

January 28, 2019

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

Kenneth L. Marcus  
Assistant Secretary for Civil Rights  
Department of Education  
400 Maryland Avenue SW  
Washington, DC 20202

Re: Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Mr. Marcus:

These comments are submitted on the proposed rule published at ED-2018-OCR-0064 (November 29, 2018), RIN #1870-AA14, with the title “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” (the “Proposed Rule” or “Rule”).

I am writing on behalf of the New Jersey Coalition Against Sexual Assault (“NJCASA”) to express our **strong opposition** to the Proposed Rule and the negative impact it will have on students who experience sexual violence.

NJCASA represents the interests of New Jersey’s 22 sexual violence service providers<sup>1</sup> (also called “rape crisis centers” or “SVPs”) and over 1.8M survivors of sexual violence who live in the state.<sup>2</sup> We work closely with policymakers at a state and national level, offering expertise on how proposed legislation would impact the survivors we serve. We are recognized for our expertise in advocating for the rights of victims of sexual violence.

We believed the Proposed Rule would undermine student safety, create a chilling effect for students reporting harassment and assault, limit schools’ ability to hold responsible students who cause harm, and minimize the responsibility of institutions of learning to protect and respond to survivors.

Research from New Jersey’s largest state university begins to give us a sense of the enormous prevalence of sexual violence in our educational institutions, from early education to college and university settings. Nineteen percent<sup>3</sup> of students reported experiencing sexual violence *before* coming to Rutgers University–New Brunswick, including 24 percent<sup>4</sup> of incoming undergraduate women. Subsequently, 13 percent of students reported at least one incident of unwanted sexual contact during their Rutgers educational career, including 20 percent of undergraduate women – consistent with national findings.<sup>5</sup>

Areas of the proposed regulations that we believe will cause disproportionate harm to students who experience sexual violence are outlined below.

### **1. Regarding the institution of learning’s duty to respond**

#### **a. Changes to the definition of ‘sexual harassment’ (§§ 106.30, 106.45(b)(3))**

The updated definition of sexual harassment in the Proposed Rule would in effect result in students missing class, dropping out of school, or otherwise being wholly denied their right to an educational experience before the institution of learning would be required to take action. This definition of sexual harassment is stricter than the definition codified to address workplace harassment via Title VII of the

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<sup>1</sup> [www.njcasa.org/find-help](http://www.njcasa.org/find-help)

<sup>2</sup> Smith, S.G., Chen, J., Basile, K.C., Gilbert, L.K., Merrick, M.T., Patel, N., Walling, M., & Jain, A. (2017). The National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 State Report. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.

<sup>3</sup> McMahan, S., Stepleton, K., O’Connor, J., Cusano, J. (2015, rev. 2016). #ISpeak Student Experiences, Attitudes, and Beliefs About Sexual Violence. New Brunswick, NJ: Rutgers University School of Social Work, Center on Violence Against Women and Children.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

Civil Rights Act of 1964,<sup>6</sup> and has led to some federal courts determining an act of rape would not constitute sexual harassment under Title IX because it does not meet the definition of ‘pervasive,’ even though the victim in one such case “saw a counselor a number of times for posttraumatic stress disorder, depression, and suicidal ideation.”<sup>7</sup>

Even if not meeting the definition of ‘pervasive,’ experiencing a single incident of sexual violence can have lasting emotional, physical, and financial consequences for its victims. National research has found that victims of sexual violence were statistically much more likely to report poor physical health outcomes, including chronic conditions like asthma, frequent headaches, and difficulty sleeping, and reported overall poorer mental health than those who did not experience sexual violence.<sup>8</sup> Researchers have also found the lifetime economic burden of rape for U.S. adults is \$122,461 per victim<sup>9</sup> and \$282,734 per female victim of child sexual abuse.<sup>10</sup>

It’s also not unusual for students to experience an isolated incident of sexual harassment. New Jersey’s largest state university, Rutgers, found that among surveyed students, 13 percent experienced attempted or completed unwanted sexual contact since arriving at Rutgers, with 46 percent experiencing one type of violence.<sup>11</sup> The updated definition of sexual harassment would leave many of these students with no opportunity for recourse by their institution.

It is our opinion that limiting the definition of sexual harassment seeks to intentionally winnow the pool of survivors that educational institutions must respond to and will result in students who have the most need being unable to access recourse or resources from their institution.

**b. Changes to geography where schools must respond (§§ 106.30, 106.45(b)(3))**

The Proposed Rule would allow schools to ignore incidents that occur “off campus property” or online, disqualifying a vast number of survivors from accessing services and recourse through their institution. This flouts Supreme Court precedent regarding schools responding to off-campus incidents in K-12 settings<sup>12</sup> and appellate court decisions regarding college and university campuses.<sup>13</sup>

Additionally, understanding how and when sexual assault occurs illuminates how damaging this policy would be for victims. Research shows that just eight percent of rapes occur on school property.<sup>14</sup> The vast majority (87 percent) of college students live off-campus,<sup>15</sup> while the majority (55 percent) of rapes occur at or near the victim’s home.<sup>16</sup> Research on sexual assault in college and university settings found that female students are more likely to be victimized when “pursuing leisure activities and traveling from place to place,” versus nonstudents (ages 18 – 24) who were more likely to be assaulted at home.<sup>17</sup> For students attending two-year community colleges, trade schools, or K-12 institutions, socialization often occurs off the institution’s property. This change appears to us a deliberate attempt to greatly reduce the number of victims schools must respond to. This is especially problematic for our most vulnerable

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<sup>6</sup> 29 CFR § 1604.11

<sup>7</sup> *Ross v. Corporation Of Mercer University*, 506 F. Supp. 2d 1325

<sup>8</sup> The National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 State Report

<sup>9</sup> Peterson, C., DeGue, S., Florence, C., Lokey, C.N. (2017). *Lifetime Economic Burden of Rape Among U.S. Adults*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.

<sup>10</sup> Letourneau, E.J., Brown, D.S., Fang, X., Hassan, A., Mercy, J.A. (2018). *The economic burden of child sexual abuse in the United States*. *Journal of Child Abuse and Neglect*, pp. 413 – 422. NB: Researchers noted that there was insufficient data concerning productivity losses for male survivors of child sexual abuse, hence only reporting the number for females.

<sup>11</sup> McMahan, S., Stepleton, K., O’Connor, J., Cusano, J. (2015, rev. 2016). *#ISpeak Student Experiences, Attitudes, and Beliefs About Sexual Violence*. New Brunswick, NJ: Rutgers University School of Social Work, Center on Violence Against Women and Children.

<sup>12</sup> *Morse v. Frederick*, 551 U.S. 393 (2007)

<sup>13</sup> *Yeasin v. Durham*, No. 16-3367, 2018 WL 300553 (10th Cir. Jan. 5, 2018)

<sup>14</sup> Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. (2013). *Female Victims of Sexual Violence, 1994-2010*

<sup>15</sup> Sharpe, R. (2016). *How Much Does Living Off-Campus Cost? Who Knows?* New York, NY: The New York Times.

<sup>16</sup> Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. (2013). *Female Victims of Sexual Violence, 1994-2010*

<sup>17</sup> Sinozich, S., Langton, L. (2014). *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013*. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

student survivors, including students of color and/or LGBTQ+, who are statistically more likely to experience sexual violence.<sup>18 19</sup>

The location of a sexual assault does not lessen the deeply traumatic impact of sexual assault on its victims, and institutions should still be required to investigate and adjudicate these crimes if the survivor wishes and provide victims with supportive services if they are seeking them.

## 2. *Regarding due process*

### **a. Changes to acceptable standard of evidence (§ 106.45(b)(4)(i))**

The Proposed Rule mandates that institutions of learning may only use the preponderance of the evidence (“POE”) standard if (1) it uses the POE standard for other code of conduct cases that can result in similar penalties (such as expulsion) and (2) it uses the POE in complaints against its employees. The preponderance of the evidence standard is the traditional standard of evidence applied in other civil rights law covering discrimination, including Titles VI and VII of the Civil Rights Act of 1964<sup>20</sup> and Titles II and XVI of the Social Security Act.<sup>21</sup> By approving the application of different standards of proof, the Department of Education renders gender-based violence the *only* civil rights violation not decided by the POE standard and requires a higher burden of proof specifically from victims of sexual violence.

This flouts long-standing precedent in deciding cases related to sexual assault on campus, dating back to guidance rendered by the Department of Education under the George W. Bush administration.<sup>22</sup> It also flouts common practice on campus: even before directives from the 2011 *Dear Colleague Letter*, a majority of schools were using the POE standard to decide cases involving sexual assault. A nationally-representative survey found that 61 percent of colleges and universities used the POE standard for determining cases involving sexual assault.<sup>23</sup>

We are concerned about a requirement that places a higher burden of proof on victims of gender-based discrimination than victims of other types of discrimination and fear this deliberately higher standard will serve to push more survivors into the shadows for what is already a vastly underreported crime. This is particularly troublesome when examining cases that occur in college and university settings: victims who are students were already more likely to not report their victimization (80 percent) than nonstudents (67 percent).<sup>24</sup>

### **b. Changes to campus hearing proceedings (§ 106.45(b)(3)(vi)-(vii))**

The Proposed Rule would *require* colleges and universities to conduct live hearings, where parties would be able to be cross-examined by the other party’s advisor of choice.

We are concerned this will result in institutions creating a courtroom-like atmosphere, without the essential legal protections afforded to plaintiffs and defendants (objections, subpoenaed evidence, rape shield laws that prevent counsel from bringing up a victim’s sexual past, etc.). Intense cross-examination is widely accepted to be deeply traumatic for survivors. Psychiatrist and expert researcher on trauma Judith Lewis Herman wrote, “If one set out intentionally to design a system for provoking symptoms of traumatic stress [for victims of sexual violence], it might look very much like a court of law.”<sup>25</sup>

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<sup>18</sup> End Rape on Campus. *Prevalence Rates*. Accessed at: <http://endrapeoncampus.org/new-page-3/>

<sup>19</sup> Lawyers’ Committee for Civil Rights Under Law. (2018). *The Trump Administration’s Changes to Title IX Hurt Survivors of Color*. Washington, D.C. Accessed at: <https://lawyerscommittee.org/press-release/the-trump-administrations-changes-to-title-ix-hurt-survivors-of-color/>

<sup>20</sup> Cantalupo, N.C., et al. (2017). *Title IX and the Preponderance of the Evidence: A White Paper*. Feminist Law Professors.

<sup>21</sup> 81 FR 13436

<sup>22</sup> Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, Office for Civil Rights, U.S. Dep’t of Educ., to Jane Genster, Vice President and General Counsel, Georgetown Univ. (October 16, 2003) Accessed at: <https://www.nchem.org/wp-content/uploads/2017/08/202-GeorgetownUniversity--110302017Genster.pdf>

<sup>23</sup> Amar A., et al. (2014). *Administrators’ Perceptions of College Campus Protocols, Response, and Student Prevention Efforts for Campus Sexual Assault*, 29 (4) *Violence and Victims* 579, 584-85.

<sup>24</sup> Sinozich, S., Langton, L. (2014). *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013*. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

<sup>25</sup> Herman, Judith Lewis. 2005. “Justice From the Victim’s Perspective.” *Violence Against Women* 11 (5) (May): 571–602.

When sexual harassment and assault are addressed in our nation's workplaces, it is commonly accepted practice for decisions to be rendered by a single, trained arbitrator who examines the case and renders judgments, protections for victims, and consequences to those who cause harm. In stark contrast, this proposed rule instructs institutions of higher learning to create systems that could be more traumatizing to student victims than our workplaces.

Additionally, this model too closely mirrors our criminal justice system. As lawyer and researcher Nancy Chi Cantalupo notes, educational institutions do not hold the same coercive and punitive powers as our courts,<sup>26</sup> which are able to render punishments that deny a person's civil liberties (prison and jail time). Replicating the criminal justice system seems an overreach specifically designed to intimidate victims out of pursuing justice.

### ***Conclusion***

For the reasons detailed above, the Education Department should immediately withdraw its current proposal and dedicate its efforts to advancing policies that ensure equal access to education for all students, including students who experience sexual harassment.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact Patricia Teffenhart, at [pteffenhart@njcasa.org](mailto:pteffenhart@njcasa.org) for further information or discussion.

Sincerely,  
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<sup>26</sup> Cantalupo, N.C., et al. (2017). *Title IX and the Preponderance of the Evidence: A White Paper*. Feminist Law Professors.