HOWARD UNIVERSITY

Office of the Provost and
Chief Academic Officer

January 30, 2019

The Honorable Betsy DeVos Secretary
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202

VIA ELECTRONIC SUBMISSION

Re: Docket No. ED-2018-OCR-0064, RIN 1870–AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Secretary DeVos:

Thank you for the opportunity to submit comments regarding the Notice of Proposed Rulemaking: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

Howard University is a federally chartered, private, doctoral research extensive university located in Washington, DC. With an enrollment of approximately 9,200 students in its undergraduate, graduate, professional, and joint degree programs, which span more than 120 areas of study within 13 schools and colleges, the University is dedicated to educating students from diverse backgrounds. Since its founding in 1867, Howard has awarded more than 120,000 degrees and certificates in the arts, the sciences, and the humanities. Howard ranks among the highest producers of the nation's Black professionals in medicine, dentistry, pharmacy, engineering, nursing, architecture, religion, law, music, social work and education.
The University has long held a commitment to the study of disadvantaged persons in American society and throughout the world. The goal is the elimination of inequities related to race, color, social, economic and political circumstances. As the only truly comprehensive predominantly Black university, Howard is one of the major engineers of change in our society. Through its traditional and cutting-edge academic programs, the University seeks to improve the circumstances of all people in the search for peace and justice on earth.

Over the last several years, Howard University has made steady progress in improving its Title IX Policy, providing training and education to the campus community, and implementing a fair and impartial process for the investigation and adjudication of complaints of sexual harassment. Our commitment to ensuring a welcoming environment for all members of our community is unwavering. We appreciate the Department’s stated interest in providing greater clarity and ensuring a fair process.

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However, we are concerned that several key aspects of the proposed rule delineate an overly rigid framework that will provide less flexibility to institutions to effectively prevent, respond to, and remedy sexual harassment, add real costs, and potentially leave institutions vulnerable to new private lawsuits. Specifically, we are concerned about the requirement of live hearings for all

investigations in order to have a determination of findings; the requirement of cross-examinations
by advisors at hearings; the rigid scope of institutional responsibility; the definition of sexual harassment and the required dismissal of complaints; the applicability of the proposed regulations to employees; and the interplay with the Clery Act. We urge the Department of Education to reconsider the proposed regulations and provide higher education institutions with the flexibility needed to effectively and appropriately address sexual harassment.

Requirement of a live hearing for all investigations in order to determine the findings

The proposed regulations would require a live hearing after the gathering of evidence by investigators and that a hearing officer or panel be the decision-maker regarding the finding. The proposed rule specifically states that the decision-maker cannot be the Title IX Coordinator or the investigator.

As a practical matter, we believe this requirement would increase the real financial costs to Howard University, and many institutions, of complying with Title IX without commensurately improving the institution's response to complaints of sexual harassment. The requirement of a live hearing and a hearing officer or hearing panel for each and every Title IX investigation would require the University to identify and/or hire additional staff, potentially without experience with Title IX, all of whom would need to be trained on the Title IX law and its protections, the grievance process, their specific role in ensuring a fair and equitable process, and training on how to conduct the actual hearings and then write and issue decisions. As many institutions do, Howard University has well-trained professional investigators who work under the guidance of the Title IX Director, and make evidence-based and impartial decisions. If a party disagrees with the decision, the party has the right to request a review of the decision by the Provost, who serves as the final decision-maker. We believe that this approach strikes an appropriate balance for a campus of our size and financial resources, by ensuring both that the University has well-trained staff to conduct impartial investigations and make findings, and providing the ability of the parties to request a review of their case by a senior administrator, if there is disagreement with that decision.

Further, we are concerned that the very process of conducting live hearings for each and every investigation would lead to a slow-down in the adjudication and resolution of matters ranging from, for example, on-line and non-physical sexual harassment to sexual assault. This proposed approach does not appear to recognize the wide range of prohibited conduct that is covered and the need for the University to properly tailor its response based on the specific circumstances.

We urge the Department of Education to reconsider the requirement that every investigation receive a live hearing, conducted by a hearing officer or panel. Institutions must have the flexibility to implement fair and impartial procedures for decision-making that best enable them to swiftly and effectively respond to complaints of sexual harassment.

Cross-examination at a live hearing

The proposed regulations would require that each party and any witnesses submit to cross-examination at a live hearing to be conducted by an advisor for the other party. If one party does not have an advisor, the University would have the obligation to provide an advisor to that party that is aligned with that party's interest. The decision-makers are responsible for making determinations about the relevancy of questions asked during cross-examination. Further, if a party of witness does not submit to cross-examination at the hearing, the decision-maker cannot rely on any statement of that party or witness in reaching a determination regarding responsibility.

The requirement of a live hearing with cross-examination of parties and witnesses, in effect, converts an administrative process under Title IX, into a process that operates very similarly to a civil court proceeding, which raises several concerns. First, there are real personnel costs that are potentially associated with this requirement. In those situations where the University must provide an advisor to a party that does not have such an advisor, the University will likely need to compensate an advisor for this service, or provide extensive training to an existing staff member. Many institutions, including Howard, do not currently provide advisors that are trained to present witnesses and evidence or conduct cross-examination.

Additionally, the requirement that the decision-maker be able to make nuanced determinations regarding the relevancy of cross-examination questions and admissibility of evidence – which are determinations that are made in courts of law by trained judges with law degrees – places a very high burden on institutions to ensure that it has highly-trained hearing professionals who can perform this duty, even though institutions themselves are not in the business of training and retaining a professional judiciary.

Further, inequities that might already exist between the parties with regard to their economic means is solidified with this requirement of cross-examination. Parties with sufficient resources will be able to hire their own advisor – likely an attorney – while a party with less means will be dependent on the appointment of an advisor by the university and this person is not likely to be an attorney trained to cross-examine individuals. The risk of promoting inequities is perhaps even greater where one party is an employee and one is a student. For example, an employee covered by a collective bargaining unit would automatically have union representation available to them, and employees are more likely to be in a financial position to pay for a lawyer than students. Where an institution must appoint an advisor, to attempt to avoid such inequities, the institution would need to appoint advisors who are well-trained on the Title IX law, the administrative process, the policy under Title IX at the University, and cross-examination techniques, at significant cost to the institutions.

This provision also creates an adversarial process for adjudication of campus sexual harassment incidents and would likely have a chilling effect on participation in the Title IX investigation process by both parties and witnesses, as parties and witnesses will need to be informed that they must participate in a live hearing where they may be cross-examined by an advisor, who may be an attorney, and many may decide against doing so. Indeed, the University may not even be able to meet its obligation to conduct an investigation if parties and witnesses decline to participate in the first instance because they do not wish to be cross-examined at a hearing.

Howard University does not require respondents to participate in the Title IX investigation process; likewise, complainants who do not wish to have an investigation proceed are not required to participate even if the determination is made by the University that, in order to meet its Title IX obligations, an investigation must be conducted. Under the proposal, parties would have no choice but to participate in the investigation and the live hearing with cross-examination, or information that was gathered during the investigation could be excluded and lead to egregious conduct going unremedied by the University. Given the responsibility of the University to conduct investigations that gather evidence sufficient to reach a determination regarding responsibility, ignoring such evidence and testimony absent submission by the parties and/or witnesses to cross-examination at a live hearing, could render the investigation process meaningless, or permit a situation of sexual harassment to persist.

Further, this requirement – and the justification for it drawn from criminal legal proceedings - is a significant departure from the manner in which Howard University adjudicates other student misconduct matters. For example, the Howard University Student Code of Conduct is explicit in stating that its proceedings are not subject to rules that would be applied in criminal or civil court proceedings, attorneys are not permitted to be present or participate in the hearings, and peer advisors, who may be present at the hearings, are not permitted to participate in any way. The Hearing Officer or Panel facilitates any questioning that occurs. These procedures and limitations are similar to those implemented by many other institutions.

The Department of Education acknowledges that written questions submitted by students or oral questions asked by a neutral school official are fair and effective ways to discern the truth in K-12 schools, and proposes retaining that method for K-12 proceedings. There is no explanation provided for why the processes considered effective for proceedings at that level – some of which would involve students who are the same age as the youngest college students– would be ineffective at the college level.

We urge the Department of Education to continue to allow universities to have flexibility to conduct internal investigations and administrative proceedings in a less formal manner and to reconsider its proposal to mandate cross-examinations at a live hearing that attempts to mirror processes in a court of law. To the extent live hearings are required in the final rule, cross-examinations should not be required, as the likelihood of a chilling effect on reporting outweighs the benefits provided by such a requirement.

Definition of Sexual Harassment and Required Dismissal of Formal Complaints

The proposed regulations would narrow the acts of sexual harassment prohibited under Title IX and require dismissal of complaints that do not meet the limited definition proposed. We are concerned that this would mean that students would need to suffer from repeated and escalating sexual harassment, before the University could investigate and stop the harassment. The proposed rule suggests that institutions could address misconduct that does not meet the proposed definition of sexual harassment through separately administered policies and procedures. However, this could lead to confusion as students and employees attempt to determine whether their incident meets the requirements and criteria for an institutional response under Title IX or whether they must avail themselves of some other process.

This narrower definition could limit the ability of the University to address all levels of sexual harassment and lead to conflicting outcomes, as some incidents that are in fact incidents of sexual harassment are adjudicated outside of the Title IX process.

Scope of Responsibility

The proposed regulations could be interpreted to prohibit institutions from adjudicating complaints of sexual harassment that do not occur in defined educational programs or activities, i.e. incidents that occur in "off-campus" settings that are not formally overseen or sponsored by the University, even though the impact of that harassment may be felt on-campus.

In order to create and maintain a welcoming environment for all students and employees, universities must be able to hold individuals accountable under their Title IX procedures for all sexually harassing behavior that impedes equal access to educational programs or activities or that adversely impacts the education or employment of members of the University community regardless of where the conduct occurs. This is perhaps especially important for an urban campus such as Howard University, where the very physical layout of the campus requires regular travel through "off-campus" areas that are adjacent to the campus, and students regularly use nearby "off-campus" facilities for informal activities that enhance their educational experience.

For example, a student who has experienced sexually harassing behavior from a fellow student or an employee during an "off-campus" activity may continue to experience the impact of the incident if that student must sit next to the fellow student in class or receive grades or services from that employee. While the proposed rule contemplates that the University can provide supportive measures to that student even if that student is not entitled to remedies through the formal grievance process, without being able to hold the alleged respondent accountable, the University potentially leaves the rest of the community vulnerable and may be vulnerable to a private lawsuit. The possibility for repeat offenses that could have otherwise been prevented does no service to the community. Additionally, we are concerned about the confusion that could ensue as students and employees attempt to determine whether the location of their incident meets the requirements and criteria for an institutional response. While institutions should be able to provide supportive measures, they must also be able to address and remedy sexually harassing behavior that impacts or could impact the larger community, regardless of where that conduct may have taken place.

Further, the proposed regulations narrow the responsible parties on campus who can initiate an investigation to the Title IX Coordinator or an official of the recipient who has authority to institute corrective measures on behalf of the institution. While this change does not prevent students from talking with members of the campus community who they may trust, it removes any responsibility from the individuals to report the allegations. This proposal could cause considerable confusion on campus. Over the last several years, institutions have implemented training and education programs on campus that have emphasized that students may report incidents to a wide variety of "responsible employees" at their university and expect an institutional response. This reflects the reality that students engage regularly with a variety of employees on campus – particularly faculty members – who they believe have authority to initiate institutional responses to a variety of issues presented, and that students will engage with those employees on campus with whom they feel most comfortable. Required reporting by these employees to the Title IX Coordinator has been critical to the ability of institutions to root out sexual harassment. We are also concerned that this change could leave the institutions vulnerable to liability from private lawsuits if students behave in a manner they believe will lead to a university response and none is forthcoming.

Applicability to employees

The Department of Education has specifically requested input on whether applying the proposed regulations to employees would prove "unworkable", and "whether there are any unique circumstances that apply to processes involving employees" that should be considered.

The Supreme Court made clear in 1982 that Title IX protections apply to employees as well as students. However, employees also have concurrent federal anti-discrimination rights under Title VII of the Civil Rights Act of 1964. The definition of sexual harassment under Title VII is broader than what is provided in the proposed regulations, and workplace harassment laws hold employers to a higher standard than "deliberate indifference." Thus, under the proposed regulations, employees would have far greater protection from sexual harassment than students because of their Title VII protections, than students who only have rights under Title IX. Additionally, institutions would need to have a separate process for potential harassment covered by Title VII but outside of the scope of Title IX, as the regulations as proposed prohibit institutions from applying its Title IX grievance procedures in such a situation.

Howard University is both an institution of learning for students and a workplace for employees and must provide an environment that is free from sexual harassment to all of its community members. The significant differences between Title VII and the proposed rules would mean that the University would be prohibited from taking the same steps to protect students from sexual harassment that it is required to take to protect employees. This could lead to perverse and unacceptable outcomes that are less favorable for students.

Interplay with the Clery Act Reporting Requirements

The proposed rules would require the University to dismiss certain complaints, even though the University would have an ongoing obligation to report those incidences in its Annual Security Report to the Department of Education. For example, the Clery Act requires universities to report all sexual assault, stalking, dating violence, and domestic violence that occur on "Clery geography," which includes all property controlled by a school-recognized student organization (such as an off-campus fraternity); nearby "public property"; and "areas within the patrol jurisdiction of the campus police or the campus security department."

We are concerned that this lack of alignment between the proposed rule and the Clery Act is likely to lead to confusion and could send mixed messages to the campus community and beyond regarding the University's obligations and responses to sexual harassment.

Again, thank you for the opportunity to provide comments on the proposed Title IX regulations. If you have any questions, please feel free to contact Leslie T. Annexstein, Title IX Director, at 202-806-2550 or leslie.annexstein@howard.edu.

In Truth and Service,

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