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

Re: Docket ID No. ED-2018-OCR-0064-0001, Proposed Regulations Implementing Title IX of the Education Amendments of 1972, 34 CFR Part 106

Dear Secretary DeVos,

The Society of Jesus, commonly called the Jesuits, are the stewards of 28 Colleges and Universities spread throughout the United States with a total enrollment of about 215,000 students. The schools are: Boston College, Canisius College, College of the Holy Cross, Creighton University, Fairfield University, Fordham University, Georgetown University, Gonzaga University, John Carroll University, Le Moyne College, Loyola Marymount University, Loyola University Chicago, Loyola University Maryland, Loyola University New Orleans, Marquette University, Regis University, Rockhurst University, Saint Joseph's University, Saint Louis University, Saint Peter's University, Santa Clara University, Seattle University, Spring Hill College, University of Detroit Mercy, University of San Francisco, University of Scranton, Wheeling Jesuit University and Xavier University. Together these schools constitute the membership of the Association of Jesuit Colleges and Universities (AJCU), which offers these comments.

The AJCU appreciates the Department's choice to publish proposed rules for review and public comment.

As Jesuit and Catholic institutions of higher education, the AJCU is guided by the teachings of St. Ignatius of Loyola. These teachings call us to action and guide us in ways relevant to the following comments.

Reflection and Discernment call us to carefully consider any important topic, like the Proposed Rules, from all angles and perspectives and then come to a conclusion that is tested and re-tested until we feel at peace with the result. The following comments are a product of that rigor.

Cura Personalis instructs us that each person, as a reflection of God, is entitled to our care. We have always and will always approach this topic in the following spirit: that persons subjected to sexual harassment, those accused, and those found responsible are all equally entitled to our care.

Similarly, *Solidarity and Kinship* establishes with complete clarity that we all are children of God.

Service Rooted in Justice and Love permeates all of our activities, in and out of the classroom and is what we seek to instill in our graduates. With the comments presented to you today, we gratefully

acknowledge that justice is, for all of us, what this work is about. The AJCU approaches issues surrounding sexual harassment with the aim to do justice, and in the course of doing so, educate our students.

Finally, Jesuits are also called to *Magis*, which compels us to do more-to be better-to never be fully comfortable as we pursue the Greater Good. Our goal regarding issues of sexual harassment prevention, response, and healing has always been to surpass the minimum requirements (which of course we will always faithfully meet) to further our shared mission of forming our students to become persons for and with others.

With that forward, the AJCU respectfully offer the comments that follow.

Title IX and Off-Campus Incidents

The AJCU, comprised of private Jesuit and Catholic institutions, believes it is important for all students that we address reports of harassment on campus and off campus, particularly when such off-campus harassment has a continuing effect on campus. Many of the reports received by our member institutions involve sexual misconduct occurring at off-campus parties, bars, apartment buildings, and houses over which an institution may not have direct supervision, ownership, or sponsorship. While the off-campus incident itself may occur outside of an "education program or activity," the impact of the incident has numerous on-campus implications for reporting parties, responding parties, and witnesses alike.

- The proposed rule offers the ability to adjudicate off-campus incidents through an alternative student conduct process but that would require institutions to have two separate processes in place for the same policy violation and would only provide protections under administrative regulations for on-campus incidents of harassment despite the fact that the off-campus incidents often have the exact same effects on campus.
- Although the preamble notes that the subregulatory guidance under the previous administration was too prescriptive, the proposed regulations adopt a more prescriptive process that hinders our members' ability to enforce community and disciplinary standards, whether or not they meet the proposed narrowed definition of a Title IX complaint.
- Also, the rule's requirement to dismiss a complaint if it does not meet the narrowed definition of a Title IX complaint (106.45(b) (3)) may be argued to conflict the principle that institutions remain able to respond to conduct that does not meet the new Title IX definition of harassment under other disciplinary procedures. An express statement in the regulations that institutions remain free to use other disciplinary measures with respect to claims that are dismissed would be beneficial.
- The proposed rule emphasizes the prohibition against "discrimination under any education program or activity" when it addresses off-campus jurisdiction. Because acts occurring off-campus may also "exclude" students from "participation in . . . any education program or activity," or may "deny" students "the benefits of . . . any education program or activity," the AJCU requests that you review whether consideration of only one of the three categories of

prohibited acts outlined in the statute reflects the full scope of the law as it pertains to off-campus jurisdiction. We believe it should not differ.

- Within small campus communities students interact in classes, common buildings, clubs, organizations, and hundreds of other programs and activities sponsored by the school. Sexual harassment can have a wide-ranging impact, regardless of where the incident occurred. The AJCU asks that you review and clarify the jurisdictional limits under the proposed rule to provide a more equitable resolution process for all students experiencing an impact on-campus, regardless of where an incident occurs.
- Title IX Coordinators have received specific training to handle sexual misconduct cases and are more equipped than other university administrators to handle these cases under Title IX policy.
- These particular regulations may also impose an additional burden on universities in meeting their obligations under VAWA. Many institutions have their Title IX Coordinators and Title IX policies address requirements relating to discipline procedures for VAWA crimes of sexual violence, dating violence, domestic violence, and stalking. Many cases involving VAWA crimes between students occur off campus. The AJCU asks for clarity on how the proposed rule intersects with VAWA requirements.
- The language that universities "must dismiss" (106.45(a)(3)) a complaint that does not occur within a university program or activity, and whether that results in a prohibition on conducting other proceedings under the code of conduct etc. based on sexual harassment/assault lacks clarity and appears to conflict with other language within the proposed rule.

Fundamental Fairness

The AJCU shares the Department's commitment to fairness in the Title IX adjudication process. The AJCU believes that the Department may ensure an equitable investigation process for all parties without certain aspects of the proposed rules which we believe may negatively impact students and be difficult to implement.

Many AJCU members use a single-investigator model and would need to substantially change their Title IX procedures if the proposed regulations are adopted. Some members are utilizing a hearing board structure but will be required to make changes based on the proposed rule. The AJCU believes it is important to conduct Title IX-related investigations in a thorough, fair, and impartial manner using procedures that are designed to take into account the importance and sensitivity of the underlying issues for all parties. A trauma-informed approach to investigations and offering fundamental fairness to the responding party are not mutually exclusive concepts. Both can and do exist within our current structures, including within the single-investigator civil rights model, and provide an equitable investigation process for all parties.

In reviewing the proposed rule, the AJCU offers the following:

- Any reference to "due process" in the proposed regulations should instead say "fair and equitable process" if the words "due process" were intended to refer to the constitutional requirement of due process for public entities. Private schools are not subject to due process

and it is not clear if the Department of Education is truly expecting private schools to meet constitutional due process requirements, or if the Department is just using "due process" as shorthand for a fair process. If it's the former, it should not be adopted, and the courts will strike it down. If it's the latter, the Department should change their verbiage to avoid any confusion in the proposed rule.

- Live cross-examination by each party's advisor is a significant concern for the AJCU. The purpose of cross-examination is to find the truth and address credibility but is typically conducted by attorneys in court under complicated rules of evidence and other procedures and monitored by a supervising judge. Cross-examination, in courts of law, typically involve two kinds of questions: (1) those designed to bring out additional facts and details about the alleged incident, and (2) those intended to raise questions about the credibility of the party or witness. Many of our reporting or responding parties utilize a fellow student, a faculty or staff member, or a victim advocate as their advisor. These individuals may not be trained in the art of cross-examination and the party they serve may be at a disadvantage if the other party hires an attorney. While we understand that institutions would be required to provide cross-examination training, any level of training provided will be less than the 3-year training a lawyer receives through a law school education and possibly years in a legal practice. The process should not be transformed into something so legal that it requires schools to provide attorneys for it to be fair and equitable and it should not be assumed that both parties can afford an attorney. The department should also not assume that universities can afford to provide legal counsel to parties, which would inevitability be required to provide equity in the process.
- Where one party has an attorney as an advisor, it could be argued that it is inequitable to provide a non-attorney advisor to the other party. This also raises the question of whether the actions of any appointed employee advisor would then subject the university to additional claims or liability (through either administrative enforcement or private cause of action) based upon claimed ineffective or negligent assistance of the university-appointed advisor as compared to attorney advisors. This could result in an unreasonable administrative burden for universities, the Department of Education, and the courts and will cause increased litigation (time and expense) and possibly liability for the universities.
- Additionally, introducing cross-examination and more attorneys into school processes creates a court-like/quasi-judicial procedure on campuses, which is not appropriate for an internal administrative process to determine a violation of university policy and if found, to provide appropriate sanctions and/or education. Advisors who are lawyers may expect to use or refer to other laws, evidentiary rules, and rules of procedure that are used in court by trained lawyers, judges, and court personnel but will not be known by students and institutional personnel. Faculty and staff who serve on hearing panels are typically not attorneys so there would be an increased concern and burden on the university to conduct a court-like proceeding.
- Under the proposed rule, there is limited guidance provided as to the rules of cross-examination to allow a hearing panel to exercise reasonable control over the mode and order of examining and presenting evidence so as to: (1) make those procedures effective for determining the truth;

(2) avoid irrelevant or duplicative questions; and (3) protect witnesses from harassment or undue embarrassment.

- In the proposed rule it is not clear how the investigation report may or may not be used at the hearing. For example, the proposed rule indicates that a party's previous statements to investigators cannot be considered if the party does not submit to cross-examination, which would make parts of the investigation report unavailable to decision makers with the result of potentially erroneous decisions. The AJCU does not believe that there are rules comparable to these proposed requirements for any other university conduct process. As a result, the AJCU believes that questions will be raised regarding why the procedures are deemed fair for Title IX matters only, resulting in a potential impact across all institutional disciplinary procedures.
- The AJCU believes that some responding parties may wish to provide a limited statement but decline to be cross-examined because of the risk that they may later be criminally charged or sued. These individuals would be forced to choose between making no statement whatsoever to the university or participating in the hearing process and risking adverse effects in outside court proceedings.
- Additionally, the proposed rule states that the information contributed cannot be considered unless parties have the opportunity to cross examine the witness who provided the information. Outside of a party who refuses to be cross-examined, there may also be scheduling or logistical challenges for witnesses. For example, if a witness does not appear on the date of the hearing, but previously submitted video evidence of the incident, would this evidence not be considered? If a police officer or medical professional wrote a report that was submitted as evidence, but was not available for a college proceeding, would this evidence not be considered by the board? Would an affidavit under penalty of perjury still require the witness to be cross-examined? Because universities do not have subpoena power over witnesses, this critical evidence may be lost under the proposed rule. This will likely also result in both parties' advisors calling every single adverse witness for cross examination, in hopes that the witnesses will not be available for cross examination and therefore their evidence will be unusable. Such a situation will create an immense logistical burden for institutions, lead to much longer hearings, and likely require hearing panels to make decisions based on *less* information. Most critically, it may lead to unfair or unjust results.
- The failure of a party or witness to submit cross-examination should go to the weight the hearing officer chooses to provide that evidence and not to its admissibility.
- Further, the proposed regulations do not provide for any exceptions to this rule for a declarant that is unavailable for cross-examination similar to the exceptions provided for under the Federal Rules of Evidence. The AJCU asks for additional clarification on the consideration of previous testimony and evidence, as this would significantly impact a decision process and could benefit or harm either party, depending on the scheduling of witnesses or outside experts and lead to results that may be unfair or unjust.
- Additionally, the rule requires the Title IX officer to file a complaint when the institution is faced with multiple reports and the complainants do not wish to proceed with an investigation, but it

is not clear how an institution could address these reports if the complainants are not willing to participate and be cross-examined.

- Proposed regulation 106.46(b)(ii) requires that all coordinators, investigators or decision makers not have a conflict of interest or bias. However, "bias" is not a defined legal term in the Regulations, nor is it clearly addressed in case law. Therefore, a significant lack of clarity will likely undermine the reliability of most all decisions related to sexual harassment and undoubtedly result in protracted administrative and court actions. The expense will be borne by students and their families, our member institutions and the Department itself.
- As a practical matter, "bias" could be charged against any person and particularly coordinators, investigators or decision makers that have previously worked with victims, done criminal defense work, worked for the police or have a personal or family history of abuse. The AJCU suggests that the Regulations keep the statement as to "no conflict of interest" and replace the idea of "no bias" with no "illegal discrimination." To capture the idea of bias, it is recommended that this be rephrased that the individuals working as coordinators, investigators or decision makers must receive bias training, both conscious and unconscious.

Possible Chilling Effect

The AJCU recognizes the Department of Education's efforts to improve the Title IX process through the proposed rule but believes some areas may have an unintended chilling effect on students bringing complaints forward.

- As stated above, live cross-examination by an advisor, particularly attorneys, may be intimidating to students and community members. This may limit the number of individuals willing to participate in the Title IX process, either as parties or witnesses.
- As a policy matter, the AJCU agrees that parties are presumed to not be in violation of policy, and that false statements should be prohibited. The AJCU believes this can best be articulated in policy and codes of conduct and need not be included in the initial notice of investigation letter to prevent an unintended chilling effect.
- Requiring electronic access to all materials may lead to sharing of confidential information that can easily be copied or made available through social media. The AJCU is not aware of any system that can completely prevent copying or taking a picture with another device, so any materials shared by the school may be shared outside of the parties. This risk may have a significant impact on someone's willingness to participate in the process (as a party or a witness) as private emails, texts, medical reports, and photographs are often shared within a case.

Informal Resolution

Under the proposed rule, informal resolution is possible any time before the determination of responsibility. The AJCU appreciates the ability to resolve complaints informally under the rule and offers a few thoughts and questions on this section.

- The AJCU recommends the Department provide research/evidence-based guidelines and best practices for institutions using informal resolution to ensure that it is not coercive, unfair, or unequitable – particularly in cases involving intimate partner violence where coercion and intimidation may be of concern.
- What happens if the parties reach a resolution, but then one party backs out of the agreement? Does this automatically move to a formal process?
- If an informal resolution process ends without a resolution, can the parties use what they learned through the process in a formal proceeding, internally or externally?
- If an informal resolution includes a party's acknowledgement of a policy violation, and they are allowed to stay on campus as part of the resolution, if they violate the policy again, does this possibly make campuses less safe and/or raise liability issues for the institution? For example, if a student admitted to an incident of sexual misconduct but the informal resolution allowed the student to stay on campus, would the institution be on notice regarding the student's conduct? The University must in all cases be able to make any legally supported decisions it deems appropriate for the safety and wellbeing of all students in the campus community, even if the students agree to a different result.

Title VII Considerations

In response to Directed Question number 3 (*"whether there are any parts of the proposed rule that will prove unworkable in the context of sexual harassment by employees"*), the AJCU respectfully requests that the Department take the following concerns into consideration:

- To carefully examine whether the proposed rule may conflict with existing state laws and/or common collective bargaining agreements governing recipients' obligations to respond to complaints of harassment as employers.
- Whether the proposed rule will create unequal protections for students who experience harassment by employees, as compared with protections afforded to employees who experience harassment by fellow employees.
    - Many universities have adopted a unified policy based on prior OCR guidance, and this will make it more difficult to retain and implement a unified policy in light of these differences applicable to employees and students.
    - The adequacy of a recipient's response to any sexual harassment complaint as an employer under Title VII of the Civil Rights Act of 1964 hinges on whether the remedial action is reasonably calculated to prevent further harassment. Further, the proposed rule emphasizes the use of very specific procedural components in determining whether the recipient's response is reasonable. In contrast, the fact-finding process used to investigate a complaint of harassment under Title VII is not determinative of whether an employer met its obligation to eliminate harassment in the workplace.
    - The result of this discrepancy is that employee-complainants are due a far more adequate response from recipients than student-complainants would be, in instances alleging identical conduct committed by the same employee-respondent.

    - For example, a department chair who hears that a faculty member is harassing an employee would be required to report it, and the institution would be required to take prompt and *effective* remedial action. In contrast, under the proposed rules, a department chair who hears that a faculty member is harassing the student would not be required to report the situation. Even if the student filed a formal complaint directly with the Title IX Coordinator, the institution would only have to respond in a manner that was not deliberately indifferent, i.e. “clearly unreasonable” under the circumstances; a much lower standard. Holding schools to a lower standard and affording students lesser protection under such circumstances is counterintuitive in light of the extreme imbalance of power that is likely to exist between students and employees in the field of education.
- The adoption of the deliberate indifference standard (and the emphasis on employing particular procedural requirements for meeting that standard) for the exclusive purpose of Title IX enforcement will create disparate protections for those who experience discrimination based on sex, as compared with the protections enjoyed by other protected classes addressed by Title VI and VII of the Civil Rights Act of 1964.

Standard of Evidence

The proposed regulation requires “[t]he recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.” There is a concern that this statement could be construed to either require universities to eliminate the “clear and convincing” standards that are reflected in faculty handbooks for tenured faculty or require universities to raise the standard for all other cases to “clear and convincing” if it is to be maintained for tenured faculty. In addition, is the statement intended to apply to Title IX cases only or to incorporate all faculty disciplinary proceedings outside Title IX?

Implementation of Supportive Measures

The regulation clarifies that the Title IX coordinator is responsible for "coordinating the effective implementation of supportive measures." This means the Title IX coordinator "must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other policy requirements within the recipient’s own system does not fall on the student receiving the supportive measures." While the AJCU recognizes the importance of equity in supportive measures, the organization also knows from experience that many Title IX offices partner with colleagues across campus to implement these supportive measures, based on lack of staffing or resources within the Title IX reporting structure. The AJCU would recommend that the Title IX Coordinator have oversight of effective implementation of the measures but would suggest allowing some flexibility for the point of contact for a student, as others who provide support services may be in a better position to support all parties.

Conclusion

The AJCU appreciates the intent and objective of these Proposed Rules and believes that they will best serve our students if the comment period allows further reflection and continued discussion between institutions and the Department of Education. We all share the same goal of protecting students, providing fair and equitable processes and preventing harassment on college campuses.

Sincerely,

Rev. Michael J. Sheeran, S.J.

President, AJCU