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January 25, 2019

Kenneth L. Marcus

Assistant Secretary for Civil Rights

Department of Education

400 Maryland Avenue SW

Washington, DC 20202

*Re: ED 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:

I am a Professor of Psychiatry at Harvard Medical School and the author of a book, *Trauma and Recovery,*[[1]](#footnote-1)which is considered a fundamental text for understanding psychological trauma. I am a founder of the Victims of Violence Program in the Department of Psychiatry at Cambridge Health Alliance, a teaching hospital of Harvard Medical School, where for over 30 years I have trained post-graduate students in the mental health disciplines how to promote healing in traumatized people.

On behalf of the undersigned mental health professionals and trauma specialists, I am submitting this joint comment letter in response to the Department of Education’s Notice of Proposed Rulemaking (“NPRM” or “proposed rules”) to express our strong opposition to the Department’s proposal to amend rules implementing Title IX of the Education Amendment Act of 1972 (Title IX) as published in the Federal Register on November 29, 2018.

Based on our experience in treating survivors of sexual assault and harassment, it is our opinion that many of the new proposed rules will cause increased harm to students who report sexual harassment, including sexual assault, to their schools, and will discourage students who have been victimized from coming forward. The net effect of the new proposed rules will be to reinforce the shaming and silencing of victims, which has long prevailed in our society, and to worsen the problem of sex discrimination in education.

Incidents of sexual assault and harassment are extremely common. National epidemiological studies conducted by the Department of Justice[[2]](#footnote-2) and the CDC[[3]](#footnote-3) have repeatedly documented the fact that roughly 20-25% of women have been sexually assaulted, most commonly by men they know. Young women ages 18-25, that is, women of college age, are at the highest risk.[[4]](#footnote-4)

Although under Title IX, schools are required to respond to acts of sexual violence that impact students’ access to education, in practice, many schools utterly fail to protect victims or hold perpetrators accountable. Many victims who dare to complain still encounter dismissive, shaming, or frankly punitive attitudes from authority figures. Many perpetrators can still reasonably expect tolerance, if not frank encouragement, for their behavior from authority figures and from their peers. Understanding this reality, victims of sexual assault and harassment are generally reluctant to come forward. In a recent study of rape on college campuses, only 8% of sexual assaults were reported to police.[[5]](#footnote-5)

Acts of sexual assault and harassment are assertions of raw power, intended to demonstrate total dominance over victims and to remind them to know their place. These acts degrade victims in the eyes of others so that they will be publicly stigmatized and scorned should they dare to complain. People who have been subjected to these assaults experience terror, helplessness and profound humiliation. Sexual assaults, because of their gratuitous cruelty, are among the most harmful of traumatic experiences.[[6]](#footnote-6)

The response of the survivor’s community--family, peers, and especially authority figures-- is of immense importance in determining the course of recovery. Survivors who are met with compassion and support usually recover well; such support repairs the survivor’s trust in other people.[[7]](#footnote-7) On the other hand, survivors who are met with indifference or blame from authority figures will predictably suffer increased symptoms of post-traumatic stress and depression, as they will feel abandoned and betrayed by their community.[[8]](#footnote-8)

Authority figures in schools are therefore in a position of great social responsibility. Given the prevalence of sexual assault and harassment and the vulnerability of teenage and college age women, it is incumbent on school authorities to develop pro-active measures of intervention based on an understanding of the social realities of sexual assault and the psychology of people who have been traumatized. These proposed rules seem to disregard both the seriousness of the problem of sexual harassment and assault, and the profound harm to victims that results.

In particular, the following rules would exacerbate psychological harms to victims:

Rule 106.30: This proposed rule unfairly limits the supportive measures that schools could offer in order to help survivors in the aftermath of trauma. Following sexual assault and harassment, survivors often suffer from intrusive, overwhelming flashback memories of the event, as well as nightmares, insomnia, and pervasive feelings of terror. Any reminder of the event, such as encountering the perpetrator in a dormitory or classroom, provokes these symptoms, which interfere with the student’s ability to concentrate on her studies and participate in campus life.

It is incumbent on the school to take active measures to protect the survivor, including measures that may inconvenience the accused perpetrator. It is neither unreasonable nor excessively harsh to ask the accused to make some accommodations to stay away from the survivor, such as changing classes or transferring to a new dormitory. However, there is no justification for a “mutual” no-contact order, which presumes that both parties are equally in need of protection from one another.

Rule 106.45(b)(1)(iv): This rule requires schools to presume at the outset that the accused perpetrator is not responsible. This means in effect the school is required to presume that the complaining victim is lying, reinforcing sexist rape myths, and prejudging the institutional response in favor of the accused perpetrator. In reality, false complaints of sexual assault are exceedingly rare, while false denials and claims of innocence are commonplace.

The presumption of innocence is appropriate in criminal proceedings, where the liberty of the accused is at stake, in order to protect the accused individual against the overweening power of the state. It is not appropriate in matters of educational discipline, where what is at stake is the privilege of the accused to be part of an educational community. It is certainly not appropriate as applied to gender-based violence, where perpetrators currently enjoy what amounts to impunity.[[9]](#footnote-9) This rule would continue to foster impunity for perpetrators. By implementing rules that give undue advantage to perpetrators, schools would humiliate and re-traumatize survivors of sexual assault and harassment and perpetuate sex discrimination.

Rule 106.45(b)(3)(vi-vii): This rule requires students who file formal Title IX complaints to submit to cross-examination in a “live hearing” by the accused student’s “advisor of choice.” For survivors of sexual assault and harassment, this means being subjected to hostile attacks on their credibility and public shaming at a time, following a traumatic event, when they may feel most vulnerable. It also means being forced to relive their traumatic experiences in excruciating detail, a situation almost guaranteed to aggravate their symptoms of post-traumatic stress. For these reasons, a requirement for live cross-examination is likely to cause serious to harm victims who complain and to deter even more victims from coming forward.

Rule 106.45(b)(6): This rule would allow schools to use an “informal resolution process,” such as mediation, for resolving complaints. Survivors of campus sexual assault and harassment, faced with the prospect of an extremely hostile and re-traumatizing process for investigation of formal complaints, are at high risk of being pressured to consent to mediation as a less forbidding option. Mediation, however, is never appropriate in situations of sexual violence and harassment, because it is a method of resolving disputes based on the presumption that both parties are equally responsible for the problem. To apply mediation to complaints of gender-based violence and harassment is to perpetuate sexist prejudices that blame the victim. This option can only result in further humiliation of the victim.

In sum, these proposed rules will perpetuate sex discrimination in schools, by preventing schools from taking reasonable measures to protect and care for survivors of sexual assault, and by adding to the burden of trauma for survivors who have the courage to come forward. Rather than implementing these proposed rules, the Department of Education should redirect its attention to enforcement of existing Title IX requirements that schools respond with care and diligence to the problems of campus sexual assault and harassment.

Thank you for the opportunity to submit comments on the NPRM.

Sincerely,

Judith L. Herman, M.D.

Professor of Psychiatry (Part Time)

Harvard Medical School

1. JL Herman: Trauma and Recovery: *The Aftermath of Violence—From Domestic Abuse to Political Terror.* New York: Basic Books, 1992, 1997, 2015. [↑](#footnote-ref-1)
2. P. Tjaden & N. Thoennes: *Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey.* Washington, DC: US Department of Justice, 1998. [↑](#footnote-ref-2)
3. MJ Breiding, SG Smith, KCBasile et al: “Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization---National Intimate Partner and Sexual Violence Survey—United States 2011.” *Center for Disease Control and Prevention: Morbidity and Mortality Weekly Report*, September 5, 2014. [↑](#footnote-ref-3)
4. S Sinozich & L Langton, *Special Report: Rape and Sexual Assault Victimization among College-Age Females, 1995-2013.* Washington DC: US Department of Justice, 2014 [↑](#footnote-ref-4)
5. MP Koss: “Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students of Higher Education.” In *Rape and Sexual Assault*. Vol 2. Ed. AW Burgess. New York: Garland, 1987, 3-26. [↑](#footnote-ref-5)
6. RC Kessler, A Sonnega, E Bromet et al: “Posttraumatic Stress Disorder in the National Comorbidity Survey.” *Archives of General Psychiatry* 1995; 52:1048-1060. [↑](#footnote-ref-6)
7. AW Burgess & LL Holmstrom, “Adaptive Strategies and Recovery from Rape.” *American Journal of Psychiatry* 1979; 136:1278-1282. [↑](#footnote-ref-7)
8. CP Smith & JJ Freyd: “Institutional Betrayal.” *American Psychologist* 2014; 69: 575-587. [↑](#footnote-ref-8)
9. K Daly & B Bonhours: “Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries.” *Crime and Justice* 2010; 39: 485-565. [↑](#footnote-ref-9)