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January 30, 2019

Brittany Bull
U.S. Department of Education
400 Maryland Avenue SW
Washington D.C., 20202

The American Psychological Association (APA) appreciates the opportunity to respond to the Request for Information (RFI) published in the Federal Register on November 29, 2018 (Docket Number ED-2018-OCR-0064) related to regulations implementing Title IX of the Education Amendments of 1972.

APA is the leading scientific and professional organization representing psychology in the United States, with more than 115,700 researchers, educators, clinicians, consultants, and students as its members. APA's mission is to advance the creation, communication and application of psychological knowledge to benefit society and improve people's lives. We are writing to express concerns about certain aspects of the rule that may impact victims' willingness and ability to report sexual harassment and assault, in turn impacting equal access to educational programs and activities. Psychologists are uniquely qualified to address sexual assault as both researchers and practitioners. Our response to these draft regulations is based on APA policy and grounded in psychological research.

Sexual misconduct has a significant negative impact on learning and achievement and compromises students' ability to complete college and contribute to society as expected. Sexual assault experiences before entering or during their secondary education years threaten to hamper or derail student development and success beyond higher education. An effective Title IX is critical in supporting student wellness and academic achievement.

Campus sexual misconduct, including sexual assault, is much more common than many people imagine. Estimates of sexual assaults of college women have been remarkably consistent over timeⁱ, despite efforts to address the problem. Surveys regularly show that approximately 15 to 20 percent of college women report experiencing rape or attempted rape during their college career, and that over 50 percent report experiencing some form of unwanted sexual contact. Although many studies do not have diverse samples, higher rates of victimization are found among women who are members of sexual and ethnic minoritiesⁱⁱ. Racial and ethnic minority women report high levels of assault and harassmentⁱⁱⁱ with Native American and Alaskan Indian women at the highest risk. Men too can be victims of sexual assault, most often by other men, and at lower rates than women^{iv}. Transgender and gender non-conforming college students appear to be at significantly higher risk for sexual assault and harassment compared to their heterosexual counterparts^v. In addition, despite students with disabilities reporting higher rates of sexual violence victimization compared to students without disabilities^{vi}, federally-funded research and programs practically render their experiences invisible^{vii}.

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Title IX implementation should be guided by research on campus sexual assault to ensure the program works as it is intended: to create a climate on campus where all students have an opportunity to learn and succeed. We respectfully request that the Department carefully consider the impact of the proposed changes, particularly changes that could lead to under reporting of sexual misconduct, re-victimization or traumatization of the parties involved.

APA urges the Department to maintain a broad definition of sexual harassment.

Of all crimes, sexual assault is one of the most underreported. According to the Department of Justice, only 23 percent of sexual assaults were reported to police in 2016 and 40 percent in 2017^{viii}. The false reporting rate for sexual assault is about 2 to 3 percent^{ix}, which is no different than false reporting rates for other crimes. Furthermore, these statistics do not include other forms of sexual harassment, which are more common and less likely to be reported to authorities. Sexual victimization is caused by a wide array of sexual misconduct, including sexual contact with another person who could not consent or did not want the contact and can result in decreased academic well-being such as lowered academic efficacy and higher levels of stress^{xi}. A reported 34 percent of college students who experience sexual assault drop out of college^{xii}. Rape and other forms of sexual assault also negatively impact on victims' mental and physical health. Four out of five rape victims subsequently suffer from chronic physical or psychological conditions^{xiii}.

In keeping with the intent of the Clery Act, which is to foster transparency on campus crime reporting, APA urges the Department to maintain a broad definition of sexual harassment. The proposed regulation narrows the definition of sexual harassment under Title IX from "unwelcome conduct of a sexual nature" under the Department of Education's 2011 guidance to a three-part definition that includes the conditioning of a benefit or service on participation in unwelcome sexual conduct; sexual assault as defined under the Clery Act; and unwelcome conduct on the basis of sex that is so "severe, pervasive, and objectively offensive that it effectively denies a person equal access" to educational programs or activities.

Research maintains that students are unlikely to report harassment when their experience does not match common beliefs about what rape is, particularly when the incident involves someone they know and/or alcohol^{xiv}, although the physical and mental health consequences of the experience still occur. Further, experiences that are deemed as less "severe" forms of victimization can also lead to negative outcomes and increase a victim's risk of further victimization. In addition to limiting the definition of harassment to the most extreme cases, it raises concerns that victims, who are often uncertain as to whether their experiences qualify as sexual assault, will be further discouraged from considering unwanted sexual conduct as reportable. Thus, narrowing the definition of incidents that invoke formal responsibilities under Title IX will impact the way students perceive their experience and impact their decision to report.

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APA encourages the Department not to limit the geographic scope of reporting.

We are also concerned that the limited geographic scope of the proposed regulation could also lead to under reporting. As currently written, the proposed regulation excludes incidents that happen outside of an educational program and eliminate protections for students studying abroad. Campus climate surveys show that the clear majority of sexual misconduct occurs off-campus. Past guidance has indicated that sexual harassment that initially occurred off-campus and outside of an institution's education program or activity would be reportable if there were continuing effects of that incident that created a hostile environment for the victim on campus. This is particularly impactful for community colleges and commuter colleges, where most student activities take place off-campus and outside of campus housing.

Additionally, the proposed regulation does not address how online sexual harassment might be handled. Over a third of girls and one-fourth of boys in grades 7-12 have experienced online harassment and the data clearly demonstrate impact on the victims' academic progress: 18 percent did not wish to go to school; 13 percent found it hard to study; 17 percent had trouble sleeping, and 8 percent stayed home from school^{xv}.

APA advises the Department to maintain flexibility in the reporting process.

We strongly encourage the Department to consider whether the proposed changes will impact the willingness and ability of victims to report sexual assault. Psychological research shows that regaining a sense of control is essential to survivors' recovery^{xvi}. Victims of sexual misconduct need to be believed, validated, and supported to enhance disclosure, adaptive coping, and control. The goals of the criminal justice, medical, and university disciplinary systems are different than what victims need, and victims fear that the investigation process will be confusing, traumatizing, and futile. Thus, the process of disclosure presents a barrier to victims of sexual assault. Approximately 59 percent of victims who disclose talk to their family or friends and wait to disclose their experience^{xvii}.

Under the proposed regulation, the institution is only obligated to respond when the Title IX coordinator or another employee who has the authority to take corrective action on behalf of the institution receives actual notice. The proposed regulation limits the people to whom a victim can report that will trigger a Title IX investigation. This narrowing of potential reporters could discourage victims from disclosing their experiences. Under past regulations and guidance, this obligation was triggered when a college knew or should have known about the possible harassment.

APA strongly encourages the Department to maintain flexibility in resolving complaints.

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The Department should aim for a process that builds trust between students and their institutions and that allows victims the greatest flexibility of options for resolution. As written, the proposed regulations propose a formal hearing or mediation process that mimic legal proceedings and are thus adversarial in nature. Specifically, the requirement to allow live cross-examination has the potential to re-traumatize victims and ultimately cause them to disengage with the systems that should be supporting them^{xviii}. Being forced to engage with proceedings that mimic a legal environment can retraumatize victims and ultimately lead to disengagement due to lack of choice. Institutions may also delay resolution of complaints while a law enforcement investigation is pending. This policy could force students to wait months or even longer for a resolution to their complaints; meanwhile they are suffering serious harm, including reduced learning and achievement^{xix}. We suggest widening the scope of incidents that could be considered for formal complaints while also allowing greater flexibility for institutional responses, as opposed to forcing victims and the accused into an oppositional, legalistic procedure. APA supports expanding victims' options for institutional response so that they have non-adversarial choices for resolution.

In addition, the proposed regulations state that an advisor will be afforded to all parties involved but it is not specified if this advisor will be an attorney. Without guaranteeing all students receive the same quality of legal representation, a dynamic is created where those with power and privilege may have an unequal advantage in hearing proceedings. In other words, students with limited access to financial resources will be at a significant disadvantage.

APA urges the Department to provide a framework for student support and recovery.

For reports that are not formal complaints, the institution may still respond, and the regulations put forth "supportive measures" that the institution may wish to offer the complainant. These services, similar in concept to "interim measures" under previous guidance, must be non-disciplinary and at no cost to the students. The measures described in the regulation include counseling, mutual restrictions on contact between the parties, leaves of absence, increased security, and other measures. The preamble to the regulation cites these measures as a means of avoiding a more protracted and potentially charged proceeding. We suggest that these measures include medical and psychological services for victims to support recovery and required rehabilitation options for students who have been found responsible for sexual misconduct but remain on campus.

Currently there is no formalization of sanctions, no requirement to use any qualified treatment personnel, and no standard method for rehabilitation. If concern for victim safety is not central to the proposed options, general campus safety is challenged and the perception that "nothing happens" will persist. Victims should be assured a well-publicized pathway to medical and psychological services that support recovery, and which are confidential and within which they can hear about their options. Institutions should

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explicitly address the supportive measures that will be offered to victims. We also suggest that schools be required to specify the steps they take to rehabilitate those accused who are found responsible but retained on campus^{xx}. There is a robust and growing body of scientific literature on community engagement and restorative approaches to addressing sexual harassment from which these approaches can be drawn^{xxi}.

APA proposes increased collaboration and transparency.

Reporting sexual harassment accurately and addressing it safely is not a trivial matter. Scientific knowledge and a transparent scientific process should guide this work if it is to have integrity and accuracy. In addition to the recommendations suggested above, we recommend periodic comprehensive assessments of campus climate at no cost to institutions using methods that meet the needs of campus administrators, students, and educational communities. These assessments should balance the need for scientific standardization with flexibility for individual institutions and provide an accurate assessment of the effectiveness of different approaches to sexual harassment.

In closing, psychology has much to contribute to addressing campus sexual assault. It is our goal to assist in steering the national dialogue from a crisis-oriented one to one that ensures empowerment, safety and accountability, while focusing on evidence-based solutions. While this goal goes beyond the scope of this request for comment, it is with that intent that APA engages in this dialogue. If we may provide any further input, please contact Amalia Corby (acorby-edwards@apa.org or 202-336-6068) or Jennifer Smulson (jmulson@apa.org or 202-336-5945).

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