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

Re: Docket ID: ED-2018-OCR-0064

Dear Secretary DeVos,

The University of Notre Dame ("University") is a private, non-profit, Catholic academic community of higher learning located near the city of South Bend, Indiana. Founded in 1842 by Rev. Edward F. Sorin, C.S.C., a member of the Congregation of Holy Cross, we are still governed by a two-tiered, mixed board of lay and religious trustees and fellows. Notre Dame's current president is Rev. John I. Jenkins, C.S.C. Today, Notre Dame is a leading American research university that offers its students a unique academic environment, enriched by Catholic intellectual and cultural traditions. Our more than 1,300 faculty teach and conduct research with over 3,800 graduate and professional students, as well as approximately 8,500 undergraduate students who call Notre Dame home. A staff of more than 250 student affairs professionals supports students in endeavors ranging from residential life to health and counseling services.

At the center of the University's mission is the goal of educating the whole person, honoring the Congregation of Holy Cross' aspiration to cultivate both the mind and the heart. We want our students to grow intellectually as well as nurture their moral and spiritual development. We foster an environment that is inclusive of all members and characterized by a collective sense of care and concern for the common good and service toward others. The University's standards of conduct reflect our commitment to this ideal. Calling one another to accountability in the context of these standards is a necessary part of our common life. The University's behavioral standards are grounded in student development and formation, and they are designed to uphold the values of the community we aspire to create. Sexual violence and harassment have no place in this community, where we strive to honor the human dignity of each individual.

It is with these values and our mission in mind that we submit this Comment.

A. The University Supports a Number of the Proposed Regulatory Changes.

We appreciate the benefits of this regulatory approach, in that notice-and-comment rulemaking should provide much-needed legal clarity and certainty for institutions and students alike. Furthermore, and after careful consideration, we view a number of the specific changes proposed by the Department as reasonable and prudent.

We believe that the following provisions will help to ensure procedural fairness for all parties: the requirement in Section 106.45(b)(2) to provide detailed, written notices of investigation to both parties; the right provided to both parties in Section 106.45(b)(3)(viii) to inspect and review evidence; and the requirement in Section 106.45(b)(5) that if an institution chooses to offer an appeal it must make this offer to both parties. Further, and as a general matter, we stand in support of the Department's efforts to increase student access to supportive measures at various stages of the complaint resolution process.

We are also grateful the Department appreciates the uniqueness of each recipient institution and of each harassment complaint, and has therefore proposed to offer institutions some flexibility to individualize and tailor their processes to the needs of their communities. For instance, we are encouraged by the proposed change in Section 106.45(b)(6), which recognizes the value and effectiveness of informal resolution in appropriate circumstances. We also appreciate the latitude that would be granted to institutions under Section 106.44(a) and Section 106.44(c) to decide how to address off-campus alleged conduct and safety emergencies, respectively.

B. The University Has Serious Concerns About Other Proposed Changes.

Nevertheless, in its attempt to ensure fairness and reliability, the Department included other requirements in the Proposed Rule that would require radical changes to many institutions' processes and are ultimately unnecessary in light of existing alternatives. Some of these requirements may unintentionally erode the very principles the Department seeks to cement.

1. *Cross-Examination Requirement*

Our primary concern is with proposed Section 106.45(b)(3)(vii) and its requirement for cross-examination at a live hearing that must be conducted by a party's advisor of choice. The notion of subjecting our students – whether they are complainants, those accused of harassment, or witnesses – to cross-examination by litigators is problematic for a variety of reasons.

First, we fear that this requirement has the potential to distort rather than promote fairness. Like many other institutions, our student population spans a broad socioeconomic spectrum. This requirement could easily have the effect of benefitting better-resourced students, whether they are complainants or those accused of harassment. By permitting paid trial attorneys to act as the cross-examining advisor, this requirement threatens to allow income disparity to influence the hearing outcome. And, as we discuss below, the proposed rule's requirement that we provide under-resourced students with a staff member serving as advisor (or an external attorney-advisor paid for by the University) is insufficient to overcome this influence.

Second, the requirement may have an unintended effect of reducing overall reporting and, in particular, formal resolution of allegations of sexual harassment. It is well understood that sexual assaults occur on college campuses, yet incidents are often underreported.[1] As an institution committed to providing a safe and thriving educational community, guided by our mission and free from harassment, we have a compelling interest in learning of harassment whenever it occurs. Motivated by this interest, we regularly train our community on our policies and procedures and we encourage students to report allegations of harassment so that we can respond appropriately. For a student weighing the decision of whether to report, the prospect of being interrogated by a litigator may dissuade him or her from making a formal complaint or coming forward at all. This impedes our ability to fulfill our mission and also runs counter to the spirit of the statute and the proposed regulation. Furthermore, when a procedural requirement deters parties or witnesses from sharing information (i.e., testifying) and thus deprives institutions of the opportunity to investigate alleged harassment, the procedural requirement no longer serves to secure the reliable outcomes the Department seeks.

Third, the financial burden imposed by this requirement would be immense. Most institutions are not currently equipped, nor should they be expected to become equipped, with internal resources (staff) to deal with the procedural burdens and complexities associated with a process that closely mirrors a criminal trial. We, and likely many of our peers, would be faced with the prospect of outsourcing our own disciplinary hearings or hiring new personnel trained as trial or administrative law judges. While we would also have the option of training existing student affairs staff on these matters, their expertise lies in student development and formation rather than in the distinctly different skill set of a trial judge. Each of these options carries significant costs and risks. For what it is worth, the financial burden associated with acquiring technology to enable live hearings in separate rooms, 83 Fed. Reg. 61,462, at 61,483, is paltry compared to the costs we and other institutions would incur to comply with this requirement.

Finally, and especially in light of the potential for outsourcing noted above, this requirement would further remove our education professionals from their own process, thereby depriving us of the ability to perform our core function: forming and developing our students and upholding the values of our community, all consistent with our mission.

We submit that a reasonable alternative solution exists and is already being used successfully by a number of institutions. Indirect cross-examination permits the parties to submit relevant questions to a hearing panel, which then poses questions to the other party. It allows each party to directly observe the opposing party's responses to its questions in real-time and to submit follow-up questions (including those challenging credibility) after observing those responses. This alternative is equally effective in achieving the Department's goals concerning fairness and reliability and serves to reduce the harms and undue burdens outlined above.

[1] The Association of American Universities (AAU) administered the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct in spring 2015. 27 institutions of higher educations participated, 26 of which are AAU member universities. The survey revealed that a relatively small percentage (*e.g.*, 28% or less) of even the most serious incidents are reported to an organization or agency (*e.g.*, Title IX office; law enforcement). *See* https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015.

2. *Requirement to Provide an Advisor*

We have a related concern about another requirement in Section 106.45(b)(3)(vii): the requirement to provide an advisor to a student who does not have one present at the hearing. This requirement, while still not preferred, would be more sensible in the absence of the cross-examination requirement referenced above.

If, however, mandatory, advisor-conducted cross-examination is retained in the Final Rule, then the requirement to provide an advisor "aligned" with the party presents problems and burdens almost identical to those discussed above. Our students with the fewest resources – whether they are complainants or those accused of harassment – would be the most likely recipients of University-appointed advisors, whether those advisors were University staff or third-party advisors paid for by the University. The skill set and legal background required to effectively perform the role of something akin to a public defender are also quite distinct from the skill set and professional education of our student affairs staff. While it is true that universities need to make decisions at times that impact particular students' interests in different ways, this process would drastically undermine our mission-centered student formation and development by requiring a University employee (or representative) to zealously interrogate one of our own students. This requirement would put University personnel (or representatives) in the untenable position of directly advocating for one student's interests against another student's interests. Additionally, there would be significant financial costs associated with training those personnel (or with outsourcing or hiring new personnel) to perform this task.

Most importantly, none of these problems and burdens are necessary. By adopting the alternative approach of indirect cross-examination discussed above, the Department can avoid them altogether and still effectively accomplish its rulemaking goals.

3. *Burden on Institutions to Gather Sufficient Evidence*

Our final concern highlights what are perhaps unintended consequences of a requirement that seems reasonable on its face. Section 106.45(b)(3)(i) would place the burden on institutions of "gathering evidence sufficient to reach a determination regarding responsibility." While it may be appropriate to require the investigating entity to bear this burden, this requirement as proposed introduces a potential procedural downside that could threaten the fairness of investigations and unduly burden an institution's resources. The problem, as we see it, is in the lack of modifying language about relevance and cumulativeness.

The threat of litigation – from both complainants and respondents – related to this requirement could compel schools to gather everything sought by one party from the other, regardless of the information's likely relevance or its cumulative nature. Ultimately, this requirement would incentivize the parties to bury institutions and each other with something akin to pre-trial discovery requests to preserve an avenue for litigation. As with the concerns addressed above, this would likely have a disproportionate benefit for the party with the deeper pockets, whether they are a complainant or respondent. Because the tactic of burying opponents in discovery requests is a form of gamesmanship unique to litigation, the proposed requirement of providing under-resourced students with a University-appointed advisor would not eliminate

this imbalance. University-appointed advisors would be unlikely to employ such a purposely over-burdensome and litigious tactic.

We suggest that this perhaps-unintended defect could be resolved by either removing the requirement entirely or by specifically stating that institutions are not required to gather information that they deem likely to be of limited or no relevance or which is cumulative in nature.

We respectfully propose that, in light of the serious concerns and reasonable alternatives addressed above, each of the three requirements at issue – concerning cross-examination, appointed advisors, and evidence gathering – merits reconsideration. When viewed collectively, these requirements have the potential to alter processes that are fundamental to our educational mission. We share the Department's interest in ensuring fairness and promoting the reliability of outcomes. Yet, as a private institution with a distinctive mission centered on the formation of our students, we view these requirements with legitimate and grave misgivings about our continuing ability to perform a core function: to administer a process that is consistent with our mission, advances our educational objectives, and reflects the values of our community.

C. The University Requests Clarification on Two Items.

Finally, we ask that the Department clarify in the preamble to its Final Rule the following items from the Proposed Rule:

1. *Decision-Maker and Hearing Officer Roles*: Section 106.45(b)(4) articulates the duties of "decision-maker(s)" in connection with determinations of responsibility. Section 106.45(b)(3)(vii) implies that the decision-maker must also be the officer presiding over the live hearing. For example, it states that "the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility," and that "[t]he decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant." Should the cross-examination requirement be retained in the Final Rule, we may find ourselves in the position of having to outsource the hearing officer role. Under those circumstances, we and other institutions may prefer to retain the role of decision-maker, allowing the decision-maker to attend the live hearing without having to preside over it as hearing officer. To this end, we request a clarification that the roles of decision-maker and hearing officer can be performed by different individuals.

2. *Application to Employees*: In the third Directed Question, the Department seeks comment on the applicability of the rule to employees. 83 Fed. Reg. at 61,483. The Department's stated purpose in proposing its regulation is to articulate the requirements institutions must meet "to protect the rights of their students to access education free from sex discrimination." 83 Fed. Reg. at 61,462. This seems appropriate and consistent with the underlying statute, which prohibits discrimination "under any education program or activity." 20 U.S.C. 1681(a). Furthermore, virtually all of the proposed changes would impact only Part 106, Subpart D of the Code (prohibiting discrimination in education programs or activities) and not Part 106, Subpart E of the Code (prohibiting discrimination *in employment* in education

programs or activities). Therefore, we assume and request clarification that requirements in the Final Rule, when applied to reports involving employees, would apply only to reports of discrimination and/or harassment that allegedly impede student access to education programs or activities. If this assumption is misplaced, and if the Department intends to apply its Proposed Rule to reports of discrimination in employment generally, we request the opportunity to further comment on the impact of such a change.

Thank you for your efforts to bring clarity and certainty to this field of law, to promote fairness in procedures, and to generate public discussion on these issues by inviting comments on the Proposed Rule.

Sincerely,

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University of Notre Dame