NEW JERSEY STATE BAR ASSOCIATION

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January 30, 2019

Brittany Bull
United States Department of Education
400 Maryland Avenue SW, Room 6E310
Washington, DC 20202

Re: Proposed Amendments to Title IX of the Education Amendments of 1972

Dear Ms. Bull:

On behalf of the New Jersey State Bar Association, I welcome this opportunity to comment on the Department of Education's proposed amendments to regulations implementing Title IX of the Education Amendments of 1972 ("Title IX"), formally titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 83 Fed. Reg. 61,462 (Nov. 29, 2018) ("the Proposed Rule"). Our members are committed to protecting campus communities from sexual harassment and other forms of sexual misconduct. They also seek to guarantee a fair process to determine when student conduct offends Title IX.

Please see the NJSBA's Comments to the Proposed Rule. Thank you for your consideration of these comments and recommendations.

Very truly yours,

John E. Keefe Jr.
President

C: Angela Scheck, Executive Director, NJSBA (via electronic mail)
Edward G. Sponzilli, Esq. (via electronic mail)

Comments of the New Jersey State Bar Association on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, A Proposed Rule by the Department of Education

Submitted Electronically to:

The Department of Education
Office for Civil Rights
Attention Docket ID NO. ED-2018-OCR-0064
January 30, 2019

A. Mandatory Live Cross-Examination of Every Witness In Title IX Cases May Have a Chilling Effect on Complainants and Witnesses and Lead to an Inequitable Process.

The Proposed Rule would impose on the Title IX grievance process a judicial construct that is largely incompatible with the nature and purpose of student grievance procedures in sexual harassment or sexual assault cases. Colleges and universities do not operate courts of law, and their disciplinary proceedings are generally conducted by non-lawyers. The requirement under proposed § 106.45(b)(3)(vii) for institutions of higher education to hold a live hearing, with mandatory cross-examination of all witnesses by an "aligned" advisor of each party, could have negative consequences for parties, witnesses, and universities.

First, the prospect of facing live cross-examination by an advisor (who may be an attorney) is likely to discourage Title IX complainants from bringing complaints, and witnesses from coming forward or participating in the grievance process. This chilling effect will be

exacerbated by the fact that the Proposed Rule does not limit the cross-examination in a meaningful way. Studies show that sexual assaults on campuses already are under-reported by students. Under the Proposed Rule, the number of reports or complaints of sexual harassment is likely to drop significantly from already low levels, not for lack of merit, but for fear of the having to endure re-traumatization during the prescribed process, notwithstanding the opportunity to move the parties to separate rooms during the process.

This will likely have a negative impact on universities' ability to provide a complainant or respondent with the access to education required by Title IX. For instance, pursuant to proposed § 106.45(b)(3)(vii), if a party or witness does not submit to cross-examination at a hearing, the decision-maker *may not* rely on *any* statement of that party or witness in reaching a determination regarding responsibility.[1] Thus, a complainant may not be able to obtain relief for a meritorious claim of sexual harassment if key witnesses refuse to provide testimony, or if their testimony is disallowed, because they are unwilling to submit to the broad cross-examination contemplated by the Proposed Rule.

Second, the Proposed Rule likely will lead to an inequitable grievance process, because the cross-examination must be conducted by an advisor "aligned" with the party. There will be inequity if one party hires an attorney and the other does not have the financial means to do so. Even if both parties hire lawyers, different skill levels and backgrounds may create inequity if

[1] 83 Fed. Reg. at 61,498.

cross-examination becomes a significant part of the process. While attorneys have been involved in hearing processes under the prior Department guidance, their roles have been limited. Prior guidance has *not* mandated cross-examination of complainants, respondents, or witnesses.

Third, the proposed cross-examination requirement, including the requirement that the institution provide an advisor "aligned" with each party for purposes of cross-examination, will subject institutions to additional enforcement risk that the Department may not have intended. The Proposed Rule does not define what "aligned" means. If the institution is required to provide an advisor comparable to the advisor hired by the other party in order to be "aligned," those costs incurred by the institution could be prohibitive. Further, if the institution is required to provide an advisor for cross-examination whom the party later believes was not appropriately "aligned" with him or her, the party may raise that issue on appeal or in litigation and, in effect, argue that an institution failed to provide adequate counsel or an adequate advisor. It is unclear under the Proposed Rule what happens if an institution cannot provide, or fails to provide, despite its best efforts, an "aligned" advisor for a party. A disappointed party should not be permitted to challenge the adequacy of an advisor appointed by a university in good faith, either on appeal or in subsequent litigation.

We acknowledge that some form of cross-examination may be beneficial to Title IX grievance procedures, and, in fact, some colleges and universities already use forms of cross-examination in certain types of disciplinary proceedings. But, in our view, any advantages

associated with the form of cross-examination set forth in the Proposed Rule are outweighed by the risk that it will discourage reporting and participation in the grievance process, and thus substantially interfere with the ability of institutions of higher education to fulfill their obligations under Title IX.

Given the circumstances and sensitivities of Title IX cases, it would be more consistent with the purposes of Title IX and the Proposed Rule for the cross-examination to be conducted by each hearing's presiding officer based on written questions submitted by the appropriate party. Some institutions of higher education have used this written process in disciplinary proceedings, at the discretion of the person presiding over the hearing, and it has worked well. This approach would make the role of the advisor less prominent and likely reduce the chilling effect that the live, advisor-led, cross-examination requirement would have on complainants and witnesses. Additionally, such an approach would align the standards for cross-examination across both elementary and secondary schools and institutions of higher education.

Should the final rule include the proposed live cross-examination requirement, the Department should consider the elimination of the provision in the Proposed Rule that precludes decision-makers from relying on any statement of a party or witness who refuses to submit to cross-examination. The failure of a party or witness to submit to cross-examination should be a factor for consideration in the decision-maker's assessment of that party's or witness's credibility and the weight to be given to their testimony, rather than an absolute bar to any consideration of

that testimony. This change would help ensure that parties – complainants and respondents alike – are not unduly prejudiced by a witness's unwillingness to submit to cross-examination.[2]

B. Institutions Should Be Allowed to Use Different Standards of Evidence For Different Types of Disciplinary Cases.

Proposed § 106.45(b)(4)(i) provides that institutions of higher education may use the preponderance-of-the-evidence standard in reaching a determination regarding responsibility in Title IX cases only if they also use that standard for *all* conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.[3] In Directed Question No. 6, the Department seeks comment on whether it is "appropriate" to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed.[4] There are valid reasons to employ different standards of evidence in Title IX cases from those employed in non-Title IX cases where the same maximum disciplinary sanction may be imposed, such as cases involving academic or other conduct infractions. Rather, institutions of higher education should have the discretion to employ the

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[2] In the event this requirement is not revised before the Proposed Rule becomes final, clarification is required regarding how a Title IX Coordinator can proceed with an investigation where there are multiple complaints against the same respondent, as required under proposed § 106.44(b)(2), but the complainants are unwilling to subject themselves to cross-examination at a live hearing. If the Title IX Coordinator's sole basis for filing the formal complaint is statements provided by multiple complainants, and the Title IX Coordinator knows that the complainants are not willing to appear for cross-examination (thereby resulting in the striking of their statements), must the Title IX Coordinator still proceed with filing the formal complaint and dismiss the complaint only after the complainants refuse to be cross-examined?

[3] 83 Fed. Reg. at 61,499.

[4] 83 Fed. Reg. at 61,483.

preponderance test in sexual harassment and other student disciplinary cases involving discrimination, including discrimination on the basis of race, sex, or disability, without being forced to modify their existing tests in other disciplinary contexts.

A college or university may determine that some kinds of disciplinary cases benefit from application of a different standard, particularly if it determines that issues of proof are less problematic in those categories of cases, such as cases involving academic violations. In general, there are sound policy reasons for adjudicating harassment and protected category discrimination claims under a lower standard of proof: such discrimination is particularly insidious, and it is often more difficult to substantiate such discrimination than, for example, student conduct code infractions involving plagiarism, alcohol/drugs, or property damage, in which there are likely to be physical evidence or non-party fact eyewitnesses.

Institutions of higher education should have the discretion to employ the preponderance-of-the-evidence test in disciplinary proceedings involving complaints of sexual harassment, even if they do not employ that standard in other disciplinary proceedings. There is no rational basis for prohibiting the use of the preponderance standard in sexual harassment cases just because it is not used in *all* other disciplinary cases. As the Department recognized in its Federal Register notice, "recipients should be able to choose a standard of proof that is appropriate for

investigating and adjudicating complaints of sex discrimination given the unique needs of their community."[5]

Civil society follows a similar method to adjudicate disputes; it is common to use a "substantial evidence" standard in administrative hearings, preponderance-of-the-evidence standard in most civil lawsuits, a clear-and-convincing-evidence standard in select civil lawsuits and "beyond a reasonable doubt" in criminal matters. The tiered standards of proof to enforce codes of conduct is well recognized in our jurisprudence.

C. **THE PROPOSED RULE SHOULD APPLY ONLY TO CLAIMS THAT INVOLVE STUDENTS.**

In Directed Question No. 3, the Department explicitly states that the Proposed Rule would apply to sexual harassment by students, employees (including faculty), and third parties, and seeks comment on "whether there are any unique circumstances that apply to processes involving employees that the Department should consider."[6] There are unique circumstances when claims involve only employees, and, therefore, the Department should *not* mandate procedures for cases not involving a student. For instance, public universities in New Jersey have employees in categories that include law enforcement, faculty and civil service. Additionally, in cases involving a student complainant and a faculty or staff respondent, aspects of the grievance procedures mandated by the Proposed Rule create insurmountable challenges. The significant

[5] 83 Fed. Reg. at 61,477.
[6] 83 Fed. Reg. at 61,483.

imbalance of real and perceived power between students and faculty (and administrators) in the academic setting would make it exceedingly difficult, and perhaps impossible, to achieve equity in any procedure with adversarial hearings during which lawyers representing employee respondents would be entitled to question student complainants and witnesses about sensitive, traumatic events that those students experienced or witnessed.

Extending all of the procedural safeguards contemplated by the Proposed Rule to employee respondents is also unnecessary. Most institutions of higher education have other processes for resolving claims of faculty and staff misconduct, including claims of sexual harassment brought by students, which provide those respondents with a full and fair opportunity to respond to the complaint while protecting the student-complainant. Additionally, consistent with the requirements of the academic tenure system, faculty respondents are generally afforded extraordinary protections in the discipline context, including, for example, the opportunity for review by independent faculty committees or senates, and requirements that their institution's governing boards approve serious disciplinary penalties such as dismissals.

With respect to complaints that do *not* involve students at all (i.e., employee-employee cases), the Department's authority to regulate is at best questionable, as it is not at all clear that Title IX's protections for equal access to education programs and activities were intended to apply to employees. Existing procedures at colleges and universities take account of the various union contracts and human resource policies that govern an institution's relationship with its

employees, and Title VII and state laws exist to address sex discrimination, including harassment, in such circumstances. Moreover, the Proposed Rule fails to consider the fact that employers have a strong interest in maintaining privacy for the parties and witnesses in workplace investigations, given that those individuals may have to continue to work within the campus community. The Department should make clear that the grievance process described in the Proposed Rule is intended to protect *students'* rights, and does not apply in cases that involve only faculty and staff.

To the extent that the phrase "third parties" in Directed Question 3 refers to respondents without a formal affiliation to an institution, it is submitted that the Proposed Rule should not apply to them. Instead, universities should be permitted to use alternate methods to address their conduct. Allegations of harassment involving a third party can be dealt with under separate laws and regulations, depending on the relationship, if any, between the third party and the institution. Additionally, it is unreasonable for the Department to require institutions to provide advisors to unaffiliated third parties, as would be the case if the Proposed Rule were to apply to allegations involving such parties. Accordingly, the Department should add language to the Proposed Rule expressly stating that the regulations do not apply to an allegation against a third-party respondent.

D. CLARIFICATION IS NEEDED REGARDING AN INSTITUTION'S ABILITY TO INVESTIGATE ALLEGATIONS THAT FALL OUTSIDE THE SCOPE OF TITLE IX.

In describing the requirements for grievance procedures for formal complaints of sexual harassment, the Notice of Proposed Rulemaking states that the Department's intent is "to balance the need to establish procedural safeguards providing a fair process for all parties with recognition that a recipient needs flexibility to employ grievance procedures that work best for the recipient's educational environment."[7] The Department should make clear that it does not intend to place limitations on an institution's ability to investigate allegations that, under the Proposed Rule, fall outside the purview of Title IX.

Proposed § 106.45(b)(3) *requires* institutions to dismiss a formal complaint or an allegation within a complaint without conducting an investigation if the alleged conduct, taken as true, is not sexual harassment as defined in the Proposed Rule or if the conduct did not occur within the institution's program or activity. The Department notes that the purpose of this requirement is to "ensure a recipient's resources are directed appropriately at handling complaints of sexual harassment," but the Department also emphasizes that "a recipient remains free to respond to the conduct" that does not come within the scope of Title IX under the Proposed Rule, "including by responding with supportive measures for the affected student or investigating the allegations through the recipient's student conduct code."[8]

[7] 83 Fed. Reg. at 61,472.
[8] 83 Fed. Reg. at 61,475.

Substantial clarification is needed to ensure that any final rule does not interfere with an institution's ability to proceed with a non-Title IX grievance process for an allegation of sexual misconduct that falls *outside* of the scope of Title IX and the final rule's definition of "sexual harassment." For example, the final rule should clarify that proposed § 106.45(b)(3) does not preclude investigation and adjudication of allegations where, for instance: (1) the complainant is not a student or employee of the institution; (2) the alleged conduct occurred in an off-campus apartment or other premises not owned by or affiliated with the recipient and thus did not occur "within a university program or activity"; or (3) the alleged conduct does not constitute sexual harassment because it does not jeopardize a person's equal access to a college or university program or activity.

1. Allegations Arising Out of the Same Set of Facts

The Department should clarify that the same investigator may investigate, and the same decision-maker may consider, both Title IX and non-Title IX allegations that arise out of the same operative facts. Allowing for investigation and consideration of such allegations arising out of a single incident by the same investigators and decision-makers is consistent with the purposes of the Proposed Rule and would both increase efficiency of the investigation and resolution process and avoid unnecessary duplication of effort. Clarification is particularly necessary relative to retaliation claims, where the alleged retaliation may relate to an underlying event that is outside the institution's Title IX jurisdiction.

2. Discovery That a Complaint Does Not Fall Under Title IX

Any final rule should provide clear guidance concerning how a university should convert a matter to a non-Title IX grievance proceeding mid-stream if it discovers, after starting a Title IX grievance process, that the alleged conduct does not meet the definition of sexual harassment or occurred outside of a college or university program or activity. Colleges and universities should not be expected or required to duplicate efforts and waste valuable resources by conducting multiple investigations of the same conduct through various offices. Similarly, complainants and respondents should not be expected or required to recount difficult, and potentially traumatizing, facts multiple times to various officials throughout the campus.

E. Clarification is Needed Regarding Grounds for Excluding or Restricting Evidence In a Formal Grievance Process.

The regulations as proposed do not identify any grounds for the exclusion of evidence other than lack of relevance. Section 106.45(b)(3)(vii) of the Proposed Rule provides that, at a hearing, the decision-maker "must permit each party to ask the other party and any witnesses *all relevant questions* and follow-up questions."[9] It further states that a decision-maker must explain any decision to exclude questions as not relevant.[10] However, it does not state whether a decision-maker may exclude testimony or questions on any other grounds, such as where the proffered evidence is immaterial, cumulative, duplicative, or unduly prejudicial. For example, in

[9] *Id.*
[10] *Id.*

a case where information was collected from 20 witnesses, do the parties have the right to call and question all of those witnesses during the live hearing, or may the hearing official decline to call certain witnesses on the basis that information provided by the witnesses is duplicative of the testimony and evidence offered by other witnesses? Accordingly, it is recommended that the Department identify additional grounds and factors, or explicitly give decision-makers the discretion to identify appropriate other grounds, for excluding or restricting evidence.

F. THE DEPARTMENT SHOULD CLARIFY THE APPLICABILITY OF CERTAIN FERPA REQUIREMENTS WHEN PROVIDING PARTIES WITH ACCESS TO EVIDENCE.

Section 106.6(e) of the Proposed Rule seeks to clarify that institutions' obligations under the Proposed Rule are "not obviated or alleviated" by the requirements in the Family Educational Rights and Privacy Act (FERPA) or its implementing regulations, 20 U.S.C. § 1232g and 34 CFR part 99.[11] However, the Proposed Rule fails to recognize the difficulty colleges and universities will have in complying simultaneously with both FERPA, which is intended to protect a student's "education records,"[12] from unauthorized disclosure, and the broad evidentiary review rights the Proposed Rule would grant parties during the grievance process, when a formal complaint has been filed.

One of the cornerstone requirements of FERPA is that where an "education record" contains information regarding more than one student, the institution must redact any

[11] 83 Fed. Reg. at 61,495.
[12] 34 CFR § 99.3.

personally identifiable information regarding other students before providing students with access to their own records. This is no easy task in light of the inclusion, in the FERPA definition of "personally identifiable information," of "indirect identifiers" and information that "alone, or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student(s) with reasonable certainty."[13] In addition to redacting information as required by FERPA, academic institutions should also be able to reserve the right to redact information to protect a person's safety or to prevent retaliation.

The Proposed Rule, if finalized, will place academic institutions in a difficult, if not untenable, situation. In seemingly direct contravention of FERPA's instructions and protections, the Proposed Rule would require recipients to provide both parties to a grievance process "an equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation."[14] In practice, this could require an institution to undergo the painstaking task of reviewing and redacting numerous documents, emails, and text messages

[13] *Id.*
[14] 83 Fed. Reg. at 61,498.

which need to be shared with the parties in the course of the grievance process for *each* formal complaint. The inclusion of any evidence that is "directly related to the allegations raised," rather than simply the evidence on which the institution intends to rely and potentially exculpatory evidence, will increase, by orders of magnitude the number of required redactions.

Moreover, it is possible – perhaps likely – that some information cannot be adequately "de-identified" to mask a student's identity, and thus evidence about both parties and other students, such as mental health records and records regarding academic concerns, could be disclosed during the grievance process and shared across the pertinent campus. This certainly would chill participation in such proceedings and be inconsistent with FERPA requirements.

G. IMPLEMENTING THE PROPOSED REGULATIONS, IF FINALIZED, WILL REQUIRE SIGNIFICANT LEAD TIME.

If the Secretary opts to finalize the regulations as proposed (or in any form substantially similar to the Proposed Rule), then institutions of higher education are likely to require *significant* lead time – on the order of no less than one year – before they can implement the regulations in any reasonable manner. Before any final regulations go into effect, recipients should be given ample time to (i) develop and adopt policies and procedures that conform to the regulations; (ii) hire the additional personnel needed to implement the revised processes; (iii) identify, recruit, and train the advisors required by the Proposed Rule; and (iv) develop and deliver adequate training.

The fact that implementation of the Proposed Rule will demand significant effort and resources from affected institutions is recognized in the NPRM, which summarizes the various steps that will be required before the contemplated regulations can be implemented. For example, colleges and universities will need to:

- Review the regulations, with the assistance of counsel, to determine what they require and what changes must be made to existing policies and procedures;
- Revise their policies and procedures to ensure compliance with the Proposed Rule, again with the assistance of counsel;
- Develop new or revised training materials and programs aligned with the final regulations;
- Recruit and identify additional staff, including potential advisors for respondents;
- Reallocation already limited resources from existing programs; and
- Provide training to Title IX Coordinators, investigators, decision-makers (both fact-finders and appellate reviewers), and advisors on the new grievance procedures, standards of evidence, and rules attending relevance of evidence and cross-examination of witnesses.[15]

In addition, adoption of the revised rules and procedures by colleges and universities will require approval by various internal stakeholders, including in many cases the faculty, as required by binding internal rules. In light of the number and complexity of the tasks that affected institutions would have to undertake to implement the final regulations, a one-year implementation period appears to be a minimum requirement. Anything less could arbitrarily and unfairly subject such institutions to further enforcement action under Title IX.

[15] 83 Fed. Reg. at 61,486.