January 30, 2019

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

Re: Docket ID ED-2018-OCR-0064

Dear Secretary DeVos:

Thank you for the opportunity to provide comments in response to the November 29, 2018 notice of proposed rulemaking (“NPRM” or “proposed rules”) amending regulations implementing Title IX of the Education Amendments of 1972 (“Title IX”), Docket ID ED-2018-OCR-0064. Washington State University (WSU) has engaged with, and is aware, that a number of other organizations, including our colleagues at other universities within the state of Washington, are also submitting responses to the proposed rules. Because we concur, in large part, with those responses (See the responses from the Washington State Council of Presidents, University of Washington, and the American Association of Universities, among others), and are aware that you will be reviewing a significant number of responses, we will limit our response to sections of the proposed rules that interest us the most.

WSU firmly believes that addressing the significant issue of sexual violence is critical to ensuring the safety and success of our students. WSU also has a strong commitment to equal access to education, the underpinning value of Title IX, and is dedicated to eliminating barriers caused by sex or gender based discrimination. We believe effectively addressing sexual violence requires a strong emphasis on education and prevention as well as a strong, care-driven, and equitable responses to incidents of sexual violence that involve or impact our students, regardless of where the incident occurred. Furthermore, WSU has taken significant steps to implement a robust system, involving multiple layers of review and due process protections, including administrative law proceedings with provisions for questioning and legal advocacy. As such, WSU’s experience speaks broadly on the practical impact these processes have on student populations. We believe it is critical when reviewing the NPRM to take into account the unique role universities have with respect to their student populations and communities, including educating those who may be away from their home for the first time and protecting the overall student population.
Because of our strong commitment to ensuring equitable access to education, WSU has significant concerns with a number of elements and provisions of the proposed rules, including the following:

- **The definition of sexual harassment.** WSU is concerned that the narrow definition of sexual harassment, and specifically the language indicating that to be prohibited conduct under the NPRM, the conduct must “be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity,” will impede the university’s ability to address conduct that could and/or will deny a victim/survivor equal access to the school’s education programs or activities. The proposed rule will limit WSU’s ability to address behavior where a victim or survivor feels unsafe, but has no recourse until the harm actually occurs. Furthermore, the phrase “effectively denies” is ambiguous; without further guidance, this standard would be interpreted differently across universities.

- **The definition of program or activity.** The NPRM includes ambiguous language that appears to limit WSU’s ability to address behavior off its physical campus or outside of an endorsed program activity. If interpreted to prevent institutions from investigating conduct if it occurs off campus and not within a program or activity, the institution would be unable to investigate matters where the misconduct outside of a program or activity impacts a person’s participation in the institution’s program or activity. Sex discrimination, in particular sexual harassment and sexual assault, does occur outside of an education program or activity (for example, at a local bar frequented by students or employees), but result in a person being otherwise excluded from participation in, denied the benefits of, or be subjected to discrimination under a recipient’s education program or activity. In our experience, the campus community extends beyond the borders of the physical campus itself, and the institution must have the ability to address misconduct in those circumstances.

In applying the proposed rule, the institution would be unable to investigate a matter where a student is sexually harassed by another student from the same institution at a local bar on Monday night, and then forced to sit next to the alleged harasser during Tuesday morning’s lecture. There is little doubt that this scenario will result in a complainant being unable to continue to receive any educational benefit from the university while the respondent is allowed to remain conspicuously on campus. An institution should be able protect its students, staff, and faculty, and should not be limited from addressing behavior that occurred at a place or time not endorsed by an institution, but rather whether a person is deprived of a recipient’s educational benefit or program as a result of the conduct.

Furthermore, this limitation essentially causes universities to treat students involved in sexual violence differently than other students. Universities regularly address conduct which occurs off campus pursuant to their community
standards. It would be unequitable for a school to address alcohol related violation or physical assaults that occurred between students off-campus but then to ignore sexual violence occurring off-campus. The NPRM creates an unnecessary distinction in how universities address sexual violence that is not applicable to any other type of conduct.

- **Legalistic, court-like processes.** WSU is concerned that the NPRM imposes highly legalistic, court-like processes that conflict with the fundamental educational missions of universities, and that imposing a legalistic process will significantly increase the amount of time that will be required to conduct a Title IX investigation and arrive at final determinations regarding responsibility. WSU is particularly aware of this, as the process imposed by the Washington APA, requires live, court-like hearings with multiple levels of appeals that necessitate very robust, time consuming investigative processes, which in addition to the time constraints imposed by scheduling and administering such hearings, can result in processes that all parties find frustratingly long and unnecessarily complicated. Specifically, the complexity and time commitments of these processes can lead to unnecessary stress on the participants and have the potential to financially impact both parties, who may be paying additional tuition dollars while waiting for the final determinations.

  - The provision of the NPRM which require a “live hearing” with direct cross-examination by the parties’ advisors in campus disciplinary proceedings regarding sexual harassment contributes to this overly legalistic process. More concerning is the chilling effect this direct cross-examination will have not only on the complainant, but also on any witnesses that may have relevant evidence. This direct cross-examination will likely inflict additional trauma on those involved in the process, and create unnecessary conflict within the hearings.

  Since implementing formal hearings required by the Washington Administrative Procedures Act (APA), WSU has already seen aggressive questioning by attorneys or other advisors, which have intimidated the Complainant, the Respondent, or witnesses, and can actually impede fact finding processes by discouraging participation. WSU supports procedures where a fact-finder poses questions that are suggested by the parties, allow for information gathering and “confrontation” of witnesses, ensuring due process is met, etc., all without the unnecessary potential trauma.

  - Moreover, under the NPRM, the respondent has an advantage over the complainant in that they can choose to remain silent during the investigation and at the hearing without concern of their statement being thrown out; this creates an advantage for the respondent and creates an imbalance, as well as a disincentive for a complainant to submit a complaint.
Additionally, the resources required to implement and maintain such legalistic processes will be cost-prohibitive for many smaller institutions and not the best use of resources for institutions that can find the funds.

The “live hearing” may be inequitable for students without the financial resources to seek legal support.

- **Access to confidential information not relevant to the investigation.** The NPRM’s requirement that institutions give both parties the absolute right to inspect “any evidence . . . directly related” to the allegations will cause more harm than good. This could require the disclosure of confidential and sensitive information, such as medical information. All parties should have access to information that is directly related to the allegations at issue, and is required to allow the parties a full opportunity to advocate for themselves in any hearing processes, but not all evidence, including confidential evidence, is necessary for disposition of the allegations. If the information is not used in the investigation, it should not be shared. In addition,
  - Mandating that parties review and comment on material both before an investigative report and before a hearing decision is duplicative and administratively burdensome. It also extends an already time-consuming process, further impacting both parties.
  - The exclusion of “any statement” of a witness that does not testify is even more restrictive than what is allowed in criminal trials under the confrontation clause.

- **Overlapping, and conflicting, regulations.** There are many laws that address sexual harassment in the employment context, including Title VII of the Civil Rights Act of 1964, many of which provide greater protections against sexual harassment than the proposed rule. The overlapping but different requirements imposed by the proposed rule, Title VII, and other state and local laws would cause confusion and create conflicting and unworkable obligations for institutions that are committed to complying with all applicable laws.

- **Actual versus constructive knowledge.** The NPRM requires “actual” rather than “constructive” knowledge. This could create a situation where a student, faculty or staff member reports, expecting some sort of response, but gets none because the NPRM limits to actual knowledge.

- **Clear and convincing versus preponderance of the evidence standard.** Allowing and/or requiring the clear and convincing evidence standard in Title IX cases seems to create an inappropriate distinction between Title IX and other civil rights claims, which are evaluated under the preponderance of the evidence standard (see, Title VII, U.S. Courts, etc.)
• **Requirement to provide an advisor.** “If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination.” This requirement may be cost prohibitive for schools to implement in an effective manner. It also invites complaints of conflicts of interest and inadequate representation further increasing the administrative burden on schools and extending, even further, the timeline to a final determination.

Thank you again for the opportunity to comment on the NPRM, and for your thoughtful review of our feedback.

Regards.

Kimberly D. Anderson
Title IX Coordinator