Bates

Office of the President

30 January 2019

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Via electronic submission at regulations.gov

Re: Docket ID No. ED 2018-ED-0064, Proposed Regulations Implementing Title IX of the Education Amendments of 1972, 34 CFR Part 106

Dear Secretary DeVos:

On behalf of Bates College, thank you for the opportunity to provide comments on the U.S. Department of Education's (DoE) Notice of Proposed Rulemaking (NPRM) on Regulations Implementing Title IX.

Bates College shares the DoE's stated goal of ensuring that educational institutions address sexual harassment and discrimination in systematic and effective ways. As an educational institution, we must work to eradicate systems, climates, and behaviors, including those based upon sex and gender, that limit individuals' access to educational opportunities. We also agree that we must use equitable, fair, impartial, and transparent processes to produce reliable outcomes when resolving reports of discrimination and harassment. Current policies and procedures at Bates already encompass many of the proposed regulations' provisions that reflect best practices in the field, including providing robust systems of support to all individuals involved, timely notice of allegations, an equitable opportunity to review and rebut relevant evidence, equity of participation in the investigation process, opportunity to review and comment on a detailed and comprehensive investigation report, notice of outcomes and rationales, and equitable opportunities to appeal. We submit these comments, questions, and recommendations to assist the DoE in crafting final regulations that ensure that the shared goal of eliminating sex-based discrimination is met.

While we respect the DoE's attempt to provide clarity to recipients regarding their responsibilities, we are concerned that some of these regulations will result in a chilling effect on individuals reporting concerns and by extension seeking support. We request that the DoE more fully examine the impact of these regulations on those wishing to report incidents of discrimination and harassment. It is our belief that recipients can provide a full, fair, and transparent process for the resolution of reports without creating additional barriers to reporting.

2 Andrews Road | Lewiston, Maine | 04240-6028 | 207 786-6100 | FAX 207 786-6434

In addition, we request that the DoE more fully examine the impact of these regulations on other forms of equity, particularly those based on protected class. The premise of Title IX rests on the equitable treatment of individuals regardless of sex and gender. This goal should not be achieved at the expense of other types of equity. We ask that the DoE analyze and address whether these regulations create inequities based upon race, economic status, first-generation student status, and other important demographic categories. We are particularly concerned about the potential inequities arising from live hearings with direct cross-examination conducted by advisors.

In the preamble of this document, the DoE implies that the due process protections it proposes will lead to more reliable investigation outcomes. But, due process protections alone do not guarantee more reliable and better-reasoned decisions. The reliability of outcomes rests on a range of factors including: 1) the quality of the information gathered during the investigation; 2) the candid participation of parties and witnesses; 3) the equitable application and implementation of those protections; and 4) the training, skill, and experience of the Title IX Coordinator, the investigator, the decision-maker, and other participants in the process. By focusing so heavily on due process protections, the DoE instructs recipients about strategies to create safe harbors for themselves without necessarily improving the reliability of outcomes for the parties. We encourage the DoE to clarify how recipients can create both procedural and substantive due process to produce reliable outcomes that hold those who engage in discriminatory and harassing behaviors accountable and provide remedies for those who have had their access to educational opportunities limited.

GENERAL COMMENTS

- Since the concept of sex and gender are indivisible as it relates to harassment and discrimination, we encourage the DoE to include language explicitly protecting "gender" as well as sex in the document.
- The proposed regulations refer to recipients' responsibilities related to actionable "harassment" under Title IX. The text of Title IX and case law suggest the term "discrimination" would be more appropriate. Sex- and gender-based harassment is but one form of discrimination that Title IX prohibits.
- Throughout the regulations references to "both parties" do not account for the variety of incidents that include multiple parties. A simple change to "all parties" would rectify this problem.
- The proposed regulations appear to use "equal" and "equitable" interchangeably. They are not synonymous terms. Title IX mandates "equitable" access to educational programs and activities. Equal treatment of parties does not necessarily yield equitable results. We encourage the replacement of "equal" with "equitable" throughout the document.

COMMENTS REGARDING IMPACT ANALYSIS

- The DoE vastly underestimates the impact of these regulations on recipients. The formula it uses to calculate costs only accounts for the involvement of the Title IX Coordinator, legal counsel, and administrative support. Changes to policy and procedures at institutions of higher education require broad consultation and participation of stakeholders across the institution, including but not limited to students, faculty, student affairs staff, academic affairs staff, human resources professionals, senior staff members, and even trustees. Policy changes often demand significant time and prescribed processes for approval, adoption, and ratification at the institutional and system level, resulting in the need for substantial human and financial resources. We request the DoE revise its cost estimates after broader consultation with recipients regarding the anticipated costs to analyze and understand the regulations and to revise and implement policies and procedures.
- The DoE also underestimates the time and cost required to build capacity for implementing the new procedures required by these regulations. Many recipients will need to develop new pools of advisors and hearing officers. The training of these individuals is essential to the fair application of these procedures, to the reliable gathering of facts, and to decisions that are reliable. Appropriate training will require many institutions to seek the assistance of external experts, resulting in costs exponentially higher than those presented by the DoE in this document.
- We also request that the DoE consider the complexity of making these changes (and the realities of academic calendars) in determining the amount of time recipients will have to implement the final regulations.
- In this analysis the DoE celebrates the anticipated decline in the number of investigations due to the requirements of these regulations. A decrease in investigations alone does not necessarily signal success and may in fact signal a failure on the part of recipients to address discrimination and harassment on its campus. Only when the decline in investigations corresponds to a decline in actual incidents of discrimination should that statistic be used as a measure of success. Title IX compels that we continually address structures, climates, and behaviors that cause discrimination, harassment, and inequitable access to educational opportunities.

COMMENTS RE: 106.44 RECIPIENT'S RESPONSE TO SEXUAL HARASSMENT

ROLE OF TITLE IX COORDINATOR

- The new regulations require a Title IX Coordinator who has "actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment" to file a formal complaint and initiate investigative procedures. Please clarify the following:
    - The role of third-party reports and reports received via anonymous online systems in triggering this requirement;
    - The role of prior reports that have been resolved using informal means with the stipulation that parties waive their right to pursue formal processes;

- What constitutes "multiple complainants";
  - Must it be two distinct individuals or would multiple incidents against the same individual trigger this provision?
  - How would a single incident involving multiple parties be handled?
- Is this requirement time delimited at all? Would two reports many years apart still initiate this provision?
- With whom would the Title IX Coordinator file this complaint and who will oversee the investigation if the Title IX Coordinator is acting as the complainant?
- This provision neglects the potential danger in forcing complainants into resolution procedures they do not desire. In certain situations, the disclosure of a report to the respondent can put the complainant at significant risk. How will the Title IX Coordinator balance protecting complainants with this requirement?
- How will the Title IX Coordinator proceed if the complainants decline to participate and therefore the decision-maker would not be able to consider any of their statements?
- The filing of a formal complaint by the Title IX Coordinator initiates an adversarial relationship with the respondents and removes them from their position as a neutral third party. How does the DoE justify creating that conflict?

DEFINITION OF "SEXUAL HARASSMENT"

- This definition is problematic because it does not match the definition for sexual harassment consistently used by Title IX practitioners and appearing in both Title IX and Title VII case law. The standard that undergirds Title VII – after which Title IX was modeled – is clearly that of "severe **or** pervasive" conduct, not "severe **and** pervasive" conduct. This definition also does not address persistent conduct. We urge the DoE to use a definition consistent with best practices and prohibitions under Title VII: "Unwelcome sexual conduct, or conduct on the basis of sex, that is so severe or pervasive (or persistent) and objectively offensive that it excludes a person from participation in, or denies a person access to or the benefits of the recipient's education program or activity."

COMMENTS RE: 106.45 GRIEVANCE PROCEDURES FOR FORMAL COMPLAINTS OF SEXUAL HARASSMENT

NOTICE OF ALLEGATIONS

- Please provide clarification on the required timing of this notice. It is unclear whether the recipient will be allowed to engage in initial gatekeeping prior to the issuance of notice. Recipients should be provided with flexibility in determining when is the appropriate moment to deliver notice, provided it is prior to the initial formal interview.

- By relying on language used in criminal proceedings, the proposed requirement that recipients include a statement of "presumption of innocence" in its notice to parties inappropriately injects a quasi-criminal framework into an administrative process. We agree that recipients should not be presuming that a policy violation has in fact occurred; any determinations of the responsibility should be made only after the full gathering of facts. Yet at that same time, we resist the impulse to turn disciplinary proceedings into makeshift courts. We encourage the DoE to replace this requirement with the requirement that recipients include a statement declaring that the outcome of the investigation has not been predetermined. This relatively small change in language would have a great impact on maintaining clarity on the distinctions between criminal proceedings and disciplinary ones.

EVIDENTIARY STANDARD

- Despite the appearance of presenting recipients with choice in determining the evidentiary standard they use, the proposed regulations as written dictate that many recipients must use the clear and convincing standard due to the use of the clear and convincing standard in AAUP endorsed procedures for the removal of tenured faculty. Please clarify whether this reading of the regulations is accurate. Would schools who use preponderance of evidence for all disciplinary proceedings, except in those proceedings determining the singular issue of the termination of tenured faculty for cause (where the standard is clear and convincing), be required to use the clear and convincing standard in Title IX cases? If so, please clarify the following:
    - Why would the DoE require these recipients to use a higher standard (clear and convincing) in determining its own internal proceedings than is used in civil rights cases, OCR's own investigations into recipients' compliance, and Title VII investigations which use the preponderance of evidence standard?
    - By what authority does the DoE have the right to regulate a private recipient's choice of evidentiary standard particularly when that regulation extends beyond existing case law?
    - The DoE has claimed that the regulations are designed to bring about consistency within recipients' internal policies. Yet, if schools are compelled to use the clear and convincing standard in Title IX cases because of its use in faculty proceedings not related to Title IX, the new regulations will create new inconsistencies in evidentiary standards for many of them. These new inconsistencies would include inconsistencies between Title IX and other civil rights/harassment investigations, between Title IX and other serious student and employee conduct investigations, and between Title IX and academic dishonesty cases. How does the DoE justify the creation of these inconsistencies when all of these investigations carry the same maximum disciplinary sanction and a finding of responsibility in these cases can in fact result in serious, long-term consequences for respondents?
    - The preponderance of evidence standard treats all parties most equitably. Throughout the regulations, the DoE asserts that the burden of gathering evidence rests with the recipient. No party is responsible for "proving" its case. The recipient should be able to determine whether policies have been

violated based upon a standard that relies upon where the weight of evidence rests no matter how small that difference might be.

LIVE HEARING WITH CROSS-EXAMINATION

- Requiring direct, live cross-examination is antithetical to the administrative nature and educational goals of college disciplinary proceedings. We assert that a robust investigation that includes opportunities to challenge evidence, to suggest questions, and to assess credibility can meet due process provisions and has the potential to produce reliable outcomes without the potential dangers and complexities of a hearing as prescribed in the regulations.
- The proposed requirement that institutions of higher education must provide live hearings with cross-examination conducted by an advisor appears to be based on the premise that these hearings will produce more reliable outcomes. Please provide evidence that this premise is true.
- Implementing live hearings with cross-examination may actually result in less reliable outcomes by discouraging the participation by witnesses who may have important information. Cross-examination conducted by skilled individuals who abide by clear and even-handedly administered rules of engagement can serve to test the veracity of factual assertions. Attorneys and judges learn to skillfully employ cross-examination and cultivate the ability to judge relevance in real time only after years of intensive training. It is unreasonable to expect higher education staff and amateur advisors to exhibit the same skill. Allowing potentially untrained advisors to conduct cross-examination in a live hearing, risks creating harms that outweigh the benefits. While the preamble suggests that the potential for harm to parties can be mitigated, the DoE underestimates the potential impact this process might have in the hands of individuals who may or may not have any training. We believe that parties can and should be allowed to challenge evidence and credibility through neutral parties. Recipients should be required to craft processes that allow for parties to ask for clarity, to challenge statements of fact, and to question credibility. They should not be required to provide prescriptive live hearings with cross-examination as described.
- Since advisors will conduct the cross-examination, we are concerned about the potential inequities that will emerge based upon each party's own resources.
- The cross-examination mandates will likely result in a serious chilling effect in the willingness of individuals to report harassment and to pursue formal resolution processes. Please comment on how the benefits of this system outweigh the potential negative effects.

RIGHT TO INSPECT EVIDENCE

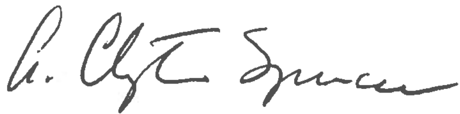
- While we fully support each party's right to inspect all relevant evidence that will be used to reach a determination, we oppose the requirement to provide all evidence that has been collected but will not be relied upon in determining the outcome. Some of this evidence may contain highly sensitive information that has no bearing on the decision and should remain confidential. This requirement will likely have a chilling effect on complainants coming forward to make reports and a hindrance to getting

witness participation and cooperation. It will also result in parties and witnesses speaking with less candor and potentially holding back information that may in fact be relevant and important to the final determination.

- Does this provision require that recipients provide transcripts of all interviews or would summaries of these conversations still meet this requirement?
- Would confidential information (such as medical information) included on documents that have been collected but determined by the investigator to be irrelevant be able to be redacted prior to distribution to the parties?
- How would recipients protect the privacy of witnesses when potentially highly sensitive information regarding them would be distributed to the parties, particularly when this information will not be used in determining an outcome?
- Might a requirement that investigators list, in broad outline, evidence that they are not considering to allow parties to challenge whether the evidence is in fact relevant achieve the same results without the potential pitfalls?

Thank you in advance for your consideration of the points we raise. We have worked very hard at Bates in recent years to develop policies and procedures that address issues of sex- and gender-based discrimination in a way that is fair and equitable to all parties involved and promotes a positive climate on campus. We are concerned, as outlined above, that some of the provisions of the proposed regulation will cause us to go backwards on these vitally important issues in ways that are damaging to all students involved and to the Bates community as a whole. We look forward to working with you and the DoE as you continue to refine the regulations.

Sincerely yours,



A. Clayton Spencer
President

Gwen Lexow
Director of Title IX & Civil Rights Compliance