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January 28, 2019

Secretary Betsy DeVos  
c/o Brittany Bull  
U.S. Department of Education  
400 Maryland Avenue SW  
Room 6E310  
Washington DC 20202  
Re: **Docket ID ED-2018-OCR-0064**

Dear Secretary DeVos,

The Vermont Commission on Women is pleased to have the opportunity to provide comments in response to the Department's November 29, 2018 Notice of Proposed Rulemaking amending regulations implementing Title IX of the Education Amendments of 1972, Docket ID ED-2018-OCR-0064.

The Vermont Commission on Women (VCW) is an independent, nonpartisan state agency dedicated to advancing rights and opportunities for women. The Commission advises and consults with the legislative and executive branches of state government on policies affecting the status of women in Vermont; conducts research and study of issues affecting the status of women in Vermont; educates and informs business, education, state and local governments and the general public about the nature and scope of sex discrimination and other matters affecting the status of women in Vermont; and serves as a liaison and clearinghouse between government, private interest groups and the general public concerned with services for women. The Commission consists of 16 commissioners, appointed by multiple appointing authorities, and drawn from throughout the state from diverse backgrounds. An Advisory Council, representing a range of partnership organizations, provides information and assists the Commission.

VCW appreciates the Department's regulatory approach, including publishing the proposed regulations and soliciting public comment. We recognize and share the values of transparency, fairness, and public dialogue that the Department is exhibiting with this process, and we value the opportunity to contribute.

Our specific comments follow:

**A. Designation of coordinator, dissemination of policy, adoption of grievance procedures**

**Proposed Rule:**

**§106.8** Designation of coordinator, dissemination of policy, adoption of grievance procedures

- We appreciate this measure to codify good practices that many schools are already using.

## B. Education program or activity ... against a person in the United States

### Proposed Rule:

§ 106.44 (a) A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent.

- We hope that “education program or activity” and “in the United States” will be interpreted as broadly as possible, so as to provide protections for students in off-campus settings such as school trips, fraternities and sororities, sporting events, etc., as well as those students in school programs that are international in nature, such as campuses of the college or university housed in other countries, or on international school trips.

## C. Religious exemption

### Proposed rule:

§ 106.12 (b) ... In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of the exemption from the Assistant Secretary.

- We are concerned that changing the timeline for schools declaring a religious exemption from Title IX from before complaints are filed to afterwards will mean that prospective students will not have the information they need during the application process.
- We are concerned that proper handling of a complaint may be delayed or denied by a school’s filing of a religious exemption after the complaint has been made.

## D. Deliberate indifference

### Proposed Rule:

§ 106.44 (a) A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent.

- We are concerned that the standard of deliberate indifference as it is expressed in these regulations is an inappropriately high standard for determining schools’ unacceptable responses to complaints.
- We are not convinced that the language coming from the Davis Supreme Court decision, which concerned monetary damages in a civil suit, is appropriately imputed to schools’ general administrative procedures.

## E. Emergency removal

### Proposed rule:

§ 106.44 (c) Nothing in this section precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

- Requiring a threat assessment to be conducted before a student is removed from a respondent’s education program or activity on an emergency basis is a good practice.
- We suggest that providing more clarity as to whether the assessment needs to be internal or external, as well as what it should otherwise entail, may be helpful.

## F. Definition of sexual harassment

### Proposed rule:

§ 106.44 (e)(1)(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 education program or activity

- We are concerned that the proposed definition of sexual harassment that reads: “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 education program or activity” presents a higher threshold for defining unacceptable behavior than do the regulations associated with federal employment law in Title VII, which read, in part, “Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when...(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.”
- We believe that the standard for conduct in schools should not be more accepting of sexual harassment than that in the workplace.

## G. Actual knowledge

### Proposed rule:

§ 106.44 (e)(6) *Actual knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment.

- We appreciate the clarity that comes with defining who at schools can receive official reports.

- We are concerned that confining “actual knowledge” on the part of the post-secondary schools to Title IX coordinators and officials who have the authority to institute correctional measures is unduly limiting.
- We also believe that it will be important to ensure that whoever is taking reports is provided with appropriate training to do so.

#### **H. Basic requirements for grievance procedures and notice of allegations**

##### **Proposed rules:**

**§ 106.45 (b)(1) basic requirements for grievance procedures**

**§ 106.45 (b)(2) notice of allegations**

- We appreciate these measures to codify good practices that many schools are already using.

#### **I. Requirement to dismiss certain complaints**

##### **Proposed rule:**

**§ 106.45 (b)(3)** If the conduct alleged by the complainant would not constitute sexual harassment as defined in section 106.44(e) even if proved or did not occur within the recipient’s program or activity, the recipient must dismiss the formal complaint with regard to that conduct.

- We suggest that schools not be required to dismiss complaints that are determined before investigation to fall outside of the narrow definition of sexual harassment in the proposed regulations, but should be explicitly granted the discretion to follow the formal procedures if they so choose, as well as to address such behavior in their own student conduct process.

#### **K. Live hearings including cross-examination by advisors**

##### **Proposed Rule:**

**§ 106.45 (b)(3)(vii)** For institutions of higher education, the recipient's grievance procedure must provide for a live hearing. At the hearing, 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. Such cross-examination at a hearing must be conducted by the party's advisor of choice. ... All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant’s sexual behavior is offered to prove that someone other than the respondent committee the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant’s sexual behavior with respect to the respondent and is offered to prove consent. ... The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant. 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. ...

- We share the Department’s concern that an effective investigation process be fair to all parties.
- We value an investigatory and resolution process that allows the respondent to question the complainant, guarantees both parties the ability to question each other, ensures that witnesses are properly identified and questioned, provides for secure sharing of evidence, and guarantees both parties the opportunities to review and respond to evidence, findings, and the final report before the final decision is rendered.
- Some concerns were raised that:
  - Depending upon the practices of various colleges and universities, one aspect of student conduct could be controlled by a quasi-judicial process when other aspects of student conduct are not
  - Requiring schools to implement a quasi-judicial process in an educational setting might undermine the effectiveness of the resolution process for both parties. Educational institutions might not be properly equipped to conduct such a process, and it might be unrealistic, impractical, and potentially dangerous to require education professionals to control overly-zealous questioners, make evidentiary rulings in the moment, and otherwise behave as courtroom judges
  - The prospect of facing live cross-examination has the potential to inappropriately discourage people from reporting
  - Requiring cross-examination to be conducted by advisors could place parties not represented by an attorney at a significant disadvantage, and this disparity could be heightened by unequal access to financial resources

#### **L. File sharing platform**

##### **Proposed Rule:**

**§ 106.45 (b)(3)(viii)** ... Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence ...

- We recognize and appreciate the need for confidentiality and security in the sharing of evidence, and would suggest that language be included in the regulations that calls for both while allowing schools to use their discretion in determining how best to meet those standards.
- We are concerned that requiring the sharing of evidence in an electronic format such as a file-sharing platform could place an undue financial and technical burden on schools.

#### **M. Standard of evidence**

##### **Proposed rule:**

**§ 106.45 (b)(4)(i)** ... To reach this determination, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient 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. ...

- We agree that the standard of evidence used for Title IX proceedings should not be lower than that used for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction, but we also do not believe that the standard should be higher.
- We suggest that the language used in the Q & A issued by the Department of Education in September 2017 more effectively captures this than that in the proposed regulations; that language reads, “The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases...When a school applies special procedures in sexual misconduct cases, it suggest a discriminatory purpose and should be avoided.”

## N. Appeals

### Proposed rule:

**§ 106.45 (5) Appeals.** A recipient may choose to offer an appeal. If a recipient offers an appeal, it must allow both parties to appeal. In cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant’s access to the recipient’s education program or activity, a complainant is not entitled to a particular sanction against the respondent.

- We agree that if a recipient offers an appeal, it must do so for both parties.
- We are concerned that there is a lack of clarity regarding the grounds for appeal, and whether they apply equally to both parties.

## O. Informal resolution

### Proposed rule:

**§ 106.45 (6) Informal resolution.** At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient--

- (i) Provides to the parties a written notice disclosing--
  - (A) The allegations;
  - (B) The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and
  - (C) Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and
- (ii) Obtains the parties’ voluntary, written consent to the informal resolution process.

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- We welcome the inclusion of informal resolution processes as a possible path that some schools and students might find beneficial.
- We are concerned that some students might feel pressured to abandon a formal complaint and instead take up informal resolution.
- We would like to see an assurance that either party, once entering informal resolution, has the option to revert to a formal process, while protecting both parties from being incriminated by anything revealed in the informal process.

**P. Record-keeping**

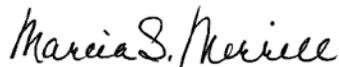
**Proposed rule:**

**§ 106.45 (7)**

- We welcome the clarity provided in the proposed record-keeping process.
- We also suggest that three years is too short a time period for retaining records. Many students take longer than four years to complete a degree, and a three-year retention period would mean that some records would be disposed of before the student had left the institution.

Thank you for your consideration of these comments.

Sincerely,



Marcia Merrill  
Chair, Vermont Commission on Women