College and University Professional Association for Human Resources

January 30, 2019

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

Re: Docket ID ED-2018-OCR-0064

Dear Secretary DeVos:

On behalf of the College and University Professional Association for Human Resources (CUPA-HR), thank you for the opportunity to comment on the Department's November 29, 2018, notice of proposed rulemaking ("NPRM" or "proposed rule") amending regulations implementing Title IX of the Education Amendments of 1972 ("Title IX"), Docket ID ED-2018-OCR-0064.

CUPA-HR serves as the voice of human resources (HR) in higher education, representing more than 30,000 human resources professionals and other campus leaders at over 2,000 colleges and universities across the country, including 93 percent of all U.S. doctoral institutions, 78 percent of all master's institutions, 53 percent of all bachelor's institutions and over 500 two-year and specialized institutions. Higher education employs over 3.9 million workers nationwide, with colleges and universities in all 50 states.

CUPA-HR members are committed to diversity, inclusion, access and equitable practices as a means to achieving excellence in higher education. Our members have a strong interest in the proposed rule, as our surveys indicate that at least 50 percent of our membership has some Title IX compliance and reporting responsibilities. In addition, aspects of the NPRM could be read to impose specific process requirements on institutional responses to faculty and staff conduct, thereby inhibiting, and otherwise impacting, how higher education HR professionals manage policies and claims involving *employment* discrimination.

CUPA-HR joins and fully supports the comments filed by American Council on Education (ACE) and urges the Department to adopt in any final rule the changes proposed by ACE. CUPA-HR files these additional comments to bring attention to the possible impact a final rule could have on how institutions address *employment* discrimination and to suggest changes that will enhance the rule's clarity and ease of implementation. The Department states in the NPRM that the proposed regulations would apply to sexual harassment by students, employees and third parties and requested comments on "whether there are any parts of the proposed rule that will prove

unworkable in the context of sexual harassment by employees, and whether there are any unique circumstances that apply to processes involving employees that the Department should consider."

It appears that the Department designed the grievance procedures in the NPRM to address concerns regarding claims of sexual harassment against students, and to help ensure students have equal access to education. The relationship between an institution and its students and the related rights and responsibilities, legally and otherwise, fundamentally and significantly differs from relationship between an institution and its employees. As a result, the grievance procedures in the NPRM are not workable in the employment context.

For this reason, we ask the Department to clearly state the scope of the final rule and only require the use of any grievance procedures contained in the final rule with respect to sexual harassment allegations where the respondent is a *student*.[1] Specifically, we ask the Department to state in any final rule that, while an institution may have obligations informed by Title IX to effectively address sexual harassment allegations against employees, the NPRM's grievance procedures are not required to be applied in those contexts. Rather, such situations will be governed by Title VII of the Civil Rights Act of 1964 (Title VII) and similar state and local laws.

All CUPA-HR member institutions are subject to the provisions in Title VII that bar employment discrimination based on, among other things, sex. In addition, many of our members are subject to similar state and local anti-discrimination laws. These federal, state and local laws, related court cases, regulations and guidance create a regulatory framework detailing how employers should (1) address claims of discrimination and (2) create policies to proactively discourage employment discrimination based on sex and other characteristics.[2] Institutions have spent decades developing, honing and implementing policies that comply with the requirements of this regulatory framework and are designed to promote work environments free of harassment and unlawful discrimination.

The NPRM's grievance procedures appear, at times, inconsistent with these policies and widely accepted best practices for complying with the aforementioned regulatory framework and

[1] We acknowledge that in the case of a student accused of sexually harassing an employee, any disciplinary proceeding against the student-respondent involving his or her status as a student would be informed by the final rule's grievance procedures. We suggest the Department consult with the Equal Employment Opportunity Commission and issue joint guidance on how to minimize potential conflicts between the obligations to claimants under Title VII and respondents under Title IX. We do not believe the grievance process should apply to any possible adverse *employment* action against a student employee, however, where the job in question is not an integral part of the educational program and thus the adverse action would not impact the student's equal access to an education. For example, if the student works at the dining center on campus and is accused of harassment on the job, the employer should be permitted to follow its policies for addressing employment discrimination rather than any grievance process contained in a final rule. We acknowledge, however, additional discipline against the student with respect to his or her role as a student of the institution would be informed by the grievance processes in the final rule.

[2] *See, e.g.,* EEOC Laws, Regulations and Guidance (https://www.eeoc.gov/laws/types/sex.cfm); EEOC Select Task Force on the Study of Harassment in the Workplace (https://www.eeoc.gov/eeoc/task_force/harassment/index.cfm); California Requirements for Sexual Harassment Training (https://www.dfeh.ca.gov/resources/frequently-asked-questions/employment-faqs/sexual-harassment-faqs/); and Massachusetts Requirements for Posters, Policies and Recommended Training (https://www.mass.gov/service-details/about-sexual-harassment-in-the-workplace). All websites were visited on January 22, 2019.

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underlying laws.[3] While the federal courts are split as to whether an employee can pursue a private right of action under both Title VII and Title IX, federal agencies are required to guard against creating duplicative or conflicting regulatory obligations.[4]

If the grievance procedures in any final rule are required for allegations against employees, colleges and universities would need to substantially revise employment policies and engage in extensive and time-consuming efforts to revise faculty handbooks and codes under a process of shared governance. Unionized employers would need to renegotiate collective bargaining agreements. Non-unionized employers, including those in states that recognize the doctrine of employment-at-will, would be subject to new, extensive and unduly burdensome procedural obligations when seeking to address allegations of sexual harassment currently governed by Title VII and state laws. Many of these institutions also may need to renegotiate contracts that contain specific discipline procedures with employees. There will also be substantial costs related to making these changes and resulting from the confusion and related litigation over possible conflicts between the Title IX rules and employer obligations under Title VII and state and local laws.

Set forth below are specific changes we believe ensure any final rule does not create parallel and possibly conflicting requirements for addressing employment discrimination on campus, which would dramatically increase the rule's cost and render the NPRM's regulatory impact estimate under Executive Order 13563 invalid.

- *Standard of Proof (34 CFR §106.45(b)(4)(i))*
    - To the extent the Department elects to issue final regulations addressing the burden of proof, the scope of those regulations should be limited to disciplinary proceedings against students and not against an employee of a college or university.

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[3] The NPRM's procedures could interfere with the institution's duty to promptly address harassment and discrimination and the well-developed and widely accepted HR practices aimed at meeting that duty. Areas of conflict or possible conflict include: the NPRM's requirement for a live hearing with cross examination by assigned advisors of choice; difference in threshold definitions of prohibited conduct/sexual harassment; and prohibition against the single investigator model. For example, the grievance procedures in many cases would interfere with prompt action against an employee who has been repeatedly warned and progressively disciplined for sexually harassing behavior. Another example might be where two students report a professor's inappropriate comments and seven other students say they observed the behavior, but none of the nine students want to participate in any kind of public process. The university might have difficulty meeting its obligation to address known discrimination if the grievance procedure applied. The power dynamics between students and faculty, or other persons of authority, amplify concerns that the grievance procedures may chill reporting of harassment.

[4] *See President's January 30, 2017, Executive Order on Reducing Regulation and Controlling Regulatory Cost* (https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/ - last visited on January 22, 2019); *Executive Order 13563 – Improving Regulation and Regulatory Review* (https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review). As noted in the ACE comments, "[t]he Department should proceed cautiously when considering regulatory changes that would impact the personnel of colleges and universities. Congress was concerned about the potential for overreach when it created the Department in 1979 and included in the General Education Provisions Act a clear prohibition that the Department may not exercise any 'direction, supervision, or control' 'over the . . . administration, or personnel of any educational institution …'" ACE comments at note 14; see also 20 U.S.C. 3403 available at https://www.law.cornell.edu/uscode/text/20/3403 last visited on January 22, 2019.

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The requirement to synchronize the standard with other types of institutional disciplinary proceedings should be dropped.

- *Grievance Procedures* (*34 CRF §106.45)*
    - The final rule's grievance procedures should be limited to sexual harassment allegations involving student-respondents. The rule should specifically state that the procedures by which colleges and universities respond to allegations of sexual harassment where the respondent is an employee are governed by Title VII and its implementing regulations, and similar state and local laws addressing discrimination in employment.

Thank you for the opportunity to provide comments on this NPRM. Like you, CUPA-HR members are committed to ending unlawful discrimination, including sexual harassment and sexual assault on campus. We appreciate the Department's efforts and request that you make the changes proposed in these comments as well as the comments we joined that were filed by ACE. Please do not hesitate to reach out to me to discuss any of the issues we have raised in these comments or on other issues where we may be of assistance.

Respectfully Submitted,

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