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OFFICE OF ACADEMIC AND STUDENT AFFAIRS

January 30, 2019

Via Federal eRulemaking Portal ([www.regulations.gov](http://www.regulations.gov))

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

**Re: Docket ID ED-2018-OCR-0064**

Dear Ms. DeVos:

The University System of Maryland (USM), comprising 12 public institutions of higher education and two regional higher education centers, has reviewed the Department of Education's November 29, 2018, Notice of Proposed Rulemaking (NPRM) containing proposed amendments to the regulations implementing Title IX of the Education Amendments of 1972. The USM appreciates the Secretary of Education's efforts to engage a variety of stakeholders in the rulemaking process and to balance the positions of interested parties. The USM, however, shares the concerns of many other institutions of higher education regarding the potential impact of several proposed provisions. The USM also seeks clarity with respect to several proposed provisions.

1. Cross-examination requirement

Proposed § 106.45(b)(3)(vii) requires universities' Title IX grievance procedures to provide for a live hearing at which a decision-maker must permit cross-examination conducted by a party's advisor of choice. The USM supports the Department's inclusion of certain provisions intended to safeguard parties from potential harm arising from personal confrontation, such as questioning being conducted by parties' advisors, the facilitation of parties being located in separate rooms, and limitations on the inclusion of certain evidence (i.e., rape shield protections), but the USM opposes the requirement that a live hearing with cross-examination be held.

The USM is fully committed to fair and equitable investigative processes that protect the rights of all parties and promote truth-seeking. There exist alternatives to live cross-examination that can be used to sufficiently assess credibility, such as allowing parties to submit questions to be posed to a party or witness by a hearing board or hearing officer, thus permitting the decision-maker to evaluate credibility without creating a trial-like proceeding within an educational institution. Although the proposed regulations provide certain protections for parties, the possibility of a chilling effect on reporting of misconduct and concerns about re-traumatization nevertheless remains substantial.

Another significant concern is the substantial expense associated with the requirement that higher education institutions provide parties with advocates trained to engage in cross-examination of parties and witnesses. Cross-examination in trial proceedings is governed by an extensive set of rules of evidence that are closely enforced by trained and experienced judges. Higher education institutions are ill-suited to provide a forum for these trial-like proceedings. Many lack funds and resources to hire individuals with the necessary expertise to carry out such activities.

The USM asks that the Department revise its proposed regulations to permit educational institutions to use alternatives to live cross-examination by advisors of parties, such as allowing parties to submit questions to be posed directly by the decision-maker to a party or witness.

## 2. Scope of “education program or activity”

Proposed § 106.44(a)–(b) explains that an institution with actual knowledge of sexual harassment in an education program or activity of the institution against a person in the United States must respond in a manner that is not deliberately indifferent. Although the Department expands on the meaning of “education program or activity” in the preamble on page 61468, there remains some ambiguity as to its scope. For example, would conduct occurring in online communications between university students who share a class fall within an “education program or activity?” Although the USM understands that its constituent institutions will remain free to respond under their own codes of conduct to misconduct that does not occur within an education program or activity (see pages 61468, 61475 of the NPRM), it would be helpful if the Department could provide additional examples to illustrate the parameters of this definition.

## 3. Meaning of “so severe, pervasive and objectively offensive that it effectively denies ... equal access”

Sexual harassment as defined in § 106.30 includes, among other conduct, 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. Although the USM understands that its constituent institutions will remain free to respond to misconduct that does not meet the proposed definition of sexual harassment under their own codes of conduct (see page 61475 of the NPRM), it

would be helpful for institutions to have a clearer understanding of the conduct to which institutions' responses fall within the Department's proposed rules. It would be useful if the Department could provide examples to illustrate the parameters of this definition.

The sexual harassment definition in § 106.30 is also likely to cause confusion or difficulty in application to employees' claims of sexual harassment because it differs from the definition of sexual harassment applicable to Title VII workplace discrimination claims. The Title VII definition provides that employers are subject to liability for harassment "sufficiently severe or pervasive to alter the conditions of the victim's employment." Because these definitions are different, a complaint brought under both Title VII and Title IX would require an institution to consider two different definitions. In cases involving student employees, it may be unclear which definition should be applied.

#### 4. Required dismissal of formal complaints that do not fall within the scope of Title IX

Proposed § 106.45(b)(3) provides that if a formal Title IX complaint is filed, and the conduct alleged would not constitute sexual harassment as defined in § 106.30 or did not occur within the recipient's education program or activity, the institution must dismiss the formal complaint. Although institutions remain free under the proposed rules to respond to sexual misconduct that does not meet the definition of sexual harassment or does not occur within an education program or activity by, for example, implementing supportive measures or investigating the conduct under the institution's code of conduct (see page 61475 of the NPRM), the lack of clarity as to these jurisdictional bounds will render it difficult for institutions to determine whether a formal Title IX complaint should be dismissed. We ask that the Department provide further clarity as to the jurisdictional parameters.

#### 5. Applicability to claims by employees

Regarding Directed Question No. 3 (see page 61483 of the NPRM), it is the USM's understanding that the proposed rules would apply to sexual harassment by students, employees, and third parties. Given the ambiguities discussed above regarding the definition of sexual harassment and the meaning of "education program or activity," it is not clear whether the regulations apply only to complaints brought by students against students, employees, and third parties, or whether they apply to complaints brought by employees as well. It is also unclear whether the proposed rules would ever apply to complaints brought against students by third parties. The USM asks that the Department clarify these points to avoid confusion.

#### 6. Conflict with Maryland state law

Maryland state law prohibits an adjudicator from considering a student's prior sexual history with individuals other than a party, except to: (1) prove source of injury; (2) prove prior sexual misconduct; (3) support a claim that a student has an ulterior motive; or (4) impeach a student's credibility after

that student has put his or her own prior sexual conduct at issue. In the NPRM, proposed § 106.45(b)(3)(vii) requires decision-makers to permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility, through cross-examination. Further, all cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent.

It is unclear whether it will be possible for institutions to comply with both obligations in all cases. For example, would the Department view state law restrictions on the consideration of certain evidence, such as a respondent's sexual history with an individual other than the complainant, a permissible ground for an adjudicator to exclude such evidence as not relevant during cross-examination?

## 7. Conclusion

The USM remains committed to ensuring the safety and wellbeing of its students, employees and all members of its campus communities, equal access to its educational programs and activities, and fair and equitable investigatory processes that protect the rights of all parties. The USM believes these goals would be better achieved through the Department of Education's revision and clarification of the proposed rules as described herein, and the USM urges the Department of Education to alter the proposed regulations and to accept specific recommendations made by the USM herein as to approach and language.

Sincerely,

Joann A. Boughman, PhD  
Senior Vice Chancellor for Academic and Student Affairs