Bucknell UNIVERSITY

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January 28, 2019

Hon. Betsy DeVos, Secretary of Education
c/o Brittany Bull
U.S. Department of Education
400 Maryland Ave., SW
Room 6E310
Washington, D.C. 20202

Re: Docket ID ED-2018-OCR-0064
Comments on Title IX Notice of Proposed Rulemaking

Dear Secretary DeVos:

On Sept. 22, 2017, the U.S. Department of Education ("Department") issued a Dear Colleague Letter withdrawing the Department's previously-issued April 4, 2011 Dear Colleague Letter and April 29, 2014 Questions and Answers on Title IX and Sexual Violence. In doing so, the Department stated that the earlier guidance had not succeeded in, among other things, "leading institutions to guarantee educational opportunities on the equal basis that Title IX requires." I am taking this opportunity to write during the public comment period for the Department's Nov. 2018 Notice of Proposed Rulemaking on Title IX to express my deep concern that the Department's draft regulations, if implemented, will thwart institutions' attempts to do just that. Specifically, there are aspects of the draft regulations that I believe – based on my more than 35 years as an educator and almost a decade as a university president – will discourage victims of sexual misconduct from coming forward for support and to hold the offender responsible, thereby potentially denying them their educational opportunities.

In its Sept. 2017 Q&A on Campus Sexual Misconduct, the Department emphasized the need for equity and impartiality in an institution's handling of reports of sexual misconduct and also afforded institutions greater flexibility to determine how best to implement their grievance processes. In doing so, the Department appropriately recognized that colleges and universities are not courts of law and that, provided they are implementing fundamentally fair processes, they are best equipped to determine, within the context of their specific institution's culture, climate and challenges, the most effective way to address sexual misconduct on their campuses. That is the mindset that I had hoped to see reflected in the draft regulations.

I applaud the Department's commitment to ensuring that colleges and universities provide a fair, impartial process for students involved in proceedings arising from allegations of sexual misconduct. As I said in an open letter to our campus community in Sept. 2017, Bucknell University is "committed to providing ***all*** of our students with a fair process for the resolution of allegations of sexual misconduct." Unfortunately, the Nov. 2018 draft regulations have moved from providing institutions flexibility in ensuring fundamental fairness to creating the very strictly-defined, courtroom-like settings that the Department criticized in Sept. 2017.

I appreciate the efforts of the many other colleges, universities and higher education associations that have submitted comments thoroughly analyzing the proposed regulations. I will not try to replicate their work here. Instead, I will take this opportunity to illustrate from a practical day-to-day campus life perspective the deleterious impact the proposed regulations will have on institutions' efforts to combat sexual misconduct, and to extend a plea to the Department to reconsider its abrupt shift from supporting flexibility in ensuring fundamental fairness to mandating courtroom-like proceedings that are almost certain to discourage victims of sexual violence from coming forward.

1. **Cross-examination and Relevance Determinations at Hearings.** The proposed regulations require that complaints of sexual misconduct be handled at a live hearing, during which the parties' advisors conduct cross-examination of the parties and witnesses. During those proceedings, the decision-maker is required to articulate in real-time the basis for rulings on issues of relevancy and the admissibility of information. While Bucknell University already adjudicates allegations of sexual misconduct through live hearings, these courtroom-like requirements are my single greatest concern regarding the proposed regulations.

   Institutions are already required to permit students to have an advisor of their choice present during these proceedings. At our institution, that advisor – whether for a complainant or a respondent – is often a trusted member of the faculty or staff. We have seen an increasing number of situations where the respondent engages outside counsel to serve in that capacity, which is the student's prerogative. To my knowledge, we have not encountered a situation where a complainant, the individual alleged to have been assaulted, has engaged legal representation for purposes of these proceedings. Often, complainants have not informed their parents of the alleged assault as of the time of the hearing, which complicates the engagement of counsel for our student body comprising almost solely 18-22 year olds.

   As an educator, the power imbalance created by an alleged assailant having an attorney when the alleged victim does not is a concern; our institution's current authority to limit the participation of those attorneys to quietly and non-disruptively advising their clients has helped to mitigate that power differential. The fact that the draft regulations would create a situation where those attorneys will be directly cross-examining our students is deeply concerning. Such would be the case regardless of the party represented by counsel.

To better illustrate this point, it might be helpful to share the set-up for these hearings on our campus. Our hearing room has a screen down the middle so that the parties can hear *and see* the hearing panel, but can only hear one another. Because the advisors are permitted to speak only to their advisees and in a manner that is not disruptive to the proceedings, there is limited opportunity for one student to hear the other student's advisor, although the advisor can hear both students. Questions for cross-examination are posed by the students to the hearing panel, which in turn asks the questions of the other student. As a result, while a student might have the benefit of the advice of counsel, if that student chooses *and can afford* to do so, the other student is shielded from the direct intimidation of having to interact with that counsel. The draft regulations, however, will have the practical effect of subjecting alleged victims of sexual assault – some perhaps only months out of high school – to aggressive cross-examination by trained attorneys as if in a court of law.

Of additional concern, the draft regulations require that faculty and staff serving on hearing panels articulate on-the-spot explanations for any decision to exclude a question or certain information, a standard not even required of judges in courtroom trials. As noted above, they likely will be doing so while being challenged by an attorney for at least one of the students involved. At our institution, faculty and staff have volunteered to undergo training and to serve as hearing panel members because they are committed to our students – *all of our students*. They will not continue serving in these important roles if they will be subjected to attempted intimidation by attorneys who are hired (and professionally licensed) to push, challenge and advocate on behalf of their clients. Instead, our student disciplinary proceedings will become courtroom trials, with attorneys and judges, rather than students and educators.

2. **Dismissal of Formal Complaints.** The proposed regulations would require an institution to "terminate its grievance process" without completing an investigation if the alleged conduct does not constitute sexual harassment as defined by the Department or did not occur within the school's program or activity. According to the Department, the institution could then pursue the matter under its "conduct code" so as to "ensure that only conduct covered by Title IX is treated as a Title IX issue in a school's grievance process." The Department's position on this point misunderstands that many institutions have broad "sexual misconduct" policies, not narrow "Title IX policies," and usurps an institution's ability to define what constitutes conduct subject to its sexual misconduct policies and procedures. Certainly, the Department has the authority to define what *must* be included within those policies (i.e. conduct triggering a school's Title IX obligations), but it should not able to preclude an institution from electing to bring additional conduct under that umbrella, including off-campus conduct.

   Applied at an institution like Bucknell University, where most students live on-campus in University residential space and a small number live in privately-leased houses contiguous to campus, the draft regulations would create an unacceptable situation, as follows:

> Student A alleges she was sexually assaulted by Student B at 10 p.m. on Jan. 26 in an on-campus residence hall. She files a complaint with the Title IX Coordinator, who investigates the matter under the University's Sexual Misconduct Policy and Procedures. The allegation moves forward to a hearing before a three-member hearing panel comprising trained faculty and staff, with Student B charged with sexual assault.
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> Student C alleges she was sexually assaulted by Student D at 2 a.m. on Jan. 27 at an off-campus apartment across the street from the residence hall in which Student A alleges she was sexually assaulted. Student C files a complaint with the Title IX Coordinator. When the Title IX Coordinator, who is trained to work with complainants and respondents in investigating allegations of sexual assault, learns that the matter occurred 50 yards away from campus, she is required to terminate her investigation and refer the matter to the Student Conduct Administrator within the Dean of Students' office. He will investigate and adjudicate the matter, or refer it to a community conduct board including fellow students, none of whom have particularized training in determining matters involving allegations of sexual assault. In fact, their cases typically involve drug and alcohol violations, theft, and disorderly conduct-type violations of the institution's Code of Conduct.

This illustration gets even more nonsensical when Student B is the accused in both scenarios, a situation we have encountered. Regardless, an institution should have the authority to continue handling the second scenario under its Sexual Misconduct Policies and Procedures, if it chooses to do so.

3. **Forced Disposition in the Case of Multiple Complaints.** The proposed regulations require that when an institution "has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint." As written, the draft regulations seem to require that the complaint move forward through the grievance process even if the alleged victims do not wish it to do so and decline to participate. According to the regulations, information from the non-participating alleged victims cannot be used at the hearing. Absent that evidence, it seems unlikely that the respondent will be found responsible. It is quite possible that by forcing the matter forward despite the wishes of the alleged victims at that time, the alleged serial assailant will be found not responsible, regardless of the veracity of the reports. This result, arising from the fact that the matter was driven to formal proceedings against the wishes of the alleged victims and not from an evaluation of the credibility of the reports, not only re-victimizes the alleged victims, but also empowers a possible serial offender, endangering campus further.

As you stated at George Mason University on Sept. 7, 2017, "acts of sexual misconduct are reprehensible, disgusting, and unacceptable. They are acts of cowardice and personal weakness, often thinly disguised as strength and power." At Bucknell University, we have been and remain committed to our efforts to prevent sexual misconduct, to hold offenders accountable, ***and*** to provide all students with a fair process through which allegations of sexual misconduct are addressed. These unwavering commitments are not the result of federal guidance or even the law; they are a reflection of who we strive to be as an institution. I hope the Department will reconsider the highly legalistic and, I believe, counterproductive proposed rulemaking so as to avoid unnecessarily stifling victims of sexual misconduct.

Sincerely,

John C. Bravman
President