From: Samantha Berner
Sent: Wed, 9 Jun 2021 11:14:01 -0400
To: T9PublicHearing
Subject: Georgetown University's Written Comment
Attachments: Title IX Public Comment Submission_06092021.pdf

Dear Acting Assistant Secretary Goldberg,
Thank you for the opportunity to submit written comments in regards to the Department of Education's Office for Civil Rights hosting virtual public hearings to gather information for the purpose of improving enforcement of Title IX.
I write on behalf of Georgetown University in my capacity as Title IX Coordinator and Director of Title IX Compliance to submit our institution's written comment; please find it attached.
Sincerely,
Samantha Berner
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Samantha Berner, J.D.
Title IX Coordinator and Director of Title IX Compliance
Georgetown University
Office of Institutional Diversity, Equity, and Affirmative Action
(202) 687-9183
M-36 Darnall Hall, 37th and O Streets, NW
Washington, D.C. 20057
Pronouns: *she, her, hers*

June 9, 2021

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
Via email: T9PublicHearing@ed.gov

Re: Review of Regulations Implementing Title IX of the Education Amendments of 1972 ("Title IX")

Dear Acting Assistant Secretary Goldberg:

Georgetown University, the nation's oldest Catholic and Jesuit university, is committed to eradicating all forms of sexual misconduct and creating a campus community that is safe and respectful for all members of our community. To that end, we are pleased that—pursuant to President Biden's Executive Order 14021 (March 8, 2021)—the U.S. Department of Education ("Department") is taking this opportunity to review the regulations entitled ''Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,'' 85 FR 30026 (May 19, 2020) ("2020 Title IX Regulations").

When the Department first proposed the 2020 Title IX Regulations in November 2018, Georgetown, like many institutions of higher education, expressed significant concerns with the proposed rule. We hosted eleven listening sessions to gather feedback on the proposed regulations from members of our community. More than 375 students, faculty, and staff members attended these listening sessions, sharing a diversity of views and opinions, which informed the formal comment that we submitted to the Department on January 30, 2019 in response to its proposed regulations.

Our comment emphasized that Georgetown supports regulations that hold institutions and individuals accountable, encourage reporting, and allow institutions to address the broad range of sexual misconduct that impacts their communities before an individual's access to education is effectively denied, regardless of where the conduct occurred. We also underscored that grievance procedures related to sexual misconduct should be carried out in a manner that protects the safety of those who experience sexual misconduct, promotes accountability, and is impartial and fair to those accused of misconduct, as well as those bringing complaints. We stressed that in many respects, the proposed regulations did not succeed in promoting those goals. Specifically, Georgetown raised concerns that the regulations would:

- Narrow the scope of Title IX to protect against a much smaller range of sexual misconduct;
- Set the bar too low for colleges and universities, requiring only that they respond to sexual misconduct in a manner that is not "deliberately indifferent" or "clearly unreasonable" instead of requiring schools to respond reasonably; and
- Mandate an overly legalistic grievance process to address sexual misconduct, including cross-examination of parties, which would unnecessarily chill reporting, traumatize students, lead to less accountability, and create inequities.

When the Department issued its final regulations in August 2020, we were disappointed to see that the regulations failed to address many of the concerns that Georgetown and thousands of other commenters had raised. We are therefore grateful for the Department's interest in reviewing the final regulations, and for this renewed opportunity to provide our input. Our January 30, 2019 formal comment to the Department remains a comprehensive summary of the concerns that we had with the proposed regulations and continue to have with the 2020 Title IX Regulations. We have attached that comment here for ease of reference, and

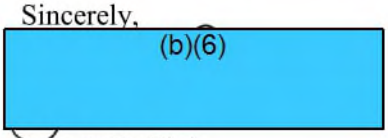
respectfully request that the Department consider the points raised therein, and whether the 2020 Title IX Regulations may be suspended, revised, or rescinded in a manner that addresses these critical concerns.

In addition to the detailed points made in our January 2019 comment, we support the principles outlined in Executive Order 14021 that ask the Department to:

- account for intersecting forms of prohibited discrimination that can affect the availability of resources and support for students who have experienced sex discrimination, including discrimination on the basis of race, disability, sexual orientation and gender identity, and national origin;
- account for the significant rates at which students who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ+) are subject to sexual harassment, which encompasses sexual violence;
- ensure that educational institutions are providing appropriate support for students who have experienced sex discrimination; and
- ensure that sexual misconduct grievance procedures are fair and equitable for all.

As the review of the 2020 Title IX Regulations moves forward, we would encourage the Department to continue seeking broad input from those most impacted by these regulations, including survivors and those who have been accused, as well as the counselors, clinicians, Title IX Coordinators, student conduct officials, and other campus officials who are charged with implementing these regulations on a daily basis on college and university campuses. We hope that the Department views Georgetown, and all of higher education, as partners in this endeavor to make our schools safer, more equitable places to learn and work, and we look forward to helping the Department achieve these goals.

Sincerely,



John J. DeGioia
President, Georgetown University

Office of the President
Georgetown University

January 30, 2019

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

Re: Docket ID: ED-2018-OCR-0064
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Secretary DeVos:

Georgetown University, the nation's oldest Catholic and Jesuit university, is committed to eradicating all forms of sexual misconduct and creating a campus community that is safe and respectful for everyone. Our institution's response to sexual misconduct is guided by the foundational Jesuit tenet of *cura personalis*: care for the whole person, which calls for individualized attention to and respect for every person's unique circumstances and needs. Such care is grounded in an understanding of faith that necessitates pursuing and acting out of justice. Our Jesuit tradition maintains that such justice is inclusive and demands accountability, always seeking to live more fully the *magis* – the idea of striving to do more for others, especially those on the margins and without voice.

Georgetown has focused on combating sexual harassment and assault for many years – from being one of the nation's first institutions to hire a full-time sexual assault coordinator in 1997, to establishing a sexual assault working group more than fifteen years ago. We have worked with students, faculty, and staff to significantly expand our efforts in recent years, focusing on education and prevention, support for parties impacted by sexual misconduct, and a prompt and equitable process to address complaints of sexual misconduct. We launched a university-wide sexual assault and misconduct survey in 2016 which will be administered again this year, added staff clinicians to expand our ongoing clinical and education and outreach efforts with students, and have adopted a requirement for all incoming first year undergraduate students to complete a five-hour mandatory in-person bystander intervention education program upon arriving at Georgetown. We have enhanced our grievance procedures to continue to ensure they are fair and equitable and are consistent with best practices among institutions of higher education. Our sexual misconduct investigations are carried out by investigators and hearing panel members who receive specialized and comprehensive training on how to conduct an investigation that protects the safety of victims, promotes accountability, and is impartial and fair to those accused of misconduct as well as those bringing complaints. We recognize that there is a critical need to continue to address sexual assault and misconduct and believe there remains more work to be done as a community.

We also recognize that there remains more work to be done as a country and that the Department of Education plays a critical role in shaping and directing this work. The purpose of Title IX of the Education Amendments of 1972 is to create educational environments where students are safe and free from discrimination and harassment based on sex, including sexual harassment and sexual assault. Consistent with our core values, Georgetown supports regulations that hold institutions and individuals accountable, encourage reporting, and allow institutions to address the broad range of sexual misconduct that impacts their communities before an individual's access to education is effectively denied, regardless of where the conduct occurred. As laid out more fully below, Georgetown is concerned that, in many respects, the proposed regulations do not succeed in promoting these goals. Georgetown also supports Title IX regulations that promote a fair, just, and supportive grievance process for all parties within the educational context of a college or university. As detailed in our comments below, however, Georgetown is concerned that the proposed regulations create an overly legalistic process that will unnecessarily restrain reporting, traumatize students, lead to less accountability, and create inequities.

The University's comments are a product of the collaboration and insight of many within our community. Upon release of the proposed regulations, Georgetown conducted eleven listening sessions with students, faculty, and staff across our undergraduate and graduate campuses. More than three hundred seventy members of our community participated in those listening sessions and provided feedback. Our community members' views were thoughtful and compelling. They were also diverse and represented many different experiences and opinions on this complex topic. The University's comment cannot effectively do justice to every important remark we heard from those in our community. However, those many individual viewpoints, along with our core Jesuit values, have helped to shape and inform this comment, and we respectfully request that the Department of Education seriously consider this feedback in drafting final regulations that effectively address sexual misconduct.

A. Georgetown supports regulations that promote accountability, encourage reporting, and allow institutions to address the broad range of sexual misconduct that impacts our communities.

While Georgetown supports the Department's initiative to define essential terms through regulations, the proposed definitions are unnecessarily narrow and do not serve Title IX's purposes.

1. *The proposed definition of sexual harassment is too narrow and fails to adequately protect individuals from discrimination prohibited by Title IX.*

The proposed definition of sexual harassment is divided into three prongs. The first prong defines sexual harassment as: "***An employee*** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct" (emphasis added). This definition artificially narrows *quid pro quo* harassment to only those cases involving employees. Students may also hold positions of authority over other students and can engage in *quid pro quo* harassment. For example, team captains, club presidents, graduate assistants, and resident advisors are able to condition the provision of benefits and services. We

therefore recommend that the Department broaden the definition beyond employee-student *quid pro quo* harassment.

The second prong of the definition of sexual harassment states that sexual harassment is "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). The removal of the conjunction "or" between the words "severe" and "pervasive" in the second prong would create a gap of coverage in which conduct that is pervasive, but not severe – or vice versa – would not be covered. It is not difficult to imagine examples of behavior that could fall within this coverage gap. For example, pervasive romantically-motivated stalking may not rise to the level of "severe" but could nonetheless deeply impact a victim's sense of safety and security and willingness to access programs and activities on campus. Title IX's broad prohibition against discrimination on the basis of sex should extend to such behavior.

Furthermore, the Department's proposed "severe and pervasive" standard would be inconsistent with long-standing "severe ***or*** pervasive" precedent set forth in Supreme Court cases,[1] legislation enacted by Congress,[2] OCR guidance,[3] and EEOC guidance.[4] Indeed, the Secretary of Education recently applied the "severe ***or*** pervasive" standard to the Department's own employees. *See* https://www2.ed.gov/about/offices/list/om/docs/antiharasspolstate.pdf (December 19, 2017 memorandum from the Secretary of Education to all Department employees, reaffirming the Department's anti-harassment policy: "In essence, it is imperative that supervisors and managers take proactive measures to prevent harassment from occurring and to stop any harassment before it becomes severe or pervasive"). In sum, the Department of Education, the Supreme Court, Congress, OCR, and the EEOC have all used "severe or pervasive" in opinions and guidance, and Georgetown recommends that the proposed regulations maintain this standard.

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[1] The Supreme Court first defined sexual harassment in *Meritor Savings Bank v. Vincent*, 477 U.S. 57, 67-68 (1986) (for sexual harassment to be actionable, it must be unwelcome and "sufficiently severe ***or*** pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'") (emphasis added). The "severe or pervasive" standard was reinforced in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-2 (1993). In *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), when the Supreme Court used a "severe, pervasive, and objectively offensive standard," it did so solely with respect to the question whether a school district could be liable in a private cause of action for money damages in cases of student-to-student harassment. The Department of Education has a responsibility to hold institutions to a higher standard for compliance purposes.

[2] Congress has already defined sexual harassment and there is no justifiable reason for the Department of Education to narrow the definition in light of Congress's clear intent. *See* National Defense Authorization Act of 1998, 10 U.S.C. § 1561, as amended: "the term "sexual harassment" means conduct that is "so severe ***or*** pervasive that a reasonable person would perceive, and the victim does perceive, the environment as hostile or offensive" (emphasis added).

[3] The Office for Civil Rights of the Department of Education has consistently applied the "severe or pervasive" standard to all forms of harassment, including sexual harassment. *See* https://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html (sexual harassment); https://www2.ed.gov/about/offices/list/ocr/docs/race394.html (racial harassment); https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html (disability harassment). There is no reason to treat sex differently than other protected statuses.

[4] See https://www.eeoc.gov/laws/types/harassment.cfm. Because Title IX covers discrimination and harassment against employees as well as students, the proposed definition would create untenable inconsistency between employment cases governed by HR policies and EEOC standards, and student cases governed by these new Title IX regulations. With two different standards, it will be almost impossible to adjudicate cases that involve both students and employees.

In addition, the proposed regulations would not address conduct, even if it is severe and pervasive, unless equal access to a university's education programs or activities has been ***effectively denied***. However, access to education is not dichotomous; individuals have degrees of access, and individuals can be significantly impacted, emotionally distressed, and limited in their ability to participate in education programs or activities as a result of sexual misconduct. The Department should not require that a victim be effectively denied access, or come close to failing out of school, before being able to bring a sexual harassment complaint. The proposed definition would not allow universities to adjudicate cases before the most dire consequences result.

Title IX itself does not require such a restrictive definition. The statute states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, ***or be subjected to discrimination*** under any education program or activity receiving Federal financial assistance." 20 USCS § 1681. Where there is evidence of discrimination, which includes harassment, an individual need not have been excluded from participation or denied benefits for there to be a violation of Title IX. Additionally, the proposed definition of sexual harassment is inconsistent with long-standing guidance from the Department of Education, including in its recent "Q&A on Campus Sexual Misconduct" (September 2017) which states: "when sexual misconduct is so severe, persistent, ***or*** pervasive as to deny ***or limit*** a student's ability to participate in or benefit from the school's programs or activities, a hostile environment exists and the school must respond" (emphasis added). Georgetown recommends the Department maintain this "deny ***or limit***" standard in any new regulations.

2. *The proposed definition of "formal complaint" is too narrow and fails to address incidents of sexual misconduct that occur outside of school-sponsored programs or activities, even when such incidents have continuing effects on-campus or under an education program or activity.*

The proposed definition of a formal complaint is "a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct ***within its education program or activity*** and requesting initiation of the recipient's grievance procedures..." (emphasis added). In the preamble to the proposed regulations, the Department has stated: "In determining whether a sexual harassment incident occurred within a recipient's program or activity, courts have examined factors such as whether the conduct occurred in a location or in a context where the recipient owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance." Such a narrow interpretation would lead to significant and concerning gaps in coverage under Title IX, leaving unaddressed such scenarios as: a professor sexually harassing a graduate student at a conference they attend together; a student sexually assaulting another student at a house off campus that is not affiliated with the university; or a graduate teaching assistant sexually harassing a student at a restaurant.

Georgetown urges the Department not to adopt this restricted interpretation of Title IX. The statute's prohibition of sex discrimination ***"under"*** any program or activity receiving federal financial assistance can and should be interpreted to encompass conduct that occurs off-campus or outside of university-sponsored events, if that conduct has a continuing effect on-campus or under

an education program or activity. This broader definition would be consistent with the goals of Title IX and reflective of the reality of campus life at many colleges and universities. For urban campuses like Georgetown, and especially those that have separate undergraduate and graduate locations and facilities, much student life occurs off-campus in the surrounding neighborhoods.

In addition, many colleges and universities operate or support study abroad programs, and federal financial aid is used to support students in their studies abroad. The Higher Education Act of 1992 – enacted twenty years after Title IX – mandated that a student can receive financial aid for the costs of studying abroad, if the student is enrolled in a program approved by the home institution. If students can receive federal financial assistance while abroad, and if Title IX is "designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner" (*see Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 292 (1998)), then students should be protected from sex discrimination and harassment during the time they are studying abroad.

The Department recognizes that colleges and universities have an interest in addressing misconduct that occurs outside of their programs and activities, as the preamble to the proposed regulations states: "Importantly, nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding or offering supportive measures to students who report sexual harassment that occurs outside the recipient's education program or activity (or as to conduct that harms a person located outside the United States, such as a student participating in a study abroad program)." However, under such a model, schools could end up addressing the same conduct under two different conduct processes, merely because one incident happened on campus and the other happened nearby in a student's private apartment or at an off-campus bar. Similarly, if a complaint alleges that an individual committed two acts of sexual violence – one on campus and one off campus – it is unclear whether the regulations would require a separate investigation and adjudication for each. Such outcomes would be confusing to students, wasteful of university resources, inequitable if some students received procedural protections and benefits that others did not, and counter-productive to the overarching goal of preventing and responding promptly and equitably to sexual misconduct within campus communities.

Although Georgetown will not curtail its focus on preventing and addressing sexual misconduct wherever it occurs, we respectfully request that the Department of Education revise the definition of "formal complaint" such that institutions may use their Title IX processes and procedures to address conduct that occurs off-campus or outside of university-sponsored events, including in study abroad programs, if that conduct has a continuing effect on-campus or under an education program or activity.

3. *Georgetown supports broad institutional accountability in order to keep college and university campuses safe.*

The proposed regulations state that a school with *"**actual knowledge**"* of sexual harassment in an education program or activity must respond in a manner that is *"**not deliberately indifferent**"* or *"**clearly unreasonable**"* (emphasis added). This standard sets the bar far too low and does not adequately incentivize schools to take preventive and remedial action.

Here, as always, Georgetown is guided by its core values. *Cura personalis* encourages us to respect and respond to each person's unique circumstances and needs, and the idea of *magis* calls upon us to do more for others, especially those who are most vulnerable. As such, Georgetown holds itself to a standard much higher than deliberate indifference when it comes to the safety and success of our students. We will continue to do so and we believe the Department of Education should expect the same, particularly with respect to an issue as important as responding to sexual misconduct in schools.

The standard set forth in OCR's 2001 "Revised Sexual Harassment Guidance" – which is still in force – remains appropriate. Specifically, if a school knows or reasonably should know about harassment, a school must respond promptly and effectively, and the school's response will be evaluated using a reasonableness standard. This is similar to the standard the Equal Employment Opportunity Commission applies in the Title VII employment context, when reviewing an employer's response to harassment claims by an employee against a coworker.[5] By aligning these standards, Title IX will properly incentivize schools to take all reasonable steps to prevent and address sexual misconduct, and the standards will be clear for cases that involve both students and employees. By contrast, setting a lower liability standard for Title IX cases than for Title VII cases, as the proposed regulations would do, sends the wrong message and would provide less protection to a student complainant than to an employee complainant in sexual harassment cases, even if they were both harassed in the same manner by the same university employee.

As noted above, under existing guidance from the Office for Civil Rights, institutions are responsible for responding to sexual misconduct of which they knew or should have known. As a result, many institutions have designated a broad range of mandatory reporters who are required to inform the Title IX Coordinator of reports of sexual misconduct. At Georgetown, we have seen first-hand that mandatory reporting leads to more individuals who have been impacted by sexual misconduct being connected to resources and learning about their options. The new proposed regulations only hold institutions responsible when the institution has "actual knowledge," which means "notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient." As such, schools may be inclined to walk back mandatory reporting policies. This will almost certainly lead to fewer reports of sexual misconduct, and fewer students, faculty and staff being connected to the resources or interim measures they may need.

B. Title IX grievance procedures should promote a fair, just, and supportive process for all parties, but the proposed regulations create an overly legalistic process that will unnecessarily restrain reporting, traumatize students, and create inequities.

The student conduct and Title IX grievance processes at Georgetown are designed to reflect our institution's larger educational mission. Guided by Georgetown's core values, we are committed to ensuring that our process serves all involved parties equally in an unbiased and fair manner, upholds our community standards, and promotes the education and development of students. The

[5] *See, e.g. Harassment at* https://www.eeoc.gov/laws/types/harassment.cfm ("The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.")

student conduct system is not – and should not be – a substitute for the criminal or civil courts. The goals of the systems are different, the consequences are different, and the capacities are different. Educational institutions are not courts of law, and elements like cross-examination by advisors and live hearings should not be mandated. By requiring colleges to mimic courtroom procedures, we believe the proposed regulations will deter reporting, allow misconduct to go unaddressed, and ultimately make our communities less safe.

1. *The regulations should not require cross-examination by advisors.*

The proposed regulations require institutions of higher education to allow cross-examination of all parties and witnesses by advisors. Mandatory cross-examination by advisors will have a chilling effect on reporting and therefore diminish accountability of perpetrators. We already know that the majority of students who experience sexual misconduct never proceed with a formal complaint. There is little doubt that the specter of being cross-examined by a trained criminal defense attorney during a school's grievance procedure would drive down the number of students seeking redress through formal processes even further.

Many other equally effective methods exist to ensure both parties have an opportunity to fully present their cases and test the credibility of the other party's evidence. In Georgetown's undergraduate Title IX adjudicatory process for example, each party has a chance to review the Title IX investigator's report in full and submit a written response to any party or witness testimony in that report. That response is included as part of the final report that is given to the hearing panel. Additionally, during the hearing, each party has the opportunity to respond to the other party's live testimony in-person, and to submit questions that the hearing panel may ask the other party. These methods allow each party ample opportunity to address the other's evidence in a manner that promotes truthful fact-finding without chilling reporting or unnecessarily traumatizing participants.

The proposed regulations also prohibit consideration of any statement provided by a party or witness unless he or she submits to cross-examination. This proposal will restrain reporting and impede fact-finding and the pursuit of truth. Victims of sexual misconduct will be less likely to formally report incidents at all. Those accused of sexual misconduct will be forced to choose between submitting to cross examination by opposing counsel – the results of which could later be used in a criminal proceeding – or staying silent, which would result in the hearing panel not being able to consider their statements at all. Witnesses will be less likely to participate in investigations as they will not want to be cross-examined by hostile attorneys. Attorneys representing the parties will be incentivized to call every adverse witness for cross-examination, in the hope that the witnesses will not make themselves available, therefore nullifying their statements. Universities do not have the ability to issue subpoenas or require that witnesses, particularly those who may not be students, appear at a hearing. It is unclear how hearing panels would be expected to treat the detailed investigative reports including such witness statements where the witness chooses not to be cross-examined by an advisor. At best, this requirement for cross-examination will result in excessive administrative burden and unnecessarily long hearings potentially spanning many days. At worst, it will lead to confusion among hearing panelists and decisions of responsibility being made without the benefit of critical evidence.

In addition, the proposed regulations require a Title IX Coordinator to file a formal complaint when there are multiple reports of sexual misconduct against the same respondent. Yet the investigation and adjudication of these complaints will be grossly undermined by the rule that every individual must submit to cross-examination or that individual's testimony will be nullified. Without complainants or witnesses willing to be cross-examined by a potentially adverse advisor, the decision-maker will be presented with very little usable evidence, making it incredibly difficult in such cases to hold alleged serial perpetrators accountable. In the interest of the safety of the community, the Title IX Coordinators should be permitted to proceed with such cases and gather relevant evidence and testimony even if certain complainants and witnesses are not willing to be cross-examined in a live hearing.

The Department's prior guidance, including the 2017 "Q&A on Campus Sexual Misconduct," gave appropriate deference to institutions as to whether to allow cross-examination and Georgetown urges the Department not to adopt the newly proposed regulations regarding cross-examination.

2. *The regulations should not require live hearings.*

Live hearings are not necessary for procedural fairness and equity. While Georgetown uses live hearings for adjudication of most student cases, many institutions use an investigator model, as Georgetown does for faculty and staff cases. An investigator model that provides notice to the individual accused, an opportunity for both parties to be heard, and a thorough and impartial investigation, has long been recognized as a fair and equitable investigation.[6] Institutions should have discretion to use live hearings or the investigative model depending on the unique needs and resources of each campus.

Maintaining an option other than a live hearing is also important for cases where there may be reluctant complainants yet the school still has an obligation to respond. For example, many schools have processes such as administrative reviews where the institution itself can initiate an investigation or administrative review into particularly concerning or serial behavior even if the victims do not wish to participate. These reviews would be undermined if a live hearing were required in every case.

While institutions may determine that live hearings are appropriate under certain processes, institutions should not be required to use them and Georgetown urges the Department not to adopt this requirement in the proposed regulations.

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[6] *See* e.g., EEOC Enforcement Guidance, June 18, 1999, https://www.eeoc.gov/policy/docs/harassment.html#_ftn68 ("An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. . . If a fact-finding investigation is necessary, it should be launched immediately. . . . The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. . . . Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility. . . . Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator's report. The parties should be informed of the determination.")

3. *The legalistic nature of the proposed Title IX grievance process will create inequities and restrain reporting and participation.*

As noted above, the student conduct and Title IX grievance processes at Georgetown are designed to further and fit within our institution's larger educational mission. The student conduct system is not – and should not be – a substitute for the criminal or civil courts. By requiring colleges to mimic courtroom procedures, and to provide advisors to the parties for the purpose of cross-examination, the proposed regulations will deter reporting, create inequities, allow misconduct to go unaddressed, and ultimately make students feel less safe.

Georgetown strongly supports the provisions in the proposed regulations that provide the parties with the same opportunities to have an advisor of their choice present throughout the grievance process. We also support the provision giving discretion to institutions to establish restrictions regarding the extent to which the advisor may participate in the proceedings. However, we are concerned about the highly juridical nature of the proposed grievance procedures, including the proposed requirement that "[i]f a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination." By requiring colleges and universities to allow advisors to cross-examine the parties, and consequently requiring institutions to provide appropriate advisors to carry out that courtroom-style cross-examination, colleges and universities are placed in a position incompatible with the fundamentally educational nature of our institutions and processes. Parties with financial means will hire experienced lawyers, who can intimidate the other party and that party's advisor. Universities will face significant administrative and financial burdens as they will either have to train non-lawyer advisors and fact-finders on cross-examination, how to handle objections, how to treat evidence, and other matters that lawyers would introduce into the system, or to hire attorneys for each party that requests one. Even if the university were to provide those who do not have an advisor with a lawyer, there would inevitably be claims of discrimination and bias.

We feel it critical to note as well that the chilling effect that we believe would result from an increasingly legalistic Title IX grievance process may have an outsized impact upon underrepresented and marginalized communities. As a result of the findings in our first university-wide sexual misconduct climate survey in 2016, Georgetown conducted a series of feedback sessions and focus groups with various populations in our community, including underrepresented minorities and marginalized communities. Through those sessions, we heard feedback that students of color in particular may avoid reporting incidents of sexual misconduct because of a lack of trust in adjudicatory systems. Research has also shown that for students who identify as LGBTQ who experience sexual assault, the discrimination they may face surrounding those identities often makes them hesitant to seek help from police, hospitals, or other systems that are supposed to help them. As such, we are particularly concerned that the aspects of the proposed regulations that would require institutions to operate their administrative educational processes like courts of law will lead to less reporting, less use of our institutional grievance procedures, less accountability, and could disproportionally impact students who are from marginalized or minority populations.

4. *The preponderance of the evidence standard should be permitted in sexual misconduct cases, even if a different standard is used for other types of misconduct.*

Under the proposed regulations, "the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty." Georgetown believes that preponderance of the evidence – the standard used in civil and administrative cases – is a fair, just, and equitable standard for sexual misconduct cases at colleges and universities, and we oppose provisions that dissuade universities from adopting that standard. By placing a heavier burden on use of the preponderance of the evidence standard, the Department of Education is encouraging universities to adopt the clear and convincing standard.

Sexual misconduct cases often involve two people with little extrinsic evidence, which is why many institutions opt to use preponderance of the evidence. Georgetown uses the preponderance of the evidence standard for sexual misconduct cases and the outcomes of those cases are not skewed in favor of one party or the other, but depend on whether the evidence shows that it is more likely than not that the sexual misconduct occurred. Preponderance of the evidence puts the parties on equal footing in cases that are often very difficult to prove because, very often, there are no witnesses. The clear and convincing standard, which necessarily results in fewer findings, does not promote safety or accountability.

5. *Georgetown supports supportive measures that promote safety and encourage reporting.*

The proposed regulations define supportive measures as "non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment." Georgetown supports these goals. When students trust that a university will provide supportive measures, they are more likely to report misconduct, seek resources, and feel safe on campus. To that end, we think supportive measures should be described in writing to both parties, who should be given an opportunity to participate in the formulation of the supportive measures through an interactive process.

Georgetown also appreciates the Department's recognition that schools should be provided with "legitimate and necessary flexibility to make disciplinary decisions and to provide supportive measures that might be necessary in response to sexual harassment." However, supportive measures do not prevent a perpetrator from engaging in similar behavior again, or protect the broader community from a perpetrator, and therefore should not be considered an alternative to adjudication for conduct that occurs outside of an education program or activity. Individuals should have a right to file a formal complaint in addition to receiving supportive measures, and

that right should extend to conduct that occurs off-campus or outside of an education program or activity, if there is a continuing effect on-campus or under an education program or activity.

6. *Informal resolution, as long as mutually agreeable and not coercive, encourages reporting.*

Under the proposed regulations, "[a]t any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication." Georgetown supports the Department's proposal to allow informal resolution as an option in sexual misconduct cases, if mutually agreeable to both parties and not coercive. This option will encourage reporting, accountability, and access to support services. However, if the final regulations require a formal grievance process that is overly legalistic and intimidating, as these proposed regulations do, then students may feel that informal resolution is their only good option, and therefore is not truly voluntary. In addition, where there are power differentials and the possibility of coercion or pressure, such as may occur in *quid pro quo* and sexual assault cases, then informal resolution may not be appropriate. As such, the Title IX Coordinator should have the discretion to decide that informal resolution is not appropriate (even after it has begun), if there is evidence of actual or potential coercion, and it would be helpful if the Department provided general best practices and guidelines for institutions to prevent such coercion.

Conclusion

Georgetown University is committed to providing a safe and welcoming environment where students, faculty, and staff can thrive. Our work to address and eradicate sexual violence is guided by our Jesuit values: *cura personalis* – caring for the whole person and providing individualized respect to each person's unique circumstances; justice; accountability; and seeking to live more fully the *magis* – striving to do more for others, especially those without a voice. We hope that the Department of Education will consider these values as it issues regulations under Title IX that encourage reporting, promote safety and access to resources, and ensure equitable and fair procedures.

Sincerely,

John J. DeGioia
President, Georgetown University