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RE: Docket ID ED-2018-OCR-0064-0001

January 30, 2019

Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Ave., SW
Room 6E310
Washington, D.C. 20202

Dear Secretary Devos,

On behalf of the fifteen independent, non-profit institutions of higher education in Connecticut that comprise the Connecticut Conference of Independent Colleges (CCIC), I am writing to express serious concerns about the proposed regulations addressing sexual misconduct under Title IX issued for comment and published in a Notice of Proposed Rulemaking (“NPRM”) in the Federal Register on November 29, 2018.

CCIC member institutions are deeply committed to providing all students, faculty and staff with a safe and healthy educational environment and workplace, free from discrimination based on gender including sexual harassment and other forms of sexual misconduct. They have worked hard for years, with broad input from campus constituencies, to administer processes for addressing allegations of sexual misconduct that are thorough and fair to all, and that are appropriate to the academic context. We are deeply concerned that the legalistic processes required by the proposed rules are inappropriate in an educational setting, and beyond the scope of what is necessary to maintain a fair process in an administrative hearing. These processes, including additional discovery requirements and the requirement that schools permit cross examination through an advisor, would undermine our efforts by discouraging survivors from reporting incidents of harassment and violence.

Albertus Magnus College
Connecticut College
Fairfield University
Goodwin College
Mitchell College
Quinnipiac University
Rensselaer at Hartford
Sacred Heart University
Trinity College
University of Bridgeport
University of Hartford
University of New Haven
University of Saint Joseph
Wesleyan University
Yale University

More specifically, we want to highlight our shared concern about the following issues that are raised in the letter submitted by American Council on Education, dated January 30, 2019:

- The prospect of having to endure cross-examination by an attorney-adviser, without a judge to control the process, will deter the reporting of sexual assaults.
- The requirement that an institution initiate proceedings if it has received two or more complaints against a single individual will deter reports of assault from complainants who fear being drawn involuntarily into a formal process.
- Overbroad discovery requirements will prolong proceedings, create ancillary disputes, and unnecessarily invade the privacy of parties and witnesses.
- The proposed rules create ambiguity regarding the authority of institutions to enforce their own sexual misconduct policies outside the regulated Title IX process.

We also wish to identify and underscore the conflicts between the proposed regulations and existing state law that Connecticut independent institutions of higher education will be forced to address if the proposed regulations go into effect as currently written.

Standard of Evidence: CT Law Requires a Preponderance of the Evidence Standard

The proposed regulations seek to give institutions discretion to determine which standard of evidence may be employed in Title IX proceedings: either the preponderance of the evidence standard or the clear and convincing evidence standard. See Proposed Section CFR 106.45(B)(4)(I) of the NPRM. The proposed regulations further require that institutions may employ the preponderance of the evidence standard only if the institution uses that standard for all conduct code violations that carry penalties as severe as the sanctions for sexual harassment violations. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

The comment letter authored by ACE articulates the challenges that this provision may pose, especially in proceedings related to faculty misconduct, which may be governed by legally binding, negotiated contracts that call for a different evidentiary standard to be used.

In Connecticut, this proposal is particularly problematic as the Connecticut General Statutes (C.G.S.) require that for cases of “sexual assault, stalking and intimate partner violence” the institution “shall use the preponderance of the evidence standard.” See C.G.S. 10a-55m(b)(6). Therefore, Connecticut institutions do not have discretion in choosing an evidentiary standard for these categories of sexual misconduct. It follows that, under the proposed regulation, Connecticut institutions would be required to apply the state-required preponderance standard to all other conduct code violations involving students, staff, and faculty that carry the same maximum penalty. As a result, the proposed regulations would dictate institutional policies for adjudicating allegations of faculty, staff or student code violations in a broad array of academic areas that have no nexus to Title IX and that historically have been reserved to institutional

governance, such as academic integrity, failure to meet professional obligations, and other professional or educational conduct code violations.

Suggested Revision: We recommend that institutions of higher education continue to have the ability to determine whether a different standard of evidence may be used for different types of misconduct.

Sexual Harassment Definition: CT Law Requires an “Affirmative Consent” Standard

The proposed regulations define “sexual harassment” as: 1) an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or 2) 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; or 3) sexual assault as defined in 34 CFR 668.46(a), implementing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).

This definition conflicts with Connecticut law. The Connecticut General Statutes require that in the context of alleged sexual assault, stalking, and intimate partner violence, higher education institutions must use an “affirmative consent” standard to determine whether consent to engage in sexual activity was given by all persons who engaged in the sexual activity. See C.G.S. 10a-55m(b)(1). “Affirmative consent” is defined as: “an active, clear and voluntary agreement by a person to engage in sexual activity with another person.” See C.G.S. 10a-55m(a)(1). Under Connecticut law, this definition is to be used both in investigation and disciplinary procedures and in training and prevention programming and has been used by Connecticut institutions to instill in their communities standards for acceptable conduct. See C.G.S. 10a-55m(c).

We are concerned that the proposed federal definition of sexual harassment may exclude the state-mandated use of affirmative consent in adjudicating complaints of sexual harassment, and particularly complaints of sexual assault. Moreover, since the proposed regulations forbid the use of Title IX procedures when alleged misconduct does not meet the proposed federal definition of sexual harassment, Connecticut institutions could be required to develop two sets of procedures for addressing complaints of sexual assault.

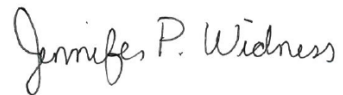
Maintaining two definitions for sexual misconduct that are different and which require specific disciplinary procedures by law – federal and state – will be distinctly disruptive and confusing to the students, faculty and staff at our member institutions. Further, it will upend significant efforts to improve campus culture and educate students about the importance of receiving affirmative consent.

Suggested Revision: We recommend that the Department of Education clarify that states and institutions have discretion in defining consent and applying the definition in training, prevention programming, and both investigative and disciplinary procedures, and that the federal definition

of sexual harassment explicitly allow institutions to incorporate pertinent state law on affirmative consent.

In conclusion, although we recognize that the proposed regulations seek to clarify processes and standards under Title IX, the proposed procedures and standards will not accomplish the statutory mandate of providing students access to education free from gender discrimination. We are deeply concerned that the legalistic process that the proposed rules require will strongly discourage survivors from coming forward and reporting incidents of harassment and violence.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer P. Widness".

Jennifer Widness
President