The Honorable Betsy DeVos

Secretary

U.S. Department of Education

400 Maryland Ave. SW

Washington, DC 20202-0596

Dear Secretary DeVos:

On behalf of **[institution name]**, I appreciate this opportunity to comment on the Department of Education’s (ED) proposed regulations governing institutional responses to cases of sexual harassment under Title IX of the Education Amendments of 1972. (*Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 FR 61462, Docket ID ED-2018-OCR-0064).

Our students’ and staff members’ safety and their ability to attain a college education free of sexual harassment is of paramount concern. Harassment denies a student full access to a higher education, one of our core tenets. Therefore, **[institution name]** strongly supports Title IX’s objectives, including its application to sexual harassment.

Though **[institution name]** has redoubled efforts to address sexual harassment, improvements in campus procedures are always possible. Community colleges are not always associated with the issue of campus sexual harassment, but they face challenges in fostering the objectives of Title IX that can be different from those in other sectors of higher education. **[Detail relevant facts about your institution, including the fact that it is exclusively or primarily non-residential, whether alcohol is permitted on campus, the average student age, and the limited resources your institution has at its disposal.]**

Data provided through the Clery Act show that, at campuses across the country, in 2016 community colleges accounted for 10% of all reported crimes, and 6% of sexual offenses, despite comprising 41% of total undergraduate student enrollment. **[Insert any relevant statistics from your college].** However, because even one incidence of sexual harassment is unacceptable, colleges must adequately respond to reported incidents, educate their students, faculty, and staff about the topic, and create a campus climate that does everything possible to eliminate harassment.

I commend ED for addressing this Title IX implementation through the formal rulemaking process, giving interested stakeholders the opportunity to comment, and providing greater clarity concerning campus compliance. Previous sub-regulatory guidance on this issue did not afford us that opportunity.

This letter is not an exhaustive analysis of how the regulations would affect my institution. **[Institution name]** is a member of the American Association of Community Colleges, which has joined other higher education associations in a more comprehensive response. This letter focuses on some of the issues that are of particular relevance to my institution and community colleges overall. For the reasons detailed below, my positions on the proposed regulations are as follows:

* The proposed regulations provide institutions needed clarity and flexibility on the standards by which they will be judged in implementing Title IX, the circumstances that require a Title IX response, and the amount of time they have to resolve a sexual harassment proceeding.
* The regulation’s formal, judicial-like grievance procedures will likely deter students from reporting sexual harassment incidents, impose undue burden on colleges, and are generally unsuited to educational institutions.
* Institutions must retain the authority to investigate and take disciplinary action against conduct that does not meet the regulation’s proposed definition of sexual harassment.

**Standard, Notice and Timing (Secs. 106.44(a), 106.45(b)(1)(v))**

I appreciate that the proposed rules clarify when Title IX requires a response to sexual harassment incidents and the standard by which that response will be evaluated. **[Institution name]** endeavors to take a proactive approach in this area as much as possible, but requiring us to respond only when we have actual notice of an incident is a positive development. **This is especially important because my institution employs large numbers of adjunct faculty, increasing the chances that those with authority to take corrective action may not become aware of a given incident report**. **[Modify or eliminate the previous sentence as necessary].** I am pleased, however, that the regulations still allow my college to design internal reporting processes as we see fit, including mandatory reporting by all employees to the Title IX coordinator and others with the authority to take corrective action.

The “not clearly unreasonable” standard that an institution must meet to comply with Title IX (Sec. 106.44(a)) is sufficient to hold our institution accountable while theoretically providing us with the discretion to handle Title IX cases in a manner most suitable to our educational mission. On its own, this provision takes the right approach: setting a minimum standard for compliance rather than an exacting, and seemingly ever-changing, set of requirements. However, the prescriptive requirements contained throughout the regulations seriously undermine this potentially positive feature.

I am grateful that **[institution name]** would be given greater flexibility in the amount of time necessary to conclude a Title IX investigation and grievance process (Sec. 106.45 (b)(1)(v). Some institutions have struggled to comply with the rigid time requirements imposed under the so-called “60-day rule” for resolving sexual harassment proceedings. **[Describe any experience your institution has had with this, if applicable.]** Institutions should move as expeditiously as possible to resolve these cases, which generally serves all parties. However, any number of circumstances may delay proceedings, including concurrent police investigations, witness unavailability, and other factors. Fairness demands that colleges be thorough above all else. A flexible timeframe will be especially important should institutions be required to implement the complex proceedings that are proposed in these rules.

**Grievance Procedure Requirements (Sec. 106.45)**

My views on the NPRM’s proposed Title IX grievance procedures derive from current campus disciplinary procedures that address matters related to Title IX but are also much broader. **[Describe how your institution handles sexual harassment complaints under your code of conduct.]** Our disciplinary procedures are primarily designed to support our educational mission, ensuring a safe teaching and learning environment, academic integrity, and other aspects of a positive educational context.

Consequently, many of my most serious concerns with the NPRM stem from the formal, judicial-like grievance procedures institutions would be required to follow in response to a formal complaint (filed either by a complainant or Title IX coordinator) under 34 CFR 106.45. These requirements bolster what is referred to as due process protections for respondents in Title IX cases. While I strongly concur that possible incidents of sexual harassment must be treated in a manner that is fair to all parties, the procedures required by the NPRM will, on balance, impair student safety and impose counterproductive burdens on my institution. **[Institution name]** is not equipped to be, and does not wish to be, a judicial body. Though we appreciate the department’s intention to provide institutions with safe harbors that are entered into by following prescribed procedures, the difficulty in adhering to the numerous requirements may often render them moot.

While the NPRM’s grievance procedure requirements are troubling in general, the most problematic aspect is the requirement that Title IX sexual harassment proceedings at institutions of higher education include a live hearing at which the parties, through their advisors, are entitled to cross-examine the other party and any witnesses. I believe this requirement will have the following adverse effects:

* **Deter students from pursuing sexual harassment complaints**. Knowing that filing a complaint will result in a formal, judicial-like hearing that will entail live cross-examination from the respondent’s advisor will surely dissuade some students from pursuing claims, to the detriment of student safety. Many sexual assault survivors currently resist pursuing their cases with law enforcement because of the ordeal that a potential trial represents. Imposing a trial-like procedure on institutions will have this same deterrent effect.

The fact that this cross-examination would be conducted by an advisor, rather than the respondent him/herself, does not make the prospect any less daunting, particularly since that advisor is likely to be an attorney. The ability to conduct the hearing in separate rooms via telecommunications equipment also does not adequately diminish the specter of a live hearing.

* **Impose significant burdens on institutions**. The regulations mandate that institutions provide an advisor for the hearing to any parties that do not already have one. Due to the nature of the hearing and the legal acumen that would be required of the advisors to effectively represent their party (including knowledge of rape shield laws, etc.), that advisor in most cases would need to be an attorney. Supplying one or more attorneys with the requisite knowledge will come at considerable expense. For similar reasons, the decision maker presiding over the hearing would likely need to be an attorney as well because of the at-the-moment evidentiary decisions that are required, coming at additional expense. **[Describe any other burdens you think this requirement may have on your institution.]**

The department bases its decision to require a live hearing at colleges and universities while making it optional at K-12 institutions largely because the parties in college proceedings will be “adults,” and thus presumably better equipped than K-12 students to handle live cross-examination, which the department argues in the preamble is the most assured way at getting to the truth. This justification is flawed, particularly with respect to community colleges.

Community colleges enroll substantial numbers of high school students in dual enrollment programs, many of whom attend classes on community college campuses. **[Indicate how many of your students are dual enrollment students, and whether they take classes on the campus.]** Should an incident involve one of these students, the regulations would require the college to use a live hearing regardless of the fact that one, or potentially both, student parties could be under the age of 18. These same students would not be subject to a live hearing had the conduct in question occurred at their high school. In response to the department’s directed question on this topic, my college’s circumstances would be much better served if the requirement for a live hearing were based on age, rather than institution type. Even so, the assertion that an 18-year old college student is somehow better equipped to go through a live hearing than a 17-year old high school student is not adequately supported.

K-12 institutions are given the option to conduct cross-examination and investigation through written questions, which indicates that this process, in the department’s view, is adequate to protect the respondents’ due process interests in those cases. Given that the ultimate punishment in both K-12 and postsecondary institutions is the same – expulsion of a student from the institution or firing of a staff member – it is unclear why a written process would not also be adequate for colleges and universities.

For all of these reasons, at the very least colleges should be given the same flexibility as is accorded to K-12 institutions to decide for themselves whether a live hearing is appropriate.

Other aspects of the prescribed investigation and grievance procedures will also present challenges for my institution. In particular, Sec. 106.45 (b)(4) requires that the decision maker in a Title IX proceeding not be the same person as the Title IX coordinator or investigator – the so-called “single investigator” model. Sec. 106.45 (b)(5)(ii) mandates that appeal decision makers must be different than the original decision maker when a college opts to offer an appeal.

Most community colleges are relatively small institutions; in the fall of 2016, 56% of them enrolled fewer than 5,000 students. As stated, community colleges of all sizes usually operate on very lean administrative budgets. Consequently, many community college staff perform multiple functions, and requiring that functions currently being performed by one person be undertaken by several is problematic. **[Modify or add to the previous sentence describing the particular situation at your college.]** Taken together, these changes would certainly create substantial additional costs that would likely be borne by students.

Because Sec. 106.45(b)4) has been portrayed as requiring that different people handle each of these three roles, I seek clarity on whether the Title IX coordinator can also serve as the investigator. The NPRM merely requires the separation of the decision-making function from the other two roles, but there is lingering ambiguity that should be eliminated.

Again, colleges should be given much greater flexibility to use grievance procedures that, in their best judgment, are the fairest to all parties and reflect the primacy of the institution’s educational mission. This includes a single investigator process where appropriate. Doing so would ameliorate some of the costs that flow from the prescribed judicial-like procedures.

**Institutional Authority to Investigate Non-Title IX Incidents (Sec. 106.45(b)(3))**

As noted, the vast majority **[or all]** of **[institution name]**’s students reside off campus, and thus the college often supports students and staff who have experienced sexual violence outside the institution’s educational program or activity. In other cases, conduct may occur within an educational program or activity that does not constitute sexual harassment as defined in the regulations, but nonetheless may be actionable under a school’s code of conduct.

The regulations need to definitively state that a college has the authority to investigate such incidents and pursue disciplinary action where warranted. This is a matter of paramount importance to community colleges that wish to ensure that off-campus incidents and others not covered by Title IX do not impede a student from accessing her or his educational program.

More specifically, Sec. 106.45 (b)(3) states that in cases where the complaint alleges conduct that does not amount to sexual harassment as defined in the regulations, or the alleged conduct took place outside of the institution’s program or activity, the institution must dismiss that complaint. However, related language in the preamble seeks to assure institutions that they are still free to pursue such cases under other parts of their disciplinary codes. The two are seemingly inconsistent. Striking this language from the regulations altogether would best remedy this confusion.

**[Institution name]** and its students look to the department to provide sound policies that will ensure that all students can participate in higher education in a safe environment free from discrimination on the basis of sex. I believe that these views will help ED achieve that goal while complying with the law. Thank you for considering them.

Sincerely,

[CEO Signature]

[Institution Name]