January 28, 2019

Submitted via www.regulations.gov

Kenneth L. Marcus
Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Docket No. ED-2018-OCR-0064, RIN 1870–AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Mr. Marcus:

The Campus Subcommittee of the Oregon Attorney General’s Sexual Assault Task Force are writing to provide comments on several aspects of the proposed rules relating to sexual harassment as published in the Federal Register on November 29, 2018.

The Campus Subcommittee is 1 of 8 subcommittees that serve as an advisory body to the Oregon Attorney General’s Sexual Assault Task Force (SATF), a private, non-profit, non-governmental statewide agency. Professionals from 14 institutions across the state currently serve on the Campus Subcommittee, including several different 4-year public and private universities as well as community colleges. These professionals represent a variety of roles on campuses including Title IX Coordinators, campus-based advocates, preventionists, attorneys, Deans of Students, counselors, medical professionals including Sexual Assault Nurse Examiners, and student conduct professionals. The mission of SATF is to facilitate and support a collaborative, survivor-centered approach to the prevention of and response to sexual violence.

For nearly two decades, SATF has provided training and technical assistance to professionals across Oregon who work to prevent and respond to sexual violence in the medical field, in the criminal justice system, as preventionists, in the K-12 education system, on college campuses, as advocates, and as sex offender treatment professionals.

The Campus Subcommittee of SATF works to promote best-practices related to sexual violence prevention and response on college campuses with the goal of promoting the safety and success of all students as they seek to attain their educational goals.
The Campus Subcommittee provides comment and suggests changes on the following provisions of the proposed rules, with further elaboration below:

- The proposed definition of harassment is insufficient; we suggest that it be amended to reflect all sexual harassment that has been shown to negatively impact students, staff, and faculty (34 CFR Part 106.30).
- Limiting a recipient’s required response to only reported incidents that occurred within the recipient’s educational program will not be sufficient to address all incidents that impact the educational access of students, faculty, and staff (34 CFR Part 106.44(a)).
- We appreciate the acknowledgement of the importance of supportive measures, and suggest allowing the Title IX Coordinator or Coordinator’s designee to implement supportive measure so that campus-based advocates may be utilized in line with research, best practice, and state and national laws (34 CFR Part 106.44(b)(3)).
- The requirement of live cross-examination in higher education settings creates an inequitable and unethical process for participating parties. We ask that the requirement be removed from the rules (34 CFR Part 104.45(2)(vii)).
- We suggest that the rules be amended to explicitly require school’s grievance procedures prohibit retaliation against all involved parties.

**Definition of Sexual Harassment**

The definition of harassment (34 CFR Part 106.30, Definitions, p. 61496 in the Federal Register) in the proposed rule is insufficient. As defined, schools would not be required to investigate many forms of sexual harassment that we know severely impact the educational experiences of students, including technology-facilitated sexual violence (such as harassment through social media or via text message), verbal sexual harassment, and dating violence. For example, technology-facilitated sexual violence (such as harassment on social media or distributing intimate images) is increasingly common, especially in teen and young adult populations, and can result in trauma or other negative psychological, academic, or social effects. As professionals currently working in the field, we have seen many students in Oregon suffer severe impacts to their educational access after experiencing these kinds of harassment.

Additionally, with the proposed regulations setting the standard as “severe, pervasive, and objectively offensive” it is not clear what would constitute sexual harassment outside of a sexual assault. For example, we have seen in Oregon that many students, particularly graduate students, experience sexual harassment by a professor making sexual advances or unwelcome sexual comments that impact their education, and the students withdraw from their graduate programs in lieu of enduring the sexual advances. Can you please clarify what conduct would fall under this standard and please provide examples?

We suggest that the Department define sexual harassment as “unwelcome conduct of a sexual nature” and bring the definition in line with those used by the U.S. Equal Employment Opportunity Commission (EEOC) and other federal agencies. We also suggest that the definition include other forms of gender-based violence, specifically stalking and relationship

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violence (i.e. domestic and/or dating violence). Adding these additional forms of gender-based violence would make the regulations consistent with the VAWA Amendments to Clery (formerly known as the Campus Sexual Violence Elimination Act) of 2013.

**Scope of Required Response (Location of Incident)**
The proposed regulation which only require schools to respond under Title IX to harassment that occurs within the narrow definition of the educational program is not sufficient to address all sex discrimination that impacts educational access of students, faculty, and staff (34 CFR Part 106.45(b)(3). *Investigations of a formal complaint*, p. 61498 in the Federal Register; further clarified on p. 61468).

Many students and employees we have worked with on campuses across Oregon have experienced sexual harassment off-campus or outside of the school’s educational program (such as at an off-campus apartment, while traveling with friends from their university, or at a casual happy-hour gathering with colleagues) that nonetheless severely impacted their educational access. For example, a graduate teaching assistant (TA) who experiences repeated sexual harassment by a fellow TA during off-campus social gatherings would no longer have recourse under Title IX, and could be faced with an immense financial impact to their education if they were forced to leave their TA position to avoid their harasser. As another example, a student assaulted in an off-campus apartment may still experience educational consequences if they are then forced to attend class with the person who assaulted them. Many students (graduate and undergraduate) go on academic or service trips as part of their graduation requirements, including some requirements involving international trips; we also know that many students can experience harassment or assault by a staff or faculty member on such trips. Under the regulations as proposed, none of these students would have any federal civil rights protections under Title IX despite the fact that sex discrimination has severely impacted their education.

We know that many students experience ongoing and severe educational impacts due to harassment and violence, whether or not it occurs on-campus or at a school-sponsored activity. These include academic impacts such as decreased ability to study and retain information, increased academic stress, and decreased ability to finish school - all of which can last for months or years after an incident occurs. Students can also experience a variety of psychological, emotional, and social consequences such as social isolation, negative impacts on their mental health, disordered eating habits, increased stress and anxiety, and post-traumatic stress disorder. Likewise, friends and peers of students who experience harassment and violence can be impacted psychologically, emotionally, socially, and academically, all of which can inhibit educational access for the wider campus community regardless of the physical location or environment of the violence.

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3 34 CFR Part 668
We suggest that the Department amend the regulations to require grievance procedures apply to all reported incidents of sexual harassment where either the reporting party (i.e. complainant) or responding party (i.e. respondent) is under the purview of the recipient. When only the reporting party is under the purview of the institution, the institution should be required to offer supportive measures to ensure that the reporting party’s educational access is not hindered. When only the responding party is under the purview of the institution, the institution should be required to conduct an investigation and respond to the best of their ability in order to prevent the conduct from recurring. We also believe that the scope of the regulations should include programs overseas when the University is sponsoring the program, the University’s faculty members and staff are abroad as the instructors or chaperones with the students, and/or only that particular university’s students are on the program.

Supportive Measures
We appreciate the inclusion of required supportive measures in the proposed rules (34 CFR Part 106.30, Definitions, pp. 61496-61497 in the Federal Register), and suggest one revision. The Campus Subcommittee has found that many survivors on campuses across Oregon, regardless of whether they choose to pursue the formal complaint process, are in need of supportive measures to ensure their ability to safety access their education. We support the Department continuing to affirm the rights of students, faculty, and staff to receive supportive measures regardless of whether they file a formal report or choose to undergo the investigation process, and ask that this provision continue to be included in the final draft of the rules.

However, we suggest revising the provision that currently states that “the Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures” (p. 61497 in the Federal Register) to clarify that the Title IX Coordinator or the Coordinator’s designee coordinate the implementation of supportive measures. This will allow campus-based advocates or others coordinating student support measures on campuses to implement supportive measures for a reporting student (i.e., a complainant). Various studies and best practice documents have established the importance of confidential and private support resources for survivors, with emphasis on the important role advocates play in the healing and support process. Recognizing this as a best practice, the State of Oregon has codified into law advocate privilege, allowing campus-based advocates to hold privilege as well as confidentiality when working as qualified advocates with survivors (ORS 40.264 Rule 507-1).

Campus-based advocates play a key role in helping student survivors regain full access to their education; indeed, SATF’s own data collection has found that schools with privileged advocates received more reports (both formal reports made to the Title IX Coordinator, and confidential reports made to a campus-based privileged advocate which resulted in supportive measures similar to those outlined in the proposed rules) in the year following their hiring of a privileged campus advocate. In recognition of the vital role that advocates play, the difficulties this will create for Oregon and other states that have laws recognizing campus-based advocate privilege, and in anticipation that some students who experience violence may not wish to file a formal

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report and may instead wish to work with a confidential advocate to receive supportive measures, we ask that the Department consider this revision.

**Live Cross-Examination Mandate for Institutions of Higher Education**

We do not believe that the requirements of live cross-examination for institutions of higher education are in line with equitable, student-centered, and ethical processes for reports of sexual harassment (34 CFR Part 106.45(b)(3)(vii), *Investigations of a formal complaint*, p. 61498 in the Federal Register). The harm and trauma that results from subjecting survivors to live cross-examination creates an inequitable and unethical process for reporting students. Research has demonstrated that many survivors experience additional trauma following an assault when they are exposed to invasive, unnecessary, and victim-blaming questioning. We also believe that once survivors are made aware they will have to undergo live cross-examination once they report, this will result in a chilling effect on help-seeking and reporting.

While we agree with the Department’s assertion that it is not appropriate for reporting and responding parties to directly question each other, we disagree that utilizing an advisor of choice will effectively mitigate the trauma of live cross-examination. The use of an advisor of choice to administer cross-examination may even compound instead of mitigating the trauma of the experience; for example, one party could choose as their advisor a friend whom they know has embarrassing information about the other party as a tactic to embarrass and intimidate the party being cross-examined. A survivor being cross-examined by an advisor of choice who is a staff or faculty member of the university could also lead to institutional trauma, severely impacting the survivor’s future engagement in their education.

The Title IX process should strive to minimize retraumatization, which in turn will create a more fair and equitable process for all parties, and not to unfairly subject one party to retraumatization when other options are available. It is possible to achieve a thorough, equitable, and fair process without requiring live cross-examination. In fact, many schools in Oregon already engage in these practices. Many schools, regardless of whether they hold a live hearing, allow reporting and responding parties to submit questions after reviewing interviews and evidence, and will then utilize an investigator or the chair of the conduct committee to ask all questions as relevant. We suggest that the requirement of live cross-examination be stricken from the rules and that instead current best practices with regards to follow-up questions be continued.

**Retaliation**

The proposed rules should be amended to require grievance procedures to include a stipulation that retaliation by any party against any other party involved (including third parties such as witnesses or retaliation by proxy) in a complaint process must be prohibited under a recipient’s grievance procedure. The Campus Subcommittee has heard from a number of schools across the

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state that fear of retaliation impacts a survivor’s decision about whether to report. Current and
former SATF Campus Committee members have also shared numerous examples in which a
reporting student (i.e. complainant), respondent, or witness experienced retaliation during or
after the investigation, further impacting their educational access and wellbeing. This retaliation
can occur both on and off-campus, including via technological means such as harassment
through text messaging or on social media. We ask that the Department amend section 34 CFR
Part 106.45, *Grievance procedures for formal complaints of sexual harassment*, to require
recipients to specifically prohibit retaliation, regardless of location or means, against all parties
involved in a complaint.

Thank you for the opportunity to submit comments. Please do not hesitate to contact Kate
Hildebrandt, Campus Coordinator and Campus Subcommittee Liaison, at kate@oregonsatf.org
to provide further information.

Sincerely,

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