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August 2, 2019

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

Dear Secretary DeVos,

I am writing to you regarding the Department of Education's (ED) proposed Title IX regulations and my continuing concerns with both the process undertaken in devising this rule and how that process may have affected the underlying substance of the proposed rule. Sexual assault is far too common in educational settings across the country. Students should feel comfortable knowing that ED is pursuing policies that create safe environments, protect survivors and ensure every person in a school or on a campus feels comfortable reporting an incident of sexual assault. Public statements by ED officials and reported meetings ED took with groups known to be hostile to survivor's rights suggest that this rulemaking could have been informed as much by stereotypes regarding sexual assault as desire to help survivors find justice and hold perpetrators accountable.

In order to further clarify ED's process and the proposed Title IX regulations please answer the following questions by August 16, 2019.

- 1) What individuals and offices internal and external to ED, were consulted as part of the decisions to:
  - a. withdraw the 2011 Dear Colleague Letter<sup>1</sup>;
  - b. withdraw the 2014 Q&A<sup>2</sup>;

<sup>1</sup> U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter on Sexual Violence (hereinafter 2011 DCL), (2011), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>2</sup> Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual violence [hereinafter 2014 Q&A] available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

- c. issue the 2017 Q&A<sup>3</sup>; and
  - d. promulgating the proposed rule?<sup>4</sup>
- 2) In the course of decisions referenced in Question #1,
  - a. What individuals internal to ED's Office of Civil Rights (OCR) were consulted?
  - b. Were regional offices at OCR consulted about the impact of proposed changes on existing enforcement of OCR cases involving allegations of sexual harassment, including sexual assault?
  - c. Please provide any communication within OCR concerning the impact of the withdrawal of the 2001 DCL and the 2014 Q&A or the impact of the proposed changes on cases that were opened after September 22, 2017.
- 3) Will OCR continue to apply the 2001 guidance<sup>5</sup> and 2017 Q&A for cases that were opened after September 22, 2017 once the Title IX rule is finalized? Explain how OCR will handle potential conflicts between policy applicable in those cases and policy contained in the final rule?
- 4) Provide any Title IX resolutions agreements or letters issued after September, 22 2017 that address compliance or non-compliance with the standards from the 2017 Q&A.
- 5) In the course of the decisions referenced in Question #1, did ED coordinate or give preferential access to any men's rights groups or other groups who advocate for the rights of those accused of sexual assault? Please provide a list of all meetings, correspondence, or communications with any of these groups. Such a list should include the number of meetings, when the meetings occurred in the process, and a list of all the attendees of each meeting.
- 6) Were groups representing survivors of sexual assault given the same level of access as the groups mentioned in the previous question? If not, what was ED's rationale for not doing so? Please provide a list of all meetings, correspondence, or communications with any of these groups. Such a list should include the number of meetings, when the meetings occurred in the process, and a list of all the attendees of each meeting.
- 7) In the course of the decisions referenced in Question #1, did any ED official, on either their personal or work electronic device, communicate regarding these matters via:
  - a. text messaging or
  - b. any third-party smartphone applications that support encryption or the ability to automatically delete messages, including but not limited to WhatsApp, Signal, and Confide?

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<sup>3</sup> Department of Education, Office for Civil Rights, Q&A on Campus Sexual Misconduct [hereinafter 2017 Q&A] available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

<sup>4</sup> Title IX of the Education Amendments of 1972 [hereinafter Title IX NPRM], 83 Fed. Reg. 61462 (No. 230) (Proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) available at <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>.

<sup>5</sup> U.S. Department of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, (hereinafter 2001 Guidance) at 19-22, (2001) available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

- c. Please provide either a copy of any such communications, or in the case of an application that deletes the communications themselves, a record of the instances of communications.
- 8) Please provide any legal analysis conducted by ED regarding the scope of what processes and procedures required of schools to conform existing Title IX proceedings with the level of due process as required under the Constitution. Does ED believe its standards, or the proposed rule require a higher-level due process than would otherwise be mandated under the Constitution? Please additionally provide any memorandum or documents produced by the ED Office of General Counsel regarding this subject.
- 9) Given that colleges are educational institutions and are not judicial entities, did ED in the development of the proposed rule consider any alternatives to direct cross examination that would still satisfy the level of due process as required under the Constitution? Specifically, did ED consider alternatives to a live hearing where questions could be posed by a neutral party in a reasonable way, including questions that would allow for a credibility determination as required by current case law<sup>6</sup>? Did ED conduct any research or analysis regarding:
- a. the potential for cross examination to retraumatize victims or
  - b. the disparity that would occur when both sides are not being represented by an attorney? Please provide any such analyses.
- 10) Did ED conduct any analysis regarding the percentage of incidents that occur off campus and the impact of the proposed rule on student safety? Please provide any such analysis.
- 11) Did ED conduct any analysis as to the potential for the proposed rule to decrease reporting of campus sexual assaults and whether alternative approaches would have the same effect? Please provide any such analysis.
- 12) Under the 2017 Q&A, along with the proposed rule, what safeguards does ED envision to ensure that the decision to pursue mediation is truly a voluntary decision for both parties and that survivors are not unduly pushed into pursuing this option?
- 13) Candace Jackson, one the key ED officials responsible for helping to promulgate this rule has stated that in her view, “the accusations – 90 percent of them – fall into the category of ‘we were both drunk,’ ‘we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.”<sup>7</sup> Given that one of the key ED officials responsible for promulgating this regulation professed views representative of common myths and stereotypes surrounding campus sexual assault, what steps did were undertaken by ED to ensure that this viewpoint and the views of individuals or groups who share this viewpoint were not reflected in the proposed rule? Additionally, please provide a copy all meetings, correspondence, or communications from Candace Jackson regarding the decisions referenced in Question #1.

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<sup>6</sup> See e.g. Title IX and Sexual Harassment: Private Right of Action, Administrative Enforcement, and Proposed Regulations. Congressional Research Service, 36-39. April 12, 2019.)

<sup>7</sup> Erica L. Green and Sheryl Gay Stolberg, “Campus Rape Policies Get a New Look as the Accused Get DeVos’s Ear,” *The New York Times*, (July 12, 2017) available at: <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html>.

- 14) ED has stated that the rule would save colleges between \$286 million and \$368 million over the next decade.<sup>8</sup> Please provide all documents underlying the Department's cost-benefit analysis for the proposed Title IX rule.
- 15) Under the proposed rule, the only individuals required to report misconduct by students or employees are those who have the "authority to institute corrective measures." Has ED conducted any analysis as to how limiting the number of individuals who are required to make mandatory reports would impact the ability of institutions to identify patterns and practices regarding specific individuals?
- 16) Please provide ED's rationale for allowing institutions to use the higher "clear and convincing evidence" standard for Title IX cases while continuing to permit the use of "preponderance of the evidence" for all other cases of student misconduct? Please additionally provide any memorandum or documents produced by the ED Office of General Counsel regarding this subject.
- 17) Please provide any analysis conducted by ED as to the impacts expected from changing the definition of sexual harassment from "unwelcome conduct of a sexual nature" to "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." Please additionally provide any memorandum or documents produced by the ED Office of General Counsel regarding this subject.
- 18) The proposed rule states that if the conduct does not fall under the newly narrowed definition of sexual harassment, institutions "must dismiss the formal complaint with regard to that conduct."<sup>9</sup> Does this language mean that institutions would be prohibited from moving forward under their own disciplinary procedures if an institution has a more expansive definition of sexual misconduct?

Thank you for your consideration of this matter. Please provide the requested information to Kia Hamadanchy who can be reached at [Kia.Hamadanchy@mail.house.gov](mailto:Kia.Hamadanchy@mail.house.gov). Should you have any inquiries, please call 202-225-3725.

Sincerely,



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**ROBERT C. "BOBBY" SCOTT**

Chairman

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<sup>8</sup> Title IX NPRM at 6.

<sup>9</sup> Title IX NPRM at 138.