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VIA ELECTRONIC SUBMISSION
at *regulations.gov*

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

Re: *Scripps College Comments on Proposed Title IX Regulations*

Dear Secretary DeVos:

I am the Title IX Coordinator at Scripps College, and prior to taking on this role, I was one of the College's Deputy Title IX Coordinators. I have five years of experience working with students and other members of the Scripps community on issues relating to sexual assault and other forms of interpersonal violence. Scripps College is a member of the Claremont Colleges, a consortium comprising five residential undergraduate institutions: Claremont McKenna, Harvey Mudd, Pitzer, and Pomona Colleges; and two graduate institutions, Claremont Graduate University and Keck Graduate Institute.

Although each of the Claremont Colleges is an independent institution with its own student body, faculty, campus, and distinctive mission and identity, the Claremont Colleges provide a cohesive educational and social experience for students by providing for cross-registration, intercollegiate academic programs, joint athletic programs, and consortium-wide student organizations and activities. Scripps College is a women's college, with a student body of approximately 1,000 students. The College's mission is "to educate women to develop their intellects and talents through active participation in a community of scholars, so that as graduates they may contribute to society through public and private lives of leadership, service, integrity, and creativity." We strive to create a safe and healthy residential educational community where students can thrive. Key to this is maintaining an environment in which individuals can live, learn and work free from these forms of discrimination. As a women's college, we therefore have a significant stake in the standards for the investigation and adjudication of Title IX sexual misconduct cases.

Scripps is committed to having, and in fact, has, a Title IX adjudication process that is fair and equitable--that is, one that requires clear notice to the respondent of the charges and an opportunity to test the evidence and be heard. Our hearing process permits students to submit questions to be asked by a panel of three adjudicators. By contrast, the proposed regulations construct substantial barriers to the reporting and redress of alleged sexual misconduct in the college and university setting. They effectively create, on the one hand, a class of respondents in student conduct cases with special rights and, on the other hand, saddle a class of student complainants with unique procedural hurdles. These proposed requirements would turn an educational institution's student disciplinary process into a trial, with, as we detail below, a cross-examination rule that results in special treatment for the accused in such cases and presents a gauntlet for the complainant and any supporting witnesses that is not present in any other disciplinary processes run by the college. Such a rigid, proscriptive system is not only inimical to but also interferes with our ability to carry out our educational mission and best serve the needs of our students and our community as a whole.

A. The Department Should Withdraw Proposed Regulation 106.45's Requirement of a Live Hearing with Cross-examination

Proposed regulation 106.45 includes a requirement for a live hearing with cross-examination conducted by the "party's advisor of choice." The Department's prior guidance has been criticized for being inflexible and overly stringent. It is our view, however, that the proposed regulations are actually far more prescriptive than what has come before. For the following reasons, we urge the Department to reconsider the requirement of a live hearing with cross-examination and, instead, revise the regulations to require that schools have a fair, equitable, trauma-informed process consistent with the venerable principles of notice and opportunity to be heard.¹

1. The Live Hearing Requirement Deviates Substantially from Traditional Notions of Due Process in the College and University Setting.

The requirement of a live hearing with cross examination substantially deviates from the decades-long practice of investigating claims of student misconduct in the educational setting and claims of sex harassment in other contexts such as the employment setting. Over fifty years ago in *Dixon v. Alabama State Bd. of Ed.*, the federal courts articulated the due process standard for students of public universities facing discipline from the institution, stating that "due process requires notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct." 294 F.2d 150, 151 (5th Cir. 1961). Most, if not all, private colleges and universities also apply this notice and an opportunity to be heard standard in disciplinary processes.

¹ For example, the prior guidance encouraged, but did not require, that parties have an opportunity to submit written questions to the adjudicator for the other side to answer (a process that the proposed regulations contemplate for K-12, presumably because of concerns that live cross-examination of be too traumatic and overwhelming for this younger age group). We would urge the Department to consider permitting this process for all sexual misconduct cases.

Students at colleges and universities may face disciplinary sanctions, up to suspension or expulsion, for a variety of reasons including academic dishonesty, violence against students or other community members, harassment based on other protected characteristics (such as race, ethnicity, disability, or religion), hazing, or vandalism of college property. In all such instances, the accused student would receive notice of the charges, the institution would investigate, and the accused student would have an opportunity to identify witnesses and present evidence to an investigator or judicial board. Such processes, which occur regularly on college campuses, clearly meet the due process standard articulated more than five decades ago by the *Dixon* court.

2. The Live Hearing Requirement Creates a Class of Special Respondents with Special Rights and a Class of Special Complainants with Special Procedural Hurdles

The proposed regulations single out those students facing potential discipline for sexual misconduct as “special respondents” who have the right to bring in their own attorney to cross-examine, in a courtroom-style setting, the complainant in a sexual misconduct case, as well as supporting witnesses. The corollary to the creation of these “special respondents” is the treatment of sexual misconduct complainants as “particularly suspect complainants.” The new standard articulated by the proposed regulations results in a requirement that each complainant of sexual misconduct be “put on trial.” This requirement stands in stark contrast to all other college disciplinary proceedings. Professors accusing a student of academic dishonesty are not “put on trial.” Students making accusations against another student for other forms of misconduct (including violence) are not “put on trial,” and college officials accusing a student of vandalizing or destroying college property are not “put on trial.”

Based upon the proposed regulations, the only persons “put on trial” in a college disciplinary process are students who report that they have been sexually harassed or sexually assaulted by another student. Respondents to allegations of sexual misconduct, just like respondents accused of any other conduct violation, are certainly entitled to know what the accusations are and what the evidence is that supports the allegations, and they must be afforded an opportunity to respond. In no other college disciplinary setting, however, is there a specific procedural process designed to intimidate and undermine the credibility of the reporting party. The commentary provided by the Department with the proposed regulations does not provide any rationale or support for treating allegations of sexual misconduct in the college and university setting so vastly different than other forms of college misconduct where the respondent faces a possible sanction of suspension or expulsion.

3. The Live Hearing Requirement Deviates from Well-established Processes for Investigating and Resolving Sexual Harassment Allegations in the Employment Context.

The investigation and hearing process required by the proposed regulations also deviates substantially from the well-established processes used to investigate and resolve allegations of sexual harassment in other contexts. Employers have been investigating sexual harassment

allegations for over thirty years, ever since the Supreme Court decision in *Meritor Savings Bank v. Vinson* recognizing hostile environment sexual harassment as a form of sex discrimination under Title VII of the 1964 Civil Rights Act. The prospect of losing one's job is at least as significant a sanction as being suspended or expelled from a college or university. The resolution of these allegations in the employment context is universally accomplished through investigations by trained investigators, not quasi-trials with courtroom-style cross-examination by the accused employee's attorney. In virtually all such matters, the investigator gathers evidence, interviews witnesses, weighs the credibility of witnesses interviewed, and reaches a conclusion on whether the accused has engaged in sexual harassment. The Department's proposed prohibition on the single investigator model and requirement of a live hearing with cross-examination ignores the long history in the Title VII context of using single investigators to interview witnesses, gather evidence, weigh credibility, and reach conclusions with respect to claims of sex, and other forms of, harassment.

4. The Live Hearing Requirement Lacks Procedural Protections and Creates Needless Burdens on Institutions

The proposed regulations relating to the live hearing are devoid of procedural protections. The only limit on cross-examination appears to be relevance, and the decision maker is required to "explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant." This requirement exceeds what is required when a trial judge rules on objections in criminal trials, where the defendant's life or liberty may be at stake. Moreover, it is unclear whether questions could be excluded on other grounds, for example, that they are harassing, argumentative, cumulative, or asked and answered. This opens the door to the interrogation of complainants about the traumatic details of their assault by a lawyer attempting to establish that the complainant is (i) lying, (ii) to blame for what happened, (iii) not actually traumatized, or (iv) not a victim because there were no injuries.

This requirement also places new burdens on institutions to train adjudicators to control these quasi-courtrooms, something judges practice daily and spend years learning to do effectively and fairly. This is a substantial burden to place on staff and faculty who already have significant institutional responsibilities and who are not practiced in the art of overseeing trials.

We are also quite concerned about the requirement that if a witness "does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that . . . witness in reaching a determination regarding responsibility." It is one thing to require the parties to participate in a hearing process, but it seems unfair to place this burden on witnesses who, given that institutions have no subpoena power, are essentially volunteers. Witnesses for the parties could find themselves between the proverbial rock and a hard place. They want to support their friends and have invested time and energy in providing information to an investigator as part of the fact gathering process, but they do not feel able for one reason or another to submit to the trauma of live cross examination. In fact, this requirement might well deter witnesses from participating in the first place, which would compromise the core goal of redressing past wrongs and preventing discrimination from recurring in the future. There is nothing in the well-

established due process jurisprudence cited above that prohibits a decision maker from relying on a statement of a witness obtained by a well-trained investigator.

The live cross examination requirement also would lead to significant inequities if one party can afford an attorney and the other cannot. This is not mitigated by the requirement that “[i]f a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party for to (sic) conduct cross-examination.” Putting aside that this requirement places an enormous financial burden on institutions, especially where the other party has a lawyer, the party who has worked with a lawyer from the beginning, whose lawyer is intimately involved with the matter, including the investigation, will have a significant advantage over the party who has a lawyer hired for the limited purpose of conducting cross examination.

Further, live cross examination is a skill that only a small subset of lawyers actually possess. A consequence of this requirement, then, is to create a system that values the involvement of trial lawyers over other potentially well-qualified advisors in college administrative proceedings, a consequence that seems at odds with our central educational mission. Some of the most thoughtful advisors are not lawyers but individuals like staff, faculty and other advocates who actually understand the operation of higher education, students, and the context in which these situations arise. We are concerned that the live cross examination requirement will discourage such well-qualified individuals from taking on this important responsibility.

5. The Live Hearing Requirement Would Discourage Students from Coming Forward to Ask for Help

We know the Department is well-acquainted with the data indicating that sexual harassment, including sexual assault is quite prevalent among college students. Studies estimate that 1 in 5 women, 1 in 18 men, and 1 in 4 transgender and gender-nonconforming students are sexually assaulted in college. Our experience at Scripps is in line with these data. It is also well known that sexual harassment, including sexual assault, is underreported. Data show that only an estimated 12% of college students report sexual assault to the police or their colleges. Consistent with this national finding, 13% of the 2018 Scripps Climate Survey respondents said they reported directly to the Title IX Office, and only 4% to Campus Safety or local police. However, nearly a quarter reported that they sought support confidential resources or non-confidential resources such as a dean or faculty member.

There are many barriers to coming forward with a claim of sexual harassment including but not limited to embarrassment and shame; fear of not being believed; anxiety about the process and concern that reporting will only make matters worse; concerns about being socially ostracized; and the psychological impact of trauma. At Scripps, we have been working for many years to reduce these barriers and to empower survivors to seek out the help they need. We have made inroads, but there is more work to do. We are gravely concerned that the prospect of standing trial and being subjected to grueling cross-examination by the respondent’s attorney will undo much of the work we and other colleges and universities have been doing, will inevitably

discourage survivors from seeking help, and result in lower reporting of sexual assault, sexual harassment, and other sexual misconduct.

B. The “Actual Knowledge” Requirement Is too Narrow and Will Make it Less Likely that Survivors Will Get the Support They Need

The proposed regulations would reduce the pool of “responsible employees” and insulate institutions by limiting the duty to respond to circumstances when the institution has “actual knowledge” of the harassment. (106.44(a)). “Actual knowledge” means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official or the recipient who has authority to institute corrective measures on behalf of the recipient” (106.44(e)(6)). This is a monumental departure from longstanding guidance, which requires institutions to respond if it knew or in the exercise of reasonable care should have known about the harassment.

The current requirement that many employees report instances of sexual harassment to the Title IX Office has proven to be an essential part of the support apparatus at institutions of higher education. As a practical matter, Scripps and other colleges have invested substantial resources over many years in identifying and training “responsible employees,” and they are now well equipped to refer students to the Title IX Coordinator. Dismantling this system will take resources that would be best allocated towards other activities, including education and prevention. Further, if employees, for example faculty or student affairs professionals, are no longer required to report to the Title IX Coordinator, this will eliminate a critical avenue for connecting needy students with support. The Coordinator is typically well-versed in support options and particularly well-positioned to empower survivors to get help (which, in some cases, but by no means all, may include pursuing a college process and/or reporting to the police). Even if a disclosing student is initially reluctant to meet with the Coordinator, they may later change their mind. It simply makes no sense to depart from longstanding principles and dismantle this system in order to insulate institutions from liability. Moreover, the current system is an important tool in identifying potential repeat offenders.

Scripps urges the Department to keep the current standard intact. It fosters the twin goals of a) addressing discriminatory behavior in our communities; and b) helping students who disclose interpersonal violence to get connected to the support so that they can access the education they deserve. We know from experience that most who encounter interpersonal violence can and do heal from that trauma, but they almost always need help. Further, as stated above, most students who have experienced sexual harassment do not formally report, in other words do not want to move forward with a process, but many are interested in accessing support or pursuing other remedial measures.

C. The Proposed Definition of Sexual Harassment is Too Narrow and Creates Confusion

Section 106.44 of the proposed regulations limits the definition of definition of sexual harassment to:

- (i) An 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;
- (ii) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's educational program or activity; or
- (iii) Sexual assault, as defined in 34 CFR 668.46(a).

This definition of sexual harassment is too narrow and creates confusion. The definition is inconsistent with the long-standing definition of hostile environment sexual harassment. This creates confusion as to whether a student's allegations of hostile environment harassment must be analyzed under a different standard than an employee's allegations of hostile environment sexual harassment. The definition also fails to account for the inter-relationship between Title IX harassment claims and allegations of dating violence, domestic violence, or stalking as defined under the SaVE Act portion of the Violence Against Women Act.

Subsection (ii) of the definition, covering hostile environment harassment, uses a definition that is inconsistent with the well-established definition of hostile environment harassment under Title VII. Since the Supreme Court first endorsed a claim of hostile environment sexual harassment, the definition recognized that a person could be sexually harassed by severe **"or"** pervasive conduct that created a hostile work environment. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). The definition in the proposed regulations is drawn from the Supreme Court's decision in *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999), which involved sexual harassment in an educational context under Title IX. The *Davis* court relied upon and cited *Meritor Savings Bank* when discussing hostile environment harassment, indicating its intention to utilize the same definition. The *Davis* court, however, did not accurately paraphrase the *Meritor Savings Bank* decision when it used **"and"** instead of **"or"** when relating severe conduct to pervasive conduct. There is nothing in the *Davis* opinion that indicates the court intended to apply a higher standard for hostile environment harassment (*i.e.*, the conduct must be both severe **and** pervasive) than the standard approved by the *Meritor Savings Bank* court. If not clarified, the result under the proposed regulations would be that the standard for a college student's allegations of hostile environment harassment would be different, and higher than, the standard for a college employee's allegations of hostile environment harassment. Accordingly, we suggest that the Department clarify in the regulations that conduct constitutes hostile environment sexual harassment under Title IX if such conduct is so **"severe or** pervasive, and objectively offensive, that it effectively denies a person equal access to the recipient's educational program or activity."

The definition contained in Section 106.44 also creates confusion because it makes no reference to dating violence, domestic violence, and stalking and a school's obligation to address allegations of such conduct under the Violence Against Women Act's "SaVE" provisions. As required by the SaVE Act provisions, colleges and universities have incorporated dating violence, domestic violence, and stalking into their Title IX investigation and resolution policies and procedures. The silence in the proposed regulations about this form of misconduct, coupled with the proposed regulations' prohibition on using the investigation and resolution procedures for any alleged conduct that does not meet the limited definition of harassment, creates significant confusion as to how educational institutions should discharge their obligations to investigate and remedy claims of dating violence, domestic violence, or stalking. For example, must institutions first determine whether the allegations of dating violence, domestic violence, or stalking would meet the definition of hostile environment before the claim could be investigated and adjudicated under the Title IX procedures? Although one could imagine that many claims of dating violence, domestic violence, or stalking would meet the hostile environment definition, it seems overly cumbersome to try to either wedge into another definition claims that already have a definition in the SaVE Act or force educational institutions to create a separate process for investigating and resolving such claims. Accordingly, we suggest that the Department revise the proposed regulations to clarify the inter-relationship between Title IX sexual harassment and SaVE Act dating violence, domestic violence, and stalking.

D. THE "PROGRAM OR ACTIVITY" RESTRICTION IS TOO NARROW

Under section 106.45(b)(3), a school is required to dismiss the complaint if it is established that the incident "did not occur within the recipient's program or activity." Effectively, this overly technical rule allows schools to ignore activity that occurs off campus, for example an assault that occurs at an off-campus location, or, presumably, on-line, even if it involves two currently enrolled students. A troubling premise underlying this rule seems to be that off-campus conduct has no impact or effect on the campus. This could not be farther from the truth. It ignores, for example, the fact that the survivor may well continue to encounter the alleged assailant or that the alleged assailant might be a serial perpetrator. We urge the Department to reinstate the standard embedded in prior guidance that the operative question is not whether the conduct literally occurred within a college's Clery geography but, rather, whether it would have an effect on the campus.

Further, the proposed rule creates confusion for schools that are in a Consortium, like the Claremont Colleges, or otherwise share resources, have an affiliation, or are geographically proximate. As noted in the introduction, Scripps College is a member of the Claremont Colleges Consortium. Though we are all free-standing institutions, students are permitted to cross register, and we have joint academic and co-curricular programs and many shared services. In addition, students go to parties and otherwise socialize at all the campuses as if it were one school. It is quite common for there to be cross-campus Title IX matters involving a complainant from one school in the Consortium and a respondent from another. In fact, at Scripps, the women's college, most of our matters are cross-campus. We are concerned that if a Scripps student is assaulted in a Scripps residence hall by a student enrolled at one of the other Claremont

Colleges, the proposed rule would deny them the right to pursue a Title IX claim under the policy of the respondent's home college. This cannot possibly be what the Department has in mind, but we nevertheless ask that the Department clarify that the program or activity definition is broad enough to include conduct that involves students at any institution with which there is an affiliation as described here.

CONCLUSION

For the reasons detailed above, Scripps College urges the Department to withdraw or revise its current proposals. In particular we ask that the Department revise the proposed regulations to require resolution proceedings under Title IX that are consistent with the standard set forth over fifty years ago in *Dixon* and the well-established processes for resolving claims of harassment in the Title VII context.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact me at ssteffen@scrippscollege.edu or (909) 607-7142 for further information.

Very truly yours,



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