

January 25, 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:

We are writing as members of the Campus PRISM Project (Promoting Restorative Initiatives for Sexual Misconduct on college campuses) in response to the Department of Education's (Department) Notice of Proposed Rulemaking regarding Docket No. ED-2018-OCR-0064, RIN 1870-AA14 to express both gratitude and concern with the Department's proposed language concerning "Informal Resolution" as published in the Federal Register on November 29, 2018 at page 61479, column 2, Section 106.45(b)(6).

The Campus PRISM Project (Campus PRISM) is an international team of researchers and practitioners who are deeply invested in reducing sexual and gender-based violence by exploring how approaches rooted in the principles and practices of restorative justice (RJ) may provide greater healing and accountability for all stakeholders impacted by the reported behavior. Our members have made significant contributions to the scholarly literature surrounding student sexual misconduct and ways in which RJ practices strengthen institutional responses.¹ Our initial report² harnessed our members prior work to describe RJ and craft a compelling vision for how RJ could enhance institutional response to sexual misconduct and advance the goal of Title IX for all students. Our membership includes individuals who facilitate RJ processes for sexual misconduct (on and off campus, as well as internationally), those who run community-based RJ programs, attorneys, educators, victim advocates, Title IX Coordinators, and many others who support the appropriate use of RJ in addressing sexual and gender-based violence on campus.

Collectively, we support the Department's efforts to reconsider and amend the ways in which sexual misconduct matters can be "informally" resolved consistent with applicable law and guidance. We recognize and appreciate that the proposed rules seem to make room for campuses to utilize RJ practices when resolving sexual misconduct matters, without limitation to a particular subset of sexually inappropriate behavior. This subtle, yet important amendment to the prior regulatory and sub-regulatory regime helps creates

¹ As an introductory overview, please see "Select Research" at <https://www.skidmore.edu/campusrj/prism.php>.

² Campus PRISM: A Report on Promoting Restorative Initiatives for Sexual Misconduct on College Campuses. April 2016. Available at: https://www.skidmore.edu/campusrj/documents/Campus_PRISM_Report_2016.pdf

conditions under which greater healing and accountability can be promoted and provided utilizing RJ principles and practices.

We do, however, have some concerns with the proposed language. As published, Section 106.45(b)(6) is described as a provision related to “Informal Resolution.” Although we understand the Department’s interest in distinguishing resolution reached through “informal” pathways with those reached through investigation, we believe the term “Informal Resolution” is an inappropriate and potentially harmful characterization of the processes envisioned by Section 106.45(b)(6). By suggesting or implying informality, the proposed rules may cause campuses to underappreciate the training, skill, preparation, and formality needed to appropriately and successfully facilitate a restorative justice process dealing with sexually assaultive behavior. RJ processes of this nature are not “informal” at all. They’re carefully constructed, circumscribed, and often scripted processes that create strong safeguards to protect victims from secondary trauma, while requiring the individual accused of misconduct to accept responsibility for the behavior and the harm it created *prior* to (and during) any facilitated conversation with the victim. These processes thoughtfully examine and address the harm created as a result of sexual misconduct by creating resolution agreements that provide meaningful and effective accountability intended to repair the harm and prevent the behavior from reoccurring. RJ processes *do not* preclude campuses or participants from incorporating temporary or permanent separation provisions into the final agreement. In this way, RJ processes are no less formal than investigative processes. Students who accept responsibility for sexual misconduct in an RJ process may still be suspended or “expelled” as a result of their behavior just like their counterparts who are found responsible through an investigative process. The difference is that an RJ participant will have voluntarily agreed to such separation, whereas a student found responsible through investigation may not have. With this in mind, we suggest the term “Alternative Resolution” instead of “Informal Resolution.”

Second, Section 106.45(b)(6) suggests that informal or alternative processes may only be facilitated “prior to [the recipient] reaching a determination regarding responsibility.” Given the fact that RJ processes require students to accept responsibility for their behavior as a prerequisite to their participation, recipients will necessarily have knowledge regarding responsibility prior to undertaking an RJ process. To clarify the proposed rules and the circumstances under which alternative resolution processes are permissible, we suggest amending the provision to read as follows: “At any time prior to reaching a determination regarding responsibility through investigative processes the recipient may facilitate an ~~informal~~ alternative resolution process.”

Third, we remain concerned with the Department’s use of the word “mediation” in regulatory and sub-regulatory guidance. As discussed in our 2016 briefing, *Distinguishing Campus Restorative Justice from Mediation*,³ RJ processes are both similar to and distinguishable from mediation in important ways. For example, RJ processes and mediation are both capable of resolving matters without a formal investigation. In mediation, however, the mediator plays the role of a “neutral” seeking to facilitate agreement between parties in conflict. RJ processes, in contrast, recognize that sexual misconduct does not involve conflict that requires neutral mediation. It requires creating the conditions under which an individual who has caused harm to another can accept responsibility for their behavior and commit to repairing that harm to the greatest extent possible. Campus PRISM

³ Campus PRISM Project Briefing Paper: Distinguishing Campus Restorative Justice from Mediation. August 2016. Available at: <https://www.skidmore.edu/campusrj/documents/RJ-vs-Mediation-Brief.pdf>.

maintains that mediation is never an appropriate process for sexually assaultive behavior. In those instances, RJ processes are most appropriate because they create safeguards to protect the victim from secondary trauma. Mediation *may*, however, be appropriate for other types of sexual misconduct, as envisioned by prior guidance issued by the Office for Civil Rights. We recommend eliminating the word “mediation” from the proposed rules and replacing it with a reference to RJ as follows: “At any time prior to reaching a determination regarding responsibility through investigative processes the recipient may facilitate an ~~informal~~ alternative resolution process, ~~such as mediation~~ including a restorative justice process, that does not involve a full investigation and adjudication.”

Fourth, given the complexities involved in sexual misconduct matters, we believe it is vital that any recipients who decide to offer alternative resolution processes, particularly RJ processes, have appropriate training and capacity to facilitate a safe and successful process. This may be demonstrated in various ways, including a history of facilitating successful RJ processes for non-sexual misconduct matters combined with adequate training related to sexual misconduct, trauma, and sexual behavior problems, or other professional training, certification, or licensure demonstrating appropriate skill and capacity. To ensure recipients are consistently reminded of this imperative, we recommend amending the proposed rules as follows: “At any time prior to reaching a determination regarding responsibility through investigative processes the recipient may facilitate an ~~informal~~ alternative resolution process, ~~such as mediation~~ including a restorative justice process, that does not involve a full investigation and adjudication, provided that the recipient: i) has appropriate training and capacity to facilitate the process.”

Fifth, we believe recipients must carefully screen and select the matters most appropriate for informal or alternative resolution. Toward that end, we suggest adding a clause to Section 106.45(b)(6) that requires recipients to perform due diligence prior to determining a complaint is appropriate for informal or alternative resolution. This may require multiple conversations with the parties involved, as well as consultation with other stakeholders or experts. With this in mind, we suggest the following additional amendment to the proposed rules: “At any time prior to reaching a determination regarding responsibility through investigative processes the recipient may facilitate an ~~informal~~ alternative resolution process, ~~such as mediation~~ including a restorative justice process, that does not involve a full investigation and adjudication, provided that the recipient:

- i) Has appropriate training and capacity to facilitate the process;
- ii) Has conducted appropriate due diligence and determined the complaint is appropriate for such a process.”

Finally, RJ processes often benefit from protected environments that provide assurance to participants that they can safely share their stories. For example, individuals accused of sexual misconduct may need some assurance, prior to accepting responsibility for their actions, that he or she will not be subject to future institutional, criminal, or civil liability beyond the terms of the resolution agreement produced in an RJ process. Likewise, victims/survivors of sexual misconduct may want to know they can privately resolve a matter without fear of being pulled into a subsequent process that operates outside their sphere of control. To create environments of this type, recipients may benefit from the ability to create private, confidential, or privileged spaces in which to facilitate RJ processes. This may require entering into thoughtfully crafted cooperative agreements with local police, prosecutors, or others who have an interest in the outcome and, yet, who understand the utility of RJ processes and who are willing to accept and support outcomes produced in an RJ process by the individuals most directly impacted by the behavior. To make sure recipients understand that the proposed rules permit environments and arrangements of this sort, we

recommend the language of Section 106.45(b)(6) be further amended as shown in item (iii)b) below:
“At any time prior to reaching a determination regarding responsibility through investigative processes the recipient may facilitate an ~~informal~~ alternative resolution process, ~~such as mediation including a restorative justice process~~, that does not involve a full investigation and adjudication, provided that the recipient:

- i) Has appropriate training and capacity to facilitate the process;
- ii) Has conducted appropriate due diligence and determined the complaint is appropriate for such a process;
- iii) Provides to the parties a written notice disclosing:
 - a. The allegations;
 - b. The requirements of the ~~informal~~ alternative resolution process including whether the process may be considered private, confidential, or privileged in any way and the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any.”

In the interest of creating the most appropriate and effective regulatory environment for addressing student sexual misconduct, we ask the Department to reconsider and amend Section 106.45(b)(6) in a manner that addresses our concerns, as you also attempt to incorporate feedback received from many others. We believe our concerns can be addressed with the changes noted above and summarized in the attached document. If Campus PRISM can be of any additional help in your revision process, please let us know. We would welcome an opportunity to assist with this important work.

Respectfully,



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SUMMARY OF PROPOSED REVISIONS TO SECTION 106.45(b)(6)
By Members of the Campus PRISM Project

Deletions: marked with strike

Additions: underlined

Section 106.45(b)(6) ~~Informal~~ Alternative resolution. At any time prior to reaching a determination regarding responsibility through investigative processes the recipient may facilitate an ~~informal~~ alternative resolution process, ~~such as mediation including a restorative justice process~~, that does not involve a full investigation and adjudication, provided that the recipient:

- iv) Has appropriate training and capacity to facilitate the process;
- v) Has conducted appropriate due diligence and determined the complaint is appropriate for such a process;
- vi) Provides to the parties a written notice disclosing:
 - a. The allegations;
 - b. The requirements of the ~~informal~~ alternative resolution process including whether the process may be considered private, confidential, or privileged in any way and the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and
 - c. Any consequences resulting from participating in the ~~informal~~ alternative resolution process, including the records that will be maintained or could be shared; and
- vii) Obtains the parties' voluntary, written consent to the ~~informal~~ alternative resolution process.