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Brittany Bull
United States Department of Education
400 Maryland Avenue SW
Room 6E310
Washington, D.C. 20202
Submitted Electronically

Re: Title IX Notice of Proposed Rulemaking (Docket No. ED-2018-OCR-0064)

Dear Ms. Bull,

Northwestern University would like to offer the following comments on the Department of Education's proposed amendments to federal regulations implementing Title IX of the Education Amendments of 1972. Our University community commends the Department for using a notice-and-comment rulemaking process and appreciates the opportunity to offer feedback. We believe there are many positive aspects to the proposed regulations. For example, they would provide clear direction and shed light on the Department's expectations in certain areas that were previously vague. They would also enhance a recipient's ability to honor the wishes of an individual impacted by sexual harassment, including sexual violence. Moreover, Northwestern shares the Department's stated commitment to providing a prompt and equitable process for all parties involved in sexual misconduct matters. In many ways, these regulations demonstrate this commitment.

However, we are concerned with several aspects of the regulations. Overall, they would impose an unprecedented amount of control over a school's – particularly a private school's – ability to develop and implement disciplinary processes in a way that best serves our community and upholds our values. Moreover, we believe the cost of implementing these regulations would be extremely high – in terms of both financial and human resources. Finally, and most importantly, Northwestern believes certain aspects of the proposed regulations are unfair to all parties involved (including those accused of sexual misconduct) and will ***significantly*** deter students, faculty, and staff from making sexual misconduct complaints.

Northwestern respectfully requests that you consider the following comments on key areas of the proposed regulations. We would welcome the opportunity to meet with you to discuss our comments.

Sincerely,

Morton O. Schapiro
President and Professor
Northwestern University

Section 106.8(c): *Adoption of grievance procedures.*
Northwestern requests that the Department clarify the scope of the proposed regulations. As drafted, they appear to apply to all "student and employee" complaints. Applying the disciplinary processes in the regulations to complaints against all faculty and staff would be an undue expansion of Title VII of the Civil Rights Act of 1964, and is outside the Department's jurisdiction. Northwestern requests that the Department clarify that any proposed regulations regarding disciplinary processes apply only to disciplinary processes where a student is accused of sexual misconduct.

Section 106.44(e): *Definitions.*
The proposed regulations define sexual harassment, in part, as "[u]nwelcome 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 education program or activity." *See* §106.44(e)(1)(ii) (emphasis added). Requiring conduct to be severe *and* pervasive sets up a framework where one severe incident of conduct based on sex could not rise to the level of sexual harassment, and similarly, many less-severe incidents of sex-based conduct spread out over time would not violate policy. This significantly heightened definition of sexual harassment impedes a university's ability to set standards for our community that align with our values. Northwestern asks that the Department revise this definition to include behavior that is severe or pervasive and objectively offensive. Northwestern further requests clarity regarding whether dating violence, domestic violence, and stalking are encompassed by the proposed regulations.

Section 106.45(b)(1)(iv): *Grievance procedures (presumption of innocence).*
Section 106.45(b)(1)(iv) states a recipient's grievance procedures must "[i]nclude a presumption that the respondent is not responsible for the alleged conduct." Section 106.45(b)(2)(i)(B) requires recipients to include this presumption in the written notice provided to the parties. Northwestern requests that the Department remove this language and any related language regarding presumptions prior to the start of an investigation. Good investigators do not make any presumptions prior to the conclusion of an investigation: they are neutral fact-finders who gather and evaluate evidence. It is unfair to complainants to start an investigation with a presumption of innocence, just as it is unfair to the accused to start with a presumption of guilt. Moreover, universities are not courts and student conduct disciplinary processes do not determine guilt or innocence. For example, at Northwestern we consider whether someone is more likely than not responsible for a policy violation.

Section 106.45(b)(3): *Investigations of a formal complaint (program or activity).*
Section 106.45(b)(3) requires recipients to dismiss complaints that do not "occur within the recipient's program or activity." The preamble to the proposed regulations states an education program or activity includes any academic, extracurricular, or research training. A university must have discretion to adjudicate cases involving its students regardless of where the conduct occurs – including when a student allegedly sexually assaults another student at an off-campus location.

Moreover, the proposed regulations create a special framework for sexual misconduct cases. Indeed, a university certainly has the right to discipline a student for engaging in other forms of off-campus misconduct – including, for example, disciplining a student who threatens a student off-campus, steals money from a student off-campus, or gets into a physical fight with a student off-campus. Excluding sexual misconduct from this framework is nonsensical and dangerous for our community. Northwestern requests this section be modified to permit a recipient to investigate complaints of sexual misconduct about a current student that could impact another student's education environment, regardless of where the alleged conduct occurred.

Section 106.45(b)(3)(vii): ***Investigations of a formal complaint (cross examination and advisors).***

Section 106.45(b)(3)(vii) requires that recipients provide a live hearing with the opportunity for "each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." This "cross-examination" must be conducted by the party's "advisor of choice." If a party does not have an advisor, a recipient "must provide that party an advisor aligned with that party." The proposed regulation goes on to state: "If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility."

Northwestern requests that the Department strike this section in its entirety as it is fundamentally unfair to all parties and witnesses – including the accused. First, Illinois state law prohibits direct cross-examination in a sexual misconduct matter in the higher education setting. While the proposed regulations do not permit direct examination by the parties themselves, they *require* cross-examination by an advisor – which is arguably the same (and perhaps worse). Second, the proposed regulation provides an unfair advantage to any student (and possibly faculty and staff) with the means to hire an attorney as an advisor. Third, requiring recipients to somehow identify and provide advisors "aligned" with a party is complicated at best. The likely tax on institutional efforts and finances to field such advisors, added to the obligation to ensure such advisors' qualifications, training, and alignment, makes the burden nearly impossible for recipients to meet and will most certainly subject institutions to lawsuits. Fourth, excluding information provided by a party or witness during an investigation because they did not sit for cross-examination during a hearing imposes an unreasonable and unfair standard that is arguably not required by even the Constitution. Fifth, recipients – particularly private schools – should have the discretion to develop prompt and equitable disciplinary procedures as they see fit. Requiring a "live hearing" infringes upon that right. Sixth, these requirements will unquestionably deter people from making sexual misconduct complaints. Seventh, if the proposed regulations do apply to faculty and staff, it would require significant time and resources to conduct live hearings in all faculty and staff sexual harassment cases. Moreover, this is not required by Title VII.

Northwestern believes all parties have a right to review any evidence that will be considered by the decision-maker before the decision is final, and to question that evidence. Notably, many universities, including Northwestern, already allow for parties to submit questions to the other

party in writing as a form of cross-examination. Indeed, the Department suggests this approach for elementary and secondary schools. Colleges and universities (particularly private institutions) should have the discretion to use this method as it accomplishes the goals of cross-examination while lowering the risk of harm to both parties and witnesses.

Section 106.45(b)(3)(viii): ***Investigations of a formal complaint (review of evidence).***
The proposed regulations state both parties have the right to inspect and review any evidence obtained during the investigation that is "directly related" to the allegations, "including evidence upon which the recipient does not intend to rely." The recipient must also send this information to the party's advisor, who is oftentimes a lawyer. Essentially, this allows parties to review irrelevant evidence, which is higher than the standard used in civil litigation. Again, Northwestern agrees – and its process reflects – that parties should be able to review and respond to all evidence considered by the fact-finder. This does not mean that the parties should have a right to see irrelevant information presented by a party or witness. Doing so could cause harm to parties and witnesses and discourage people from participating in the investigation process. Moreover, asking administrators to communicate with advisors (specifically attorney advisors) ignores the fact that universities are not courts – we value our relationships with students, faculty, and staff and speak directly to those individuals and not through "advisors" or lawyers. Northwestern asks that you modify this section to include a review of evidence that will be considered by the decision-maker.

Section 106.45(b)(4)(i): ***Determination regarding responsibility.***
The proposed regulations state the decision-maker(s) cannot be the Title IX Coordinator or investigator(s). This essentially eliminates any investigatory model where the individuals conducting the investigation also determine whether a policy was violated. Again, schools should have discretion when it comes to investigating and adjudicating complaints, as long as the process is fair to both parties. At Northwestern, our investigators are highly trained and spend a significant amount of time meeting with parties and witnesses and evaluating evidence. We believe they are in the best position to determine whether a policy was violated. After the investigators make that determination, a live panel then considers the appropriate sanction, and both parties have the right to appeal. This process is fair and equitable to both parties and was carefully developed with input from our community (including students who went through the sexual misconduct investigation process). Northwestern requests the Department permit recipients to use an investigatory model of their choosing, as long as the model provides an equitable resolution process to all parties.

Section 106.45(b)(4)(i): ***Standard of evidence.***
The proposed regulations state schools may employ the preponderance of the evidence standard "only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction." (Meaning, in the case of an accused student, any violation that has the potential to result in expulsion.) The proposed regulations go on to state the recipient must use the same standard of evidence for complaints against students as it does for complaints against employees (including faculty). As noted above, it is unclear whether and how the proposed regulations apply to complaints involving faculty and

staff. Northwestern again requests clarification on that point and requests that any revised regulations apply to cases where a student is accused of sexual misconduct. Regardless of the application of the regulations, this requirement does not make sense. Universities should have the discretion to decide that certain standards and processes are well-suited for particular types of cases. For example, a school might decide to impose a different standard of proof for research misconduct cases than it does for sexual misconduct cases. Northwestern further notes that Illinois state law requires use of the preponderance standard in cases involving sexual violence, domestic violence, dating violence, and stalking.