WASHINGTON STATE
Council of
Presidents
REPRESENTING WASHINGTON'S PUBLIC BACCALAUREATE INSTITUTIONS

The Honorable Betsy DeVos
Secretary, U.S. Department of Education
Washington D.C. 20202

Date: January 30, 2019

Re: Docket ID ED-2018-OCR-0064, RIN 1870-AA14

On behalf of the six public college and university members (Central Washington University, Eastern Washington University, The Evergreen State College, University of Washington, Washington State University, and Western Washington University) that together comprise the Council of Presidents (COP), I write to provide comments in response to the Department's November 29, 2018 notice of proposed rulemaking amending regulations implementing Title IX of the Education Amendments of 1972 , Docket ID ED-2018-OCR-0064.

Washington's public baccalaureates are profoundly committed to the safety of our entire campus communities and preventing any form of sexual harassment and violence so as to best advance our core missions of teaching and learning, research, and public service. Each has committed significant time, attention, and resources to prioritizing this issue through a coordinated network of targeted programs, services, and initiatives. We have also worked through the COP and collaboratively with other public and private, two- and four-year in-state institutional leaders to share best practices, learn from local, state, and national experts, and discuss opportunities for improvement with respect to both campus sexual violence prevention and response. At the same time, we remain committed to ensuring a fair and equitable process to all parties through our discrimination complaint procedures. This includes ensuring that anyone subject to penalties under college codes of conduct is afforded appropriate due process.

COP maintains serious concerns that the proposed Title IX regulations would undermine our institutions' ability to address sexual harassment and ensure prompt, equitable, and fair resolutions of such allegations.

We reiterate that our college and universities are educational institutions, not law enforcement agencies or courts; they are simply not a substitute for our criminal and civil legal system. A legalistic, prescriptive "one-size-fits-all" judicial-like process is unlikely to work well on a college campus. Moreover, adopting legalistic standards in the Title IX context is certain to have unintended and negative consequences for other campus disciplinary proceedings. In addition, imposing a legalistic process will increase significantly the amount of time that will be required to conduct a Title IX investigation.

Our primary concerns include:

1. Limiting a recipient's responsibility to respond only to conduct "that occurs within its 'education program or activity,'" as provided by proposed section 106.44(a), will render an institution unable to provide Title IX protections to some complainants.

It takes little thought to consider that sex discrimination, in particular sexual harassment and sexual assault, can occur outside of an education program or activity (for example, at a local bar), but result in a person being otherwise excluded from participation in, denied the benefits of, or be subjected to discrimination under a recipient's education program or activity. The test should not be whether the conduct occurred at a place or time endorsed by a recipient, but rather whether a person is deprived of a recipient's educational benefit or program as a result of the conduct.

Therefore, the Department should not limit a recipient's Title IX responsibilities only to conduct that occurred within an education program or activity. Instead, the Department should clarify that a recipient's Title IX responsibilities may be triggered even if the conduct occurred outside of an educational program or activity so long as a recipient's Title IX duties are otherwise triggered. This would allow the recipient to ensure a person's Title IX benefits are not abridged based solely on whether the conduct took place at a recipient's educational program or activity. Also, it would require a recipient to act in order to protect the Title IX benefits of all parties. Finally, it would provide a complainant with an option to receive resources and assistance beyond what local authorities can offer and is in keeping with the purpose of Title IX clearly articulated in the statute.

Jurisdiction should also not be limited in the employment context. For example, an employer should be able to discipline a staff/faculty member who sexually harasses a student at a bar off-campus after class.

2. In addition, the provisions regarding cross-examination under Section 106.45(b)(3) are also particularly alarming.

The proposed rule would bar the decision-maker from considering during a live hearing a prior statement by a party or witness that does not submit to cross-examination. This requirement will have a chilling effect not only on the complainant, but also on any witnesses that may have relevant evidence. Indeed, the requirement to participate at a live administrative hearing and subject oneself to cross-examination despite already having made a statement to an investigator may be enough to dissuade a complainant or a witness from engaging with a grievance process altogether. Moreover, it does not take much imagination to see that a savvy respondent could remain silent both during the investigation and at the live hearing without the repercussion of a prior statement being thrown out; however, the complainant has no such advantage, for it is their statement that is the catalyst that triggers the grievance process. Yet, that same statement would be dismissed if the complainant declines to be exposed to cross-examination. This swings the pendulum too far in the

direction of advantaging the respondent and creates a strategic imbalance, as well as a disincentive for a complainant to file a complaint.

Instead, the Department should permit the decision-maker to consider any prior statement made by a party or a witness irrespective of their submission to cross-examination. The issue for the decision-maker would then be one of weight rather than admissibility. The decision-maker should be able to examine the prior statement and weigh it against other testimony in reaching a decision. Under this regime, the decision-maker is not forced to consider the complainant's prior statement as true; nor is the respondent precluded from rebutting the statement. Rather, the decision-maker would be able to analyze all relevant evidence, appropriately weigh it, and then come to an evidence-based conclusion.

Our institutions are also concerned that the draft hearing procedures effectively prohibit students from representing themselves. We believe strongly that students should have the opportunity to represent themselves in student conduct proceedings, just as they have the right to represent themselves in criminal proceedings. If the Department wishes to keep its current proposed language requiring cross-examination to be done by an advisor, it should add an alternative for those students who do not wish to be represented by an advisor. Our institutions have had success with a model of requiring students to submit cross-examination questions to the hearing officer and having the hearing officer ask the questions. This alternative should be added to the rules to provide a method for students who do not wish to be represented by an advisor to still have the due process protection of cross-examination. Alternatively, cross-examination could be achieved during the investigative process if students are permitted to submit questions to an investigator who then asks those questions of the other party and includes the responses in his/her report.

3. Proposed 106.44(b)(2) would inappropriately require the initiation of conduct proceedings against survivors' wishes, even where there is little chance of the proceedings being meaningful and when no individualized risk assessment has been performed.

Proposed 106.44(b)(2) would require an institution's Title IX Coordinator to file a formal complaint when two or more survivors report conduct that would constitute sexual harassment, if true, when the survivors are unwilling to do so. This requirement is a step backwards from widely-accepted best practices and could have significant negative ramifications for survivors, respondents, and the safety of the campus community.

Based on our experience, including the reports of our confidential victim advocates, this proposal would have a chilling effect on reporting, with survivors choosing not to come forward because of the risk that their report will be disclosed without their consent. Any chilling effect on reporting negatively impacts our ability to provide supportive measures to survivors and impairs our ability to provide for the safety and security of the college or university community.

In addition, this proposed regulation requires Title IX grievance procedures to be brought

against respondents when there is no survivor desire for that to occur and little chance the student respondent will be found responsible under a student conduct code. It is always challenging for a student to be found responsible for sexual misconduct when the survivor is not a participant in the conduct proceeding. We respectfully submit that a process requiring an individualized assessment of whether to proceed, when doing so is contrary to the survivor's wishes, is more appropriate at institutions of higher education.

The bright-line rule included in the proposed regulations would inappropriately require the initiation of a grievance process against a survivor's stated desire regardless of any other considerations. Bright-line rules cannot capture the complexity of these situations: The potential of re-traumatizing the survivor through a conduct process, the safety risk to the college or university community, and even the nature of the conduct at issue are all sophisticated issues with much nuance. A process that allows but does not require the initiation of conduct proceedings following an individualized assessment of risk and a balancing of that risk against the survivor's stated desires, is a more sophisticated approach. It also better protects the interests of respondents, survivors, and college or university communities.

4. The provisions in proposed 106.45(b)(3)(vii) requiring live hearings, requiring university-paid-for advisors to conduct cross-examination, and prohibiting reliance on any hearsay evidence are unnecessarily prescriptive and would create confusion and increase costs for recipients.

Proposed 106.45(b)(3)(vii) contains three especially problematic provisions. It would require live hearings in all cases meeting the narrow definition of sexual harassment in proposed 106.30, regardless of whether suspension or dismissal is a potential sanction. It would require recipients to provide parties an advisor aligned with their interests to perform all cross-examination. It would mandate that if a witness does not submit to cross-examination at the hearing, then the decision-maker may not rely on any statement of that witness in reaching a determination.

These provisions are overly prescriptive and unnecessary to protect respondents' due process rights, and the confusion they cause would ultimately be detrimental to all students and potentially to the safety and security of college and university communities. The financial impact of providing advisors to all students, especially properly trained advisors and potentially legal advisors is significant.

5. The universities are also concerned the current language indicating that a recipient must dismiss a formal complaint that does not rise to the Department of Education's definition of sexual harassment could lead to unnecessary confusion and litigation.

Universities are obligated to address behaviors that are unacceptable before they rise to the level of being severe or pervasive, as clearly indicated in court decisions interpreting Title VII. We ask the Department revise its current language to make it abundantly clear that a college or university can continue to investigate and address behaviors that do not rise to the level of sexual harassment, while providing direction that an institution would not follow the

Department of Education's procedural requirements.

6. The proposed regulations also create unnecessary and unduly burdensome legal requirements without furthering the interests of due process or Title IX itself. Washington State's longstanding Administrative Procedures Act (APA), RCW 34.05, ensures constitutional due process guarantees at all public colleges and universities.

Under the state APA, hearings are required in the event that a student is facing suspension or dismissal. There are numerous due process protections that state law requires in conjunction with a conduct hearing, including:

- Presiding officer free of bias, prejudice, or other interest in the case, RCW 34.05.425;
- Representation is permitted, RCW 34.05.428;
- Notice, RCW 34.05.434;
- The opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, RCW 34.05.449;
- Witnesses testify under oath, RCW 34.05.452;
- Ex parte communications with the decision-maker are prohibited, RCW 34.05.455;
- The presiding officer at the hearing may not be the investigator, RCW 34.05.458; and
- Written orders, including specific requirements to protect due process, neutrality, and the parties' ability to appeal. RCW 34.05.461.

The proposed rules are so overly prescriptive that it would be difficult for colleges to both comply with the proposed rules and the State APA. This would result in significant burdens on the colleges with no discernable due process benefit to respondents.

COP believes that the Department of Education should not preempt Washington state laws on this topic that have been developed in close cooperation with our institutions, students and many other stakeholders in response to specific Washington-specific issues. To the extent to which federal regulations conflict with or are inconsistent with Washington state law, it will require a significant investment of time and effort on the part of our institutions to navigate those legal complexities.

7. Our institutions' employment processes are currently governed by collective bargaining agreements, state civil service laws, and local policies.

As noted in section four, the provision concerning live hearings is concerning. Many of our institutions do not utilize a hearing to determine whether or not an employee has engaged in misconduct or in determining the proper level of discipline. Many provide some type of hearing through mandatory arbitration after the institution has made its final decision. Under the currently drafted regulations, our institutions would be forced to completely reinvent their collective bargaining agreements and policies to provide a model for sexual harassment and sexual assault claims that bears no resemblance to other processes, such as those used for race or disability discrimination. The Department should exclude complaints against employees from its mandatory hearing requirements.

Washington's public baccalaureates remain focused on the protection of all our students, staff, and faculty while complying with all federal and state laws, including Title IX. Thank you for the opportunity to provide feedback.

Sincerely,

Paul Francis
Executive Director
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