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January 30, 2019

Secretary Betsy DeVos
c/o Brittany Bull
U.S. Department of Education
400 Maryland Avenue
S.W. Room 6E310
Washington, D.C. 20202

Re: Comment on Proposed Rule Regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance – Docket ID ED–2018–OCR–0064 (83 Fed. Reg. 61,462 (Nov. 29, 2018))

Dear Secretary DeVos:

On behalf of the Office of the Secretary of Higher Education of the State of New Jersey, the state's authorizing, policy and coordinating entity for higher education, I write to express strong objection to the Proposed Rule Regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, published by the Department of Education (the "Department") in the Federal Register on November 29, 2018. The rule, as proposed, would undo the critical work of institutions in the State of New Jersey and across the nation to put in place strong protections for survivors of sexual violence. In the past several years, many of our colleges and universities have risen to the challenge of establishing policies that reflect best practices, and that work well for their unique circumstances, consistent with guidance from the Department of Education. The promulgation of this rule at this time would effectively set back several years of collective action in good faith to adhere to the spirit and the law of Title IX as expressed in the 2001 Revised Sexual Harassment Guidance, 2011 Dear Colleague Letter, and 2014 Questions and Answers on Title IX and Sexual Violence issued by the U.S. Department of Education's Office for Civil Rights (OCR).

HISTORY AND CONTEXT

The purpose of Title IX of the Education Amendments of 1972 is to protect students from sex discrimination at our educational institutions. Title IX is a critical civil right. This law promotes equity, maximizes access to education, and protects students from harassment while pursuing a postsecondary education. In furtherance of this mission, the implementation of Title IX has created critical safeguards against sexual assault and harassment for students on college campuses. Reports show that one in five women and one in sixteen men in college will experience attempted or completed sexual assault during their time in school.¹ Now more than ever,

¹ Krebs, C. P., Lindquist, C., Warner, T., Fisher, B., & Martin, S. (2007). The campus sexual assault (CSA) study: Final report. Retrieved from the National Criminal Justice Reference Service: <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>

schools should be proactively promoting a culture of respect and creating campuses that are safe and free from discrimination, especially sexual harassment and all forms of sexual violence.

Title IX encourages colleges and universities to provide students with remedies in cases where they may experience sex-based discrimination, including harassment that disrupts their education and to administer preventative measures to create a safer campus environment for learning. Such remedies include: (1) preventative education and training for students, staff, and faculty regarding sexual harassment; (2) robust support services for survivors, which include accommodations for students who experienced harassment and assault; and (3) prompt investigations and adjudication processes for cases of sexual violence that are equitable for both the complainants and the accused.

The proposed regulation disproportionately protects the accused in cases of sexual harassment, requires schools to dismiss certain complaints of sex-based misconduct, and discourages students from coming forward to report when they experience harassment. The direction embodied within the proposed rule is particularly harmful given the amount of effort on the part of institutions to encourage increased levels of reporting to combat the silence that too often contributes to fomenting a “hostile environment” on campus. New Jersey has taken significant steps in protecting its students by establishing the New Jersey Task Force on Campus Sexual Assault, a collaborative effort between the Office of the Secretary of Higher Education, the Governor, the State Legislature, the Attorney General’s office, universities, academic researchers, community services providers, advocacy organizations, and law enforcement.² The task force authored a report in 2017, the recommendations of which are being implemented now.

AREAS OF CONCERN

While we oppose the entire spirit of this proposed regulation, there are several areas of particular concern. In addition to the particular areas of concern highlighted here, the Office of the Secretary of Higher Education concurs with the separate comments of the New Jersey Attorney General (submitted jointly with other State Attorneys General) and incorporates those comments by reference.

First, the proposed **change to the definition of sexual harassment** currently used in Title IX cases creates a new meaning so narrow as to exclude many acts that run counter to the common understanding of the term. The new definition requires sexual harassment to be “severe, pervasive, and objectively offensive” rather than “unwelcome conduct of a sexual nature,” as it was defined under previous guidance. This rule requires schools to dismiss cases of sexual misconduct from the Title IX compliance process that do not meet these standards. A student, for example, can experience a single act of sexual harassment, such as an unwanted advance made by a professor or catcalling by peers, and find that it interrupts their learning experience. For instance, the student may stay in their dormitory or intentionally miss class to avoid future confrontation. Yet, under the proposed regulation, the Title IX grievance process would not clearly afford the student a remedy. In fact, workplace harassment is not even defined this stringently; the effect of this rule would mean that students are even less protected against sexual harassment than campus staff and administrators. All levels of sexual harassment can cause harm and compromise a student’s educational environment deterring their learning, not just that which is “severe, pervasive, and objectively offensive.”

A second area of concern is the narrow definition of an **education program or activity**. Colleges and universities will have to dismiss student complaints of sexual harassment if they “did not occur *within* the recipient’s program or activity.” This language is disconcerting since college students can experience sexual harassment off-campus and even virtually, online (i.e. cyberbullying) and still be excluded from participation in or be denied the benefits of any education program or activity. In 2019, the college and university setting is not a confined or fixed location. Acts of sexual violence that occur adjacent to university property or on an online forum are so closely related to one’s educational experience that it makes little sense to insulate perpetrators

² The New Jersey Task Force on Campus Sexual Assault. (2017). Addressing Campus Sexual Violence: Creating Safer Higher Education Communities, New Jersey Task Force on Campus Sexual Assault Report and Recommendations.

who use these forums or locations from punishment. Schools should prioritize the impact the conduct has on a student's physical, emotional, and mental wellbeing and the interference it has on their ability to access their educational program or activity rather than confine remedies to conduct that itself occurred in an education program or activity, particularly within the digital age.

The third area of concern is regarding the **“actual knowledge” standard**. Under the proposed rule, schools are only required to respond to instances of sexual harassment upon “actual knowledge” or the filing of a formal complaint. “Actual knowledge” is defined as “notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.” Requiring schools to respond only to instances in which a select few officials have notice will likely depress the already low rates of reporting campus sexual harassment and assault. Most college students do not report sexual violence to law enforcement, university officials, or even family but are in fact more likely to approach a friend or peer.³ In many cases, students share their experiences with their resident advisors, who are often paid student employees, and therefore agents, of the university. Yet under the proposed rules, a resident advisor, or even a trusted faculty/staff advisor, can have full knowledge of a student's complaint of sexual assault and the institution is not required to take action or provide the complainant with remedies unless an official with authority to institute corrective measures has actual knowledge or a formal complaint is filed. Institutions in New Jersey have been working to train all staff across campus to bring issues and complaints to the Title IX coordinators, so that incidents can be appropriately addressed, no matter which campus official first hears of an issue. We oppose this proposed change.

The fourth area of concern is with **mandatory live hearings**. In § 106.45(b)(3)(vii) of the proposed rules, all institutions of higher education will be required to conduct live hearings for cases of sexual assault and harassment where the parties' advisors, who can be attorneys, must be allowed to conduct a cross-examination of the other party and their witnesses. This means student survivors of sexual assault and harassment would have to go through a prosecutorial process resembling a court of law if they file a formal complaint for remedies. Such a process would place student complainants at risk of re-traumatization, particularly if encountering the accused or are subjected to an antagonistic line of questioning from their advisor in front of others. As written, these proposed rules create an unnecessarily adversarial process. The campus adjudication is not a criminal proceeding. Students accused of sexual harassment and violence within a Title IX context will not face criminal penalty; the remedies and penalties are built upon their ability to further participate in the campus environment and to complete their academic study. As such, the hearing process should reflect the nature of the setting.

Under the current practice, cross-examinations occur at the discretion of the institution. This rule would mandate cross-examinations in all cases, and allow for students' attorneys to participate in the line of questioning, whereas any questioning now is typically carried out by a neutral third party not representing either the accused or the accuser. Cases of sexual assault and harassment deserve the highest standard of sensitivity; the process outlined within this proposed regulation is at odds with emerging best practices for survivor-centric investigations. Requiring such an adversarial process is not only burdensome and costly for colleges and universities, but also intimidating for non-lawyer advisors and university staff (such as student conduct officers, deans, and college administrators) who typically oversee these kinds of hearings. This proposed rule is especially alarming as it requires students who have experienced sexual violence on campus to undergo a process that can harm them, by potentially exposing them to re-traumatization, instead of supporting them through what can be a difficult and emotionally draining ordeal. We do not support the process as proscribed in the proposed rule.

The final two primary areas of concern pertain to **the evidentiary standard** and **students' access to review all evidence**. For years, colleges and universities have used the “preponderance of the evidence” (POE) standard for cases involving sexual violence. This has historically encouraged survivors of sexual violence to submit

³ Fisher, B., Cullen, F., & Turner, M. (2000). The sexual victimization of college women (NCJ 182369). Retrieved from the National Criminal Justice Reference Service: <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>

complaints because they understand that the rules for the proceeding, including the standard of proof, will be fair and equitable. An equitable standard equally validates all students' experiences, takes seriously their perspectives, and protects their educational rights. Giving colleges the option to apply the clear and convincing evidence standard, increasing the burden of proof, will open the door to undercutting the fundamental purpose of Title IX by making it more difficult for survivors of assault and harassment to receive remedies. We do not support this proposed rule and suggest the preponderance of the evidence remain the standard of proof for institutions to use in cases of sexual harassment and sexual assault.

Under the proposed rule, students involved in the complaint process would have access to all evidence. Such evidence could contain confidential information such as the students' sexual history, medical records, personal texts, or correspondence with a mental health service provider. Not only would such disclosure raise concerns about students' rights under the Family Educational Rights and Privacy Act (FERPA) and other privacy laws, this kind of disclosure would generally put students at risk for further harassment, and could amount to an unnecessary violation of basic privacy. Some evidence collected may in fact be unnecessary in determining responsibility, however, the proposed rules allow for parties to review the evidence and utilize it during the cross-examination portion of the disciplinary process. Putting such sensitive and personal information in the hands of someone outside a professional fact-finder is unnecessary and creates the risk for mismanagement of evidence, such as downloading or photographing and texting the evidence, further exposing students' personal information.

SUMMARY

Title IX has played an integral role in student safety on our nation's college campuses. It has provided for students to receive an equal opportunity to access education, receive the necessary supports to feel safe in their campus environment, and experience an equitable process that values their wellbeing if they are ever exposed to sex-based discrimination. Here in New Jersey, we are committed to protecting our students and their rights. And that means ensuring that students in our state are able to receive an education that is free of discrimination, harassment, assault, and all forms of sexual violence. We fear that the proposed rule would harm students, impede their success in college, and jeopardize the progress our state has made to holistically and collaboratively address campus sexual assault.

Sincerely,



Zakiya Smith Ellis, Ed.D.
Secretary of Higher Education
State of New Jersey