January 30, 2019

The Honorable Betsy DeVos
Secretary of Education
400 Maryland Avenue
Washington, DC 20202

Electronic submission at regulations.gov

Re: Docket ID No. ED 2018-ED-0064, Proposed Regulations Implementing Title IX of the Education Amendments of 1972, 34 CFR Part 106

Dear Secretary DeVos,

On behalf of Pitzer College, I write to offer comments on the proposed regulatory amendments implementing Title IX of the Education Amendments of 1972 (the NPRM). In partnership with our Consortium member institutions (Claremont Graduate University, Claremont McKenna College, Keck Graduate Institute, Pomona College, and Scripps College), Pitzer College previously requested a 60-day extension to the public comment period. The concerns raised in our joint letter remain pressing and salient, and an extension would have allowed us the opportunity, foreclosed by the limited 60-day comment period, to provide a more comprehensive assessment in response to the Department of Education’s invitation. As no extension has been granted, however, and the deadline is closing, these streamlined comments outline Pitzer College’s primary concerns about and objections to the NPRM.

Comment Tracking Number 1k3-97tt-z9sz (submitted 1/22/19 but not yet posted at regulations.gov).

In September 2017, the Department announced that draft regulations would be forthcoming, and they were widely expected to (but did not) issue in April 2018. A “leaked” draft version of proposed Title IX regulations was widely disseminated in late August 2018. Both in April and again in August, as an institution we were prepared to draft and submit public comment. The timing of the actual proposed regulations, however – more than a year after the announcement of their imminence and falling near the end of the academic semester and the closing of virtually all colleges and universities across the country for a winter break – has impacted our ability to prepare institutional comments as planned. Moreover, the proposed regulations are materially different from the September 2017 Interim Guidance and the “leaked” draft in August 2018, and at 149 pages (including lengthy commentary), they have taken significant time to review and assess. We remain concerned that 60 days is insufficient for countless individuals and organizations who will be most affected by these changes to prepare and submit a reasoned written response, and it has limited our own ability to do so.
Overarching Concerns, including Cross-Examination.

Some of the Department’s proposed regulations appear beyond the scope of, if not in conflict with, the Department’s authority under Title IX. A federal civil rights law, Title IX provides that “no person in the United States shall, of the basis of sex, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” The Department does not explain how some of its proposed regulations—such as mandating a specific hearing process that includes cross-examination of parties and witnesses, precluding other long-standing and robust means of investigating and resolving sexual harassment complaints, and limiting colleges’ and universities’ ability to provide broader protections to its students—fall within its regulatory authority under Title IX. These provisions do not reasonably promote Title IX’s equitable goal of eradicating sex discrimination.

The proposed regulations also conflict with state law in many regards, and unnecessarily and inexplicably usurp states’ rights to regulate health, education, and public safety. For instance, in California, where Pitzer College is located, colleges and universities define sexual assault more broadly than the narrow Clery Act criminal law definition of sexual assault proposed in the NPRM. California also requires use of the preponderance of the evidence standard for resolution of sex discrimination complaints. We urge the Department not to issue and implement regulations that conflict with broader state law protections against sexual harassment and other forms of sex discrimination.

For more than forty years since Title IX’s passage, and in keeping with Title IX’s purpose, the Department’s regulations and guidance have been centered around the core Title IX obligations upon educational institutions to stop discrimination, prevent its recurrence, and remedy its effects. OCR’s 1997 Guidance, and the 2001 Revised Guidance, each of which considered and incorporated public comment, comprehensively addressed specific aspects of an institution’s obligation to recognize and effectively respond to sexual harassment in an equitable manner. Both the 1997 Guidance and 2001 Revised Guidance were grounded in the reality that sex discrimination, including sexual harassment, remains prevalent in educational settings and is a barrier to education, while still recognizing that an equitable process requires basic fairness and procedural protections for all parties. The current NPRM departs from this precedent by

3 Sexual Harassment Guidance: Harassment Of Students By School Employees, Other Students, Or Third Parties.

4 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties.

5 Countless other public comments have thoroughly outlined the prevalence of sexual assault and other forms of sexual harassment, and statistics are readily available online from the DOJ, CDC, and other reputable sources. Pitzer’s internal campus climate surveys in 2015 and 2018 reflect similar results and confirm that sexual assault and other forms of sexual harassment unfortunately still negatively affect our students’ learning environment and access to education.
narrowing the scope of institutional obligations, curtailing institutions’ ability to address sex discrimination outside of the Department’s narrow parameters, and prioritizing formalistic legal requirements over an equitable, neutral, and fair process for all parties.

The proposed regulations also conflate the educational mission, as well as Title IX’s goal of eradicating sex discrimination, with criminal justice concepts. Due process is a protection from government action and overreach, embedded in the 5th Amendment and made applicable to the states through the 14th Amendment. Substantive and procedural due process rights for those accused of a crime originate in these amendments and the courts. In a private educational setting such as Pitzer’s, students have a right to a fair process, not to additional process protections that govern state actions. This right to a fair process includes a right to notice and the opportunity to provide evidence. But live cross-examination at a hearing, by an advisor or otherwise, is antithetical to best practices, the educational mission, student conduct processes, and decades of jurisprudence in both Title IX and Title VII matters.

Importantly, Title IX already requires equitable procedures. In 1975, the Office for Civil Rights issued regulations that required schools to adopt and publish grievance procedures that provide for “prompt and equitable” resolution of complaints. Ensuring adequate, reliable, and impartial investigations of complaints, including the opportunity to present witnesses and other witnesses, has long been a core requirement of any Title IX process, as outlined and developed both through longstanding case law and the 2001 Revised Guidance. The 2001 Revised Guidance also explicitly notes that “[t]he rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding.”

Instead of setting the floor for institutions’ minimum obligations, the proposed regulations impose a ceiling that will significantly curtail institutions’ ability to effectively address and prevent sex discrimination, including sexual harassment. This is inconsistent with Title IX’s purpose and goal of eradicating sex discrimination in educational programs and activities that receive federal funds.

The Impetus Behind the Proposed Regulations is Misplaced.

In June 2017, the Department requested input and public comment on Executive Order 13777, which created a federal policy to “alleviate unnecessary regulatory burdens.” The day after the close of the 90-day public comment period (June 22 – September 21, 2017), Secretary of Education Betsy DeVos rescinded the 2011 Dear Colleague Letter (2011 DCL) and characterized it as a “failed system.” As outlined in the recent article “Widely Welcomed and Supported by

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6 34 C.F.R. 106.8(b).

7 See 2001 Guidance, Section IX. Prompt and Equitable Grievance Procedures.

8 Id., Section X. Due Process Rights of the Accused.
the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education’s Executive Order 13777 Comment Call,” however, out of the 12,035 comments addressing Title IX, 99 percent supported Title IX, with 97 percent specifically urging the Department to uphold the 2011 DCL.⁹ In contrast, one percent (n: 137) of the comments opposed prior Title IX regulations and guidance. Of these comments opposing then-existing OCR guidance, 44.5% of the comments were anonymous.¹⁰

Against this backdrop of broad public support for the 2011 DCL, the Department’s departure from this guidance is inconsistent with its claim that it was a “failed system.”¹¹ While numbers alone do not matter, as summarized in “Widely Welcomed and Supported,” the public comments submitted at the Department’s invitation last year demonstrate significant and well-reasoned substantive support for this prior Guidance.¹²

The Proposed Narrowed Definition of Sexual Harassment Is Inconsistent with Title IX’s History and Purpose.

Proposed Section 34 CFR 106.44(e)(1) narrows the definitions of sexual harassment outlined in the 1997 and 2001 Guidance, restricts colleges from utilizing a broader definition consistent with EEOC guidance and long-standing legal precedent, and creates a conflict between Title VII and Title IX requirements the govern staff and faculty sex discrimination complaints. Pitzer

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¹⁰ Id.
¹¹ This characterization also relied heavily on anecdotal and sometimes inaccurate information about Title IX and other applicable law. See, e.g., Schneider, Scott D., “What DeVos Got Wrong in Her Speech on the ‘Dear Colleague’ Letter,” The Chronicle of Higher Education (September 11, 2017).
¹² The Department’s own citations also illustrate that expressions of support for key provisions of the 2011 DCL, including the preponderance of the evidence standard, numerically and substantively outweigh opposition to the prior Guidance. For instance, the Department repeatedly cites to the “Open Letter From Members Of The Penn Law School Faculty,” and, even though the number of signatories is not listed in the letter itself, the Department refers to it as a “statement of 16 members” (out of 68 full-time faculty members listed on the law school’s website, excluding adjunct professors, clinical law professors, visiting scholars, etc.). The Department also cites to “28 members of the Harvard Law School faculty” who opposed Harvard’s 2014 Sexual Harassment Policy (out of the 131 full-time law school faculty members listed on Harvard Law School’s website). In contrast, the Department characterizes the 110 law professors who signed TITLE IX AND THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER as “dozens.” If the Department relies, as it seems to at least in part, on the 44 Harvard and Penn law professors to support its representation that the 2011 Guidance led to a “failed system,” far more, including the 110 law school faculty members (including from Harvard), have disagreed.
urges the Department to abandon this proposed definition and maintain, or broaden, the
definition of sexual harassment outlined in the 2001 Guidance.  

The proposed rule would require colleges to dismiss complaints of sexual harassment that do not outline conduct so “severe, pervasive, and objectively offensive that it effectively denies a person equal access” to the school’s education program or activity. The Department’s proposed definition incorporates the legal standard used by courts since the late 1990s for determining whether an institution may be liable for monetary damages in a private cause of action. Pitzer instead urges the Department to maintain the definition it has used for the better part of two decades to enforce students’ civil rights by ensuring that schools provide a safe environment where students can learn.

Notably, in the 2001 revised guidance, the Department rejected the very definition it now seeks to adopt by regulation. The Department determined that the more restrictive standard that governs institutional liability for civil damages was not the appropriate standard for administrative enforcement of Title IX. There is no reasonable justification for conflating these two different concepts -- civil liability for failure to respond versus an educational institution’s obligation to stop, prevent, and remedy sexual harassment before it deprives students from educational access – twenty years later.

The Supreme Court itself distinguished between “defin[ing] the scope of behavior that Title IX proscribes” and limiting the circumstances where a school’s failure to respond to harassment will support a claim for monetary damages 14. The Department should continue the distinction and preserve the definition of sexual harassment outlined in the 2001 Revised Guidance.

The Clery Act Criminal-Law Based Definition of Sexual Assault is Not an Appropriate Definition for Title IX-Based Sex Discrimination and Harassment Policies.

The NPRM imports the Clery Act definition of sexual assault, which itself is based on the federal criminal law definition of sexual assault that falls under the FBI’s jurisdiction. Criminal law definitions do not translate to effective college policies. Colleges and universities address sexual assault not as a criminal offense, but because sexual assault is a form of sexual

13 The 2001 Guidance does not address sex-based discrimination that is not sexual in nature, such as gender-based harassment and sex stereotyping. California provides broader protection against these and other forms of sex discrimination for our students, staff, and faculty; federal jurisprudence also recognizes these protections. If any regulations are enacted, Pitzer urges the Department to institute broader, not narrower, protections consistent with Title IX.

harassment that deprives students of a safe learning environment. The definitions and standards are distinct, and should remain so.

The NPRM’s narrower, criminal-law based definition of sexual assault also conflicts with many broader state laws, including California and other states that require clear, affirmative consent to sexual activity. Pitzer urges the Department not to adopt the NPRM’s narrower, criminal-law definition of sexual assault that usurps state authority and is inconsistent with Title IX’s goal of eradicating sex discrimination.

Prescribing a School’s Ability to Respond to Sexual Harassment and Assault Will Deprive More Students of a Safe Learning Environment.

Pitzer also opposes proposed rules §§ 106.30 and 106.45(b)(3), which would prohibit schools from investigating and addressing complaints of off-campus or online sexual harassment (including sexual assault) unless the conduct occurs within a school-sponsored program or activity. As a small liberal arts college, Pitzer has approximately 1,000 students, the vast majority of whom live on campus. Our students generally socialize and interact daily, even if they live in off-campus housing. If one student sexually assaulted a classmate while at a party, whether we could investigate (and potentially impose a sanction) would turn on whether the assault occurred on campus. This is inconsistent with Title IX’s statutory language, which does not depend on the location of an assault, but rather prohibits discrimination that negatively affects students’ ability to participate in or access their education.

At Pitzer, where our students also interact and socialize daily with undergraduate students from four other independent colleges that comprise our Consortium, this requirement will create even greater inequitable disparities. Three of our member Consortium undergraduate schools are immediately adjacent to Pitzer; we share our NCAA Division III athletic program with the fourth. Under the NPRM, if a student from another Consortium college commits a sexual assault against Consortium student at a non-sanctioned party, whether the alleged assailant’s college can investigate and potentially impose a sanction could depend on whether the party occurred on their own campus. If it didn’t, the college could not investigate, even if both students are enrolled in the same class at another Consortium institution. This is at odds with Title IX’s goal of ensuring equal access to education and would result in widespread confusion over when a complaint can (or cannot) be investigated. Students are also likely to distrust a grievance process that will seem random, if not Kafkaesque.

Other Concerns.

As noted, the Department should provide stakeholders with more than 60 days to provide public comment on these sweeping changes, which in several, material ways were not foreshadowed by the 2017 Guidance or even the “leaked” draft of the regulations in late August. There are several other provisions that are of concern, including:

- requiring a reporting party to sign a formal complaint, rather than allowing institutions to undertake a responsible assessment of the information and respond appropriately to stop and prevent recurrence of sexual harassment even in the absence of a “formal” complaint;
- limiting an institution’s responsibility to effectively respond to institutional notice of sexual harassment unless a complaint is made to the correct person or people;
- requiring that the Title IX Coordinator serve as complainant if there are multiple reports of sexual harassment against the same person, regardless of whether there is sufficient information to substantiate the claims (including witnesses willing to testify and be cross-examined), and regardless of the potential safety risk to or impact upon the reported victims of the harassment;\footnote{Requiring the Title IX Coordinator to serve as the complainant in any context is concerning, and at odds with the Title IX Coordinator’s obligation to ensure a fair, impartial, and equitable investigation and resolution process.}
- potentially proscribing the standard of proof that may be used, rather than utilizing the preponderance of the evidence standard that applies to all other forms of prohibited discrimination. The preponderance of the evidence standard is the only standard that ensures that there is no presumption in favor of, or against, either party. It has been reliably used in civil litigation for centuries as a means of resolving disputed cases, and in the absence of contractual agreements to the contrary, it also is the standard used for employee grievance procedures even when such procedures may result in termination.
- prohibitive costs, including: to rewrite grievance policies in order to implement these changes; to retrain hearing panels, investigators, and others involved in the grievance process; to hire “advocates” to conduct cross-examination; and to train investigators and adjudicators on cross-examination, as well as on how to effectively maintain control of the hearing process in the absence of judicial officers.
- mandating an untested model of decision-making in sexual assault cases, where institutions will be required to permit attorneys to conduct virtually unfettered cross-examination without rules of evidence or a judge to enforce them.
- creates greater protections of students accused of sexual assault than has been provided for employees, whose jobs are at stake, for more than two decades.

\textbf{Conclusion.}

Under Title IX, recipient institutions have the obligation to end discrimination (primary prevention), prevent its recurrence (secondary prevention), and remedy its effects (tertiary prevention). These comprehensive and holistic obligations stem from Title IX’s equitable requirement to ensure an educational environment free from sex discrimination, including sexual harassment. The NPRM is a legally formalistic and prescriptive approach to Title IX that is at odds with Title IX’s forty-five year history as a civil rights statute whose purpose is to eradicate sex discrimination in education, and which has always required a fair, equitable,\footnote{This could preclude some victims from ever being able to make their own report and complaint. It would be unfair to respondents to potentially twice face an investigation for the same charge – even if the first “investigation” was in name only due to the lack of participation from the alleged victim at the time the Title IX Coordinator was required to file a complaint. But it is also fundamentally unfair to unilaterally deprive a victim of the ability to file their own complaint just because they were not immediately ready to participate in an investigation and cross-examination.}
neutral response to best ensure the rights of all parties. Training and education is imperative for a fair, neutral and equitable process, and neither party's rights should be promoted at the expense of the rights of the other party. We urge you not to adopt the proposed regulatory amendments.

Sincerely,

[Signature]

Corinne M. Vorenkamp