



THE UNIVERSITY OF NORTH CAROLINA SYSTEM

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The Honorable Betsy DeVos
Secretary, US Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Dear Madam Secretary:

The University of North Carolina (“University” or “UNC”) welcomes the opportunity to provide comments to the Department of Education (“Department”) as part of the Title IX rulemaking process. The University recognizes the benefits of the formal rulemaking process with regard to Title IX, as opposed to continued reliance on informal guidance, and appreciates the clarification provided by the Notice of Proposed Rulemaking (“NPRM”) in several crucial areas. However, the University believes that the provisions of the Department’s proposed rules identified below are not consistent with the objectives of the statute authorizing them and therefore exceed the statutory authority of the Agency to promulgate them.

This overreach by the Department will have wide-ranging, important impacts on the University and the larger higher education community. As detailed below, the University has concerns that the proposed rules will result in overly burdensome interference with university disciplinary policies and practices, which the UNC System and its constituent institutions have thoughtfully developed to align with federal and state law. These comments are intended to highlight greatest shared concerns, but are not exhaustive. The areas and issues of concern addressed here are summarized as follows:

1. Required Advisor (§106.45(b)(3)(iv))

The proposed requirement that an institution provide to a requesting party an advisor who must, pursuant to §106.45(b)(3)(vii), conduct cross-examination during a live hearing, presents several challenges to institutions and appears to expose them to increased potential liability.

2. Compelled Testimony and Live Cross-examination (§106.45(b)(3)(vii))

The proposed rules severely decrease recipients’ discretion in creating a formal adjudicatory process that ensures fairness through equitable due process and is also tailored to meet the unique needs and cultures of the individual institutions. Among the most potentially disruptive aspects of the proposed rules’ prescriptive due process requirements are the provisions related to testimony of parties and witnesses and live cross-examination.

3. Title IX Jurisdiction and Definitions (§106.30)

The requirement that instances of sexual misconduct determined not to meet the proposed rules' more limited definition of "sexual harassment" must be dismissed from the Title IX process, but may be pursued under an institution's student disciplinary code, presents substantial and unnecessary difficulties, as well as puzzling inequities.

4. Standard of Evidence (§106.45(b)(4)(i))

As currently written, the proposed rules will force institutions to either bifurcate their student conduct procedures, adding to student confusion and frustration, administrative burden, and increased exposure to liability; or to adopt a blanket "clear and convincing" standard for all major violations, which would be a fundamental shift in procedure and philosophy and would hamper the ability of the administration to maintain a safe and secure campus environment. This interference with non-Title IX-related disciplinary processes represents executive overreach by the Department.

5. Directed Question #3.

The University offers feedback related to (1) the release of Title IX documents/information to a Complainant (§ 106.45(b)(3)(viii); § 106.45(b)(4)); and § 106.45(b)(3)(ix)), and (2) applying Title IX's due process requirement to employee disciplinary processes (§ 106.45(b)(4)(i); § 106.45(b)(3)(vii); §106.45(b)(3); and § 106.45(b)(3)(iv)).

This letter will proceed by providing an introduction to our institutional framework, expanding on the concerns referenced above and offering some suggestions for consideration, and concluding with some final thoughts.

Introduction

The University of North Carolina is a public, multi-campus university encompassing 16 diverse institutions of higher education and one residential high school. The 16 higher education institutions range from large research institutions to small liberal arts institutions, including five historically black colleges and universities ("HBCUs"). The University system is governed by the Board of Governors, which is statutorily charged with "the general determination, control, supervision, management and governance of all affairs of the constituent institutions."¹ Although authority over student discipline is generally delegated to the chancellors of the individual institutions, the Board of Governors is responsible for promulgating system-wide policies regarding minimum due process standards for student disciplinary proceedings.

With input from the constituent institutions, and in compliance with federal and state law, the Board of Governors and the UNC President have adopted and implemented numerous broad system-wide policies, regulations, and guidelines, setting forth acceptable standards of due process related to the investigation and adjudication of student and employee conduct, including in matters of sexual misconduct. Within this system-wide framework, the individual institutions have diligently enacted and refined their own disciplinary procedures that ensure proper due process and fairness for all parties involved. These existing policies and practices meet, if not exceed, constitutional due process standards,

¹ N.C.G.S §116-11.

and comply with North Carolina law. We believe that UNC's system-wide and institution-specific policies result in efficient, fair, and impartial proceedings.

With regard to student disciplinary matters, the constituent institutions in the UNC System collectively manage thousands of discipline cases each year. It is exceedingly rare for a student discipline matter to result in litigation. Based on a collected sample of more than 540 Title IX matters across 12 UNC institutions, including our two flagship institutions, over the past three academic years, only one resulted in a filed lawsuit. This is a strong indication that the policies and procedures governing student discipline across the UNC system are fair and equitable, and include sufficient due process protections for those involved. The proposed rules would serve to disrupt these processes, adding unnecessary cost and administrative burden on our institutions.

Response to Proposed Rules and Areas of Concern

The University's overarching concern with respect to these proposed rules is that many of their provisions appear to exceed the authority given to the Department by 20 U.S.C. § 1682 to "effectuate the provisions of [Title IX] . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute . . ."² The NPRM states that the Department has the statutory authority to promulgate these rules pursuant to 20 U.S.C. § 1682 because they are designed "to protect all students from discrimination (here, in the form of sexual harassment) that jeopardizes equal access to education." (p. 61465). However, the provisions identified below go well beyond the stated goal of preventing sexual harassment and instead attempt to dictate what specific procedural requirements must be extended to students in order to provide adequate process, many of which exceed the notice and opportunity to respond that is set as the floor by common law jurisprudence. Nothing in Title IX provides the Department of Justice or Department of Education with the authority to regulate the specifics of due process in student disciplinary proceedings in this manner.

The overriding concern expressed by UNC administration officials and stakeholders at the constituent institutions clearly reflects this issue: the university attorneys, Title IX coordinators, and student affairs professionals who provided feedback on these proposed rules noted that several of the proposed requirements will force the University and its constituent institutions to overhaul student conduct policies and procedures that have already been proven to meet due process requirements, both in and apart from the Title IX context, thereby increasing uncertainty, administrative burden, inefficiencies, and costs, as well as creating additional risk of liability. The comments below identify certain provisions in the proposed rules that will, as written, substantially harm University institutions' ability to implement fair and efficient student conduct processes, while doing little to improve compliance with the nondiscriminatory goal of Title IX. These comments also seek clarification in areas where a lack of clarity in the proposed rules would increase the likelihood of legal exposure.

1. Required Advisor (§106.45(b)(3)(iv))

Issue: The provision related to a "required advisor" in §106.45 is unclear as currently written. The proposed rules would constitute a substantial departure from the University's existing practices, and may create unintended or imprudent negative consequences for our students, employees, and institutions.

² Pursuant to 5 U.S.C. § 706(2)(C), agency regulations will be held unlawful and set aside when they are "in excess of statutory jurisdiction, authority, or limitations or short of statutory right."

Discussion/Context: Under North Carolina law, in any non-academic student disciplinary proceeding, including those that may result in a suspension or expulsion, the responding student (“respondent”) may, at the student’s request and cost, be accompanied by an attorney or a non-attorney advocate, who must be allowed to fully participate in the proceeding.³ Under system policy, in cases involving student sexual harassment or misconduct, the complaining student (“complainant”) may also elect to have an attorney or non-attorney advocate fully participate in the proceedings on his/her behalf. Importantly, though, the constituent institutions are not required to provide an advisor or advocate to either party in any situation, and the state statute explicitly states that the advocates shall not be obtained at public expense. In addition, the advocates may fully participate only to the same extent that the student would be able to participate. UNC system-wide policy does not mandate live cross-examination, and most of the constituent institutions allow only indirect cross-examination.

The proposed requirement that an institution provide to a requesting party an advisor who must, pursuant to §106.45(b)(3)(vii), conduct cross-examination during a live hearing, presents several challenges to institutions and appears to expose them to increased potential liability. As proposed, the rule is vague and leaves open the following critical questions:

- If an unrepresented party requests that the institution provide an advisor, is the institution required to provide an advisor of equivalent skill and/or training as the other party’s advisor?
- If an institution provides an advisor to the respondent, and the advisor is an employee of the institution or is paid by the institution, how does the advisor avoid having a conflict of interest when advocating for the party against whom the institution has brought a disciplinary charge?
- Is an institution required to pay for the advisor’s services? If so, how is independence maintained?
- Would an institution be required to provide training to an advisor who is selected by a party?
- Will the institution face additional liability if the advisor it provides is ineffectual, unsuccessful, or simply performs poorly? Or will the institution be indemnified in such circumstances?
- May a party decline to be represented by an advisor? If so, may cross-examination still occur, as §106.45(b)(3)(vii) currently requires that cross-examination must be conducted by an advisor?
- Can evidence provided by a witness or opposing party be admitted and considered if a party elects not to be represented by an advisor and declines to conduct cross-examination?
- May institutions regulate the conduct of advisors who participate in adjudicatory proceedings, to ensure that they behave ethically and in compliance with appropriate behavioral expectations?

This advisor requirement, coupled with the proposed requirements of compelled testimony and live cross-examination of witnesses (discussed further below), will place an unnecessary burden on

³ N.C.G.S. § 116-40.11.

student discipline processes. It is foreseeable that any party to whom an institution provides an advisor and who receives an unsatisfactory decision will seek damages against the institution for providing an inadequate advisor. This will force institutions to engage experienced attorneys to serve as advisors, at substantial cost, while doing little to ensure a more equitable hearing process.

Recommendation: We request that the proposed rule be amended to address the questions stated above. We also recommend that the requirement that cross-examination be conducted by an advisor be removed from the proposed rules.

Compelled Testimony and Live Cross-Examination (§106.45(b)(3)(vii))

Issue: The overly burdensome due process requirements contemplated by the proposed rules may have the unintended consequence of more complainants inappropriately opting for an informal resolution, or institutions inappropriately directing cases through the less burdensome, less costly, and less risky informal resolution process, particularly in situations in which witness participation is not guaranteed. Many complainants may forego pursuing their claims at all in order to avoid going through the hearing process. Our institutions have a diversity of experience in conducting Title IX hearings and have developed reliable, financially responsible solutions for accommodating indirect, yet effective, cross-examination, enabling decision-makers to make necessary credibility determinations while protecting the rights and interests of both the complainant and respondent.

Discussion/Context:

Impact of not participating in a live hearing. Section 106.45(b)(3)(vii) proposes that a Title IX decision-maker must not consider any statement of a party or witness in reaching a determination unless the party or witness submits to live cross-examination. This will result in potentially persuasive or dispositive evidence being disallowed if a witness or party does not appear at the hearing or does not choose to answer questions. UNC institutions do not possess subpoena power and cannot compel student or employee participation in disciplinary hearings. Faced with the prospect of potentially having to exclude relevant evidence from Title IX adjudications, institutions would be incented to make full cooperation in Title IX cases, including giving live testimony, an explicit condition of employment or continued enrollment. Students and employees would face disciplinary sanctions for a newly created violation of declining to participate in a disciplinary hearing. This will have a chilling effect on parties naming witnesses for fear of entangling fellow classmates or colleagues in a process that will result in either forced participation in a hearing and submission to cross-examination, or a disciplinary sanction. Even the prospect of sanctions may not be a comprehensive solution, as students and employees may elect to withdraw or resign rather than participate in a hearing, and some other potential witnesses may not be affiliated with an institution and subject to its jurisdiction.

The proposed cross-examination requirements will also serve as a major obstacle for complaints initiated by an institution's Title IX Coordinator after receiving numerous reports about the same individual (§106.44(b)(2)), and may hinder the ability of institutions to provide a safe campus community. Presumably, these types of complaints will be filed only when the complainant or complainants express reluctance or refuse to file their own formal Title IX complaints. It is very likely that those complainants will not voluntarily participate in a hearing where they would be required to submit to live cross-examination. Under the proposed rule, if a party or witnesses do not participate in the live hearing and submit to cross-examination, then the decision-maker is prohibited from

considering their statements. This would make it extremely difficult, if not impossible, for a Title IX coordinator to present sufficient evidence to support a charge against a respondent, despite numerous reports naming that individual. This will severely curtail an institution's ability to provide a safe and secure campus community.

Cross-examination only by advisors. Further, requiring live cross-examination to be conducted only by advisors will lengthen the time required for resolution of complaints to accommodate schedules and potential rescheduling of parties and witnesses. Given the academic calendar and the interest in promptly processing student discipline matters so that students can continue with their studies free from the stress of pending cases, this type of delay will be harmful to the campus community and discourage the reporting of complaints.

Prescriptions for technology-aided testimony and document review. The proposed rules' prescriptions for technology-aided testimony and document review will likely prove more costly and less reliable than our institutions' existing methods. Many UNC institutions do not have the technology necessary to implement the proposed rules' requirements, and do not have the funds necessary to purchase such technology and train personnel to use it.

Cost of expanded cross-examination. The cost of prescriptively expanded cross-examination will also be reflected in additional training for hearing officers and panels. Typically, hearing officers are not attorneys and do not have the formal legal training necessary to effectively oversee active cross-examination, conducted by advisors who may often be well-trained attorneys. In addition to substantial training costs, these heightened procedural requirements will increase the potential legal exposure for institutions' good faith attempts at compliance.

Recommendation: The implementation of indirect cross-examination in student discipline hearings has proven successful across the UNC system. Both the claimant and the respondent are afforded the same opportunities to ask questions through the decision-maker presiding over the hearing, allowing the decision-maker to make credibility determinations while avoiding any re-traumatization of the claimant. In addition, this method prevents one party from having an advantage over the other due to the litigation training and skills of his or her advocate. Increasing the legalistic, litigious nature of student discipline hearings in the Title IX context will chill reporting of sexual harassment, benefit parties with the means to engage trained attorneys, and do little to improve the ability of decision-makers to make credibility determinations. We recommend that recipients be allowed to conduct limited or indirect cross-examination in Title IX disciplinary hearings.

Title IX Jurisdiction and Definitions (§106.30)

Issue: Broadly, the University is in favor of the proposed rules' definitional changes that would reduce administrative burden and exposure to potential liability under Title IX; however, the University recommends that the Department review its proposal to limit application of Title IX to "a person in the United States" and requirement that recipients "must dismiss" formal complaints that would not constitute sexual harassment under the proposed definitions of §106.30.

Discussion/Context: UNC appreciates a number of definitional changes proposed in the proposed rules, including adopting a "deliberate indifference" standard for initiating an OCR

investigation (§106.44(a)), and applying “actual knowledge” as the threshold for an institution’s notice (§106.30) of sexual harassment or allegations of sexual harassment. UNC also appreciates the proposed rules’ acknowledgment that instances of sexual misconduct that may not meet the proposed rules’ more limited definition of “sexual harassment” may be pursued under an institution’s student disciplinary code, free from the administrative and procedural requirements of cases falling under Title IX.

However, the creation of two processes presents substantial and unnecessary difficulties, as well as puzzling inequities. For instance, the proposed rules state that only incidents occurring “in an education program or activity of the recipient against *a person in the United States*” (emphasis added) fall under Title IX. This appears to mean that a complainant alleging sexual harassment while on campus in the United States will be categorized as a Title IX case, while a complainant alleging the exact same harassment while off campus in a non-University program or activity or studying abroad even in a University-sponsored program would not. These two complainants, therefore, and their respective respondents, as well as the witnesses in each case, would be treated very differently, due solely to where the incident took place. In addition, the bifurcation of the student discipline process will require recipients to make a threshold determination, before an investigation is initiated, as to whether a complaint meets the more limited definition of “sexual harassment” which would require that the complaint be processed under the Title IX requirements. Complainants who have experienced sexual harassment but may not wish to go through a hearing and be subjected to live cross-examination may downplay their complaint to avoid the burdensome Title IX process. Conversely, respondents may seek to have the charges against them defined as “sexual harassment,” to force adjudication through the Title IX process.

Recommendation: The University recommends that the Department consider the unintended consequences of such limitations in the jurisdiction of Title IX. While the proposed rules limit the scope of Title IX’s application in matters of sexual misconduct, the proposed jurisdictional definitions are overly prescriptive. The proposed rules should allow discretion for recipients to determine the appropriate means of investigation and adjudication of student disciplinary issues. Requiring recipients to make a determination of whether an incident of sexual misconduct qualifies for the additional procedural requirements under Title IX exposes recipients to potential liability to parties unsatisfied with the determination.

Standard of Evidence (§106.45(b)(4)(i))

Issue: Although the proposed rules appear to provide recipients with flexibility in choosing a standard of evidence in Title IX cases, it requires that recipients must “apply the same standard of evidence for complaints against students as they do for complaints against employees.” This will be administratively burdensome.

Discussion/Context: Under UNC policy, faculty disciplinary matters that might result in demotion, suspension, or termination, including matters of sexual harassment, are determined under a “clear and convincing” standard. Accordingly, under the proposed rules and absent any change in policy regarding faculty discipline (which is unlikely to occur), institutions will be forced to adopt the “clear and convincing” standard in all Title IX cases. Our institutions have found that “preponderance of evidence” is the appropriate standard for many student conduct adjudications, even those that may result in suspension or expulsion. However, it would be confusing and inequitable to have two different

standards of proof for offenses that could result in suspension or expulsion simply because one involved sexual harassment and the other did not, and even more problematic in cases of sexual misconduct that does not meet the Title IX definition of “sexual harassment.” Therefore, the Department’s statement that the proposed rules “recognize that recipients should be able to choose a standard of proof that is appropriate for investigating and adjudicating complaints of sex discrimination given the unique needs of their community” is illusory. In actuality, the proposed rules will force UNC institutions to either operate two student conduct procedures with different standards of evidence, adding to student confusion and frustration, administrative burden, and increased exposure to liability; or to adopt a blanket “clear and convincing” standard for all major violations, which would be a fundamental shift in procedure and philosophy and would hamper the ability of the administration to maintain a safe and secure campus environment. This interference with non-Title IX-related disciplinary processes represents executive overreach on the part of the Department.

Recommendation: If the Department truly seeks to provide recipients with flexibility in designing Title IX adjudication process, it should to allow recipients to choose an evidentiary standard for Title IX matters that is tailored to the institution’s community and/or cultural standards. Alternatively, the proposed rule should allow for different standards of proof for student disciplinary processes and employee disciplinary processes. Student disciplinary processes and employee disciplinary processes serve different purposes and are designed to protect the rights of two different populations with legally distinct relationships with the university. It would not be inappropriate for the two processes to have different standards of evidence.

Directed Question 3. Applicability of the rule to employees. “The Department seeks the public’s perspective on whether there are any parts of the proposed rule that will prove unworkable in the context of sexual harassment by employees, and whether there are any unique circumstances that apply to processes involving employees that the Department should consider.”

Release of Title IX Documents/Information to a Complainant (§ 106.45(b)(3)(viii); § 106.45(b)(4)); and § 106.45(b)(3)(ix)

Under North Carolina law, state employee personnel files are generally confidential and, with limited exceptions, cannot be disclosed. Importantly, there is no exception that would allow the release of a Title IX investigation report to a complainant, as required by proposed regulation § 106.45(b)(3)(viii), when the respondent is an employee; or the release of a written determination regarding responsibility to the complainant, as required by proposed regulation § 106.45(b)(4), when the respondent is an employee; or that would permit a complainant to view evidence that consisted of confidential personnel information of an employee-respondent, as required by proposed regulation § 106.45(b)(3)(ix).

Applying Title IX’s Due Process Requirement to Employee Disciplinary Processes (§ 106.45(b)(4)(i); § 106.45(b)(3)(vii); § 106.45(b)(3); and § 106.45(b)(3)(iv))

Application of the proposed due process requirements would substantially alter the employee disciplinary processes currently in place. For example, the proposed rules’ prohibition of the single investigator model (106.45(b)(4)(i)) conflicts with current employment policies and practices. In addition, the use of the single investigator model, or other models that do not include live hearings, in employee discipline cases has been affirmed by the Equal Employment Opportunity Commission (EEOC).

Specific requirements such as live cross-examination (106.45(b)(3)(vii)), generally prescribed investigation procedures (106.45(b)(3)), and the presence of an advisor (106.45(b)(3)(iv)) also conflict with current practices.

As noted above, student disciplinary processes and employee disciplinary process are separate and distinct. Even among employees, there are different classes of employees with different rights and protections. In North Carolina, the disciplinary procedures protecting most state employees are governed by state statute. State employees exempt from such statutes are generally either "at will" employees, contract employees, or tenured faculty whose disciplinary procedures are established by the University. Over the years, aggrieved employees have challenged the constitutionality of the due process provisions in state employee disciplinary procedures, and repeatedly, courts have held them to meet constitutional requirements, as well as the federal requirements under Title VII. Overlaying the Title IX requirements as described in the proposed rules on to an already existing, statutorily mandated, and/or constitutionally sufficient disciplinary process is unnecessary and overly burdensome.

Conclusion

The topics mentioned above are not an exhaustive list of our constituent institutions' concerns, but are intended to highlight our institutions' areas of greatest attention. Overall, the University would like to stress the lack of clarity in some key areas of proposed rules, as well as the potential administrative cost and disruption associated with implementing the proposed rules. The University has a record of commitment to effective and equitable resolution of all student and employee disciplinary matters, including those involving sexual misconduct, and continues to advance this objective through our existing policies and practices. The University is hopeful that the Department will take its comments under consideration and provide appropriate amendment or clarification of the proposed rules.

Sincerely,



Thomas C. Shanahan, Senior Vice President and General Counsel