

January 30, 2019

Submitted electronically via Federal eRulemaking Portal

Secretary Betsy DeVos
c/o Brittany Bull
U.S. Department of Education
400 Maryland Ave., SW Room 6E310
Washington, D.C. 20202

Re: Comments from Title IX Coordinators for the Oregon Public Universities (ED-2018-OCR-0064)

Dear Secretary DeVos:

The Title IX Coordinators for the University of Oregon, Oregon State University, Portland State University, Southern Oregon University, Eastern Oregon University, Oregon Institute of Technology, Western Oregon University, and Oregon Health and Science University respectfully submit the following comments in response to the Department of Education's Notice of Proposed Rulemaking (NPRM) regarding Title IX of the Education Amendments of 1972. See 83 Fed. Reg. 230 (Nov. 29, 2018).

Our institutions, which collectively educate some 100,000 students each year and employ thousands of employees, are committed to providing an environment free of discrimination, harassment, intimidation and retaliation. As the Title IX Coordinators for our respective campuses, we have worked closely with students and other stakeholders to develop processes for fairly and compassionately resolving complaints of sexual violence and sexual harassment that comport with evolving best practices, state and federal guidance, and the priorities of our campus communities. With these thorough deliberations in mind, we seek clarity from the Department on a few critical issues.

In particular, we have identified six core concerns with the NPRM that, if left unaddressed, would create potentially insurmountable barriers to student and employee reporting, would impose significant cost, would be difficult to implement, and would actually undermine the Department's stated objectives of creating fair and impartial investigations that generate reliable outcomes. Where possible, we propose alternative language for the Department's consideration.

1. Section 106.45(b)(3)(vii): The live hearing requirement introduces an adversarial process that lacks flexibility and is at odds with our institutions' educational missions.

The NPRM's requirement of live hearings, with no flexibility for institutions to adopt an investigatory model, is a substantial deviation from prior guidance, will be costly to implement, and will deter parties and witnesses from participating in the process.

Title IX investigations are administrative, not criminal, proceedings and should not be patterned after criminal trials in a court of law. Our universities do not readily have the funds available to absorb the higher costs associated with the NPRM's court-like process. Moreover, the proposed rules create considerable differences between investigations of sexual harassment versus other forms of misconduct, and would unnecessarily increase timelines due to the administrative burden of providing and scheduling live hearings with multiple parties, advisors and witnesses.

We note that the NPRM's discussion of live hearings draws heavily from the Sixth Circuit's decision in *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018). But this is not the law in our Circuit, and we are not aware of any binding authority requiring us to conduct live hearings in Title IX cases. Moreover, the NPRM is far broader even than *Baum*, which required a live hearing with cross-examination only (1) when the accused faces a potential sanction of expulsion or suspension (2) when the university's determination turns on the credibility of the accuser, the accused, or witnesses and (3) when the additional process will not bear significant administrative burden, for example because the school already has procedures in place to accommodate cross-examination. See *Baum*, 903 F.3d at 582-83.

Recommendation: We respectfully request that the Department revise Section 106.45(b)(3)(vii) to mirror the process allowed for elementary and secondary schools in proposed Section 106(b)(3)(vi). Similar justifications for (b)(3)(vi) exist in institutions of higher education. This modification gives our institutions the flexibility to decide whether a live hearing is consistent with our educational missions while ensuring the necessary procedural protections.

Alternatively, and at a minimum, the Department should clarify that live hearings are required only if the accused party faces a sanction of expulsion or suspension and the university's determination turns solely on the credibility of the accuser or the accused, without other witnesses or extrinsic evidence, thereby mirroring the limitations identified in the case law relied upon by the Department.

If the Department does not accept this recommended language, we expect that you will tell us why and respond individually to each of the identified concerns.

- 2. Section 106.45(b)(3)(vii): The requirement that institutions provide live cross-examination by advisors will be difficult and costly to implement, unnecessarily traumatizes participants in the proceedings who are subject to cross-examination, and creates a chilling effect on reporting.**

By far the most troubling provision in the proposed rules is the requirement that our institutions allow cross-examination by the party's advisor of choice.

The Department's prior guidance strongly discouraged schools from allowing parties to personally question or cross-examine each other during the hearing because, as the Department aptly observed, such questioning is often traumatic or intimidating, and may result in universities facilitating the creation, rather than the elimination, of a hostile environment. But the Department's proposed rules would allow a party's proxy—for example, an untrained friend or family member—to engage in the same traumatizing conduct that the Department states it wishes to avoid. Unlike in a courtroom where attorneys are bound by rules of professional ethics and where judges may sanction misconduct, our adjudicators do not have procedural mechanisms to control disruptive or unprofessional conduct by an advisor engaged in cross-examination.

In our experience, the cross-examination requirement will also discourage parties and witnesses from participating in the process. This is particularly true in cases involving student complainants and faculty member respondents. In these matters there is frequently an imbalance of power and the student may fear retaliation and not want to be confronted by an advisor of the accused faculty member in an adversarial setting. Given the NPRM's requirement that adjudicators not consider evidence unless offered by individuals who are subjected to cross-examination, this chilling effect could have significant consequences for both complainants and respondents. Our institutions have given considerable thought to this issue when developing alternative, procedurally fair processes that do not involve live

cross-examination. The proposed rule eliminates this flexibility, and negatively impacts our ability to investigate allegations and to resolve complaints of sexual harassment.

The live cross-examination requirement also presents considerable expense. The proposed rules require us to find and train adjudicators who are skilled in adversarial hearing processes, can make on-the-spot relevancy determinations, and can maintain decorum in a courtroom-like setting. We would likely need to hire attorneys, or local administrative law judges or arbitrators, which drastically increases the costs of the proceedings. A further complication is that these adjudicators would not have judicial immunity, as would a judge in the courtroom, and accordingly their determinations—to the extent challenged by one of the parties—could form the basis of additional legal challenges.

Relatedly, the proposed rule requiring us to provide advisors who are aligned with the party and capable of conducting cross-examination may require us to hire advisors who are trained attorneys at considerable cost. The proposed rules are unclear with respect to what constitutes sufficient alignment, whether and how a party may challenge the selection of an advisor, and the extent to which our institutions can constrain advisors who engage in unprofessional conduct or seek to unreasonably obstruct or manipulate the adjudicative process.

Recommendation: The Department should eliminate the requirement that institutions provide live cross-examination and appoint aligned advisors. This would give our institutions flexibility to decide whether cross-examination is consistent with our educational philosophies and can be implemented effectively on our campuses.

If the Department retains the cross-examination provision, we request two clarifications.

First, the Department should expressly allow cross-examination to be performed by a trained third party (e.g., the hearing adjudicator) who receives questions from the parties and asks those it deems appropriate and relevant to the case. This modification accords with the Department's prior guidance¹ and case law,² and best achieves the NPRM's stated objectives of protecting parties from unnecessary trauma. See NPRM at p. 61476. The NPRM presupposes that cross-examination will result in more reliable outcomes because the adjudicator would have the opportunity to observe the parties and witnesses answering questions in real time and to make corresponding credibility determinations; but

¹ See Catherine E. Lhamon, Assistant Secretary for Civil Rights, Questions and Answers on Title IX and Sexual Violence, at 31 (Question F-6), April 29, 2014, <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

² The only cases cited by the Department for the use of cross-examination in school disciplinary proceedings considered a "circumscribed form of cross-examination," described as the opportunity to ask questions indirectly through the fact-finder, which is far different and less intrusive than the direct questioning required by the NPRM. See *Baum*, 903 F.3d at 583 (extending the reasoning in two prior cases, *Doe v. Cummins*, 662 Fed. App'x 437, 448 (6th Cir. 2016), which held that due process was satisfied where plaintiffs were allowed to engage in a "circumscribed form of cross-examination" by submitting written questions to the hearing panel, and *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 403-04 (6th Cir. 2017), which held that "allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating" and thus the plaintiff should be allowed to confront and question the complainant through the panel).

these core benefits can be achieved via live questioning through the adjudicator, and without the same accompanying problems.

Second, the Department should provide additional guidance, and flexibility, regarding the selection of advisors. For example, the Department should expressly permit institutions to stop or remove advisors who fail to adhere to prescribed standards of conduct or who engage in obstructive, bullying, or harassing conduct. And, where a party does not have an advisor present at the hearing, the Department should clarify that the requirement that institutions provide advisors “aligned with th[e] party to conduct cross-examination” does not preclude us from requiring that such advisors be selected from a pool of persons with adequate training, or limiting when and how a party may challenge their assigned advisor.

If the Department does not accept this recommended language, we expect that you will tell us why and respond individually to each of the identified concerns.

3. Section 106.45(b)(3)(vii): The requirement that decision-makers must not rely on statements of parties or witnesses who do not submit to cross-examination will result in less fair and accurate proceedings, and could compromise parties’ constitutional rights.

We are also concerned by the NPRM’s requirement that “If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.” See Section 106.45(b)(3)(vii). This proposed rule presents a number of challenges.

For example, the university—unlike a court—does not have the ability to compel witnesses to attend the hearing. If witnesses are not available or are simply unwilling to participate at a hearing, valuable but reliable information obtained from the investigation would be excluded. In addition, some institutions, such as ours in Oregon, may have conflicting State laws that prohibit pressuring or forcing participation of complainants or respondents. The proposed rule thus puts investigators, decision-makers, and universities in the untenable position of issuing decisions when substantial evidence may demonstrate that the outcome is in error. The rule will not result in more accurate decisions because it will lead to the exclusion of evidence that is relevant, credible, and possibly even exculpatory.

Equally significant, the proposed rule effectively compels respondents to submit to cross-examination and to potentially give testimony against themselves implicating their Fifth Amendment right against self-incrimination. As drafted, if respondents do not submit to cross-examination, they risk having any statements they make being disregarded entirely, including a denial. This creates a significant and unnecessary conundrum for respondents defending against charges at a recipient institution, especially if they also face a pending criminal prosecution: If the respondent participates, the information they provide may be used against them. If the respondent does not participate, exculpatory information they have may not be considered by the university, according to the NPRM, and they face a potential finding of responsibility, which may also subsequently be used against them. The proposed rule also harms complainants by compelling them to testify multiple times, contrary to best practice in both administrative and criminal processes.

Additionally, where the parties and witnesses are also students, we worry that the proposed rule requiring them to attend both investigatory interviews and a live hearing will impact their ability to participate in other university programs and activities, including class examinations. Our investigators routinely encounter problems when scheduling interviews with students who often take breaks from

school, forget to update contact information, stop responding to emails, texts or phone calls, or even leave the country. Due to frustrations with the length of the process, complainants may even stop responding and we could be forced to dismiss even meritorious allegations because of an inability to re-engage with a complainant despite having a nearly complete investigation.

Recommendation: The Department should modify Section 106.45(b)(3)(vii) to allow an adjudicator to consider evidence from a party or witness who does not submit to cross-examination so long as the adjudicator takes this selective participation into account when assigning appropriate weight to the testimony and when determining credibility. This modification allows decision-makers to assess the reliability of evidence without excluding the evidence entirely.

If the Department does not accept this recommended language, we expect that you will tell us why and respond individually to each of the identified concerns.

4. Section 106.45(b)(3): The requirement that institutions dismiss formal complaints that do not amount to sexual harassment as defined in the NPRM negatively impacts our ability to investigate other forms of misconduct and to implement consistent processes.

Our institutions strongly prefer having the flexibility to use a single adjudicatory process that applies to sexual harassment as well as other similar violations of university policy, e.g., non-sexual assault.

But this may not be possible under the proposed rules, which require that we dismiss a formal complaint where the alleged conduct does not amount to “sexual harassment” or did not occur within the school’s program or activity. See Section 106.45(b)(3). For example, the proposed rules imply that we would be prohibited from moving forward under our own campus disciplinary procedures to address an off-campus sexual assault, which although not meeting the NPRM’s definition of actionable conduct could still constitute a violation of our schools’ codes of conduct. Or, where a complaint alleges multiple policy violations, e.g., sexual harassment and theft, the proposed rules suggest that we “must dismiss” the theft claim or treat it under an alternate process and allow only the Title IX claim to proceed as part of a “formal complaint.” These outcomes are illogical and introduce unnecessary complications.

Recommendation: To address these concerns, we respectfully request that the Department replace the “must dismiss” language in Section 106.45(b)(3) with the following language in italics: <If the conduct alleged by the complainant would not constitute sexual harassment as defined in § 106.30 even if proved or did not occur within the recipient’s program or activity, the recipient *is not deliberately indifferent* if it dismisses the formal complaint with regard to that conduct.> In addition, we recommend that the Department include language in the final rule explicitly affirming the right of schools to address misconduct that falls outside the scope of Title IX.

This change makes clear that our universities may still investigate conduct that does not amount to sexual harassment occurring within a program or activity but nevertheless violates university policy, while at the same time explaining that such actions are outside the purview of Title IX (i.e., would not amount to deliberate indifference). And, importantly, it allows our universities to have a uniform and consistent process for resolving complaints.

If the Department does not accept this recommended language, we expect that you will tell us why and respond individually to each of the identified concerns.

5. Section 106.44(b)(2): The requirement that institutions file a formal complaint in situations of multiple complainants may be unworkable where the complainants refuse to participate.

Proposed Section 106.44(b)(2) requires that the Title IX Coordinator file a formal complaint when we have actual knowledge regarding reports by multiple complainants of conduct by the same respondent. This conflicts with the Department's longstanding guidance that schools should respect a student's requests to remain anonymous or to not initiate a complaint. *See e.g.*, 2001 Guidance ("The scope of a reasonable response also may depend upon whether a student, or parent of a minor student, reporting harassment asks that the student's name not be disclosed to the harasser or that nothing be done about the alleged harassment."). We have found that, without the complainants' voluntarily participation, we frequently cannot conduct an investigation or fairly adjudicate the claims, and thus the forced initiation of a formal complaint will not necessarily result in better outcomes. We are also mindful of the requirement under Oregon law that schools may not seek to influence the decision of a victim of sexual assault, domestic violence or stalking to participate in an investigation or adjudication of the alleged incident. *See Or. Rev. Stat. 350.257.*

Finally, if we are forced to move forward without the participation of complainants in every case where there are multiple reports of sexual harassment against the same respondent, then this may just lead to dismissals if the complainants are unwilling to undergo cross-examination and there is insufficient information to adjudicate the claim. This seems counterproductive and wasteful, not to mention unnecessarily traumatic for all parties involved.

Recommendation: The Department should remove the "must file" language from Section 106.44(b)(2), and should also make clear that this rulemaking does not supersede the 2001 Guidance regarding complainants' requests for confidentiality.

If the Department does not accept this recommended language, we expect that you will tell us why and respond individually to each of the identified concerns.

6. Section 106.45(b)(3)(iii): The requirement that institutions not restrict the ability of either party to discuss the allegations is at odds with the Department's recognition that certain information must be treated confidentially.

We also request that the Department revise proposed Section 106.45(b)(3)(iii), which states that institutions may "not restrict the ability of either party to discuss the allegations under investigation," to expressly permit institutions to restrict the discussion or dissemination of materials marked as confidential, to issue mutual restraints on contact with the other party, and to otherwise prohibit retaliatory conduct between individuals involved in an investigation. This suggested modification is consistent with federal and state law and our institutional policies, which require confidential treatment of certain records and prohibit retaliation and harassment that could arise from the disclosure of such information.

If the Department does not accept this recommended language, we expect that you will tell us why and respond individually to each of the identified concerns.

7. Responses to Directed Questions in the NPRM

Finally, we provide the following comments in response to the Department's specific requests. See NPRM at pp. 61482-83 (seeking comments on specific questions).

Costs. We believe the Department's cost estimate dramatically underestimates the financial impact of the proposed rules on our institutions. For example, the Department's estimates do not include the following costs:

- The cost of purchasing technology, which we do not currently own, to enable the parties to be in separate rooms during the live hearing and to review evidence without the ability to download.
- The cost of requiring a live hearing for formal complaints, including the costs of hiring and training adjudicators who are capable of making on-the-spot relevancy determinations and advisors who are capable of conducting cross-examination.
- The cost of spending increased time on informal resolutions and supportive measures. While we applaud the NPRM's increased flexibility in allowing alternative resolutions and increased focus on supportive measures, the Department's estimated time for informal resolutions of 8 hours for the Title IX Coordinator and 8 hours for an administrative assistant, and estimated time for supportive measures of 3 hours per incident for the Title IX Coordinator and 16 hours for an administrative assistant, vastly underestimate the time and number of offices and personnel involved. For example, our offices frequently conduct interviews and other fact-finding before engaging in informal resolutions—but this additional time is not reflected in the Department's estimates. Nor do the Department's estimates consider the time spent by other university employees who assist with informal resolutions and supportive measures, for example employees providing confidential support and others who provide accommodations.
- The cost of additional legal challenges arising from the concerns we have identified with the proposed rules, for example legal risk arising from advisors who ask abusive or inappropriate questions thereby creating a hostile environment, from challenges to adjudicators' relevancy determinations, or from parties challenging the adequacy or alignment of their appointed advisors.

Applicability of the rules to employees. Many of our schools' employee groups are unionized and subject to Collective Bargaining Agreements which specify a grievance process. Requiring universities to apply the NPRM to these employee groups could breach existing agreements and undermine parties' expectations, and would likely require us to renegotiate union contracts, which is a protracted process with considerable expense. This is just another reason the Department should provide flexibility to our institutions to determine what processes are best for our campus communities, as opposed to the overly prescriptive proposals in the NPRM. Moreover, a robust body of state and federal law (including Title VII of the Civil Rights Act of 1964) already governs sexual harassment by employees. Universities should be free to rely upon Title VII and state laws when investigating and disciplining employees, without being required to apply different and possibly conflicting procedures under Title IX.

Training. The proposed rules require training for coordinators, investigators, and adjudicators, but not for advisors. We respectfully request that the Department add language requiring that all advisors (including those external to the institution) and all other persons involved in implementing a recipient's grievance procedures receive training in the applicable regulations and policies, as well as on how to protect the safety of students and to ensure a fair and equitable process for all parties.

"Directly Related To The Allegations" Language. The proposed rule requiring institutions to disclose all evidence that is directly related to the allegations is problematic in a number of ways. First, parties to

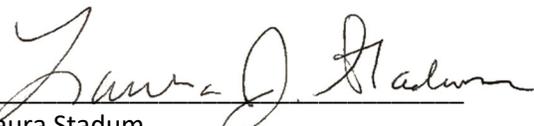
Title IX cases often provide irrelevant information that is highly sensitive or inflammatory (e.g., grades, medical or mental health history, or sexual history that would be protected from consideration by rape shield laws). Yet, this provision would require disclosure of such information, which could be traumatizing and further chill participation by parties and witnesses in the proceeding. Second, the technology specified in the proposed rules will not prevent a party from taking a screen capture or otherwise publicly sharing the information. It will be difficult for our institutions to prevent retaliation or to control the release of confidential information, particularly if confidentiality measures are not permitted (see concern no.6, above). Third, the disclosure of information on which the institution does not intend to rely will make it more difficult for all parties to identify what is critical and important information. Finally, we disagree with the Department’s observation that the “directly related to” language is consistent with The Family Educational Rights and Privacy Act (FERPA). FERPA controls information that is directly related *to the student-requestor*, which is narrower than the NPRM’s reference to information directly related *to the allegations*. For example, a complainant’s prior sexual history is not directly related to the respondent’s conduct, but may be directly related to the allegations. In order to safeguard sensitive information, we request that the Department limit disclosure to information on which an institution intends to rely or that is otherwise exculpatory.

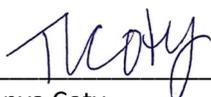
Title IX Coordinator role. Finally, we note that the proposed rules require the Title IX Coordinator do far more than a single person at our larger institutions can possibly handle. We respectfully request that the Department clarify that the Title IX Coordinator may appoint an appropriate designee for various roles, including signing a formal complaint. In addition, we request that the Department modify the definition of “supportive measures” in section 106.30 to state that the “Title IX Coordinator is responsible for overseeing the effective coordination and implementation of supportive measures.” This revision makes clear that the Title IX Coordinator may work with and delegate to other units as appropriate when implementing supportive measures.

We appreciate the Department’s careful consideration of these comments.

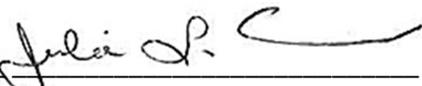
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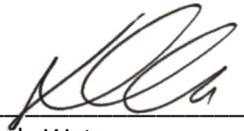
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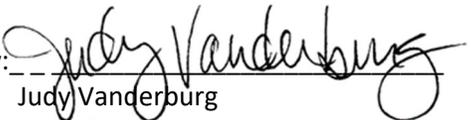
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