

Dear Assistant Secretary for Civil Rights Kenneth Marcus,

On behalf of Trinity College in Hartford, Connecticut, I am writing to provide comment on the proposed rules relating to **Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance** as published in the Federal Register on November 29, 2018 [Docket ID ED–2018– OCR–0064].

We join thousands of others, including many of our peer institutions of higher education, who have taken the opportunity to respond to the Department of Education’s proposed rule changes. In providing you with our college’s response, we have been guided by the same set of principles that have guided our community’s work to prevent and respond to sexual misconduct. We undertake that work—and have reviewed these proposals—with the aim of ensuring a learning environment that is safe for all and whose educational opportunities are available equitably to our students.

The college that I am privileged to lead is a small, residential liberal arts college in New England, a close-knit community that has worked steadfastly to assess and improve its policies, procedures, and training for preventing and responding to sexual misconduct. In 2014, I formed a task force to spearhead this initiative, and a year later that task force issued a report with specific recommendations to improve our efforts. Those recommendations led to a new college policy on sexual misconduct that is fair, equitable, accessible to all parties, including complainants and respondents, and is consistent with national best practices.

We are deeply concerned that several provisions within the proposed rule changes will undo some of that work and undermine our efforts to prevent and respond to sex discrimination and misconduct. Significantly, the effect of some of the proposals would be to deter victims of such discrimination from coming forward to seek the college’s assistance in ending sex discrimination, preventing its recurrence, and remedying its effects. We also are concerned that some aspects of the proposed regulations would create confusion and complicate the adjudication process, place unreasonable burdens on Trinity and other schools with small staffs and limited resources, and deter witnesses, as well as faculty and staff participation in these disciplinary proceedings.

The most concerning change under the proposed rules is the requirement within **Section 106.45(b)(3)(vii) that institutions must provide live hearings with cross-examinations.**

This is not only unnecessary, but it will deter both the reporting of such discrimination and misconduct and the willingness of students to move forward with investigations. It would set up a quasi-judicial proceeding for a disciplinary matter, and it incorrectly

presumes that live hearings and cross-examinations are necessary to determine whether discrimination or misconduct has occurred. Our process, which employs independent investigators and involves written statements from all parties, allows all students involved in the process to be heard and to fully respond to complaints while minimizing intimidation and/or re-traumatization, and it results in informed decisions and fair outcomes.

Within that same section, **the proposed rules indicate that such cross examinations “must be conducted by the party’s advisor of choice.”** The potential introduction of attorneys as advisors in live hearings would further deter reporting and investigations and create inequities between students with disparate financial resources—those with the means would likely hire lawyers, while those without would depend upon the college’s ability to appoint an advisor (a difficult task for a small college with limited resources). And, rather than bring swifter conclusions, the requirement for live hearings (that would follow full investigations) would add significantly to the duration and expense of such cases.

Other significant concerns we note within the proposed rules include:

1. **Section 106.44(b)(2), which would require Title IX coordinators to bring certain formal complaints automatically.** The proposal does not include an exception for complainants who wish to remain anonymous and do not wish to pursue formal complaints. This proposal would deter victims from coming forward to seek assistance and support and would hinder our ability to protect the identity of a complainant.
2. **Section 106.45(b)(3), which would require recipients to dismiss a formal complaint** if the conduct alleged by the complainant “would not constitute sexual harassment as defined...even if proved or did not occur within the recipient's program or activity.” This would seem to require the Title IX coordinator to determine whether conduct is “severe, pervasive, and objectively offensive” and has resulted in “denial of equal access” before any investigation has taken place. Such decisions should be made by the appropriate decision-maker only after all the evidence has been heard.
3. **Section 106.30, which would narrow the definition of sexual harassment** to include “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,” and **Section 106.44(a), which limits an institution’s jurisdiction** to which Title IX policies would apply to conduct that occurs “within its ‘education program of activity.’” Both of these would be

detrimental to our ability to provide support and to prevent sex-based discrimination involving members of our community. If cases are limited based on jurisdiction then it is highly plausible that incidents involving members of an academic community might very well go unreported. Therefore, institutions may not be able to stop issues of harassment and discrimination and as a result not resolve matters that affect a person's pursuit of their educational goals.

Trinity strives consistently and continually to improve upon its educational and training efforts and its response and discipline processes and policies. We must have policies and processes that are fair and equitable to all parties, that allow all voices to be heard, and that do the least harm to all involved. In short, our worry is that several aspects of the proposed rules would bring harm to our community. On behalf of Trinity College, I urge you to reconsider them.

Sincerely,

Joanne Berger-Sweeney
President and Trinity College Professor of Neuroscience