



# SYRACUSE UNIVERSITY

January 28, 2019

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

Dear Secretary DeVos:

I write on behalf of Syracuse University in response to the U.S. Department of Education's Notice of Proposed Rule Making ("NPRM") concerning Title IX of the Education Amendments Act of 1972 ("Title IX"). The NPRM proposes to govern how colleges and universities must address allegations of sexual violence and harassment on their campuses. The University appreciates the opportunity to comment on the NPRM, and although many organizations, advocacy groups, associations, and individuals will be submitting comments—some of which the University may join in—this letter highlights two specific provisions of the proposed rules that cause our community great concern.

First, the NPRM's definition of "sexual harassment" has the potential to exclude single instances of severe sexual harassment and leave colleges and universities potentially liable under Title IX if they attempt to punish conduct outside the new definition's highly circumscribed scope. Second, the grievance procedures mandated by the NPRM would transform college and university disciplinary proceedings into quasi-court proceedings, harming students and institutions in the process. These issues are discussed in turn.

## **Definition of Sexual Harassment**

The NPRM defines "sexual harassment" 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 (emphasis added)." This language suggests that a single instance of "unwelcome conduct" could not form the basis for a claim of Title IX "sexual harassment." Rather, behavior would be sanctionable only if it was part of a pattern of conduct to which the victim was repeatedly subjected.

Prior guidance from the Department recognized the opposite: "a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe." Indeed, Syracuse University has confronted single, severe instances of harassing

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behavior in its community that warranted a response and, in some cases, discipline. Narrowing the types of conduct actionable under Title IX, as the NPRM proposes to do, may countenance abusive and objectively offensive conduct.

Moreover, as written, the rules do not appear to give institutions the discretion to respond to a complaint of sexual harassment that falls outside the new proposed definition—that is, a single instance of severe sexually harassing behavior that is not “pervasive.” The proposed regulations state that institutions “must dismiss” formal complaints of conduct that “would not constitute sexual harassment” as defined in the NPRM. This language would seemingly subject schools to Title IX liability for pursuing a complaint involving a single, severe incident of sexual harassment, *i.e.*, conduct that falls outside of the NPRM’s definition.

To better foster respectful campus environments free from insidious sexual harassment, the Department should amend the proposed definition of “sexual harassment” to encompass behavior that is either “severe” *or* “pervasive.” Defining “sexual harassment” using the previous “severe *or* pervasive” standard puts students, faculty, and staff on notice that even a single instance of such conduct has no place in institutions of higher education.

### **Adjudication Procedures**

Syracuse University strongly believes that the adjudication procedures in the NPRM would harm students and deter the filing of sexual assault and harassment complaints. Under the NPRM, parties would be entitled to active representation by counsel in a university’s disciplinary proceeding, with lawyers conducting adversarial cross-examination at a live hearing. If a student does not have an advisor able to cross-examine witnesses, the university must provide one, much like a public defender in criminal cases.

No court has ever imposed the NPRM’s requirements in the context of a university disciplinary process. Relying on Supreme Court precedent emphasizing that schools are academic institutions and not courtrooms, all courts that have considered these issues have refused to require schools to hold adversarial disciplinary hearings with lawyers for both parties cross-examining students and other witnesses, as contemplated by the NPRM.

Moreover, it is well settled that federal *constitutional* requirements, such as those cited in the NPRM, do not apply to private schools. Syracuse University, as a private institution, embraces the proposition that student disciplinary proceedings must be fair to all parties and structured to provide reliable determinations. But private institutions have greater flexibility to develop standards and procedures that best serve their students’ interests and fulfill the school’s educational mission. At Syracuse University, we believe those goals are not served by transforming student disciplinary proceedings into adversarial trials, *particularly* in the complex and sensitive areas of sexual assault and harassment.

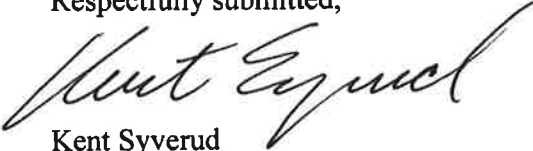
Inflexible rules are particularly inappropriate given the structural and operational differences (such as population size and makeup, staffing, financial resources, and student needs and experiences) that exist among the myriad diverse institutions of higher education throughout the country. Indeed, the NPRM’s own preamble recognizes: “Title IX must be interpreted in a

manner that leaves room for flexibility in schools' disciplinary decisions and that does not place courts in the position of second-guessing the disciplinary decisions made by school administrators."

Crucial to the University's mission is providing a learning and working environment that is inclusive, respectful, and free from discrimination and harassment, including sex-based discrimination or harassment. Within this context, Syracuse University supports federal Title IX regulations that condemn and punish sexual misconduct on college campuses, while providing a fair adjudicatory process for those accused of such misconduct. For the reasons discussed in this letter, we believe the proposed rules, as drafted, would accomplish neither objective.

I thank you in advance for considering these comments. This is a complicated and divisive area of law and policy. But it is essential that the regulations advance the core purpose of Title IX: to eradicate sex-based discrimination and harassment for any recipient of federal funds. I urge the Department to consider and incorporate the points raised in this letter before promulgating final rules.

Respectfully submitted,



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