures of sexual harassment or assault.<sup>238</sup> The mandatory supporting approach also incorporates categories of employees with varying degrees of responsibility to file a formal report after receiving notice of sexual harassment.<sup>239</sup> Similar to the mandatory referral model, employees who are not required to file a formal report are expected to provide survivors with information regarding their options to disclose confidentially or through a formal channel.<sup>240</sup> Significantly, under both models, there should not be any form of supportive intervention in cases of unintentional disclosure (e.g., disclosures made during awareness-raising events or class discussions).<sup>241</sup>

In addition to these similarities, the mandatory supporting model offers additional protections that represent an expansion upon the mandatory referral approach. While advocates of both approaches agree that faculty should not be mandated reporters,<sup>242</sup> some proponents of the mandatory supporting approach contemplate the possibility of including

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236. See MINN. STAT. ANN. § 135A.15 (West 2020).

237. See CAL. EDUC. CODE § 67386 (West 2021).

238. See Holland et al., *supra* note 142, at 3.

239. See Weiner, *supra* note 9, at 134–36.

240. See Holland, *supra* note 142, at 3.

241. *Id.*

242. See Weiner, *supra* note 9, at 141.



resident advisors, coaches, or campus police as individuals required to file a formal report of sexual harassment.<sup>243</sup> Proponents are careful to acknowledge, however, that there may be reasons for and against expanding the list of mandatory reporters to include additional faculty members.<sup>244</sup> For instance, it may be useful for institutions to designate coaches as mandatory reporters to avoid situations where coaches attempt to protect their athletes by disregarding a survivor's wish to formally report sexual harassment committed by the athlete.<sup>245</sup> However, coaches are also a source of support for their athletes, many of whom may be survivors themselves.<sup>246</sup> Broadly, proponents of the mandatory supporting approach emphasize the need to consider which employees have authority to institute corrective action and which employees primarily act as supports for students.<sup>247</sup>

The mandatory supporting approach also incorporates additional resources to support the institutions, their employees, and survivors. Advocates of this approach stress the need for additional accountability mechanisms to ensure that procedures are implemented consistently.<sup>248</sup> These types of accountability measures promote the integrity of the investigation process by verifying that institutions are adhering to their own policies and OCR guidelines for responding to reports of sexual harassment.<sup>249</sup> The proponents also recommend a variety of anonymous and voluntary reporting options for survivors.<sup>250</sup> For example, the online platform Callisto allows survivors to report sexual harassment online anonymously.<sup>251</sup> Finally, this model requires trauma-informed training for all staff as opposed to training only those staff likely to be involved in an investigation or adjudication.<sup>252</sup>

Although more comprehensive policies like those outlined in the mandatory supporting approach may be ideal, the primary drawback of this approach is its feasibility. For instance, expanding available services in the Title IX office or providing trauma-informed training for all faculty would require significant time and money.<sup>253</sup> While these features are

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243. *Id.*

244. *See id.* at 144–149.

245. *See id.* at 144.

246. *See id.*

247. *See id.* at 188.

248. *See Holland & Cipriano, supra* note 212, at 1075.

249. *See id.*

250. *See Holland, supra* note 142, at 3; *Weiner, supra* note 9, at 150–51.

251. *See Dunlap, supra* note 11, at 11.

252. *See Holland, supra* note 142, at 3.

253. *See Harry Painter, Title IX Compliance and Then Some*, JAMES G. MARTIN CTR. ACAD. RENEWAL (Apr. 4, 2014), <https://www.jamesgmartin.center/2014/04/title-ix->

undoubtedly beneficial, the cost associated with providing that level of support may limit institutions' ability to implement this method successfully.<sup>254</sup> Challenges with implementation risk leading an institution to abandon these policies and return to the problematic—albeit familiar—expansive mandatory reporting models.

Despite these limitations, several states have attempted to implement elements of the mandatory supporting approach by statute.<sup>255</sup> As mentioned previously, mandatory supporting and mandatory referral models share many similarities.<sup>256</sup> Accordingly, mandatory supporting statutes similarly emphasize survivors' right to choose whether to file a formal report.<sup>257</sup> These statutes also differentiate between employees who are required to file a formal report (i.e., the Title IX Coordinator) and those who are not (i.e., confidential employees).<sup>258</sup>

Several states that have adopted mandatory supporting statutes include expanded access to trauma-informed training for all university employees. For example, Connecticut requires training in the areas of sexual assault, intimate partner violence, and stalking for all students and employees.<sup>259</sup> These mandatory supporting statutes also provide additional channels through which a survivor may disclose sexual harassment. Illinois provides a comprehensive list of disclosure options, including anonymous or online reporting options.<sup>260</sup> By providing training for all employees as well as expanded options for reporting, these statutes adopt some of the hallmarks of the mandatory supporting approach and demonstrate its potential viability on a national scale.

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compliance-and-then-some/ [https://perma.cc/6E8J-3W32]; *Virtual 40-Hour Sexual Assault Crisis Intervention Training*, OUR RESILIENCE (Apr. 28, 2021), <https://www.ourresilience.org/virtual-40-hour-sexual-assault-crisis-intervention-training-july21/> [https://perma.cc/VX3N-48JM]; *Trauma Training Pricing*, LAKESIDE, <https://lakesidelink.com/training/pricing/> [https://perma.cc/9QYT-FBKG].

254. See generally Greta Anderson, *New Requirements, More Costs*, INSIDE HIGHER ED (June 10, 2020), <https://www.insidehighered.com/news/2020/06/10/community-colleges-burdened-new-title-ix-regulations> [https://perma.cc/HN9S-SM4Z]; Brie Haro, *UP Cuts Title IX Position Amidst Budget Shortfall*, THE BEACON (Dec. 7, 2022), <https://www.upbeacon.com/article/2022/12/up-cuts-title-ix-position-amidst-budget-shortfall> [https://perma.cc/8UC4-Q4GM].

255. See CONN. GEN. STAT. ANN. § 10a-55m (West 2021); 110 ILL. COMP. STAT. ANN. 155/5 (West 2015).

256. See *supra* notes 238–239 and accompanying text.

257. See CONN. GEN. STAT. ANN. § 10a-55m (West 2021); 110 ILL. COMP. STAT. ANN. 155/5 (West 2015).

258. See *id.*

259. See CONN. GEN. STAT. ANN. § 10a-55m (West 2021).

260. See 110 ILL. COMP. STAT. ANN. 155/10 (West 2019).

## IV. CONCLUSION

Title IX was intended “to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.”<sup>261</sup> Through this statute, Congress sought to ensure that students of all genders have equal access to educational programs and activities.<sup>262</sup> Title IX’s protections extend to any behavior, including sexual harassment, that limits students’ access to educational benefits or their ability to participate in educational activities.<sup>263</sup> An institution’s policies for addressing sexual harassment under Title IX play a pivotal role in ensuring survivors’ equal access to educational opportunities.

Although Title IX unquestionably serves its purpose in many respects, it is not without its limitations. Unfortunately, survivors of sexual harassment are acutely aware of the consequences of these limitations.<sup>264</sup> Federal funding recipients have grappled with evolving Department of Education guidance regarding the obligations of “responsible employees” who have received notice of sexual harassment.<sup>265</sup> Concern regarding Title IX investigations’ financial and reputational costs has led many institutions to adopt a broad definition of “responsible employee” that includes all university employees.<sup>266</sup> However, these policies did little to quell the rates of sexual harassment on college campuses and simultaneously chilled reporting by survivors.<sup>267</sup>

It is unsurprising that both the 2020 NPRM Final Rule and 2022 NPRM proposals attempted to clarify the duties and obligations of responsible employees. The 2020 NPRM Final Rule designated only the institution’s Title IX coordinator and employees who had the authority to institute corrective action as mandatory reporters.<sup>268</sup> In contrast, the 2022 NPRM sweeps nearly all university staff into its definition of “responsible

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261. 118 CONG. REC. 5806–07 (1972).

262. 20 U.S.C.A. § 1681; 34 C.F.R. pt. 106.

263. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

264. See, e.g., Professor, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Aug. 11, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-98763> [<https://perma.cc/4BAM-VXVA>].

265. See *supra* notes 88–109 and accompanying text.

266. See Dunlap, *supra* note 11, at 21.

267. See Michael Dolce, *The Epidemic of Rape on Campus is Getting Worse Under Betsy DeVos*, NBC NEWS (Feb. 27, 2020), <https://www.nbcnews.com/think/opinion/epidemic-rape-campus-getting-worse-under-betsy-devos-ncna1143806> [<https://perma.cc/9RRX-5DGX>].

268. See 2020 NPRM Final Rule, 85 Fed. Reg. 30026.

employee.”<sup>269</sup> Specifically, the 2022 NPRM categorizes the Title IX coordinator, any employee in a teaching or advising role, and student employees as mandatory reporters of sexual harassment.<sup>270</sup> This change to the mandatory reporting requirements is an exceptional overcorrection to the weaknesses in the previous administration’s policies. Such an overcorrection will negatively impact survivors’ sense of bodily autonomy while simultaneously decreasing rates of survivor reporting at institutions of higher education. Instead of furthering Title IX’s purpose by ensuring that sexual harassment does not disrupt survivors’ education, the 2022 NPRM ultimately leaves large swaths of students unprotected from gender-based discrimination.

By discouraging survivors of sexual harassment from disclosing their experiences, the 2022 NPRM does not elevate the needs of survivors on a pedestal. Rather, it all but ensures that survivors of sexual harassment will be left to grapple with the lasting effects of a traumatic event from the isolation of an invisible cage. To avoid such a devastating outcome, legislators and policymakers must take survivors’ voices and experiences into consideration. As this Note has shown, alternative models like the mandatory referral approach or the expanded protections of the mandatory supporting model will more appropriately protect survivor autonomy, promote survivors’ continued academic success, and encourage reporting of sexual harassment on campuses. States which have passed statutes adopting either of these approaches serve as examples of the potential viability of either model. One survivor poignantly captured the critical importance of embracing such approaches when she explained:

[t]hose who have already endured and survived potentially the most horrendous moments or seasons of their lives must be at the heart of necessary changes to Title IX, and to that end, they must have agency over their story, who hears it, and what steps will be taken on their behalf.<sup>271</sup>

The public has expressed its concern regarding the 2022 NPRM, existing research proves these concerns are well-founded, and state statutes establish that viable alternatives exist. It is now incumbent on legislators to act on this information, replace the expansive mandatory

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269. *See id.*

270. *See* 2022 NPRM, 87 Fed. Reg. 41390.

271. *See* Survivor, Comment to *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rulemaking Docket*, REGULATIONS.GOV (Sept. 12, 2022), <https://www.regulations.gov/comment/ED-2021-OCR-0166-203329> [<https://perma.cc/E8AJ-VHFY>].

reporting requirements with a more reasoned approach, and ensure that Title IX fulfills its purpose.