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'They silence us': Victims of alleged sexual assaults say new Title IX rules harm survivors

Max Lombardi, Cincinnati Enquirer | Published 9:29 p.m. ET May 27, 2020 | Updated 9:43 a.m. ET May 28, 2020

A 19-year-old University of Cincinnati student already had qualms about the handling of her 2018 Title IX complaint.

Now, after [new federal regulations](https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations) governing the adjudication of campus sexual assaults were released this month by the U.S. Department of Education, the student fears future survivors will be harmed by coming forward.

"The whole point of the movement of sexual assault survivors is to make us feel like we have a voice," said the student, who asked not to be named as a survivor of violence. "... These regulations do the complete opposite of what we are trying to accomplish. They silence us."

Survivors and advocates have criticized the new rules for a variety of reasons, including that they require cross-examination of both parties, allow universities to set a higher standard of proof needed to find fault against the accused and narrow the scope of incidents in which institutions must respond to complaints. At least one [lawsuit against the new rules](https://www.aclu.org/press-releases/aclu-sues-betsy-devos-allowing-schools-ignore-sexual-harassment-and-assault) has already been filed.

Education Secretary Betsy DeVos argued the new regulation "balances the scales of justice." Other proponents favor the law for [bolstering due-process protections](https://www.nytimes.com/2020/05/06/us/politics/campus-sexual-misconduct-betsy-devos.html) for the accused.



President Trump and Secretary of Education Betsy DeVos (Photo: Evan Vucci, AP)

One thing is certain: The new regulations are complex, with experts requiring weeks to digest the [2,000-page document](https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf). They take effect Aug. 14.

For the 19-year-old UC student, her stance is simple: The new rules favor the accused.

A UC administrative committee ruled the student, then 17, had been harmed by a male student as he digitally penetrated her, and that the male student knew he was causing the woman pain. Even so, the committee ruled the male student hadn't committed sexual violence but was responsible for "physical abuse or harm" or the threat of it, according to case documents shared with The Enquirer.

She said the ruling required months of therapy to overcome. Had the new rules been in place, she said the experience might have been worse, to the point that she would have hesitated to report it.

"The idea of being cross-examined, it brings all of those questions and insecurities in your brain to life," she said. "It makes it real. Like someone doesn't believe you? And that in itself is really difficult to go through."

Kate Lawson, the Title IX coordinator at Xavier University, wrote by email that the new rules, including the addition of cross-examination, "do run a significant risk of increasing barriers to reporting."

Title IX, the federal law passed in 1972 protecting people from discrimination based on sex in education, is one of the main recourses survivors have to address sexual assault and to hold perpetrators accountable.

Recently, courts have ruled in favor of accused students, [including at least one at UC](https://www.cincinnati.com/story/news/education/2017/09/25/appeals-court-agrees-university-cincinnati-cant-suspend-male-student-accused-sexual-assault/701261001/), who have argued the current Title IX process violated their constitutional right to due process.

The University of Cincinnati declined to answer five emailed questions related to the new rules but rather referred The Enquirer to a [letter to the "UC Family" from Bleuzette Marshall](https://www.uc.edu/about/equity-inclusion/regulations-2020.html), vice president for Equity, Inclusion & Community Impact.

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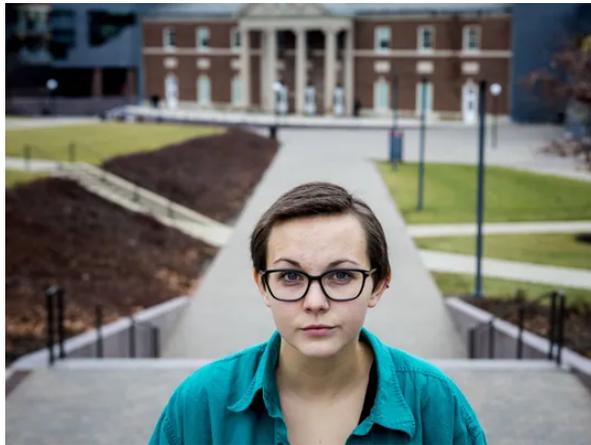


In that letter, Marshall wrote: "We have assembled a team that is carefully reviewing the new regulations and the extensive accompanying commentary, and determining how to implement these new requirements."

The new rules are meant to ensure accused students get a fair process, said Courtney Bullard, a Tennessee-based lawyer who specializes in Title IX compliance.

But as a result, "it's reasonable to conclude that a lot of survivors aren't going to want to go through that process."

Grace Cunningham, who lodged a sexual assault complaint with UC's Title IX office after a 2015 incident, was disappointed in the response after university officials said they had no jurisdictions because the man she accused was no longer a student, though he still frequented campus, Cunningham said.



Grace Cunningham posed for a portrait on UC's campus in 2017. (Photo: The Enquirer/Meg Vogel)

But had the new rules allowing cross-examination been in place at the time, they would have discouraged her from reporting her alleged assaulter.

In addition, UC would not have been obligated to respond to Cunningham, who said she was assaulted in an off-campus apartment, as the new rules only require colleges to respond to reports of incidents occurring on campus or in off-campus education programs, such as Greek life housing or events held by a university. Universities may respond to other incidents in a manner they choose.

Nearly half of sexual assaults reported in 2019-2020 to Miami University and the Oxford Police Department occurred off-campus, according to the [Miami Student newspaper](https://www.miamistudent.net/article/2020/05/how-will-the-new-title-ix-regulations-affect-miami?ct=content_open&cv=cbox_featured) (https://www.miamistudent.net/article/2020/05/how-will-the-new-title-ix-regulations-affect-miami?ct=content_open&cv=cbox_featured).

Attorney Bullard said she doesn't believe universities will simply ignore incidents occurring elsewhere, such as off-campus housing or study abroad trips outside the U.S., under the new rules. The university can choose to address them as it deems fit, such as investigating them as violations of the student code of conduct, that can have the same result.

Students for Survivors, a student-led activist group advocating for more survivor-focused support that Cunningham started in 2016, is preparing to [send a letter to UC administration](https://docs.google.com/forms/d/e/1FAIpQLScs_91WBuZTej4wT9hsfjXTvMaVn_8wvX0PXoQx-ih_tauWg/viewform) (https://docs.google.com/forms/d/e/1FAIpQLScs_91WBuZTej4wT9hsfjXTvMaVn_8wvX0PXoQx-ih_tauWg/viewform) urging the university to adopt policies that "would create the least harm for student survivors." The new Title IX rules allow some leeway to universities in how they handle cases, including choosing either the preponderance of evidence standard or the clear and convincing standard, which requires a higher burden of proof.

The group lists seven requests, including that UC adopt the preponderance standard.

About [500 people and organizations have signed](https://docs.google.com/forms/d/e/1FAIpQLScs_91WBuZTej4wT9hsfjXTvMaVn_8wvX0PXoQx-ih_tauWg/viewform) (https://docs.google.com/forms/d/e/1FAIpQLScs_91WBuZTej4wT9hsfjXTvMaVn_8wvX0PXoQx-ih_tauWg/viewform) the letter, according to Cunningham. The UC undergraduate student government voted unanimously in support Saturday. The letter calls for a response from UC by June 10.

UC did not detail which standard of evidence it would choose by press time.

Lawson, the Title IX coordinator, told The Enquirer that Xavier will select the preponderance standard, which is used in civil court and requires a greater than 50% chance that a complaint is true in order to sustain it.



Kate Lawson (Photo: Provided)

Lawson wrote that the standard "results in the most equitable, appropriate standard for an institution's internal sex discrimination complaint resolution process," adding it is the standard long used at Xavier in Title IX cases.

Once universities have chosen a standard, they must apply it to all cases, whether involving faculty or students.

Some say the alternative standard, the clear and convincing standard, requires about a 75% likelihood that a complaint is true in order to sustain it.

Allowing universities an option will lead to the "problematic outcome of students and employees being held to different standards at different institutions," Lawson wrote.

She added she does "not see the benefit in allowing education institutions ... to apply a key component of a federal civil rights law inconsistently across the country."

Another change under the new law: Institutions will now be required to provide an advisor to either the accused or accuser at no cost. But that adviser does not necessarily have to be a lawyer, so if only one party can afford their own counsel, that could disproportionately benefit that party and lead to an inequitable process, said Bullard, the Tennessee lawyer.

The education department addressed this in [explaining the rules](https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf). While it said the advisor rules will make for a more thorough and fair process, "the Department acknowledges that a party's choice of advisor may be limited by whether the party can afford to hire an advisor."

It adds later that "the issues raised by allegations of sexual misconduct may make it preferable or advisable for one or both parties to receive legal advice or obtain legal representation..."

Janet Napolitano, president of the University of California system, said in a statement that some positives come from the new rules, including that relationship violence is now part of the law.

But she called it "deeply troubling" that the rules allow things like cross-examination, a provision adopted despite the input of students, educators and Title IX experts.

Sarah Nesbitt, a policy and advocacy organizer for Know Your IX, a national advocacy group for survivors, told [Inside Higher Ed](https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations) that the new law excludes trauma-informed investigation procedures that recognize the psychological effect sexual misconduct can have on memory and that are "critical to fairness."

Read full responses from Xavier's Title IX Coordinator Kate Lawson to Enquirer questions about the new law:

Do the new rules add barriers to reporting?

Broadly speaking, when Secretary DeVos announced the Office for Civil Rights (OCR)'s intention to revise the rules for how schools must implement Title IX, it was widely understood that one of the primary goals in doing so was to strengthen protections for individuals responding to allegations. Layer onto that, significant sections of the rules require schools to add components, such as requiring a live hearing (which has been the norm at Xavier for years) and live cross-examination by a party's advisor of the other party and witnesses, to their internal sex discrimination complaint resolution process that move that process closer to the criminal legal system- a system regarded by many as one that re-victimizes individuals experiencing sexual violence, intimate partner violence, and stalking when they seek remedies/accountability through that system.

Layer onto that, the new rules narrow the definition (in content, in jurisdiction, and when a school must consider themselves on notice of a report) of conduct a school must address under Title IX. OCR still allows schools to address behavior outside of that more narrow definition (such as a report of a rape that happens between two students in an off-campus apartment), and although Xavier will continue to respond to that conduct, the choice to do so is permissive, and other schools might choose differently.

Taken all together, I would say the new rules do run a significant risk of increasing barriers to reporting. This means that schools must do everything in their power to keep barriers down by engaging in proactive, transparent, ongoing communication with their campus communities about how they will respond to these rules and their continued commitment to effectively and comprehensively responding to sex discrimination.

Xavier will select preponderance of evidence? Why?

At Xavier, we believe that utilizing the preponderance of evidence standard results in the most equitable, appropriate standard for an institution's internal sex discrimination complaint resolution process. Preponderance of the evidence is the standard that Xavier uses in all of its conduct processes, and it's the standard that Xavier has consistently used to assess reports that fall under Title IX. It is the same evidentiary standard used in civil court, and the one with which the community is familiar.

Could granting institutions the authority to choose the standard of proof used in Title IX cases (preponderance/clear and convincing) lead to an uneven application of justice across U.S. universities?

I don't see the benefit in allowing education institutions (not just U.S. universities but K-12, etc.) covered by Title IX to apply a key component of a federal civil rights law inconsistently across the country and think doing so does result in the problematic outcome of students and employees being held to different standards at different institutions.

Is the time allotted to implement these new regulations, especially considering the pandemic, sufficient to do so as effectively as possible?

I have no doubt that, like Xavier, schools across the country will do everything in their power to be compliant with these new rules by (Aug. 14). However, between now and August, schools are also dedicating an incredible amount of time, energy, and attention to responding to the pandemic and planning for safe ways to reopen campuses, and as a result, there is simply not sufficient time to implement these changes in the thoughtful, deliberate, thorough, and properly resourced way that schools would like and that lead to policies and procedures that best support students and employees who are and will be impacted by these issues.

Can you list decisions/interpretations Xavier will make in the coming months to conform to the new rules, particularly those decisions that may elicit student feedback, questions, etc.

There is so much new content – including content that warrants significant analysis and interpretation – in the new rules, Xavier will do so carefully and thoroughly in partnership with key campus and community partners. It has always been our practice, and will continue to be while implementing these new rules, to engage in ongoing, proactive conversation and discussion with our campus community to understand and work to address their questions, concerns, and feedback.

Xavier has always approached sex discrimination prevention and response in a mission-centered, equitable manner that prioritizes the dignity and care of all parties involved, and nothing in these rule changes will change that. We believe our current policies and practices are fair for all parties involved and the changes we make after folding in these new regulations will remain just as fair, compassionate, and supportive.

The University of Cincinnati declined to provide answers to the same questions.

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