



Oregon Attorney General's Sexual Assault Task Force

January 28, 2019

Submitted via 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:

I am writing on behalf of the Oregon Attorney General's Sexual Assault Task Force to provide public comment on the proposed rules relating to sexual harassment as published in the Federal Register on November 29, 2018.

The Oregon Attorney General's Sexual Assault Task Force (SATF) is a private, non-profit, non-governmental statewide agency of over 100 multi-disciplinary members who serve as advisors on our Task Force Advisory Committees. For nearly two decades, SATF has provided training and technical assistance to professionals across Oregon who work to prevent and respond to sexual violence in the medical field, in the criminal justice system, in K-12 education and on college campuses, as advocates, and as sex offender treatment professionals. The mission of SATF is to facilitate and support a collaborative, survivor-centered approach to the prevention of and response to sexual violence.

In 2018, SATF's Campus Program provided training to 1,172 campus-based professionals on 47 campuses in Oregon and around the nation, and assisted campus-based professionals with over 3,000 technical assistance consultations.

SATF appreciates the following provisions and asks the Department to continue to include these in the final regulations:

- We appreciate the Department's recognition of sexual harassment and assault experienced by students in K-12 schools and that those students may have different needs than students in higher education.
- We support the inclusion of supportive measures and ask that the Department continue to require schools to offer supportive options to students (34 CFR Part 106.30). We suggest one revision to

the process of implementing and keeping records of supportive measures to allow for the use of advocates in line with best practice and local laws.

- We support the Department's choice to respect survivors' autonomy in deciding whether to initiate a grievance process in the higher education setting (34 CFR Part 106.44), but suggest that faculty and staff should receive training on how to appropriately respond to a disclosure of harassment and resources they can share with students to help them be better informed of their options.

SATF provides comment and suggests changes below on the following provisions of the proposed rules:

- We find the definition of harassment in the proposed rules insufficient to adequately address educational discrimination and ensure access for students who experience harassment and violence (34 CFR Part 106.30), and suggest the Department return to a broader definition that encompasses all types of violence and harassment and that aligns with other school-based laws.
- To increase the equity and neutrality of the process, we urge the Department to change the language of "complainant" to "reporting party" or a similarly neutral term.
- We suggest that the rules be amended to require schools to respond to all harassment and violence that impacts a student's education access, not just violence that occurs within the narrow definition of a school's program or activity (34 CFR Part 106.45(b)(3)).
- We do not believe that mediation is a best practice in cases involving physical sexual assaults or when there is ongoing and severe harassment, and ask the Department to amend the regulations to prohibit mediation in these cases, and to caution schools to invest in sufficient training and capacity building before implementing any information resolutions (34 CFR Part 106.45(b)(6)).
- We have concerns regarding safety and privacy for reporting parties (i.e. complainants), respondents, and witnesses related to the electronic sharing of statements and evidence and suggest that this requirement be removed from the regulations (34 CFR Part 106.45(b)(3)(viii)).
- To ensure student safety, we suggest that the written determination of responsibility should not be required to include details of all remedies designed to preserve educational access if it would compromise the safety of any involved parties (34 CFR Part 106.45(b)(4)).
- We would like to ask that the Department elaborate on training requirements for Title IX Coordinators, investigators, adjudicators, and other officials involved in the Title IX response process to include additional topics focused on student-centered and trauma-informed best practices (34 CFR Part 106.45(b)(1)(iii)).

Inclusion of K-12 Education Institutions

We appreciate the Department's explicit inclusion of K-12 schools as well as institutions of higher education. We know that students of all ages experience sexual harassment and assault, and that all students deserve to access their education free from harassment and discrimination¹. We support the

¹ Hill, C., & Kearly, H. (2011). Crossing the line: Sexual harassment at school. American Association of University Women. Retrieved from <https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>; Oregon Health Authority. (2017). Sexual

Department in continuing to affirm the rights of all students in accessing reporting options, the grievance process, supportive measures, and safety at school.

Supportive Measures

We thank the Department for the inclusion of supportive measures in the proposed rules (34 CFR Part 106.30, *Definitions*, pp. 61496-61497 in the Federal Register). Regardless of whether they choose to go through a formal grievance process, many survivors need support to continue to access their education. Requiring schools to offer supportive measures such as *access to counseling, dropping or changing courses, and safe transportation options* increases the chances that students will stay in school, will not suffer academic consequences that negatively impact their future, and will feel supported by the institution thereby mitigating retraumatization. We support the Department continuing to affirm the rights of these students, faculty, and staff to receive supportive measures regardless of whether they file a formal report or choose to undergo the investigation process, and thank the Department for requiring schools to offer and implement these measures.

We suggest one revision to the proposed regulations to make clear that a designee of the Title IX Coordinator may implement supportive measures on behalf of the Coordinator, and that the designee may keep their own documentation regarding implementing these measures. Many institutions of higher education have utilized campus-based advocates for a number of years to implement supportive measures, especially when a survivor does not want to go through the formal reporting and investigation process. The use of confidential advocates is considered a best practice when supporting survivors of interpersonal violence². In recognition of this, the State of Oregon implemented advocate privilege in 2015 to allow campus-based advocates to support survivors with privileged, confidential services³; many campuses in Oregon already coordinate effectively between advocates and Title IX offices to allow advocates to implement supportive measures for students who do not choose to make a formal report. In recognition of the vital role that advocates play, of the difficulties this will create for Oregon and other states that have laws recognizing campus-based advocate privilege, and in anticipation that some students who experience violence may not wish to file a formal report and may instead wish to work with a confidential advocate to receive supportive measures, we ask that the Department to implement this revision.

coercion, sexual assault, and intimate partner violence. Oregon Healthy Teens Survey, p. 57. Retrieved from https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/SURVEYS/OREGONHEALTHYTEENS/Documents/2017/2017_OHT_State_Report.pdf.

² See for examples: <https://www.ovc.gov/publications/infores/VictimsRightToPrivacy/pfv.html>; World Health Organization, 2013. Responding to Intimate Partner Violence and Sexual Violence Against Women: WHO Clinical Policy Guidelines. World Health Organization. Geneva, Switzerland, p. 22; <https://www.nsvrc.org/sarts/toolkit/3-5>.

³ ORS 40.264 Rule 507-1

Autonomy for Survivors in Reporting

We support the Department's choice to respect survivors' autonomy in deciding whether to initiate a grievance process in the higher education setting (34 CFR Part 106.44, *Recipient's response to sexual harassment*, pp. 61497 in the Federal Register). It is important to allow survivors to control their experiences whenever possible, and allowing them autonomy to decide when they are ready to initiate formal procedures creates a more trauma-informed process. However, we also know that students who disclose to a professor or trusted mentor may not know that they have options for support or safety on campus. Alternatively, a student may believe that the institutional employee they have told will take action. Especially given that this provision in the new regulations may reverse common practices on college campuses in the past several years, we believe that it will be necessary for faculty and staff to understand and clarify their roles with students when they hear a disclosure. We therefore suggest that faculty and staff should be required to receive training on campus resources and available options so that they can help inform survivors of their options if they disclose. They should also receive training on how to appropriately respond to a disclosure of violence or harassment.

We also suggest that it is in the best interest of schools to make a good-faith inquiry when they receive reports of harassment that may not rise to the level of a formal complaint, such as through an anonymous reporting system or a report that intimates that hostile environment sexual harassment may be occurring. Studies have shown that hostile environment sexual harassment can lead to loss of productivity, unhappiness with work environment, and even loss of talent if individuals leave the university; a recent report by the National Academies of Sciences, Engineering, and Medicine, for example, noted that "sexual harassment undermines women's professional and educational attainment and mental and physical health. The cumulative effect of sexual harassment is significant damage to research integrity and a costly loss of talent in academic sciences, engineering, and medicine⁴."

While we do not believe that information that does not rise to the level of a formal report should initiate a grievance process, we do believe that encouraging schools to make inquiries and gather a reasonable amount of additional information will help mitigate this costly loss of productivity and talent. Would the Department consider encouraging schools to inquire into anonymous and third-party reports as a means of preventing harassment from worsening?

Definition of Sexual Harassment

We find the definition of harassment in the proposed rules (34 CFR Part 106.30, *Definitions*, p. 61496 in the Federal Register) insufficient to adequately address educational discrimination and ensure access for students who experience harassment and violence. As written, the definition limits the responsibility of schools to only the most extreme forms of in-person, physical, and ongoing sexual harassment, and does not encompass the breadth of experiences that can severely impact a student's educational access. Dating

⁴ National Academies of Sciences, Engineering, and Medicine. 2018. *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/24994>.

violence, domestic violence, stalking, technology-facilitated sexual violence, and hostile environment sexual harassment can all severely limit a student's educational access. In our work with education and response professionals across the state of Oregon, we have seen many students suffer severe impacts on their educational access after experiencing these kinds of harassment.

We urge the Department to define sexual harassment as “unwelcome conduct of a sexual nature.” This is a widely accepted and practiced definition that schools are already accustomed to responding to, and that educators and the public are already overwhelmingly in favor of⁵. We also suggest that the definition include other forms of gender-based violence, specifically stalking, relationship violence (domestic and/or dating violence), and technology-facilitated sexual violence. Adding these additional forms of gender-based violence would make the regulations consistent with the VAWA Amendments to Clery (formerly known as the Campus Sexual Violence Elimination Act) of 2013⁶.

Neutral Language

To increase the equity and neutrality of the process, we urge the Department to change the language of “complainant” to “reporting party” or a similarly neutral term. We believe that it is important for all students to be treated fairly, and to minimize both the barriers to participation for all parties as well as the bias that students and officials might bring into the process. The term “complainant” creates an unnecessary bias, as many students and officials associate it with “complaining.” Many students go online to read their school's policy before talking to a school official, and the word “complainant” may create a barrier to reporting if students believe their reports will be seen as complaining or whining. This is especially harmful for younger students who have no familiarity with legal jargon. We suggest the use of the phrase “reporting party” as a counterpart of the appropriately neutral language of “respondent” and “responding party.” We also suggest that the Department encourage schools to use neutral language in their policies to decrease barriers to reporting and bias within the process, and to increase equity for all students.

Location/Scope of Harassment

The proposed regulations, which limit the required response to reports of incidents that occur within a school's educational program or activity, are not sufficient to address all sex discrimination that impacts the educational access of students, faculty, and staff (34 CFR Part 106.45(b)(3), *Investigations of a formal complaint*, p. 61498 in the Federal Register; further clarified on p. 61468). Many students we have worked with on campuses across Oregon have experienced sexual harassment off-campus that nonetheless severely impacted their educational access. We know that many students, faculty, and staff experience ongoing and severe educational impacts of harassment and violence, regardless of whether it occurs within

⁵ Buffkin, T., Cantalupo, N. C., Cool, M., Orlando, A. (2018). Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education's Executive Order 13777 Comment Call. *California Law Review Online* (Forthcoming). Available at SSRN: <https://ssrn.com/abstract=3255205> or <http://dx.doi.org/10.2139/ssrn.3255205>

⁶ 34 CFR Part 668

the educational program. These include academic impacts such as increased stress, decreased knowledge retention, and decreased ability to finish school - all of which can last for months or years after an incident occurs⁷. Survivors can also experience a variety of psychological, emotional, and social consequences such as social isolation, impacts on mental health and wellbeing, increased stress and anxiety, and post-traumatic stress disorder⁸. Likewise, friends and peers of students who experience harassment and violence can be impacted psychologically, emotionally, socially, and academically⁹.

We suggest that the Department require grievance procedures apply to all reported incidents of sexual harassment where either the reporting party (i.e., complainant) or responding party (i.e. respondent) is under the purview of the institution, regardless of where the incident occurred. When only the reporting party is under the purview of the institution, the institution should be required to offer supportive measures to ensure that the reporting party's educational access is not hindered. When only the responding party is under the purview of the institution, the institution should be required to conduct an investigation to the best of their ability in order to prevent the conduct from recurring. We also suggest that the regulations should also apply to programs overseas when the University is sponsoring the program or the University's faculty members and staff are abroad as the instructors or chaperones with the students and only that particular university's students are on the program.

Mediation and Informal Measures

We do not believe that mediation is a best practice in cases involving physical sexual assaults or when there is ongoing and severe harassment (34 CFR Part 106.45(b)(6), *Informal resolutions*, p. 61499 in the Federal Register). Sexual and interpersonal violence are based in dynamics of power and control, where one person has engaged in acts that position them to have more control and more social, structural, or psychological power than the other person and then uses that power and control to excuse or perpetuate their abusive behavior¹⁰. This complicates the dynamics of mediation, as mediation typically requires that parties have equal power and equal ability to negotiate and feel safe. Mediation is heavily cautioned against in divorce and other legal proceedings involving domestic and sexual violence, and when used, must be used carefully and intentionally by skilled mediators with immense training in both mediation

⁷ Banyard, V. L., Demers, J. M., & Cohn, E. S. (2017). Academic correlates of unwanted sexual contact, dating violence, and stalking. *Journal of Interpersonal Violence*, <https://doi.org/10.1177/0886260517715022>; Jordan, C. E., Combs, J. L., & Smith, G. T. (2014). An exploration of sexual victimization and academic performance among college women. *Trauma, Violence, and Abuse*, *15*(3), 191–200. doi: 10.1177/1524838014520637

⁸ Turchik, J. A., & Hassija, C. M. (2014). Female sexual victimization among college students. *Journal of Interpersonal Violence*, *29*(13), 2439–2457. doi: 10.1177/0886260513520230

⁹ Campbell, R., & Wasco, S. (January 01, 2005). Understanding Rape and Sexual Assault. *Journal of Interpersonal Violence*, *20*, 1, 127-131.

¹⁰ Domestic Abuse Intervention Programs. (2017). Power and Control Wheels. Retrieved from <https://www.theduluthmodel.org/wheels/>; McPhail, B. A. (2016). Feminist framework plus: Knitting feminist theories of rape etiology into a comprehensive model. *Trauma, Violence, and Abuse*, *17*(3), 314–329. doi: 10.1177/1524838015584367; Turchik, J. A., Hebenstreigt, C. L., & Judson, S. S. (2016). An examination of the gender inclusiveness of current theories in sexual violence in adulthood: Recognizing male victims, female perpetrators, and same-sex violence. *Trauma, Violence, and Abuse*, *17*(2), 133–148. doi: 10.1177/1524838014566721.

and in the dynamics of violence¹¹. Unskilled mediators may do more harm than good for all parties involved, and can be manipulated by an offender into helping perpetuate harm or abuse.

Restorative justice, which is different from mediation, is an informal resolution option that has been shown to be an effective and supportive method for interpersonal violence survivors to access justice and remediation¹². However, practicing restorative justice requires intense training and capacity-building for facilitators and communities¹³. We caution the Department against encouraging schools to adopt restorative justice models without also taking the time to engage in sufficient training and capacity-building. Considering both of these points, we ask for the Department to amend the regulations to incorporate considerations regarding the appropriate use of mediation and other informal resolutions, and to indicate necessary training for those facilitating information resolutions in incidences when they are appropriate.

Privacy Concerns during Grievance Procedures

We want to express concerns regarding safety and privacy for reporting parties (i.e. complainants), respondents, and witnesses related to the sharing of statements and evidence required prior to a hearing during grievance procedures (34 CFR Part 106.45(b)(3)(viii), p. 61498 in the Federal Register). Requiring electronic sharing of evidence and statements poses a privacy and security risk, especially given the kinds of evidence that parties may submit as part of an investigation. At schools here in Oregon, we know that evidence submitted by parties in Title IX cases often includes sensitive and private content such as explicit videos and photographs, medical reports, or forensic evidence kits. While electronic sharing programs may have the capacity to prevent downloading or even screenshotting these materials, it would not prevent parties from saving and sharing the materials in other ways such as by taking pictures or videos of the evidence with a cell phone.

This highly increases the risk that these private and intimate materials could be posted on social media or shared in other ways that violate the privacy of all parties involved. For many students, leaking these types of evidence could put them at risk for social ostracization, consequences for future employment, or familial estrangement - an especially dangerous risk given that many students in both K-12 schools and

¹¹ American Bar Association. (2014). Mediation in Family Law Matters where DV is Present. Retrieved from https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Charts/migrated_charts/2014_Mediation_Statutory_Chart.pdf; United Nations. (2008). 7.D. Prohibition of mediation, *Good Practices in Legislation on Violence Against Women*. p. 43. Retrieved from [http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20\(final%2011.11.08\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20(final%2011.11.08).pdf).

¹² Cardoza, K. (2018, June 30). Students Push for Restorative Approaches to Campus Sexual Assault. Truthout. Retrieved from <https://truthout.org/articles/students-push-for-restorative-approaches-to-campus-sexual-assault/>; McGlynn, C. , Westmarland, N. and Godden, N. (2012), 'I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice. *Journal of Law and Society*, 39: 213-240. doi:[10.1111/j.1467-6478.2012.00579.x](https://doi.org/10.1111/j.1467-6478.2012.00579.x)

¹³ Baliga, S. (2018, October 10). A different path for confronting sexual assault. Vox. Retrieved from <https://www.vox.com/first-person/2018/10/10/17953016/what-is-restorative-justice-definition-questions-circle>; Restorative Justice Council (2011). Best practice guidance for restorative practice. Retrieved from <https://restorativejustice.org.uk/sites/default/files/resources/files/Best%20practice%20guidance%20for%20restorative%20practice%20011.pdf>

the higher education system are dependent on their families financially, psychologically, and materially. We do not believe that the benefits gained by requiring electronic sharing of evidence outweigh these grave risks to the safety and privacy of all parties involved.

We believe that it is possible to ensure the rights of evidentiary review for all students while still taking steps to protect the privacy of involved parties. Many schools currently restrict evidentiary review to in-person reviews, while still making wide accommodations to allow reporting and responding students to have equitable and convenient access to the materials. We suggest that the Department remove the requirement for electronic sharing of evidence, and instead require that recipients make evidence equally available and easily accessible for reporting and responding parties, including allowing sufficiently long time frames and flexible hours for reviewing the information. If one or both parties are not currently on-campus, recipients should be encouraged partner with organizations local to the party (such as another school or a law firm) who have appropriate privacy and security measures in place to allow local in-person review for those students.

Written Determination of Responsibility

We suggest that the written determination of responsibility should not be required to include details of all remedies designed to preserve educational access for all parties (34 CFR Part 106.45(b)(4), *Determination regarding responsibility*, p. 61499 in the Federal Register). Disclosing some of these remedies, such as safety planning offered to parties or witnesses such as changes to classes or living arrangements, could put the parties at further risk for violence. We suggest that the rules be amended to specify that remedies supplied to any parties do not have to be disclosed in the written report if disclosing those rules could compromise the safety of any participating parties.

Training of Coordinators and Other Officials

We would like to ask that the Department elaborate on training requirements for Title IX Coordinators, investigators, adjudicators, and other officials involved in the Title IX response process in addition to those already listed by the Department (34 CFR Part 106.45(b)(1)(iii) p. 61497 in the Federal Register). We support the department in requiring training for officials on Title IX and on how to conduct an investigation free from bias and that is not reliant on sex-stereotypes. However, we also believe that coordinators, investigators, and decision-makers need training on:

- definitions, dynamics, and rates/prevalence of sexual harassment, sexual assault, dating/domestic violence, and stalking, including within educational and employment contexts where information/data exist;
- any applicable state and local laws that may intersect with the Title IX process;
- neurobiology of trauma and trauma-informed care;
- best practices in serving reporting and responding students (such as utilizing trauma-informed principles of support and student-centered frameworks);
- addressing bias and increasing accessibility utilizing an anti-oppression framework;

- effective interviewing, including best practices in interviewing sexual assault survivors such as forensic experiential interviewing models;
- best practices in report writing, including how to reduce bias and interpretive judgements; and
- resources available for students both on-campus and within the surrounding community (including law enforcement, counseling and support groups, nonprofits agencies that provide services to any involved parties, SANE exams), including best practices in implementing coordinated care models.

We suggest that the Department amend the regulations to require coordinators, investigators, and decision-makers to receive training on these additional crucial topics.

Thank you for the opportunity to submit comments. Please do not hesitate to contact Michele Roland-Schwartz at michele@oregonsatf.org to provide further information.

Sincerely,



Michele Roland-Schwartz
Executive Director
Oregon Attorney General's Sexual Assault Task Force
www.oregonsatf.org
503.990.6541
michele@oregonsatf.org