

January 30, 2019

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 Ms. Bull:

Washington University in St. Louis is a leading private research university with a mission focused on teaching, research, patient care and service to society. We enroll over 15,000 undergraduate and graduate students who choose to come here to become their best selves and explore their intellectual passions.

I am writing on behalf of Washington University to respond directly to the proposed regulations. As a member of the Association of American Universities (AAU) and the American Council on Education, we endorse the approach those associations have taken and believe that they have raised many compelling points worthy of the Department's serious consideration. We appreciate the opportunity to share with you some additional thoughts based on our experiences at Washington University. In addition to the general perspective shared immediately below, we also address several specific areas of interest and concern.

The issue of sexual assault, sexual harassment, and relationship violence is one of society's greatest challenges. At Washington University, faculty, staff, and students are all working to better understand this problem and to identify and implement possible solutions. As part of this effort, we are committed to creating an environment that encourages reporting of sexual assault, provides support for complainants and respondents, and ensures a fair and respectful process. We believe, strongly, that meaningful improvement in this area depends upon listening to and learning through the experiences and insights of members of our community. We are confident that the Department of Education (Department) brings that same level of commitment to its rulemaking.

In general, we appreciate the Department's effort to develop guiding principles regarding sexual harassment, sexual assault and relationship violence, and share ACE's observation that certain of the proposed changes will be helpful in addressing this issue. However, we are concerned that the grievance procedure outlined in the Notice of Proposed Rulemaking (NPRM) is unduly prescriptive. Each institution of higher learning is unique and should be given the ability to design a process that best meets the needs of its individual community.

At Washington University, we believe that some components of the proposed rules may reverse the significant progress we have made in consultation with our students and other members of our campus community in designing a model that is thorough, fair to both parties, and trauma informed. We are also concerned that adoption of the NPRM will moot the engaged conversation our community is having on these issues. This possibility is deeply concerning to Washington University.

1. Cross-examination by an advisor

Under the proposed rules, universities would be required to implement a live hearing process that guarantees the ability of each party to cross-examine the other party and any witnesses through an advisor of that party's choice. If a party does not have an advisor, the university would be required to provide that party with an "aligned" advisor. The NPRM indicates that these changes are based on the idea that cross-examination is the best way to assess credibility and determine the truth.

We believe that universities, including Washington University, have worked with their communities to develop grievance procedures that allow decision makers the opportunity to assess fairly the credibility of the parties and witnesses, and to determine the truth without imposing on either party the potentially aggressive and traumatizing experience of cross-examination. We are concerned that the process outlined in the NPRM would be unduly antagonistic and, as a result, would deter students from reporting instances of sexual assault. This, in turn, would preclude any determination of the truth. There are already many social and cultural barriers to reporting (for example, barriers based upon one's ethnic or religious background and fears of being socially ostracized by peers). Requiring cross-examination by parties' advisors in a live hearing will add yet another barrier. Finally, we believe that an overtly adversarial engagement between parties could create unsafe situations for our students by increasing the risk of retaliation, harassment, or other harm.

Washington University has prior experience with a model similar to that outlined in the NPRM. For several years, before issuance of the April 2011 Dear Colleague Letter, Washington University appointed experienced, volunteer staff members to support and advise parties through certain student conduct hearings, including cases of alleged sexual harassment and sexual assault. The staff members were responsible for presenting the evidence and questioning the parties, and witnesses. Hearings conducted under this model were extremely litigious – especially so when parties relied on retained counsel to advise and coach the staff volunteers – and took a heavy emotional toll on complainants, respondents and the volunteer staff members. If universities are required to appoint "aligned advisors" for a party, our experience suggests that universities will face a significant number of internal student appeals and external litigation based upon alleged inequitable or insufficient assistance of their appointed advisor. Student concerns about the equity of representation will be especially acute for those who are cross-examined by experienced legal counsel but are unable to afford the same resource themselves.

We urge the Department to reconsider its position regarding live hearings, cross-examination, and "aligned advisors." Instead, the Department should adopt regulations that permit universities to develop processes that meet the essential requirements of impartiality and fact-based decision making in a manner consistent with their institutional needs and that meet the objective of fair, thorough and equitable consideration of cases.

2. Standard of Evidence

Washington University appreciates the flexibility contained in the NPRM in allowing universities to determine the appropriate standard of evidence for their respective grievance procedures. We intend to continue utilizing the preponderance of the evidence (i.e., more likely than not) standard when determining responsibility for any alleged violation of our student conduct code, including a complaint of sexual

harassment and sexual assault. The preponderance of the evidence standard is also used when a complaint is initiated against a faculty member under the University's Discrimination and Harassment policy. We strongly encourage the Department to maintain this flexibility in a final rule.

3. Impact of NPRM in Employment Context

The Department has specifically requested comment on the application of the proposed regulations in the employment context. Educational institutions are subject to Title VII and corresponding regulations, federal law that already comprehensively addresses sex discrimination and harassment in the workplace. That law sets out a thorough and well-established framework for assessing and ensuring compliance with its mandate. In the employment arena, entities receiving federal funds already have Title VII-compliant policies and procedures in place to address claims of sex discrimination and harassment. Extending the Department's proposed regulations to the employment context would create overlap and confusion and require universities throughout the country to rework policies and adopt new and unduly cumbersome mechanisms. Moreover, because some federal courts have ruled that Title VII preempts Title IX with respect to employment claims, extension of the proposed regulations to employment claims could have the effect of mandating the adoption of policies and procedures that are not legally applicable.

We appreciate the opportunity to comment on the proposed rules. We also are aware that some of our students are preparing to submit comments on their own behalf, and we urge the Department to consider their personal stories. We have been engaging with our students and working closely with them to strengthen our university's response to sexual assault and relationship violence. Their perspective has been powerful, compelling, and insightful. We are certain that the Department can benefit from their input, as well.

Washington University's mission statement expresses a commitment to creating an inclusive community that is welcoming, nurturing and intellectually rigorous. We strive to achieve this by providing an exemplary, respectful and responsive environment for living, teaching, learning and working. We ask that the Department consider modifications to the proposed rules so that we can continue to meet that mission.

Sincerely,



Lori S. White, Ph.D.
Vice Chancellor for Student Affairs
Washington University in St. Louis