NEW YORK SIX
LIBERAL ARTS CONSORTIUM

January 28, 2019

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

Dear Secretary DeVos:

We write to you as members of the New York Six Liberal Arts Consortium—a consortium of six liberal arts colleges in Upstate New York committed to educating and serving students in the liberal arts tradition. We submit this letter to provide comments on the proposed regulations under 34 CFR Part 106 (the "Proposed Regulations") relating to Title IX of the Education Amendments of 1972 ("Title IX"). While we are aware that the Department of Education (the "Department") already has received many comments on the Proposed Regulations, we believe that we are particularly well situated to comment on how the regulations will affect independent colleges and universities located in the State of New York, where state law already comprehensively addresses many of the same issues that the Department seeks to address in the Proposed Regulations.

Sexual assault is a serious crime, and our schools have worked hard to prevent it and, when it occurs, to address its consequences. We are committed to ensuring that every one of our students is supported appropriately and treated fairly throughout our investigative and disciplinary proceedings. With these goals in mind, we have sought to hone policies and processes that will prevent sexual assault, educate students about appropriate behavior, and provide rehabilitative and restorative experiences for the students involved, while also protecting our respective communities. We have sought to do so in a way that is fair to all parties and that ensures reliable, evidence-based outcomes. We care about the students we serve. That is why we are writing to you today.

While we appreciate the Department's efforts to improve the regulations governing how institutions should respond to sexual assault, the Proposed Regulations contain a number of provisions that we find to be ill-conceived and which would be harmful to our communities.

Chief among these is the requirement in Section 106.45(a)(3)(vii) that would require live hearings, with cross-examination of all parties and witnesses by an advisor, who may be an attorney. These provisions escalate Title IX processes into a courtroom equivalent. Proceedings will become unnecessarily stressful for both accuser and accused. This will likely have a chilling effect on reports of sexual misconduct and exacerbate socioeconomic disparities between students who have access to lawyers and other resources and those who do not, with the potential for disparate outcomes for those with means and those without. Many schools may find they

have no choice but to outsource the conduct of hearings with attorneys cross-examining students to yet more attorneys. It is unreasonable to expect institutions across the nation, particularly smaller institutions, to set up the equivalent of an internal court system. Moreover, we would face the issue of whether to provide legal counsel for students unable to afford it on their own, at significant potential expense.

School disciplinary proceedings should not be thought of or conducted in a manner seen in formal criminal trials. Fundamental fairness to all parties and appropriate outcomes do not require live hearings or cross-examination. Reliable results can and are regularly determined without direct cross-examination with the presence of attorneys. We are making an internal, administrative decision as to whether one of our students should be subject to the disciplinary guidelines of our institutions. Similar decisions are made daily by private institutions and employers, in a variety of contexts, through administrative processes that do not require adversarial cross-examination.

As schools located in New York, we are subject to New York state law. New York has already extensively legislated on the matter of sexual misconduct at colleges and universities, and does not require live hearings with cross-examination. Colleges and Universities in New York are subject to New York Education Law Article 129-B ("Section 129-B"). Additionally, New York has recently enacted comprehensive legislation specifically addressing sexual harassment in the workplace ("Section 201-g").[1] Principles of federalism should discourage the Department from regulating in an area that is already extensively covered by state law. Otherwise, the Department risks creating a labyrinth of state and federal laws that is challenging to maneuver and interpret, and harms our students and our core mission of educating those students.[2]

Of even greater concern is that the Proposed Regulations ***directly conflict*** with our obligations under New York law in several important respects:

1. **The Proposed Regulations and Section 129-B conflict with regard to when they apply to misconduct under their purview and would require an institution to take action**. Under Section 129-B, we are required to take action in response to any report of sexual misconduct that affects our campuses. The law states that "[a]ll institutional services and protections afforded to reporting individuals under this article shall be available to all students and applicable to conduct that has a reasonable connection to that institution."[3] Section 129-B further states that its provisions "shall apply regardless of whether the violation occurs on campus, off campus, or studying abroad."[4] The Proposed Regulations state exactly the opposite. If passed, under federal law we would be ***required*** to dismiss a complaint or allegation "if the conduct did not occur within the institution's program or activity."[5]

[1] NY CLS Labor § 201-G.
[2] *See* Baur-Wolf, Jeremy, "The Looming State Federal Conflict on Sexual Assault," *Inside Higher Ed*, available at https://www.insidehighered.com/news/2017/09/06/state-campus-rape-laws-could-be-problematic-under-new-administration.
[3] Section 129-B at § 6440 (2).
[4] *Id*. at § 6440 (6).
[5] 34 CFR Part 106.

While the term "program or activity" is not defined in the regulations, the Department's commentary suggests that the term should be narrowly construed to exclude much conduct that occurs off campus and all conduct that occurs abroad. And the Proposed Regulations are mandatory – we ***must*** dismiss a complaint that involves conduct that does not occur within our programs. This sets up the seemingly illogical result that an allegation of sexual assault occurring in a campus residence hall would be adjudicated using the Department's required Title IX process, but an allegation of ***identical behavior*** occurring in, for example, an off-campus apartment located 50 feet away could be subject to a vastly different process. While arguably we could set up a separate system to cover complaints that would be covered by Section 129-B (and, for that matter, the Violence Against Women Act amendments to the Clery Act, which themselves require processes similar in many respect to those used to adjudicate allegations of sexual assault) but excluded by the Proposed Regulations, there is no rational basis for requiring us to do so. At the very least, this provision of the Proposed Regulations should make dismissal of a complaint permissive, rather than mandatory.

2. **The Proposed Regulations conflict with Section 129-B with regard to honoring the wishes of a complainant and involving a complainant**. A central premise of Section 129-B is that schools in New York must generally honor the wishes of a complainant as to how they wish to proceed with their allegations. Section 129-B's "Bill of Rights" states that complainants have a right to "make a decision about whether or not to disclose a crime or violation and participate in the judicial or conduct process and/or criminal justice process free from pressure from the institution."[6] Further, Section 129-B affords students the right to "withdraw a complaint or involvement from the institution['s] process at any time."[7] They also require institutions to seek consent of a complainant before investigating and such consent "shall be honored unless the institution determines in good faith that failure to investigate does not adequately mitigate a potential risk of harm to the reporting individual or other members of the community."[8] Finally, Section 129-B tells institutions to balance a complainant's wishes for confidentiality against its obligation to provide a safe environment.[9] By contrast, Section 106.44(b)(2) of the Proposed Regulations ***requires*** schools to file a complaint any time they have two reports of misconduct involving the same individual.[10] No discretion is provided; no balancing of factors is permitted. So even if, in conducting the analysis required by New York law, a school concluded that it should honor the wishes of a complainant to maintain confidentiality or decline to proceed with an investigation (because there is no safety risk to the community), under federal law that school would be required to disregard the complainant's wishes if there have been two reports involving the same respondent. The complainant would apparently be forced to participate in an investigation against his, her or their wishes, and the respondent would be subjected

[6] Section 129-B at § 6443 (3).
[7] *Id*. at § 6444 (1)(I).
[8] *Id*. at § 6446 (4).
[9] *Id*. at § 6446(1)(D).
[10] Proposed 34 CFR 106.44(b)(2)

to a disciplinary process even if he, she or they do not represent a risk to the community.

3. **The Proposed Regulations' provisions on interviews, investigations, and cross-examination conflict with rights and protections afforded to all parties under Section 129-B**. Section 129-B's "Student Bill of Rights" states that all students retain a right to "describe the [alleged] incident [of sexual assault] to as few institution representatives as practicable," and further states that students would not "be required to unnecessarily repeat a description of the incident."[11] As explained above, we do not believe that the Department's proposal to require a live hearing with cross-examination is sensible or required. Those provisions are also in tension with Section 129-B's directive against forcing parties to tell their accounts to different groups of people in different settings.

4. **The Proposed Regulations conflict with Section 129-B with regard to law enforcement investigations**. Section 129-B commands that institutions in New York afford any student a right to have the institutions' conduct or judicial processes run concurrently with any law enforcement investigation, with delays of more than 10 days permitted only at the request of law enforcement.[12] This mandate appears to conflict with the Proposed Regulations, which provide for the delay of the grievance process for "good cause." Good cause "may include considerations such as…law enforcement activity."[13] It is unclear whether "law enforcement activity" is limited to the investigative stage, consistent with 129-B, or allows a student to request (and an institution to grant) a delay until a criminal case is resolved.

5. **The Proposed Regulations conflict with Section 129-B with regard to the use of prior sexual history**. Section 129-B ensures that all students (including complainants and respondents) have a right "[t]o exclude their own prior sexual history with persons other than the other party in the judicial or conduct process…."[14] with limited exceptions. The Proposed Regulations prohibit consideration of a complainant's prior sexual history other than to show consent or to show that the respondent is not the perpetrator, but provide no restriction on consideration of a respondent's sexual history other than in cases where it is deemed irrelevant.[15] This standard provides unequal protection to the two parties; if there is to be allowance of the limited evidence related to prior sexual history, it should be applied to both parties or it should not be allowed at all.

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[11] *Id*. at § 6443 (7).
[12] *Id*. at § 6444 (5)(C)(iv). This provision also contains language regarding temporary delays while law enforcement proceeds with its work.
[13] 34 CFR Part 106.45 (b)(1)(v).
[14] *Id*. at § 6444 (5)(C)(vi).
[15] *Id*. at 106.45 (b)(3)(vii).

6. **The Proposed Regulations define "Sexual Harassment" in a manner inconsistent with state law definitions of the same term**. The Proposed Regulations suggest that "Sexual Harassment" shall be defined as "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."[16] New York has recently enacted several legislative changes in this area that define the term "Sexual Harassment" far more broadly.[17] For example, the guidance in New York suggests that sexual harassment "consists of words, signs, jokes, pranks, intimidation or physical violence which are of a sexual nature, or which are directed at an individual because of that individual's sex," and that Sexual Harassment "also consists of any unwanted verbal or physical advances, sexually explicit derogatory statements, or sexually discriminatory remarks made by someone in the workplace which are offensive or objectionable to the recipient, which cause the recipient discomfort or humiliation…."[18] Finding Sexual Harassment under each definition is of course highly dependent on the facts and circumstances, but the definition in the Proposed Regulations, layered upon the New York definition, muddies the waters to the detriment of our respective communities.

In addition to points above, there are a number of other issues in the Proposed Regulations that require clarification, such as how retaliation should be handled under these regulations, what privacy protections exist regarding sexual history and medical information collected throughout the investigation, the effects of a party not submitting to cross-examination, and many other issues.

We are grateful that the Department has sought to clarify the law in this area. However, in the interest of our students and their education, we strongly urge the Department to consider the concerns we have raised.

Sincerely,

Brian W. Casey, President
Colgate University

William L. Fox, President
St. Lawrence University

David Wippman, President
Hamilton College

Philip A. Glotzbach, President
Skidmore College

Patrick A. McGuire, Interim President
Hobart and William Smith Colleges

David R. Harris, President
Union College

[16] *Id*. at 106.44(e)(1)(ii).
[17] See NY CLS Labor § 201-g and the New York State Department of Labor's "Guidance on Sexual Harassment for All Employers in New York State."
[18] *Id*.