COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE GOVERNOR
HARRISBURG

January 30, 2019

Secretary Betsy DeVos
U.S. Department of Education
400 Maryland Ave., SW
Washington, D.C. 20202

Re: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Docket ID ED-2018-OCR-0064
Document Number: 2018-25314

Dear Secretary DeVos:

On behalf of the more than 1.7 million students enrolled in public K-12 schools and the nearly 950,000 learners enrolled in 243 degree-granting postsecondary institutions across Pennsylvania, the Commonwealth appreciates the opportunity to provide comments regarding the U.S. Department of Education's proposal to amend regulations implementing Title IX of the Education Amendments of 1972 (Title IX).

Sexual violence should not be part of any student's education. Unfortunately, research suggests that these experiences are far too common for students: nearly 20 percent of girls between the ages of 14 and 17 experience sexual assault, and more than one in five women and one in 20 men experience sexual violence during their college years.

Most individuals who experience sexual harassment or sexual assault do not report these experiences to authorities – such as school/campus officials or law enforcement – or seek formal action, such as filing a complaint. The reasons why a person who has experienced sexual misconduct does – or does not – share their experiences are unique, but decades of research show that victims are especially unlikely to come forward and seek action when they feel they will not be believed, or that more harm than good will result from breaking silence.

In order to encourage individuals to come forward, many education institutions across Pennsylvania and the country have worked in collaboration with survivors, students, and partners ranging from victim advocacy organizations to law enforcement agencies to create reporting and response protocols that are trauma-informed and victim-centered.

Much of this work was the result of protections and policies advanced by the U.S. Department of Education's Office for Civil Rights (OCR) in the form of non-regulatory guidance that provided clear expectations for education institutions regarding their responsibilities to effectively prevent, respond to, and address sexual violence under Title IX.

The Department's proposed regulations would reverse that progress and would create significant burdens on K-12 and postsecondary institutions to implement prescriptive investigatory and hearing practices that fail to take into account the unique and significant challenges sexual violence poses in education settings. As outlined below, we have serious concerns with these proposed rules and the devastating consequences they could have for Pennsylvania's students, educators, and communities. As such, we strongly urge the Department to make appropriate revisions to the proposed regulations that would facilitate and not hinder the ability of education institutions to respond to complaints of sexual harassment and sexual assault.

Subsection 1006.44(e)(1) – Narrowing the Definition of Sexual Harassment
By more narrowly defining what counts as "sexual harassment" under Title IX, the Department's proposed regulations would make it even more difficult for victims of sexual harassment and sexual assault to come forward and seek action.

Since 2001, the Department has defined sexual harassment as "unwelcome conduct of a sexual nature," and has included within that definition "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."[1] Under this longstanding and consistent guidance, institutions have an obligation under Title IX to address harassment that either "denies or limits a student's ability to participate in or benefit from" the school's education program. This definition was reaffirmed by the Department in September 2017, which cites the 2001 *Revised Sexual Harassment Guidance* as a supplemental resource to the interim guidance.[2]

The proposed regulations would upend that current definition by limiting "sexual harassment" to: (1) quid pro quo harassment, (2) sexual assault, or (3) "unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it denies a person access to the school's education program or activity."

By significantly narrowing the definition of harassment to cases that only deny – rather than deny or limit – educational access and benefits, the Department is encouraging education institutions to focus only on repeated or extremely egregious conduct and ignore other harassing conduct that can negatively affect a student's ability to fully access and/or benefit from their education program. The proposed changes would deviate from longstanding expectations under Title IX that schools and postsecondary institutions address harassment well before it reaches this level of harm and severity.

Subsection106.44(a) – Limiting Authority to Address On-Campus Impacts of Off-Campus Conduct
The Department has indicated it believes its proposed regulations would simplify and reduce burdens on schools and campuses in their efforts to fulfill that obligation. However, many of the proposed changes would have the opposite effect, restricting education institutions' ability to investigate and address reports of sexual harassment and sexual assault that do not align with prescriptive definitions and procedural requirements.

Under the proposed changes, sexual assault or harassment that takes place outside the confines of institution programs or activities could not be addressed under Title IX, making it harder to hold perpetrators accountable and foster a safe school or campus environment for all students.

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[1] *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. Department of Education, Office for Civil Rights, January 19, 2001, https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.
[2] *Q&A on Campus Sexual Misconduct*, U.S. Department of Education, Office for Civil Rights, September 2017, https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

Under the new proposed rules, institutions would only need to respond to "conduct within its education program or activity," which would permit institutions to ignore off-campus incidents, like incidents at student parties. It may also create some confusion about whether schools and campuses are required to respond to online harassment, a growing concern in both K-12 and postsecondary education settings. Additionally, the alleged harassment must have occurred within the United States – thus potentially prohibiting institutions from addressing allegations of sexual harassment in study abroad programs.

Subsection 106.45(b)(3) – Requirement that Certain Charges Must Be Dismissed
Subsection 106.45(b)(3) provides a mandate for when an institution must investigate a formal complaint and how it must investigate that complaint. Unfortunately, the language also states that an institution must dismiss a formal complaint that does not meet the narrowed definition of "sexual harassment" or does not occur within the recipient's program or activity. This language contradicts the stated intention of the Department in the preamble to provide institutions with the discretion and flexibility to continue with student conduct proceedings outside the Title IX context.

As currently written, the regulations would also require that a formal complaint alleging that a student sexually assaulted another student must have occurred on campus or at a location that is clearly a part of the institution's education program or activity. In all other situations, such as a sexual harassment or a sexual violence incident that occurred at an off-campus party, during a study abroad program or even online, the formal complaint of a victim willing to come forward would have to be dismissed because the alleged conduct did not occur as part of the institution's education program or activity.

Were it not for this "must dismiss" language, the revisions to the definition of sexual harassment and the requirement that the harassment must be "conduct within its education program or activity" and within the United States would not be as problematic because the institution, in its discretion, could still address conduct that did not meet these conditions through student conduct proceedings outside the Title IX context. The "must dismiss" language will encourage respondents to challenge <u>any</u> sexual harassment conduct proceedings, regardless of whether the charge is pursued under the Title IX grievance procedures.

These proposed changes would also effectively establish a different threshold for institutions' responses to sexual misconduct than for other forms of harassment or violence that occur off-campus. Schools and postsecondary institutions frequently address issues that take place off-campus – such as drug or alcohol use, physical assault, cyberbullying, hazing, etc. – since they can have a negative effect on students' ability to learn in an education setting. Because these cases would not meet the narrow and prescriptive criteria proposed by the Department, however, school administrators and campus leaders could not address sexual harassment and sexual violence in the same way as other serious conduct issues.

Subsection 106.45(b)(4)(i) - Burden of Proof
The burden of proof established under 2011 Dear Colleague Letter issued by OCR required institutions to use the "preponderance of the evidence" standard (more probable than not) to determine whether sexual harassment or sexual violence occurred. The new proposed regulations would allow institutions to shift the threshold to a "clear and convincing evidence" standard (highly probable), which is a higher bar (making it more difficult to establish that the assault/harassment occurred).

Coupled with a narrower definition of "sexual harassment" that relies on standards of harm typically reserved for lawsuits seeking monetary damages, the Department's proposed changes to evidentiary standards would inappropriately impose expectations on education institutions that should be reserved for our civil and criminal justice systems.

We believe the preponderance of the evidence standard is more appropriate for a process that is not a civil or law enforcement legal process, such as misconduct/disciplinary investigations and hearings conducted in education settings.

In addition, we strongly oppose the Department's consideration of a uniform standard of evidence for both Title IX cases and other cases in which a similar disciplinary sanction may be imposed. As referenced previously, sexual violence remains an underreported violence crime at schools and on college campuses; efforts to impose additional evidentiary burdens on individuals seeking to report sexual assault or sexual harassment would likely have a chilling effect on victims coming forward to seek protections and support from education institutions.

Subsections 106.44(a) and 106.44(e)(5) and (6). – Requirement of a More Formal Reporting Process
Under the Department's 2001 guidance, K-12 schools and postsecondary institutions are required to intervene and take immediate effective action to eliminate and prevent the recurrence of a hostile environment if they "reasonably" should have known about a violation. Under this longstanding requirement, a school was considered to "have notice" of a violation if a the incident was known to any "responsible employee," defined as "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility."[3] The guidance also provides multiple avenues for notice to be given to schools that triggers a responsibility to act, including both formal grievances and informal complaints made directly to these employees, as well as indirect ways, such as observations, information shared from sources such as other staff, community members, media organizations, parents/families, or administrators.

By contrast, the Department's proposed regulations would hold education institutions responsible for addressing a complaint only if they have "actual knowledge" that an offense occurred (i.e., if they are "deliberately indifferent" to known sexual harassment), a much higher bar. In addition, the proposed rules would mean that an investigation and the grievance process would be triggered only if a formal complaint is filed with the Title IX Coordinator or another official who has the authority to institute corrective measures – a significantly narrower set of individuals compared with the current criteria of responsible employees. This tightening of the reporting process fails to honor the important role that educators, staff, and other personnel play in ensuring students' safety and well-being, and will most likely lead to victims choosing not to report and pursue action.

The proposed regulations requiring institutions to address complaints only where there is "actual knowledge" of an offense also undermines the awareness and training campaigns undertaken by education institutions over the course of the last decade or so. Many of these campaigns deployed the message of "see something, say something", creating institutional cultures where individuals knew and adhered to a responsibility to report both suspected and known violations, and survivors could report an offense with the expectation the education institution would take action.

Subsections 106.45 and 106.45(b)(3)(vii) – Turning Campus Hearings into Courtrooms
In the case of institutions of higher education, the proposed rule would require live hearings with cross-examination to be conducted by a party's advisor (who may be an attorney). The concern is that both complainants and respondents will bring experienced trial counsel as advisors who will use the cross-examination portion of a hearing to disrupt and seize control of a process that is not a civil or criminal justice process where rules of court exist and are able to be enforced against both parties and their

[3] *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. Department of Education, Office for Civil Rights, January 19, 2001, https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

advocates. This has the potential to greatly harm the Department's goals of avoiding personal confrontation while still offering a process that is fair to both parties. We encourage the Department to permit the use of a neutral third-party questioner.

Subsection 106.45 also requires an institution to provide a party who does not have an advisor with an "advisor aligned with that party" in order to conduct cross-examination. This requirement could result in institutions bearing the financial and administrative burden of providing counsel in order to ensure an equitable, impartial, and fair investigation and response process. This would require redirecting already limited resources to a process that increasingly approaches a formalized legal process, rather than a disciplinary process focused on remediation and education.

Subsection 106.44 (d)(1)(i). - Limited Definition of Quid Pro Quo Harassment
As currently written, the definition of quid pro quo sexual harassment is limited only to the conduct of "[a]n employee" of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct. We are concerned this language is too limited, as there are scenarios where students and volunteers can engage in quid pro quo sexual harassment. The definition should be expanded to include students and volunteers.

Conclusion
Throughout the proposed regulations, the Department creates changes that would undermine decades of practice and progress by making it harder for victims of sexual harassment and sexual assault to come forward and seek assistance and harder for education institutions to respond when they do come forward and seek assistance. Pennsylvania's students deserve better.

Again, we appreciate the opportunity to provide feedback and public comment, and strongly urge the Department to withdraw its proposed regulations.

Sincerely,

Meg Snead
Secretary
Governor's Office of Policy and Planning
Commonwealth of Pennsylvania