



division on women and crime  
american society of criminology

*established 1984*

To the Department of Education,

The American Society of Criminology (<http://www.asc41.com/about.htm>) is an international organization whose members pursue scholarly, scientific, and professional knowledge concerning the measurement, etiology, consequences, prevention, control, and treatment of crime and delinquency. The Society's objectives are to encourage the exchange, in a multidisciplinary setting, of those engaged in research, teaching, and practice so as to foster criminological scholarship, and to serve as a forum for the dissemination of criminological knowledge. Our membership includes students, practitioners, and academicians from the many fields of criminal justice and criminology. ASC's membership spans 63 countries and includes roughly 3700 practitioners and academicians from the many fields of criminal justice and criminology.

The Division on Women and Crime (<http://ascdwc.com/>) is a unit of the American Society of Criminology composed of scholars and practitioners who are committed to feminist perspectives on gender, crime, and justice. It is one of the oldest and largest divisions within the American Society of Criminology. In the attached document, the Executive Council of the Division on Women and Crime outlines a research and evidence-based response to the public comment section of proposed changes to Title IX of the Education Amendments of 1972. As scientists and educators, we urge the Department of Education to conduct a thorough review of the research detailing the context and impact of sexual harassment and to ensure that any changes to Title IX guidance are data-driven.

Please see attached document.

Respectfully submitted by

The Executive Council of The Division on Women & Crime  
American Society of Criminology

## Priority Comment #1

**The draft regulatory language defines sexual harassment as behavior, “that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity” (34 CFR Part 106.45 (b)(3)(vi)). This changes the definition of sexual harassment from warranting an investigation if it is, “sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program.”<sup>1</sup> The proposed language narrows the definition of sexual harassment and thus decreases schools’ responsibility to investigate sexual harassment, as it recognizes only the extreme situation.**

Although some students who experience sexual violence and harassment drop classes or drop out of school altogether,<sup>2</sup> student victims experience a much wider range of negative consequences that limit their ability to benefit from education, even if it does not deny their access to programs. Victims of sexual harassment experience psychological trauma including cognitive (e.g., reduced ability to concentrate) and emotional (e.g., depression) issues, which present barriers to academic achievement, including resulting in a decreased quality of work, lower GPA, and less ambition.<sup>3,4,5,6</sup> Likewise, students who experience sexual harassment also report less academic and social engagement<sup>2,7</sup> and student engagement is integrally tied to

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<sup>1</sup> US Department of Education, Office of Civil Rights. (2011). Dear Colleague Letter, 3.

<sup>2</sup> Mengo, C., & Black, B. M. (2016). Violence victimization on a college campus: Impact on GPA and school dropout. *Journal of College Student Retention: Research, Theory & Practice*, 18(2), 234–248

<sup>3</sup> Huerta, M., Cortina, L. M., Pang, J. S., Torges, C. M., & Magley, V. J. (2006). Sex and power in the academy: Modeling sexual harassment in the lives of college women. *Personality and Social Psychology Bulletin*, 32(5), 616–628.

<sup>4</sup> Jordan, C. E., Combs, J. L., & Smith, G. T. (2014). An exploration of sexual victimization and academic performance among college women. *Trauma, Violence, & Abuse*, 15(3), 191–200.

<sup>5</sup> van Roosmalen, E., & McDaniel, S. A. (1999). Sexual harassment in academia: A hazard to women’s health. *Women & Health*, 28(2), 33–54.

<sup>6</sup> Wolff, J. M., Rospenda, K. M., & Colaneri, A. S. (2017). Sexual harassment, psychological distress, and problematic drinking behavior among college students: An examination of reciprocal causal relations. *The Journal of Sex Research*, 54(3), 362–373.

<sup>7</sup> Fisher, B. S., & Sloan III, J. J. (2013). *Campus Crime: Legal, Social, and Policy Perspectives*. (3rd Ed.). Springfield, IL: Charles C Thomas.

student retention and academic success.<sup>8</sup>

As noted by a recent consensus report by the National Academies of Science, Engineering, and Math (NASEM), perceived tolerance for sexual harassment is the “most potent predictor” of its occurrence.<sup>9</sup> Failure to investigate credible cases of sexual harassment creates an organizational climate that will increase the occurrence and severity of sexual harassment<sup>10</sup> and exacerbate student victim trauma.<sup>11</sup> An institution’s climate reflects its policies and practices, but it is also influenced by the national climate.<sup>12</sup> Therefore, it is imperative that the Department of Education (DoE) facilitate a safe and productive learning environment by recognizing and addressing sexual harassment.

**The proposed definition will exacerbate student trauma, compromise student success, and create an environment that will contribute to increased prevalence and severity of sexual harassment. The DoE should define sexual harassment as behavior that limits students’ ability to benefit from their education and mandate that all credible cases of sexual harassment should be investigated.**

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<sup>8</sup> Harper, S. R., & Quaye, S. J. (2009). Beyond sameness with engagement and outcomes for all: An introduction. In S. R. Harper & S. J. Quaye (Eds.), *Student Engagement in Higher Education* (pp. 1–15). New York: Routledge.

<sup>9</sup> National Academies of Sciences, Engineering, and Math. (2018). *Sexual harassment of women: Climate, culture, and consequences in academic sciences, engineering, and medicine*. Washington, D.C.: National Academies Press, 3.

<sup>10</sup> Lee, V. E., Croninger, R. G., Linn, E., & Chen, X. (1996). The culture of sexual harassment in secondary schools. *American Educational Research Journal*, 33(2), 383–417.

<sup>11</sup> Ormerod, A. J., Collinsworth, L. L., & Perry, L. A. (2008). Critical Climate: relations among sexual harassment, climate, and outcomes for high school girls and boys. *Psychology of Women Quarterly*, 32(2), 113–125.

<sup>12</sup> Tenbrunsel, A. E., Rees, M. R., & Diekmann, K. A. (2019). Sexual harassment in academia: Ethical climates and bounded ethicality. *Annual Review of Psychology*, (70), 1–18.

## Priority Comment #2

**Under the proposed regulations (§ 106.30), an institution would be only liable to act on a report if a formal complaint were filed with the Title IX officer. This is a significant deviation from the 2001 guidance which indicates that that the school is liable if “a responsible employee knew, or in the exercise of reasonable care should have known about the harassment”.<sup>13</sup> This proposed change will severely narrow schools’ obligations to respond to incidents of sexual harassment and will limit complainants’ access to accommodations and respondents’ rights to due process.**

In Secretary DeVos’s September 2017 speech, she indicated that the proposed regulations would “include the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined.” However, research has consistently reflected that survivors of campus sexual assault are more likely to disclose to someone with whom they have an existing relationship (faculty, staff, Resident Assistant, peer) versus a campus administrator. Fisher et al.’s (2000) landmark national study of sexual victimization of college women found that fewer than 5% of students reported incidents that would be legally defined (in state statutes) as rape to law enforcement.<sup>14</sup> An additional study by Walsh, Banyard, Moynihan, Ward and Cohn (2005) found that an overwhelming majority of college student victims (97%) did not access on-campus services after an assault.<sup>15</sup> A systematic review of studies on disclosure by college victims<sup>16</sup> found that reports to law enforcement ranged from 0% to 12.9% and that up to 15.8% of victims sought help from a victim service, crisis or health center. Similarly, a recent nationally representative study found that “a relatively small percentage (e.g., 28% or less) of

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<sup>13</sup> U.S. Department of Education, Office for Civil Rights. (2001, January 19), 21. Revised sexual harassment guidance: Harassment of students by school employees, other students, or third parties.

<sup>14</sup> Fisher, B. S., Cullen, F. T., & Turner, M. G. (2000). *The Sexual Victimization of College Women* (NCJ 182369). Washington, DC: U.S. Department of Justice. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>

<sup>15</sup> Walsh, W., Banyard, V., Moynihan, M., Ward, S., & Cohn, E. (2010). Disclosure and service use on a college campus after an unwanted sexual experience. *Journal of Trauma & Dissociation*, 11, 134-151

<sup>16</sup> Sabina, C. & Ho, Ly.Y. (2014). Campus and college victim responses to sexual assault and dating violence: Disclosure, service utilization and service provision. *Trauma, Violence & Abuse*, 15, 201-226

even the most serious incidents are reported to an organization or agency (e.g., Title IX office; law enforcement).”<sup>17</sup> It is concerning that, across several studies, less than one-third of victims reported to formal sources. Title IX's original intent was to prevent barriers to educational opportunities due to sex discrimination. Limiting which victims' reports warrant a response from the university to those formally made to a Title IX officer does little to correct a potentially hostile environment or reduce the deliberate indifference that many institutions perpetuate.

**This proposed regulatory change does not enhance the ability of schools to create an environment free from sexual harassment; instead, based on extant research,<sup>15, 18</sup> this change would have a “chilling” effect, reducing reports and allowing sexual harassment and sexual assault to continue unaddressed. The DoE should continue to uphold the 2001 guidance and hold schools accountable for sexual harassment known to any responsible employee.**

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<sup>17</sup> Cantor, D., Fisher, B., Chibnall, S., Bruce, C., Townsend, R., Thomas, G., & Lee, H. (2015). *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*. Rockville, MD: Westat. Retrieved from <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>

<sup>18</sup> Fisher, B.S., Daigle, L.E., Cullen, F. T. & Turner, M.G. (2003). Reporting sexual victimization to the police and others: Results from a national-level study of college women. *Criminal Justice & Behavior*, 30(1), 6-38.

## Priority Comment #3

**In a departure from the 2001 guidance, the proposed regulatory guidance will allow schools to use unregulated “mediation” processes in lieu of investigations. Due to imbalances of power, potential for secondary victimization and retraumatization, safety concerns, lack of accountability by the alleged perpetrator and a lack of a community focused approach (as seen in restorative justice practices, but not in mediation) - mediation is not appropriate in cases of sexual harassment and sexual assault.**

Hallmarks of sexual harassment include power, fear, and coercion.<sup>19</sup> Much research has illustrated the problems inherent in mediation for family law cases where abuse has occurred.<sup>23, 20, 21, 22, 23</sup> The proposed shift represents a departure from the 2001 guidance letter in ways that are harmful to the complainant.<sup>24</sup> The 2001 guidance clearly states, “In some cases, such as alleged sexual assault, mediation will not be appropriate even on a voluntary basis.”<sup>25</sup> Additionally, the changes proposed will force victims to choose between informal and formal routes of adjudication. Should a complainant choose the informal mechanisms for resolution, the complainant will not be allowed (under proposed changes) to pursue formal procedures. This reduces a complainant’s rights and restricts the complainant’s ability to exercise her/his agency.

Should Title IX responsible institutions choose to seek informal procedures for handling sexual assault and harassment, restorative justice practices that rely on community-based

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<sup>19</sup> Irvine, M. (1993). Mediation: Is it appropriate for sexual harassment grievances? *Ohio State Journal on Dispute Resolution*, 9(1), 27-53.

<sup>20</sup> Beck, C. J.A., Anderson, E.R., O’Hara, K., L., & Benjamin, G.A.H. (2013). Patterns of intimate partner violence in large, epidemiological study of divorcing couples. *Journal of Family Psychology* 27(5), 743-753.

<sup>21</sup> Chowdhury, J. A. (2012). *Gender, power and mediation: Evaluative mediation to challenge the power of social discourses*. Newcastle upon Tyne, UK: Cambridge Scholars Publishing.

<sup>22</sup> Haynes, John, M. (1981). *Divorce Mediation*. NY: Springer Publishing Company, Inc.

<sup>23</sup> Johnson, N. E., Saccuzzo, D. P., & Koen, W.J. (2005). Custody mediation in cases of domestic violence: Empirical evidence of failure to protect. *Violence Against Women*, 11, 1022-1053.

<sup>24</sup> Novkov, J. (2016). Equality, process, and campus sexual assault. *Maryland Law Review*, 75, 590-619.

<sup>25</sup> U.S. Department of Education, Office for Civil Rights. (2001, January 19), 21. Revised sexual harassment guidance: Harassment of students by school employees, other students, or third parties. Retrieved from <https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf>

approaches should be implemented. Restorative justice departs from mediation in one key component; the perpetrator takes accountability for her/his actions and finds ways to restore justice to the community impacted.<sup>28, 26</sup> “No institutional solution can resolve the tension between the interests of individuals experiencing sexual assault and individuals defending themselves against such accusations. The responsible school owes a duty of protection and education to both, and a broader duty to its own community to prevent a culture of sexual violence, to educate its citizens about responsible and healthy sexual relationships, to ensure that school institutions such as athletic teams and student groups reject sexual assault, and to protect the interests of all students in fair process and equitable dispute resolution.”<sup>28</sup> As sexual assault and sexual harassment are issues that affect all of our communities, institutions of education should ensure that the changes proposed include broader community perspectives.<sup>28, 30</sup> We encourage the administration to see this as an, “opportunity to integrate more community perspectives and to think about ways to create more positive sexual cultures.”<sup>28</sup>

**In cases of sexual harassment or sexual assault, mediation should not be used. The DoE should continue to uphold the 2001 guidance, and language explicitly prohibiting the use of any informal resolutions in cases of sexual assault should be included in any new guidance.**

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<sup>26</sup> Koss, M.P., Wilgus, J.K., and Williamson, K.M. (2014). Campus sexual misconduct: Restorative justice approaches to enhance compliance with Title IX guidance. *Trauma, Violence & Abuse*, 15(3), 242-257.

## Priority Comment #4

**The proposed guidance would allow schools to adopt a “clear and convincing” standard for sexual harassment complaints, thereby discriminating against complainants in cases of sexual harassment.**

Universities are not criminal courts of law. Higher levels of proof are required in criminal court because of the possible sanctions. Although a respondent sanctioned as a result of a finding in a sexual harassment case may be expelled, this is not nearly as punitive as a prison sentence. It is not surprising that research found that even prior to the 2012 “Dear Colleague Letter” that 80% of campuses utilized a preponderance of the evidence standard in their disciplinary proceedings.<sup>27</sup> This level of proof is consistent with what groups such as the NACUA and United Educators have argued is the purpose of disciplinary proceedings: “to create the best environment in which students can live and learn ... [a]t the cornerstone [or which] is the obligation of students to treat all other members of the academic community with dignity and respect” (Stoner, 2000, p. 7)<sup>28</sup>. This means treating complainants the same as respondents.<sup>29</sup> Not only does this proposed change treat complainants and respondents differently, but it would also result in discrimination against sexual harassment/violence complainants.

First, the preponderance of the evidence (POTE) is the level of evidence long utilized to adjudicate claims of discrimination. Changing the standard of evidence for Title IX claims to clear and convincing evidence (C&C) treats victims of sexual violence and harassment differently than victims of all other forms of discrimination (e.g., Title VI and VII).<sup>30</sup> This, itself,

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<sup>27</sup> Karjane, H.K., Fisher, B.S., & Cullen, F.T. (2002). Campus Sexual Assault: How America’s Institutions of Higher Education Respond. Final Report, NIJ Grant # 1999-WA-VX-0008, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>

<sup>28</sup> Fisher, B. S., & Sloan III, J. J. (2013). *Campus Crime: Legal, Social, and Policy Perspectives*. (3rd Ed.). Springfield, IL: Charles C Thomas.

<sup>29</sup> <https://atixa.org/wordpress/wp-content/uploads/2017/09/ATIXA-Guide-to-Choosing-Between-Preponderance-of-the-Evidence-v.-Clear-and-Convincing-Evidence-9.22.17.pdf>

<sup>30</sup> Letter from Fatima Goss Graves, Vice President of Educ. and Emp’t at the Nat’l Women’s Law Ctr., to Catherine Lhamon, Assistant Sec. for Civil Rights 7-10 (Nov. 21, 2013).



would be discrimination by the government against victims of sexual harassment/violence on college campuses. This change would be incompatible with the spirit of Title IX, which is to protect students from gender discrimination to provide equal access to education.

Second, the POTE standard is also the standard generally utilized in civil litigation. This includes child custody cases, orders of protection, and civil lawsuits. As discussed above, the purported reason for using a higher burden of proof lies in the potential consequence of a finding of responsibility: the suspension or expulsion of the responsible student. While suspension or expulsion may certainly be problematic for a person who is expelled, this sanction "pales in comparison to the unlimited sum of money that one can be held liable for in civil cases, and occupational license revocation, both of which can destroy lives, yet use the same [POTE] standard that Title IX cases use."<sup>31</sup> In actuality, although possible, expulsion is not often utilized – even in cases of non-consensual penetration.<sup>32, 33</sup> Indeed, when someone brings a case against a University under Title IX in an “erroneous outcome” case – the level of evidence required is POTE. Increasing the standard of evidence required in cases involving victims of sexual violence signals a return to the days where complainants (often female) of sexual violence or harassment were assumed to be lying and where respondents (often male) needed be protected.<sup>34</sup>

Third, under the proposed changes, schools would be able to use a higher evidentiary standard for sexual harassment than for any other student conduct violation – even those that have the same maximum potential disciplinary sanction. As it is written in 34 CFR 106.45(b)(4), the rules allow for schools to use the POTE standard for sexual harassment only when other student conduct violations also require the POTE standard. This shows a one-sided regard

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<sup>31</sup> <https://repositories.lib.utexas.edu/bitstream/handle/2152/64959/www-thetexasatorator-com-blog-2018-4-4-defending-title-ixs-burden-of-proof.pdf?sequence=2>

<sup>32</sup> <https://www.nhregister.com/news/article/Expulsion-not-always-the-punishment-for-campus-12531199.php>

<sup>33</sup> Richards, T. N. (2019). No evidence of “weaponized Title IX” here: An empirical assessment of sexual misconduct reporting, case processing, and outcomes. *Law and Human Behavior*.

<sup>34</sup> See, e.g., *DoE v. Brown University*, 2016 WL 715794 (D.R.I. Feb. 22, 2016); *DoE v. Columbia University*, 2015 WL 1840402 (Apr. 21, 2015); *Xiaolu Peter Yu v. Vassar Coll.*, 2015 WL 1499408 (S.D.N.Y. Mar. 31, 2015).



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for equality in outcomes – indicating that the DoE views sexual harassment differently than other conduct violations. This further sends the message that complainants reporting sexual harassment are viewed with heightened suspicion.

**The DoE should maintain the preponderance of the evidence standard in any new Title IX guidance to ensure consistency across civil rights complaints.**

## Priority Comment #5

**The proposed change to limit the scope of incidents addressed under Title IX to those that occur in the context of an "education program or activity" (p. 24) will allow schools to ignore a significant amount of sexual harassment such as incidents that occur in off-campus housing, online, or among students studying abroad.**

Using data from the National Crime Victimization Survey (NCVS), Sinozich and Langton (2014) found that 5% of college students who were sexually assaulted were assaulted while attending school or traveling to school, while just over half (51%) were sexually assaulted while they were away from home pursuing leisure activities or traveling from place to place.<sup>41</sup> Further, 29% were assaulted while in a commercial place, parking lot or garage, or open areas/public transportation.<sup>35</sup> These nationally representative, data demonstrate that under the proposed changes the majority of college students (here, females) who are sexually assaulted while enrolled at a college, university, trade or vocational school would not receive mandated academic and psychological resources, let alone be able to pursue a campus judicial proceeding.

More localized datasets reinforce this worrying finding. In two separate datasets, collected at two different universities five years apart, 17-19% of participants who had experienced sexual assault were assaulted in a public place, such as outside, at a bar or club, at a hotel, or in a car.<sup>36</sup><sup>37</sup> Approximately 30% were assaulted in their own dorm or residence, and most of the remaining victim/survivors were assaulted at the offender's home, the home of a friend or relative, or some other private residence. In addition, the majority of completed (66%) and attempted rapes (55%) that occurred in a nationally representative sample of college women occurred off campus.<sup>38</sup> At

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<sup>35</sup> Sinozich, S., & Langton, L. P. (2014). Rape and sexual assault among college-age females, 1995–2013. Retrieved from <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>

<sup>36</sup> Boyle, K. M. (2011). The Re-identification of acquaintance and date rape and revictimization (Masters thesis, University of North Carolina at Charlotte).

<sup>37</sup> Boyle, K. M. (2016). Self, identity, and the mental health of sexual assault victim/survivors (Doctoral dissertation, University of Georgia).

<sup>38</sup> Fisher, B., Cullen, F. T., & Turner, M. G. (2000). The sexual victimization of college women. Washington, DC: U.S. Dept. of Justice, Office of Justice Programs, National Institute of Justice. Retrieved from

the risk of hierarchizing experiences of violence, these criminal acts are arguably among the most “severe... and objectively offensive” incidents, those that “Title IX is designed to protect” (p. 8-9; quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 647, 652 (1999)).

Further, a recent study of all institutions of higher education in a Middle Atlantic state (N=42), found that less than 60% of the sexual misconduct incidents reported to Title IX coordinators in 2015 occurred on campus or during a school-sponsored activity.<sup>33</sup> Importantly, Richards’ (2019) examination of reported incidents demonstrates that the vast majority of reports made do not end in formal Title IX complaints or disciplinary actions against accused students.<sup>37</sup> Of the 1,054 incidents reported, 11% led to a finding of responsibility and 2% resulted in the expulsion of an accused student. Rather, the most common outcome of Title IX incident reports, by far, was a referral to counseling/health services for the complainant (72%).<sup>33</sup>

Taken together, the research indicates that if off-campus incidents no longer mandated an institutional response, it is likely that many students who are assaulted and need or want counseling or health services, would be harmed. There is no doubt that interpersonal violence and rape often lead to negative consequences, including decreased self-esteem, depression and anxiety, alcohol abuse, lower grade point average, impaired academic achievement.<sup>39, 40, 41, 42, 43, 44</sup> These consequences are part of the rationale for legislation mandating access to mental health care on college campuses *and* psychological counseling for victim/survivors of sexual violence.

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[http://www.ncdsv.org/NIJ\\_SEXUAL-VICTIMIZATION-OF-COLLEGE-WOMEN\\_12-2000.pdf](http://www.ncdsv.org/NIJ_SEXUAL-VICTIMIZATION-OF-COLLEGE-WOMEN_12-2000.pdf)

<sup>39</sup> Golding, J. M. (1999). Intimate partner violence as a risk factor for mental disorders: A meta-analysis.” *Journal of Family Violence*, 14(2), 99-132.

<sup>40</sup> Jordan, C. E., Combs, J. L., & Smith, G. T. (2014). An exploration of sexual victimization and academic performance among college women. *Trauma, Violence, & Abuse*, 15(3), 191-200.

<sup>41</sup> Kaysen, D., Neighbors, C., Martell, J., Fossos, N., & Larimer, M. E. (2006). Incapacitated rape and alcohol use: A prospective analysis. *Addictive Behaviors*, 31(10), 1820-1832.

<sup>42</sup> Kemp, A., Green, B. L., Hovanitz, C., & Rawlings, E. I. (1995). Incidence and correlates of post-traumatic stress disorder in battered women: Shelter and community samples. *Journal of Interpersonal Violence*, 10(1), 43-55.

<sup>43</sup> Noll, J. G., Horowitz, L. A., Bonanno, G. A., Trickett, P. K., & Putnam, F. W. (2003). Revictimization and self-harm in females who experienced childhood sexual abuse: Results from a prospective study.” *Journal of Interpersonal Violence*, 18(12), 1452-1471.

<sup>44</sup> Stepakoff, S. (1998). Effects of sexual victimization on suicidal ideation and behavior in U.S. college women. *Suicide and Life-Threatening Behavior*, 28(1), 107-126.

Under these proposed changes, students who are sexually harassed off-campus will be unfairly neglected in terms of health resources. There is no reason to believe assaults that occur off campus are any less severe, traumatic, or consequential. In fact, in the aforementioned studies,<sup>42, 43</sup> location of the sexual assault was *not* significantly correlated with participants' depression, self-esteem, post-traumatic stress disorder, or feelings of stigma, nor was it associated with assault details, such as the use of weapon, offender use of force, or victim/survivor injury. In other words, there is no reason to believe that students victimized off-campus (or in non-school-related contexts) experience lower levels of force or injury, nor is there evidence that they are less in need of psychological and academic support in the aftermath of violence.

Limiting the scope of incidents under the reach of Title IX not only disadvantages college students who live off campus, but it could deeply disadvantage students who attend colleges with nebulous boundaries between what is considered "campus" and "off-campus," and most prominently, students in K-12 settings. Proposed changes could also disadvantage the hundreds of thousands of students who study outside of the United States through U.S. educational institutions each year. Recent studies have found that US college students studying abroad experience sexual assault at rates as high as 38%.<sup>45, 46</sup>

**If the scope of protected incidents is narrowed, ultimately, many complainants will be denied access to Title IX administrative process, and to resources such as counseling and health services. The DoE should maintain protections for all students who experience sexual harassment and ensure that we do not take "backward" steps regarding ensuring equal educational access.**

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<sup>45</sup> Flack Jr, W. F., Kimble, M. O., Campbell, B. E., Hopper, A. B., Petercă, O., & Heller, E. J. (2015). Sexual assault victimization among female undergraduates during study abroad: A single campus survey study. *Journal of Interpersonal Violence, 30*(20), 3453-3466.

<sup>46</sup> Kimble, M., Flack Jr, W. F., & Burbridge, E. (2013). Study abroad increases risk for sexual assault in female undergraduates: A preliminary report. *Psychological Trauma: Theory, Research, Practice, and Policy, 5*(5), 426-430.

## Priority Comment #6

**The proposed changes would allow schools to delay investigations of sexual harassment for unspecified periods of time when a concurrent law enforcement investigation is ongoing. This is a significant departure from the currently enforced guidance adopted in 2011.**

Proposed rule 34 CFP Part 106.45 (b)(1)(v) establishes that “concurrent law enforcement activity” is “good cause” for delaying an investigation. This proposed change would allow a school to delay investigating a civil complaint while a criminal investigation and prosecution are ongoing, which could be as little as several months to a year or more. Research illustrates just how lengthy the criminal investigative process can be. In a sample of sexual assault investigations that were previously adjudicated (e.g., where a suspect was prosecuted and found guilty, found not guilty or pled guilty), the mean number of days from the occurrence of the sexual assault to the case being forwarded to a prosecutor for a charging decision was 45.3 days (Median = 8 days) and the mean number of days from the sexual assault to adjudication was 340.7 days (Median = 222 days).<sup>47</sup>

These delays serve to harm to the complainant’s educational access and psychological wellbeing, especially considering other proposed changes that would ban a school from removing the perpetrator from a dorm or a shared class with the complainant unless the respondent is found responsible in a disciplinary proceeding. Previous research has consistently demonstrated the harm experienced by victims when being forced to share a living space or classroom with a perpetrator, such as significant drop in grades, attendance in class, and even enrollment at the

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<sup>47</sup> Lovell, R., Overman, L., Luminais, M., McGuire, M., and Flannery, D.J. (Forthcoming) “Differences in Sexual Assault Investigations and Prosecutions in Previously Disposed vs. Non-Previously Disposed Cases: Findings from Unsubmitted Sexual Assault Kits.” See [case.edu/socialwork/begun/saki](http://case.edu/socialwork/begun/saki) for more information.

university.<sup>48, 49, 50, 51, 52</sup> Previous research also suggests that immediate intervention after disclosure is necessary to reduce the complainant's risk for repeated victimization and/or retaliation by the perpetrator, especially in cases of intimate partner violence.<sup>53</sup> A delay in investigation, especially a delay without accommodation, could jeopardize the complaint's safety or impact her/his decision to report the abuse. A lengthier investigative process increases the chances of a victim being identified as a victim or having to disclose to friends and/or family, and the fear of loss of confidentiality affects the decision to report.<sup>54</sup> Lastly, a delayed process also serves to put others at risk for victimization by the perpetrator, as serial sexual offending is more common than previously believed.<sup>55</sup>

In practical terms, this means that there could be a delay of more than a year (i.e., the time it typically takes for the criminal investigation and prosecution to be concluded) before the school begins its investigation, which could take several more months before reaching the point of a disciplinary proceeding. Thus, this change serves as a violation of the existing requirement in 34 CFR 106.8 that the process have a “prompt and equitable resolution” for the complaint. Additionally, a delay for “concurrent law enforcement activity” is unnecessary, as the process

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<sup>48</sup> Bohmer, C. & Parrot, A. (1993). *Sexual Assault on Campus: The Problem and the Solution* (pp. 41). New York, NY: Lexington Books.

<sup>49</sup> Chu, A. (2017, Sep 26). I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus. Retrieved from [https://broadly.vice.com/en\\_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus](https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus)

<sup>50</sup> Raymond, C. & Corse, S. (2018). A Distorting Mirror: Educational Trajectory After College Sexual Assault. *Feminist Studies*, 44(2), 464-490.

<sup>51</sup> Smythe, A. (2017, Oct 9). My daughter had to share a classroom with her rapist. Retrieved from <https://www.bbc.com/news/education-41486776>

<sup>52</sup> Wilkerson, A. (1999). Locating Risk, Fostering Empathy: Campus Rape, the Classroom, and Rhetorics of Safety. *Transformations: The Journal of Inclusive Scholarship and Pedagogy*, 10(2), 60-68.

<sup>53</sup> Meyer, S. (2014). Victims' experiences of short-and long-term safety and well-being: Findings from an examination of an integrated response to domestic violence. *Trends & Issues in Crime & Criminal Justice*, 478, 1-7.

<sup>54</sup> Sable, M. R., Danis, F., Mauzy, D. L., & Gallagher, S. K. (2006). Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students. *Journal of American College Health*, 55(3), 157-162.

<sup>55</sup> Lovell, R., Flannery, D., & Luminais, M. (2018). Lessons Learned: Serial Sex Offenders Identified from Backlogged Sexual Assault Kits. In A. Vazsonyi, D. J. Flannery, & M. Delisi (Eds.), *The Cambridge Handbook of Violent Behavior and Aggression* (2nd ed., pp. 399-417). New York, NY: Cambridge University Press.



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and standards are different in a civil vs. a criminal complaint. The perpetrator does not need to be found guilty beyond a reasonable double in a court of law for a civil case to proceed to an investigation by the school and possible disciplinary hearing.

**This proposed change is a significant departure from the 2011 guidance, which states that “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. For example, a school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime.”<sup>56</sup> The DoE should maintain the position it adopted in the 2011 guidance and not allow for delays in investigating on the basis of “concurrent law enforcement activity.”**

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<sup>56</sup> US Department of Education, Office of Civil Rights. (2011). Dear Colleague Letter, 10. <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>



## Priority Comment #7

**The proposed changes will require schools to establish procedures for live cross-examination of complainants and respondents by a party’s advisor of choice. While this change is an improvement over the previous draft rule allowing respondents to question complainants directly, there is still much data-driven concern regarding the requirement of live cross-examination.**

First, allowing a live cross-examination may be retraumatizing to victims. A live cross-examination of victims moves the Title IX proceedings one step closer to the proceedings of a criminal trial, something that has been proven to be traumatizing to most victims by decades of research.<sup>57, 58, 59</sup> Further, live cross-examination may not be the best way to elicit information, as research shows that victims are reluctant to share information when questioned aggressively.<sup>60, 61</sup> Victims who report assault or harassment to their educational institution and are met with a process that is retraumatizing, they may feel betrayed by that institution and subsequently regret attending, cease attendance, or discourage others from attending.<sup>62, 63</sup>

As such, the process students experience following a formal report can have long-term consequences for student retention in the academic institution. Continuing the previous method of written questions and comments submitted to the hearing panel or investigators grants alleged

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<sup>57</sup> Konradi, A. (2007). *Taking the Stand: Rape Survivors and the Prosecution of Rapists*. Greenwood Publishing Group.

<sup>58</sup> Orth, U. (2002). Secondary victimization of crime victims by criminal proceedings. *Social Justice Research*, 15(4), 313-325.

<sup>59</sup> Campbell, R., Wasco, S.M., Ahrens, C.E., Sefl, T., & Barnes, H.E. (2002). Preventing the “second rape”: Rape survivors’ experiences with community service provides. *Journal of Interpersonal Violence*, 16(12), 1239-1259.

<sup>60</sup> Lorenz, K. (2017). Reporting sexual assault to the police: Victim experiences and the potential for procedural justice [Doctoral Dissertation]. Proquest: 10818114.

<sup>61</sup> Patterson, D.A. (2011). The linkage between secondary victimization by law enforcement and rape case outcomes. *Journal of Interpersonal Violence*, 26(2), 328-347.

<sup>62</sup> Cortina, L.M., Swan, S., Fitzgerald, L.F., & Waldo, C. (1998). Sexual harassment and assault: Chilling the climate for women in academia. *Psychology of Women Quarterly*, 22(3), 419-441.

<sup>63</sup> Lorenz, K., Kirkner, A., & Mazar, L. (in press). Graduate student experiences with sexual harassment and social disengagement in higher education. *NASPA Journal About Women in Higher Education*.

perpetrators due process rights, while allowing victims a process that is beneficial to recovery, and creating a space for sharing the most information about the alleged assault or harassment.

Second, the requirement of a live cross-examination may further discourage victims from reporting to their educational institution. Sexual assault is already highly unreported to formal system actors (e.g., law enforcement)<sup>64,65</sup> particularly among college students.<sup>66</sup> Victims are most commonly reluctant to report due to fear of harmful or revictimizing/retraumatizing responses by the institution,<sup>67</sup> concerns of reprisal by the perpetrator,<sup>68</sup> and feeling like nothing will result from the process.<sup>69</sup> If the live cross-examination is implemented, victims may be reluctant to report or discouraged to report after hearing of revictimizing experiences of others.<sup>68,76</sup> It is clearly demonstrated in the research that victims weigh the potential costs and benefits to reporting prior to doing so, and may be increasingly unlikely to report if they have concerns that the process will be harmful to their recovery. Research shows that experiences victims have when disclosing or reporting can influence whether they are likely to report or seek help again<sup>73</sup> and therefore, a retraumatizing Title IX process can be silencing to victims, preventing them from receiving the support they need to recover and successfully continue their education. By putting procedures in place, such as a requirement of live cross-examination, victims may be deterred from reporting, which allows victims to go without support and resources they need and allows perpetrators to walk free on the campuses of our educational institutions with the potential to

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<sup>64</sup> Bachman, R. (1998). The factors related to rape reporting behavior and arrest: New evidence from the national crime victimization survey. *Criminal Justice and Behavior*, 25(1), 8-29.

<sup>65</sup> Ahrens, C.E. (2006). Being silence: The impact of negative social reactions on the disclosure of rape. *American Journal of Community Psychology*, 38(3-4), 263-274.

<sup>66</sup> Fisher, B.S., Daigle, L.E., Cullen, F.T., & Turner, M.G. (2003). Reporting sexual victimization to the police and others: Results from a national-level study of college women. *Criminal Justice and Behavior*, 30(1), 6-38.

<sup>67</sup> Logan, T.K., Evans, L., Stevenson, E., & Jordan, C.E. (2005). Barriers to services for rural and urban survivors of rape. *Journal of Interpersonal Violence*, 20(5), 591-616.

<sup>68</sup> Wolitzky-Taylor, K.B., Resnick, H.S., Amstadter, A.B., McCauley, J.L., Ruggiero, K.J., & Kilpatrick, D.G. (2011) Reporting rape in a national sample of college women, *Journal of American College Health*, 59(7), 582-587

<sup>69</sup> Patterson, D.A., Greeson, M. & Campbell, R. (2009). Understanding rape survivors' decisions not to seek help from formal social systems. *Health & Social Work*, 34(2), 127-136.



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victimize other students.

**There is a plethora of research revealing the possible consequences of implementing procedures that can be retraumatizing to victims, such as the requirement of a live cross-examination. Yet, there is no research that suggests a live cross-examination is more effective or efficient than the process of submitting written questions and statements for Title IX investigations. The DoE should maintain the written submission method rather than a live cross-examination procedure. We contend that the method of written submissions and a hearing panel creates a balance between testing the strength of the evidence with reduced risk of retraumatizing the alleged victim.**

## Priority Comment #8

**The proposed changes would make it impossible for complainants to request that respondents be moved out of their dorm or classes as an interim accommodation.**

The ability for a school to remove a respondent from classes and housing shared by their complainant as an interim accommodation is crucial for preventing acute psychological harm. Multiple studies of campus sexual assault demonstrate exposing an accuser to their alleged perpetrator in shared classes for any span of time can lead to an accuser having a severe drop in academic achievement (i.e., grades), absenteeism, and/or withdrawing from school entirely.<sup>56, 58</sup> Complainants sharing a classroom with their respondent may experience a decline in academic success due to the psychological stress of trying to master course material while also managing flashbacks of the assault and perceived safety concerns. One graduate student, whose classmate sexually assaulted her and subsequently registered for her seminar, provides a rich description of such an experience: “So much of my energy in that seminar was spent on simply maintaining my composure that I could not give my full attention to the material, despite my preparations for each class.”<sup>60</sup> The psychological harm done by schools who allow alleged perpetrators to remain in physical spaces with their accusers prior to the conclusion of a Title IX investigation extends beyond the classroom as victims of campus sexual assault attribute withdrawing from school entirely to the fear of seeing their rapist on campus in shared social settings, such as running into their rapists in a common dorm.<sup>57, 59</sup>

In addition to the demonstrated psychological harm of allowing respondents to remain in classes and dorms with complainants, there is also a significant physical safety risk regarding repeat victimization of the complainant. For example, the physical danger inherent in forbidding schools from removing alleged perpetrators from living spaces shared with accusers as an interim accommodation is highlighted in a recent civil lawsuit against Columbia University<sup>70</sup> where an undergraduate college student was raped a second time by her assailant in her dorm room two

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<sup>70</sup> *Roskin-Fraze v. Columbia University*, 2017

months after her first assault when her school refused to provide housing accommodations directly after her first rape. Finally, the fear of further physical harm accusers experience in spaces shared with their alleged perpetrators can also lead to accuser's chronic absenteeism, resulting in negative academic performance.<sup>58</sup>

**Preventing schools from removing alleged perpetrators from classes and dorms as an interim accommodation can cause permanent psychological and physical harm to accusers, including causing an irreparable drop in academic performance and further instances of victimization. In order to minimize harm to all parties in sexual assault cases, the DoE should continue to allow schools the latitude to remove alleged perpetrators from classes and dorms shared with their accusers as an interim accommodation.**