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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

To Whom It May Concern:

My name is Nona Gronert, and I am writing this comment on my own behalf. I am a doctoral student in Sociology at the University of Wisconsin–Madison, and I work in the Violence Prevention office at UW Madison.

I have researched sexual violence[1] and sexual consent in higher education since 2012. I have attended numerous professional conferences to seek further education on how to best research sexual violence. In my work as a teaching assistant, I have had students disclose experiences of sexual violence to me, and I have directed them to confidential campus resources. In my dissertation, I study how one large, public university has responded to sexual violence from 1972 through 2017. My other project investigates how study abroad professionals manage gendered risk, such as sexual harassment, among their students.

I strongly oppose the proposed Title IX regulations in their current form. In my comment, I argue that the proposed regulations create additional barriers for survivors to formally report sexual violence, overlook the common types of sexual harassment and assault students experience, and encourage schools to symbolically, not substantively, comply with Title IX.

Concern 1: (§ 106.44(e)(1)) Recipient's response to sexual harassment—definition of sexual harassment

Definition of sexual harassment: Proposed section 106.44(e)(1) states, "*Sexual harassment* means: (i) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (ii) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it

[1] By sexual violence, I mean sexual harassment, sexual assault, stalking, and dating violence. Research shows that repeated sexual harassment has similar negative effects on women's well-being as infrequent sexual assault (Sojo, Wood, & Genat, 2016).

effectively denies a person equal access to the recipient's education program or activity; or (iii) Sexual assault, as defined in 34 CFR 668.46(a)."

Why I am concerned: The proposed rule narrows the definition of sexual harassment, "Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;" this narrower definition will discourage survivors from reporting to school authorities. Students already underreport sexual violence via the formal Title IX adjudication process (Cantor et al., 2015; Holland & Cortina, 2017; Khan, Hirsch, Wamboldt, & Mellins, 2018). Such a limited definition has the possibility to further depress formal complaints.

The narrowed definition of sexual harassment only focuses on unwelcome conduct, ignoring the possibility that the conduct creates a hostile environment. Sexual violence is one form of trauma (SAMHSA, 2014b). Trauma consists of three interrelated elements: events, experience of events, and effects (SAMHSA, 2014a). Therefore, the Department of Education should not exclusively consider the events of sexual harassment or sexual assault, but also the survivor's experience and the events' lasting effects on the survivor. A hostile environment is made up not only of the event of sexual violence but also one's experiences and sexual violence's lasting effects.

Research shows that the effects of sexual violence bar survivors from educational opportunities. Ongoing sexual harassment has similar negative effects on women's health as infrequent sexual assault, such as PTSD (Sojo et al., 2016). Sexual assault jeopardizes survivors' education. Students' grades may decrease and about one third of student survivors drop out of school (Karjane, Fisher & Cullen, 1999; Mengo & Black 2016). Consequently, not only the behavior of sexual violence but also the aftermath of sexual violence restricts survivors' educational access.

Alternative to the proposed definition of sexual harassment: I urge the Department of Education to reestablish the 2011 Dear Colleague Letter's definition of sexual harassment: "when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program (p. 3)."

Concern 2: (§ 106.44(a)) Recipient's response to sexual harassment—Program or activity and against a person in the United States

Actual knowledge of sexual harassment: Per proposed section 106.44(a), universities only have the obligation to address sexual harassment when it occurs "in an education program or activity of the recipient against a person in the United States."

Why I am concerned: Schools will not be able to address sexual harassment off-campus, outside an educational program, or outside the United States, even when it occurs between students. It is the norm for students to live off-campus. Many students engage in career advancement opportunities off-campus as well. While students could file reports with the police to address forms of sexual assault as defined by state law, the criminal justice system has not treated survivors with dignity. Police often discourage survivors from filing a report and the majority of one sample, 80 percent, felt reluctant to seek further help (Campbell, 2005). Much research has shown that the criminal justice system retraumatizes survivors, making them relive the

experience of sexual violence, which is known as "second assault" (Fairstein, 1993; Martin, 2005). Consequently, the Title IX process could be a leader in how to fairly investigate and adjudicate cases using trauma-informed practices.

As a graduate student, I have firsthand knowledge of sexual harassment that can happen at professional networking events; research also shows this is a problem for graduate and professional students. Off-campus networking and mentoring is essential for graduate students' careers (National Academies of Science, Engineering, and Medicine, 2018). Important networking often happens at off-campus happy hours, events hosted by professors, and conference events with alcohol. Research shows that alcohol is prevalent in sexual assault cases; people who manipulate others into sex use alcohol to incapacitate their target or they use situations with alcohol as camouflage (Abbey, 2002; Carr & VanDeusen, 2004; Krebs, Lindquist, Warner, Fisher, & Martin, 2009). More than half of female graduate and professional students at UW Madison have experienced sexual harassment (UW Madison, 2016). One tenure-track professor shared her experience with sexual violence during her doctoral program; the experience compelled her to complete the program from afar (Cohen, 2018). While the perpetrator was sanctioned in court, he was allowed to continue in the doctoral program; consequently, she was forced to take precautions for her own safety and avoid the university (Cohen, 2018).

Both graduate and undergraduate students leave the United States for further educational and professional development. Increased numbers of undergraduates study abroad every year (Institute of International Education, 2019). From my ongoing research on sexual violence during study abroad programs, I have learned that students experience sexual violence at the hands of someone from their home institution while abroad. For example, students socialize with other students from their home institution to feel connected to something familiar; sometimes, sexual violence occurs within these social relationships. Graduate students often leave the United States to conduct research at specific sites, also known as "fieldwork." The Survey of Academic Field Experiences revealed that 72.4 percent of field researchers had either observed or been informed of sexual harassment or sexual assault occurring at their field site (Clancy, Nelson, Rutherford, & Hinde, 2014). One study found that graduate students in anthropology who experienced sexual harassment in the field were forced to significantly alter their career paths (Nelson, Rutherford, Hinde, & Clancy, 2017).

Alternative to program or activity & against a person in the United States: The university should be allowed to address sexual violence when the people involved have school affiliations, such as being students or faculty. Schools should be able to discipline students, faculty, or staff members who sexually harass or force sex upon others. Schools should be required to provide supportive measures to survivors of sexual harassment or sexual assault that occurs abroad or off-campus. Moreover, schools should provide survivors the opportunity to pursue a formal complaint or an informal resolution when the accused is affiliated with the university.

Concern 3: (§ 106.45(b)(1)(v)) Grievance procedures for formal complaints of sexual harassment—temporary delay of the grievance procedures due to concurrent law enforcement investigation

Delay of the grievance process: Proposed section 106.45(b)(1)(v) states, "Include reasonably prompt timeframes for conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals if the recipient offers an appeal, and a process that allows for the temporary delay of the grievance process or the limited extension of timeframes for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities."

Why I am concerned: I am concerned by the implications of postponing schools' investigations. Law enforcement investigations do not have set timelines, which could delay the Title IX adjudication process indefinitely. Such a rule will increase barriers to reporting and discourage survivors from pursuing a formal complaint.

Students already avoid the formal reporting process and find going through the process harrowing, infrequently formally report sexual assault, ranging from 5 to 27 percent in samples of undergraduates (Cantor et al., 2015; Holland & Cortina, 2017; Khan et al., 2018). Students eschew the formal reporting process, saying they fear negative consequences, feel ashamed, or lack the resources to purse a case against a wealthier student (Cantor et al., 2015; Holland & Cortina, 2017; Khan et al., 2018). Students who do go through the reporting process cite many difficulties, including intensified mental health issues (Khan et al., 2018).

The experience of sexual violence not only harms survivors' academic success (Karjane et al., 1999; Mengo & Black, 2016), but also the practice of delayed investigations can jeopardize survivors' academic attainment and general well-being. For example, a survivor from my undergraduate institution, Occidental College, wrote about how her hearing was scheduled the week before finals and such timing affected her coursework: "I took some of my finals but had to take incompletes in two of my courses. I had been too depressed and anxious to do work most of the semester and had gotten behind. I was lucky enough to have understanding professors. I worked on finishing two of my courses for the first few weeks of winter break (OSAC, n.d.)." Another survivor from Occidental wrote about how, "I was not kept up to date as the investigation continued and had to constantly email administrators to check on the progress and next steps. When the hearing finally happened, it was during Final exams and my rights were not respected" (OSAC, n.d.). She goes on to write, "My case lasted approximately eight months during which I was harassed by my attacker's friends and I could never feel fully safe on campus."

Alternative to pausing Title IX investigations due to a law enforcement investigation: The Department of Education should continue the current practice of concurrent law enforcement and Title IX processes. I encourage the Department to adopt the 2011 Dear Colleague Letter's guidance: "schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting" (p. 10).

Concern 4: (§ 106.44(a), (b)(1)-(4))—deliberate indifference

Deliberate indifference: The proposed rule states, "A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances."

Why I am concerned: I am worried that the deliberate indifference standard will encourage schools to adopt practices that were common before the 2011 Dear Colleague Letter and the 2013 increase in Title IX complaints. Universities have a history of keeping policies "on the books," but then treating survivors poorly and mismanaging the adjudication process (Heldman, Ackerman, & Breckenridge-Jackson, 2018; Lombardi, 2009). Sociologists have found that companies adopt symbolic policies to show compliance with EEOC guidance, but these policies do little to decrease discrimination (Edelman, 2016). The proposed rule allows universities to behave similar to such companies, employing Title IX policies with little to no impact. I am deeply concerned that the proposed rule will lead schools to merely "checking the boxes" rather than implementing Title IX policies with substantive impact.

Alternative to the deliberate indifference standard: The Department of Education should work with campus professionals who work on Title IX issues and experts who have studied the Title IX disciplinary process to determine the extent to which schools have symbolic ("checking the box") to substantive policies. Such consultation with experts will show the best practices for writing and implementing Title IX policies. This is crucial, as the implementation of Title IX policies are just as important as their existence.

Concern 5: (§ 106.45(6))—Informal resolution

Informal resolution: Proposed section 106.45(6) states, "At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication." It also states that schools must disclose, "The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations."

Why I am concerned: I am deeply troubled that schools will interpret this rule to mean that complainants are locked into the informal process. Moreover, the definition of an informal process is vague and does not include evidence-based best practices.

First, the proposed rule appears to hold that someone could not opt out of the informal resolution process and start or resume the formal complaint process if they so choose. Such a rule perpetuates the history of harm survivors face when they report (Heldman et al., 2018; Khan et al., 2018).

Second, "informal resolution process" is a phrase so vague that it has no meaning. It might include for example, mediation, arbitration, and/or restorative justice, to list just a few. Experts argue that restorative justice is in fact a promising informal resolution process for addressing

sexual violence on campus (Koss, Wilgus, & Williamsen, 2014).[2] However, they differentiate between mediation, arbitration, and restorative justice (Koss et al., 2014).

Alternative to informal resolution: The Department of Education should allow survivors to end the informal resolution process before it concludes, and either start or resume the formal complaint process. The Department should also be more specific about what constitutes an acceptable informal resolution process. I encourage the Department to consult with experts on restorative justice and fund research on restorative justice programs both at universities and in larger communities. Through the combination of consultation and research, the Department can determine whether schools have the option to facilitate restorative justice processes. Alternatively, community-based restorative justice programs could increase the options available to survivors and the accused.

Concern 6: (§ 106.45 (b)(3)(vii)) Cross-examination required with rape shield protections

Cross-examination required with rape shield protections: "For institutions of higher education, the recipient's grievance procedure must provide for a live hearing. At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party's advisor of choice, notwithstanding the discretion of the recipient under subsection 106.45(b)(3)(iv) to otherwise restrict the extent to which advisors may participate in the proceedings. If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party for to conduct cross-examination. All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision- maker and parties to simultaneously see and hear the party answering questions. The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant. If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility."

Why I am concerned: The Title IX formal complaint process is not a criminal proceeding. Cross-examination will discourage survivors from reporting; survivors already refrain from reporting sexual violence (Cantor et al., 2015; Holland & Cortina, 2017; Khan et al., 2018). For survivors who do report, cross-examination will likely negatively affect their health.

I strongly oppose making the Title IX process more like a criminal trial by requiring the right to cross-examination. A large body of scholarship shows that survivors who report to the criminal justice system experience "second assault" (Campbell, 2005, Fairstein, 1993, Martin, 2005). The formal reporting process also harms students' wellbeing (Khan et al., 2018). Experts argue that limiting the types of questions lawyers can ask (e.g. rape shield protections) is inadequate to

[2] Please see Karp et al. for more specifics on restorative justice on campus.

overcome the problematic nature of cross-examination in trials (Zydervelt, Zajac, Kaladelfos, & Westera, 2016). To be successful, defense lawyers must call into question the plaintiff's story, even if they stretch rape shield protections. In other words, the adversarial structure of court proceedings is the problem (Zydervelt et al., 2016). Such questioning impacts how survivors answer questions and act during a hearing. Survivors may not be able to answer questions because this format may trigger a trauma response; moreover, trauma shapes memory patterns, making details of sexual violence difficult to remember (SAMHSA, 2014b).

Alternative to cross-examination with rape shield protections: I urge the Department of Education to work with experts in trauma-informed practices and experts in fair legal proceedings to consider alternatives to cross-examination. An acceptable alternative to cross-examination should also include rape shield protections, which bar questioning about prior sexual experiences with the respondent. It is possible to have a just and objective adjudication process without retraumatizing survivors.

Concern 7: (§ 106.45(b)(4)(i)) Standard of evidence

Standard of evidence: "The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty."

The Department of Education argues, "These cases recognize that, where a finding of responsibility carries particularly grave consequences for a respondent's reputation and ability to pursue a profession or career, a higher standard of proof can be warranted" (p. 62).

The Department also states on page 63: "In contrast, because of the heightened stigma often associated with a complaint regarding sexual harassment, the proposed regulation gives recipients the discretion to impose a clear and convincing evidence standard with regard to sexual harassment complaints even if other types of complaints are subject to a preponderance of the evidence standard."

Why I am concerned: The preponderance of evidence standard is most appropriate. Legal experts indicate that preponderance of the evidence is the appropriate standard as it values both the respondent and complainant equally and recognizes that schools' adjudication processes are different from the civil and criminal justice systems (Loschavio & Waller; Baker et al., 2017). I agree that fairness and objectivity are essential to a just disciplinary process. However, I am concerned that the clear and convincing standard of evidence unjustly tilts adjudication in favor of the accused and discourages survivors from reporting (see Cantor et al., 2015, Holland & Cortina, 2017, and Khan et al., 2018 for why survivors do not report).

The Department's encouragement to use the clear and convincing standard fails to acknowledge the ways in which adjudications are already stacked against survivors. Historically, institutions' approaches to addressing sexual violence have relied on rape myths (Fairstein, 1993; Zydervelt et al., 2016). The Department's concern over the accused's future career and reputation demonstrates a commitment to rape myths, or "prejudicial, stereotyped, or false beliefs about rape" (Burt, 1980, p. 217; Gavey, 2013). Specifically, the Department's argument for a clear and convincing standard implies that survivors are untrustworthy and make false accusations of sexual harassment or sexual assault (McMahon & Farmer, 2011).

Yet, false accusations of sexual assault occur at similar rates to other violent crimes. Peer-reviewed research shows that false accusations of sexual assault occur between 2 and 10 percent of the time in different samples (Lisak, Gardinier, Nicksa, & Cote, 2010). While we know false accusations are rare, we also know that findings of responsibility (including in Title IX proceedings) for committing sexual violence are low, too (Van Dam, 2018). The history of cultural backlash against survivors (Bevacqua, 2000) combined with the statistics cited above show how delicate and difficult adjudication processes are. As such, it is essential to use the preponderance of evidence standard since it values both the accused and the survivor (Loschavio & Waller; Baker et al., 2017).

Alternative to the proposed rule on the standard of evidence: Schools should adopt the preponderance of evidence standard as long as it is consistent with state law.

Concern 8: (§ 106.12(b))—Assurance of religious exemption

Religious exemption: "*Assurance of exemption*. An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of the exemption from the Assistant Secretary."

Why I am concerned: I am deeply troubled by the sentence, "An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption." Students and their caretakers should know as they are considering schools whether the school claims religious exemption to Title IX. It should not take a filing a federal Title IX complaint to determine whether your school claims religious exemption.

Alternative to religious exemption: Instead, the Department of Education should require schools to state religious exemption in their publicly available Title IX policies. Additionally, the

Department should require schools to submit written requests for religious exemption. The Department should keep a publicly available list of schools granted religious exemptions.

I appreciate the opportunity to submit comments on Docket No. ED-2018-OCR-0064, RIN 1870–AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance. If you want additional information, please feel free to contact me at gronert@wisc.edu or 505-917-2555.

Respectfully,

Nona Maria Gronert, M.S.

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