January 30, 2019

Secretary Betsy DeVos
c/o Brittany Bull
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202

RE: Docket ID ED-2018-OCR-0064

Dear Secretary DeVos:

The American Association of Community Colleges (AACC) and the Association of Community College Trustees (ACCT) appreciate this opportunity to comment on the U.S. 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).

Community colleges strongly support Title IX's objectives, including its application to sexual harassment. Students' safety and their ability to attain a college education free of sexual harassment is of paramount concern on our campuses. Any instance of harassment constitutes a denial of full access to a higher education and conflicts with a core tenet of our mission. Sexual harassment and sexual violence at institutions of higher education have come under intense scrutiny and community colleges have implemented significant improvements in this area. As part of this effort, community colleges have launched sexual harassment education and prevention initiatives.

Community colleges face some challenges in addressing sexual harassment that differ in nature from other sectors of higher education. This is largely because they are almost exclusively non-residential institutions. Only about one-fourth of all community colleges offer some on-campus housing (approximately 270 institutions), according to ED, and only 1percent of 7 million community college students live on campus, compared to about 22 percent of postsecondary students overall. Community college students are generally older than students in other sectors (average age 27), and most of the campuses are alcohol-free. These and other factors are reasons why, in 2016, community colleges accounted for 10 percent of all reported crimes, and only 6 percent of sexual offenses under the Clery Act, despite accounting for 41 percent of all undergraduates. That said, a single incidence of sexual harassment is unacceptable. Colleges remain responsible for adequately responding to reported incidents, educating their students, faculty and staff about sexual harassment, and creating an atmosphere that strictly minimizes its occurrence.

We commend ED for addressing these proposed changes to Title IX through the formal rulemaking process, giving interested stakeholders the opportunity to comment. Unfortunately, previous sub-regulatory guidance on this issue did not afford that opportunity.

AACC and ACCT have endorsed the comments of the American Council on Education (ACE). This communication does not address all the issues raised in the ACE letter, but instead emphasizes those that are of particular relevance to community colleges. For the reasons detailed below, our overarching 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 are generally unsuited to educational institutions and will likely deter students from reporting sexual harassment incidents, while imposing undue burden on colleges.
- 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))

The NPRM helpfully clarifies those instances in which Title IX requires a response to sexual harassment incidents as well as the standard by which that response will be evaluated by ED. Requiring institutions to respond only when specific individuals have actual notice of an incident is positive. This is especially important because most community colleges employ high percentages of adjunct faculty, increasing the chances that those with the authority to take corrective action may not be aware of a given incident report. We are pleased, however, that the regulations still allow colleges to prescribe their own internal reporting processes, including mandatory reporting by all employees to the Title IX coordinator and others with the authority to take corrective action. This flexibility should allow colleges to design reporting mechanisms that encourage students to seek guidance confidentially.

The "not clearly unreasonable" compliance standard (Sec. 106.44(a)) is sufficient to hold institutions accountable for Title IX implementation, while theoretically providing them 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 previously shifting) a set of requirements. However, the prescriptive requirements contained throughout the proposed regulations seriously undermine this potentially positive feature.

We are grateful that the NPRM gives community colleges increased flexibility in the amount of time they have to conclude a Title IX investigation and grievance process. (Sec. 106.45 (b)(1)(v). Some institutions have struggled to comply with the so-called "60-day rule" for resolving sexual harassment proceedings. Institutions should move as expeditiously as possible to resolve Title IX cases, which generally serves all parties, but any number of

circumstances may delay proceedings, including concurrent police investigations, witness availability, and other factors. Fairness demands that colleges be thorough above all else. A flexible timeframe is especially important if institutions are required to implement the complex proceedings proposed in the NPRM.

Grievance Procedure Requirements (Sec. 106.45)

Our most serious concerns with the NPRM stem from the formal, judicial-like grievance procedures institutions are required to follow in response to a formal complaint (filed either by a complainant or Title IX coordinator) under 34 CFR 106.45. The intent of these requirements appears to be to ensure the fair treatment of respondents in Title IX cases. While community colleges strongly agree that these incidents must be dealt with in a way that is fair to all parties, the procedures required by the NPRM will impair student safety and impose counterproductive institutional burdens.

Community colleges' disciplinary procedures are primarily designed to support their educational missions, ensuring a safe teaching and learning environment, academic integrity, and other aspects of a positive educational experience. Colleges are not equipped to be, and do not wish to be, judicial bodies.

Many of the concerns enumerated below would be ameliorated by providing colleges with greater flexibility in meeting Title IX's requirements. We appreciate ED's efforts to provide institutions with safe harbors that are entered into by following prescribed procedures, but the difficulty in adhering to the numerous requirements may often render those safe harbors moot.

While the grievance procedures contain many provisions that concern our institutions, we are most troubled by the requirement that colleges' Title IX sexual harassment proceedings include a live hearing at which the parties, through their advisors, have the ability to cross-examine each other and any witnesses. In particular, we believe this requirement will have the following adverse effects:

- **Deter students from pursuing sexual harassment complaints**: Knowing that making a complaint will result in a formal, judicial-like hearing in which they face live cross-examination from the respondent's advisor will undoubtedly dissuade some students from acting, to the detriment of student safety. As it stands now, many survivors are resistant to pursuing their cases with law enforcement because of the ordeal that a potential trial represents. Imposing a trial-like procedure on institutions will have the 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 for the hearing an advisor to any parties who do not already have them. Due to the legal nature of the hearing

(including the expectation of the knowledge of rape shield laws, etc.), advisors representing their party, in most cases would necessitate them being an attorney. Supplying one or more attorneys with the requisite expertise 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 to be made, again, coming at additional institutional expense.

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." As such, they presumably are better equipped to handle cross-examination at a live hearing, in contrast to younger students. In the preamble, ED argues that cross-examination is the most reliable way at getting to the truth. This age-based justification for an adversarial type process is flawed, particularly for community colleges.

Community colleges enroll substantial numbers of high school students in dual enrollment programs, roughly one million across the country. Many of those students attend classes on community college campuses. Should an incident arise involving one of these students, the regulations would require the college to utilize a live hearing regardless of the fact that one, or potentially both, of the student parties could be under 18. These same students would not be subject to a live hearing had the conduct in question occurred at their high school. Deciding whether dual enrollment classes taught at a high school fall under the college's or the high school's education program further complicates the issue. However, in response to the department's directed question on this topic, community colleges oppose the mandate of a live hearing under any circumstance. Additionally, we note that the department's assertion that an 18-year old college student is somehow better equipped to endure a live hearing than a 17-year old high school student is not adequately justified.

Under the NPRM, K-12 institutions are given the option to conduct cross examination and investigation through written questions, which indicates that ED thinks that this process is adequate to protect the respondents' "due process" interests. 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 process involving written questions and responses 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 accorded to K-12 institutions to decide for themselves whether a live hearing is appropriate for their circumstances.

Other aspects of the prescribed investigation and grievance procedures present challenges for community colleges. 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 – thereby rejecting a 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 small institutions – 56 percent of them enrolled fewer than 5,000 students in the fall of 2016. And as a rule, community colleges of all sizes operate on very lean administrative budgets. Consequently, many community college staff perform multiple roles. So, requiring that functions previously

performed by one person be assigned to several is problematic. These provisions promise to impose substantial costs on our institutions, many of which will have no choice but to pass them on to students. These costs are amplified by the fact that, as noted above, the prescribed grievance procedures will often require individuals with legal expertise.

Colleges should be given much greater flexibility to use grievance procedures that, in their best judgment, are the fairest to all parties and are tightly integrated with the institution's educational mission. This includes a single investigator process where appropriate. Doing so would stem some of the costs that flow from the NPRM's proposed judicial-like procedures.

Should the single investigator model be prohibited, we seek clarity on whether the Title IX coordinator can also serve as the investigator, because Sec. 106.45(b)(4) has been interpreted as requiring that different individuals assume each of these three roles. The NPRM in our reading merely requires the separation of the decision-making function from the other two roles, but there is lingering ambiguity that should be eliminated.

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

As noted, the vast majority of community college students reside off campus, and thus community colleges often support 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 regulations, but nonetheless is 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. Such authority is crucial to community colleges' ability to ensure that off-campus incidents do not impede a student from accessing her or his educational program. This may happen in cases where a student and her/his alleged attacker in an off-campus incident continues to attend the institution. In some cases, disciplinary action is required against the alleged perpetrator, up to and including removal from the institution.

Sec. 106.45 (b)(3) states that in cases where the complainant 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.

We believe that the authority to investigate and take necessary disciplinary action must be clearly reflected in the regulation itself, rather than left to the preamble. In part, the proposed regulation's ambiguity in this area stems from the underlying assumption that institutions will implement separate procedures for Title IX disciplinary cases from those used for other disciplinary proceedings. This interpretation is the only way to reconcile the regulation's requirement to dismiss certain complaints with the preamble's assurance that the

underlying conduct may still be dealt with – that the regulation merely requires an institution to dismiss a specific *Title IX* complaint in the circumstances noted above.

This implied modifier is inconsistent, however, with the fact that Title IX governs the actions of the *institution*, in this case its response to allegations of sexual harassment. A student does not accuse another student or staff member of violating her or his Title IX rights, but rather of the underlying conduct that may require a certain institutional response under Title IX. This concept is clearly reflected in the preamble. Keeping this principle in mind, the requirement that institutions dismiss certain complaints because the alleged conduct does not meet the regulatory definition of sexual harassment makes no sense, and should be stricken from the final regulations. It would only sow confusion in an area where clarity is critical.

Thank you for considering our views on this matter. Please let us know if you have any questions relating to this submission.

Sincerely,

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