

American Academy of Pediatrics



DEDICATED TO THE HEALTH OF ALL CHILDREN®



January 28, 2019

The Honorable Betsy DeVos
U.S. Secretary of Education
Department of Education
400 Maryland Avenue, SW
Room 6E310
Washington, DC 20202

Re: Docket No. ED 2018-OCR-0064; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Secretary DeVos:

The American Academy of Pediatrics and the Society for Adolescent Health and Medicine write in response to the Proposed Rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" (Proposed Rule), published in the Federal Register on November 29, 2018, by the Department of Education (ED), which would make changes to the requirements on academic institutions under Title IX of the Education Amendments of 1972. The Proposed Rule represents a retreat from previous ED guidance, undermining critical protections for sexual assault survivors, and is contrary to best practices for the treatment and long-term care of individuals who have experienced acute sexual assault. We therefore urge you to rescind the Proposed Rule in its entirety.

The American Academy of Pediatrics (AAP) is a non-profit professional organization of 67,000 primary care pediatricians, pediatric medical sub-specialists, and pediatric surgical specialists dedicated to the health, safety, and well-being of infants, children, adolescents, and young adults. It is the policy of the AAP that pediatricians routinely screen adolescents for sexual violence and assault and, for those who disclose such an experience, provide medical, psychological, and supportive care in a non-stigmatizing manner. The AAP also advises that its members provide emotional support and appropriate referrals to mental health care for adolescent patients who have been sexually assaulted. Furthermore, the AAP encourages pediatricians to support efforts on college campuses to implement evidence-based sexual violence prevention activities.

The Society for Adolescent Health and Medicine (SAHM) is a multidisciplinary organization that promotes optimal health, well-being, and equity for all adolescents and young adults by supporting adolescent health and medicine professionals through the advancement of clinical practice, care delivery, research, advocacy, and professional development. As an organization dedicated to the health of young people, including those attending colleges and universities, changes to Title IX requirements are of particular importance to our members and those we serve.

Sexual assault and sexual harassment are extremely prevalent and infrequently reported, meaning many survivors suffer without opportunities for intervention. In a 2015 study by the Association of American Universities surveying 27 four-year institutions of higher education, 21.2% of all respondents reported experiencing nonconsensual sexual contact during college, including 33.1% of females and 39.1% of gender and sexual minority students,¹ a rate consistent with previous studies.² An even higher percentage of students reported being victims of sexual harassment, 47.7% of all students and 61.9% of female undergraduates.³ Yet, reporting rates on college campuses were extremely low: 5.0% for sexual touching while incapacitated, 7.7% for sexual harassment, and 25.5% for physical penetration.

The low rate of reporting for sexual misconduct amongst college students is extremely concerning given its high prevalence and association with severe, negative health and academic outcomes. In adolescents and young adults alike, sexual assault is associated with higher rates of depression, anxiety, post-traumatic stress disorder, suicidality, self-mutilation, and eating disorders.^{4 5 6 7 8 9} Even less severe sexual harassment in adolescents and young adults is associated with similarly negative mental health outcomes and substance use.^{10 11} Without intervention from trained professionals, these health outcomes can persist or worsen over time, significantly impairing the lives of those experiencing sexual violence. Additionally, victimized students have significantly lower GPAs and higher rates of school withdrawal than those who do not experience sexual assault.^{12 13}

Systems and policies that encourage reporting are important for connecting adolescents and young adults to school leaders and health professionals who can help manage the common negative sequelae of sexual harassment and assault. Such policies are enacted partially with the hope of deterring perpetrators from committing these offenses, reducing the need for medical intervention. Thus, schools and institutions of higher education have the opportunity and responsibility to respond to sexual harassment and assault in ways that improve the well-being of survivors and prevent it from happening in the first place.

Survivors are significantly more likely to report sexual assaults if they believe that their report will be handled appropriately and view the overall university climate as positive.¹⁴ Indeed, more progressive social policies nationally have been correlated with increased reporting of sexual harassment.¹⁵ Survivors have avoided reporting to campus officials because of concerns that the perpetrator would not be punished, that they would not be believed, or that their incidents were not serious enough.¹⁶ It follows then that policies taking a stronger stance against “less serious” forms of sexual misconduct could improve reporting rates and thus improve the chance that survivors will be connected to appropriate supports.¹⁷

Unfortunately, the Proposed Rule does not foster institutional policies that encourage reporting or that are appropriate for the care and support of survivors of sexual assault. We urge you to ensure that any rule implementing Title IX’s requirement for nondiscrimination on the basis of sex take into account the disproportionate burden of sexual violence on women and focus on the needs of survivors of sexual violence in recovering from their experience and in excelling academically, socially, and professionally.

Section 106.30 Definitions

At its outset, the Proposed Rule defines sexual harassment to mean specifically: 1) the conditioning of the provision of an aid, benefit, or service by an employee of an institution on unwelcome sexual conduct; 2) unwelcome conduct on the basis of sex that is *so severe, pervasive, and objectively offensive*

that it effectively denies a person equal access to the recipient's education program or activity (emphasis added); or 3) sexual assault meeting the Federal Bureau of Investigation (FBI)'s uniform crime reporting program (see 34 CFR 668.46 (a)).

Under the third criteria, sexual assault must meet the specific definition of rape, fondling, incest, or statutory rape as defined by the FBI. However, this definition fails to meet the AAP's own definition of sexual assault, as defined in the clinical report "Care of the Adolescent After an Acute Sexual Assault," which describes sexual assault as a comprehensive term that describes any nonconsensual sexual act.¹⁸ This includes any situation in which there is any nonvoluntary sexual contact with or without penetration and/or touching of the anogenital area or breasts, that occurs because of physical force, psychological coercion, or incapacitation or impairment. The definition proposed in 106.30 is likely to be overly exclusive, removing a formal pathway for redress to students who have been the victims of sexual assault or violence and for whom the remedy of corrective disciplinary action would help ensure equal access to education as well as appropriate supportive services.

Furthermore, the second criteria is not only inappropriately vague but largely irrelevant from a medical perspective—sexual assault need not meet a threshold of severity or be objectively offensive to have a detrimental impact on a victim or require remediation. Any individual experiencing sexual assault needs appropriate medical attention and supportive services, and defining sexual assault in this way is likely to lead to underreporting, missing an important opportunity to connect students to needed medical attention including testing for sexually transmitted infections (STIs) and access to emergency contraception. We urge ED to define sexual assault in line with the medical conception of sexual assault in order to best support the health and well-being of these students.

Section 106.45 Grievance procedures for formal complaints of sexual harassment

The provisions outlined in Section 106.45, which detail the process by which institutions must respond to complaints of sexual harassment and assault, fail to align with evidence-based recommendations for the treatment and care of an individual who has experienced sexual assault, and we are concerned that they threaten to inflict more harm on such adolescents and young adults. In general, Section 106.45 would make changes to the disciplinary process that align it more closely with formal legal proceedings. The juridical process is not an appropriate model for academic disciplinary proceedings that are designed first and foremost to restore equal access to education under Title IX – not to adjudicate potentially criminal behavior – and which should be designed with the goal of best supporting victims of sexual violence.

This section would allow institutions to use a stricter evidentiary standard in such proceedings, which would make it more difficult for a victim of sexual assault to successfully prove she or he experienced sexual violence. The experience of trauma can alter the perceptions and memories of those who are victims of sexual assault, heightening recall of certain details while making it more difficult to recall others. It is therefore inappropriate to employ a heightened standard of evidence used in more routine legal proceedings because victims may, due to the nature of their trauma, be unable to recall sufficient details meeting that standard. Fear that their claims will not be believed is likely to further depress reporting and force additional victims of sexual assault to suffer in silence without connecting to needed supports or receiving appropriate redress for their experiences.

Section 106.45 would also give academic institutions the option to allow live cross-examinations of both complainants and respondents. Forcing an individual who has been abused to give a disclosure can be experienced as revictimization and loss of control, making an already painful experience worse.¹⁹ This is particularly victimizing to students from challenged socioeconomic backgrounds who may not be able to afford legal representation. We know from an analysis of reported sexual assaults over a 10-year period in Chicago that only 5.9% of sexual assault allegations proved false, and these data support previous reports that 2-10% of allegations proved false.²⁰ In other words, 90-98% of sexual assault complaints are true. Given the level of trauma endured by a victim, it is alarming that the Department of Education would sanction complainant cross-examination.

Also of concern are changes to Title IX that would limit the responsibility of colleges and universities to respond only to reported cases of sexual assault, rather than including third party observations by classmates and employees. Although Greek fraternities and sororities are considered educational activities, the proposed change limits the responsibility of the university to investigating only that misconduct that occurred within the institution's programs. This relieves Title IX institutions of their responsibility to their students who have been assaulted by university employees or colleagues in off-campus housing or during internships and externships, assault which may directly impact on-campus and programmatic learning and performance.

Directed Question 2

ED has requested specific feedback regarding the applicability of cross-examination based on the age of the party rather than the type of recipient (i.e., elementary and secondary school versus institution of higher education). As proposed, Section 106.45 differentiates between elementary and secondary schools and institutions of higher education, providing discretion for the former in whether or not a live hearing is required while requiring live hearings for colleges and universities and allowing for cross-examination. However, ED is considering differentiating the use of these specific processes based on whether an individual complainant is above or below 18 years of age, the legal age of majority. We wish to reemphasize at the outset that live hearings, cross-examinations, and other such legalistic constructs are traumatic for victims of sexual assault of all ages and may have the effect of revictimizing these individuals. As such, we urge ED to discourage the use of this model.

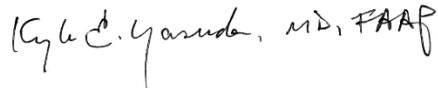
However, we also wish to emphasize that there is no medical or developmental justification for employing such an age-based distinction. Human development continues across the lifespan and the brain has not reached full maturity until the age of 25. Furthermore, development occurs at a different pace for different individuals, making the age of 18 arbitrary for the purposes of determining what is or is not developmentally appropriate in disciplinary proceedings for sexual assault and violence. We urge you to ensure that any Title IX implementing regulations, which will by their nature predominantly impact those in the pediatric population (i.e., 25 years of age and under), are responsive to and in line with medical and scientific knowledge about human development.

Conclusion

Through the rulemaking process, ED has the opportunity to encourage systems and practices that support the recovery and long-term well-being of victims of sexual assault. Unfortunately, this rule misses the mark. We urge you to rescind the Proposed Rule in its entirety and ensure any future ED guidance or rulemaking is in the best interest of sexual assault survivors.

We appreciate the opportunity to comment on the Proposed Rule and look forward to working with ED to support equal access to educational opportunity and long-term well-being for survivors of sexual assault. Thank you.

Sincerely,



Kyle Yasuda, MD, FAAP
President
American Academy of Pediatrics



Deborah Christie, PhD, FSAHM
President
Society for Adolescent Health and Medicine

¹ Krebs CP, Lindquist CH, Warner TD, Fisher BS, Martin SL. College women's experiences with physically forced, alcohol- or other drug-enabled, and drug-facilitated sexual assault before and since entering college. *J Am Coll Health*. 2009;57(6):639–647pmid:19433402

² Cantor D, Fisher B, Chibnall S; Westat, et al. Report on the AAU Campus Climate Survey on sexual assault and sexual misconduct. Available at:

www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf. September 21, 2015. Accessed January 22, 2019

³ Cantor D, Fisher B, Chibnall S; Westat, et al. 2015.

⁴ American College of Obstetricians and Gynecologists. Committee on Health Care for Underserved Women. Committee opinion no. 499: Sexual assault. *Obstet Gynecol*. 2011;118(2 Pt 1):396–399pmid:21775873

⁵ Moore KA, Nord CW, Peterson JL. Nonvoluntary sexual activity among adolescents. *Fam Plann Perspect*. 1989;21(3):110–114pmid:2759216

⁶ Miller BC, Monson BH, Norton MC. The effects of forced sexual intercourse on white female adolescents. *Child Abuse Negl*. 1995;19(10):1289–1301pmid:8556443

⁷ Kellogg ND, Hoffman TJ. Unwanted and illegal sexual experiences in childhood and adolescence. *Child Abuse Negl*. 1995;19(12):1457–1468pmid:8777696

⁸ Ahrens, C.E., Cabral, G., & Abeling, S. (2009). Healing or hurtful: Sexual assault survivors' interpretations of social reactions from providers. *Psychology of Women Quarterly*, 33, 81–94.

⁹ Kaltman, S., Krupnick, J., Stockton, P., Hooper, L., & Green, B.L. (2005). Psychological impact of types of sexual trauma among college women. *Journal of Traumatic Stress*, 18, 547–555.

¹⁰ Bucchianeri MM, Eisenberg ME, Wall MM, Piran N, Neumark-Sztainer D. Multiple types of harassment: associations with emotional well-being and unhealthy behaviors in adolescents. *J. Adolesc. Health*. 2014;54(6):724–729

¹¹ Mcginley M, Wolff JM, Rospenda KM, Liu L, Richman JA. Risk factors and outcomes of chronic sexual harassment during the transition to college: Examination of a two-part growth mixture model. *Soc Sci Res*. 2016;60:297-310.

¹² 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, 191–200.

¹³ 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 and Practice*, 18, 234–248.

¹⁴ Spencer C, Stith S, Durtschi J, Toews M. Factors Related to College Students' Decisions to Report Sexual Assault. *J Interpers Violence*. 2017;;886260517717490.

¹⁵ Cunningham GB, Benavides-Espinoza C. A trend analysis of sexual harassment claims: 1992-2006. *Psychol Rep*. 2008;103(3):779-82.

¹⁶ Holland KJ, Cortina LM. "It Happens to Girls All the Time": Examining Sexual Assault Survivors' Reasons for Not Using Campus Supports. *Am J Community Psychol*. 2017;59(1-2):50-64.

¹⁷ Holland KJ, Cortina LM, 2017.

¹⁸ Crawford-Jakubiak JE, Alderman EM, Leventhal JM; Committee on Child Abuse and Neglect, Committee on Adolescence. Care of the Adolescent After an Acute Sexual Assault. *Pediatrics*. 2017;139(3).

¹⁹ Jenny C, Crawford-Jakubiak JE; Committee on Child Abuse and Neglect, American Academy of Pediatrics. The evaluation of children in the primary care setting when sexual abuse is suspected. *Pediatrics*. 2013;132(2).

²⁰ Lisak D et al. False allegations of sexual assault: an analysis of ten years of reported cases. *Violence Against Women*. 2010;16(12):1318-34.