Department of Education
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Comments of Wesleyan University

Notice of Proposed Rulemaking
Office for Civil Rights Department of Education
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

On behalf of Wesleyan University, we strongly urge the Department of Education to reconsider the above-captioned proposed rulemaking. The problem of sexual assault and misconduct remains grossly underreported, insufficiently discussed, and inadequately addressed. There is no better place than our educational system to spearhead change by increasing awareness and facilitating prevention. Students should have access to an educational experience free from victimization. While far from perfect, the existing landscape of required investigative and adjudicative measures has slowly helped educational institutions better address sexual assault and misconduct, and better enable equal access to the full benefits of their education.

Many of the intentions and some of the changes described in the latest proposed rules are admirable. Public comment and the clarity of regulation – as well as equal procedural rights, a presumption of non-responsibility, and opportunities for both sides to participate in such a difficult process – are welcome. That said, we believe that many of the proposed changes (including the narrowed definition of sexual harassment) will not improve campus culture. Rather, they will reduce the number of complaints/reports, unnecessarily complicate and make less predictable what is currently a reasonable system, and create hardships for students.

In the United States, schools are in the difficult position of both educating students and holding community members accountable for behavior that violates internal policy and expectations; this includes serving in an investigative and adjudicative capacity in matters concerning sexual harassment, assault, and misconduct. Schools do this within a framework that involves civil and criminal systems and processes for all involved. If they are to do this well, the requirements of such systems and processes must allow them as much discretion as possible.

While many schools employ live hearings for the adjudication of these complaints, many more have moved away from such proceedings. Wesleyan employed the live hearing model for a significant period of time, until it became clear that the pitfalls associated with that model outweighed its usefulness. While investigations were completed and reports issued prior to the initiation of a hearing, the hearing nonetheless became a springboard for attempts to introduce new evidence, witnesses, and testimony of disputed relevance. The hearing also, at times, embarrassed parties in ways that derailed the process. Hearing panels were left needing legal advice as to evidentiary determinations, recharacterization, and the disregarding of evidence or testimony and dozens of other issues – advice that is the province of experienced attorneys and judges operating in courts where such proceedings often take *years*. For practical and legal reasons, schools need to act more expeditiously in these situations. But they are not a substitute for courts. School employees asked to adjudicate may be well-intentioned, but they lack the legal expertise and the immunity that characterize court proceedings.

We have found that without live hearings, which tend to be adversarial, our investigative and adjudicative approach has been more efficient, resulting in fewer contested outcomes. A trained panel considers information gathered through a full and impartial investigation by certified investigators. That panel reviews evidence deemed relevant and provided in a full and complete investigative report. Parties are allowed to submit questions to be asked of adversaries, *through the panel*, in a way that reasonably protects fundamental fairness rights while not confusing a school disciplinary proceeding with a criminal trial. A new mandate that requires schools to allow parties' attorneys to have access to active participation and conduct cross-examination of adversaries and witnesses – most often undergraduate students – is troubling. Such a requirement leads to a host of complicated substantive and procedural legal complications that schools will be forced to wade through. College administrators, not judges, will be tasked to make legal evidentiary decisions and reign in hostile counsel, on the fly. For these reasons, we believe that a live hearing mandate is a step backwards that will result in a less fair and more contentious process with fewer objective outcomes.

Lastly, whether inadvertent or by design, the proposed rules (particularly with respect to the hearing requirements) do not explicitly distinguish between proceedings involving students as respondents and those that involve employee respondents. Such a proposal potentially runs afoul of numerous federal and state employment mandates. Any proposed rules and changes to definition or process should be mindful of other requirements that may arise in the context of employee actions and, at a minimum, defer to those requirements so long as they are respectful of the themes and policy represented by Title IX.

Wesleyan, along with many other colleges and universities, is ready and willing to be part of a constructive dialogue about improving our individual and collective responses to campus sexual misconduct. We support efforts to ensure fairness and encourage solutions that work for both the reporting and responding parties. We oppose, however, requirements that limit prevention and response through narrowed definitions or that effectively convert the campus community standards and discipline process to full-scale litigation or criminal proceeding without any of the systems or safeguards offered in those arenas. It is important to note that the survivors of campus sexual misconduct and assault are seeking non-criminal and non-monetary redress on an expedited basis so as to ensure that they might have access to the educational experience to which they are entitled by law. The proposed regulations threaten to create a campus climate in which sexual violence will be less frequently reported because of a cumbersome and threatening adjudication procedure. The proposed regulations would undermine the safety and well-being of our students, and we strongly urge the department to reconsider them.