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Final Comment Letter to Department of Education

Rhode Island School of Design

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January 30, 2019

Via Hand Delivery and Federal eRulemaking Portal

The Honorable Betsy DeVos
Secretary of Education
C/O Brittany Bull
United States Department of Education
U.S. Department of Education
400 Maryland Ave. SW, Room 6E310
Washington, DC 20202

Re: Comments on Proposed Title IX Regulations

Dear Secretary DeVos:

Our Firm writes to comment on the Department of Education's (the "Department") Notice of Proposed Rulemaking under Title IX of the Education Amendments of 1972 (the "Proposed Regulations"), on behalf of twenty-four private, liberal arts colleges and universities located throughout the United States: Antioch University, Barnard College, Bryn Mawr College, Bowdoin College, Carleton College, Colby College, Connecticut College, Dickinson College, Franklin & Marshall College, Gettysburg College, Hamilton College, Haverford College, Hobart and William Smith Colleges, Macalester College, Middlebury College, Mount Holyoke College, Muhlenberg College, Rhode Island School of Design, Skidmore College, Swarthmore College, Trinity College, Wellesley College, Wesleyan University, and Williams College (collectively the "Institutions"). We appreciate the effort that the Department has made to consider a wide range of issues relating to the challenging area of sexual harassment and assault. We further appreciate that the Department is striving to provide "clarity, permanence, and prudence [through] regulation properly informed by public participation in the full rulemaking process" (Preamble, p. 61,464) and trust that comments of the regulated community – schools, colleges and universities – will be carefully considered. Several aspects of the Proposed Regulations, such as the flexibility to use informal resolution

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processes in certain cases, are well-thought out and will be very beneficial to the higher education community. Other aspects of the Proposed Regulations, however, merit re-consideration and/or further work to ensure that they advance Title IX's goal of educational environments free from discrimination and harassment – a goal our clients share.

For many years, the Institutions have worked tirelessly to address the complex problem of sexual assault and sexual harassment among members of their communities. They have made significant investments of time and resources to develop policies tailored to their campus communities, hire appropriate staff, and ensure that appropriate support resources are available to students. Their responses to incidents of sexual harassment are of the utmost importance to their communities – students, faculty, alumni, and administrators demand that they get this issue right. With or without federal law, the Institutions will continue to make addressing sexual harassment in a careful, thorough, and fair way among the highest of their priorities.

While the statistics vary, there can be no reasonable debate that sexual assault is a far too prevalent problem throughout our country, including on our campuses. Each of the Institutions has developed policies, procedures, trainings, and programs to combat sexual violence, and consistently monitor the effectiveness of those policies and procedures. The core of the Institutions' work focuses on providing appropriate support to victims of sexual harassment and violence, and ensuring accountability for individuals who violate their policies. Each of the Institutions is also deeply committed to treating every member of our communities with respect, care, and fairness.

Although each of the Institutions has as a defining goal that their policies and procedures both address the effects of sexual violence while ensuring fundamental fairness to all participants, they have developed differing policies to achieve these goals. The model chosen by each Institution is based on careful consideration of many factors, including what has worked for them in years of experience, what best fits their individual school's mission, culture and values, what is most sensible given the size and the unique organization of their administrations and programs, and what kinds of sexual harassment cases they each most commonly face, which can differ significantly in nature, scope, and quantity and in ways that may warrant significantly differing approaches. Simply because their policies may be different does not, however, mean that they do not achieve the same goals of consistent, evidence-based results through a careful, thorough and fair process. Colleges and universities employ experienced and dedicated professionals who are on the front lines of addressing sexual harassment and violence every day. These professionals are better positioned than the Department to determine what will and will not be effective in adjudicating these complex cases.

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Our primary concern with the Proposed Regulations is that the Department seeks to remove the autonomy of private, independent schools like the Institutions, by seeking to impose a uniform, “one-size-fits-all” set of procedures for handling all allegations of sexual violence and sexual harassment, for every school in the United States, regardless of the school’s size, history, geography, mission, values, or culture. The Department can and should address situations where recipients of federal funds intentionally discriminate on the basis of sex. But it is ill-equipped to regulate the many details of student disciplinary proceedings. Rather than setting forth broad principles, the regulations seek to micro-manage how schools will handle every aspect of an investigation of sexual harassment, ranging from mandating adversarial cross-examination at a live hearing to dictating when a school must file or dismiss a complaint of sexual harassment. The Institutions, like every school in the country, will be required to re-write their policies and procedures to follow the Department’s directives, even if their current policies have been developed with community input, have worked well, and have achieved reliable results.

Respectfully, we question whether the minute details of internal student disciplinary matters are appropriately regulated by the federal Department of Education with a single, one-size-fits-all set of mandatory procedures. Moreover, from a purely legal perspective, we question whether the Department has the authority to do so. Title IX forbids colleges and universities who receive federal funds from engaging in intentional gender discrimination, but it does not purport to dictate how their disciplinary proceedings should be handled. Indeed, the Proposed Regulations are contrary to the very Supreme Court cases that the Department claims to be applying. We also submit that a number of the specific details of the Proposed Regulations are unnecessary, will have unforeseen consequences, and will cause considerable harm.

We urge the Department to reconsider the Proposed Regulations.

I. As a Threshold Matter, The Department Has Not Established It Has Authority to Dictate How Schools Handle Their Internal Disciplinary Proceedings

Proposed § 106.45 purports to set out details as to how every college and university in the Nation must handle claims of sexual harassment. It requires that separate individuals investigate the facts from those who decide responsibility. It dictates the precise wording of certain elements of notices to parties. It sets exact deadlines. It requires a live hearing. It requires that schools allow direct cross-examination by an advisor, and that schools provide an advisor to conduct cross-examination if a party does not have one of their own. It sets forth specific evidence that can and cannot be considered. It dictates that a school must dismiss a complaint depending on the geography where the misconduct occurred. The list goes on and on for almost ten pages.

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The Department appears to find its authority to do all of this from the following proposition contained in § 106.45(a): “A recipient’s treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX. A recipient’s treatment of the respondent may also constitute discrimination on the basis of sex under Title IX.” Of course, any action by a recipient of federal funds “may” constitute discrimination on the basis of sex, but only if an adverse action is taken **because of** someone’s gender. *See, e.g., Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 865 (8th Cir. 2011) (“Title IX imposes liability on a school district for discrimination only if the discrimination is ‘on the basis of sex.’ We glean from this language of the statute a requirement of underlying intent, and therefore motivation, on the part of the actor to discriminate because of one’s sex or gender.”); *Hyman v. Cornell Univ.*, 834 F. Supp. 2d 77, 82 (N.D.N.Y. 2011) (dismissing Title IX claim where “Plaintiff alleged that [the university] ignored her [complaint], but she did not, as the law requires, allege facts to indicate that [the university] ignored her **because she is a woman.**”) (emphasis in original), *aff’d*, 485 F. App’x 465 (2d Cir. 2012).

If the mere possibility that a recipient of federal funds “may” act with discriminatory intent were enough to regulate, then the Department could literally regulate every aspect of a school’s programs, on the theory that some action by the school “may” be discriminatory in some circumstances. A professor “may” give a student a poor grade because she is a woman. A club “may” exclude a student because he is a man. An administrator “may” fire a subordinate because of his sexual identity. The mere possibility of discrimination does not justify the Department’s imposition of a complex regulatory scheme on a recipient of federal funds.

The question, instead, is whether the Department has reasonably interpreted Title IX to **require** schools to engage in the exhaustive processes set out by the Department in the Proposed Regulations. It has not. Title IX does not speak in any way on the issue of how a school must handle an internal complaint to address sexual harassment. In fact, case law involving claims brought by both complainants and respondents makes very clear that Title IX does not require schools to do the things the Department is now proposing. First, the Department’s assertion that a school’s failure to follow the detailed procedures it commands constitutes “deliberate indifference” under Title IX is contrary to the very two Supreme Court cases on which the Department claims to rely. Second, it is well-settled that schools do not violate Title IX by failing to provide the types of “due process” protections the Department wants to require. Instead, a school violates Title IX only if a flawed process is specifically undertaken **because of** a student’s gender.

There is, in sum, no legal basis under Title IX for requiring schools to do what the Department is now considering requiring them to do.

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A. *The Supreme Court Has Held That Failure to Follow a Particular Disciplinary Process is Not a Violation of Title IX and That Schools Should Retain Flexibility In Responding to Allegations of Sexual Harassment*

In the commentary to the Proposed Regulations, the Department suggests that the Proposed Regulations are meant to follow the Supreme Court’s foundational law in this area, namely *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998) and *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).¹ See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,468 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) (noting that “we are persuaded by the policy rationales relied on by [*Gebser* and *Davis*] and believe it’s the best policy approach.”). Section 106.44 of the Proposed Regulations states that the Department will not take action against a school unless it has actual knowledge of sexual harassment or violence and then responds with “deliberate indifference” – apparently a reference to the liability standards set out in *Gebser* and *Davis*. Section 106.44(b) then states that a school “*must* follow procedures consistent with section 106.45 in response to a formal complaint” and that, if it does so, “the recipient’s response to the formal complaint is not deliberately indifferent and does not otherwise constitute discrimination under Title IX.” (emphasis added). In other words, the Proposed Regulations are premised on the notion that a school’s failure to follow the detailed procedures it has proscribed – such as missing a deadline by one day or failing to use the exact wording prescribed by the regulations – constitutes deliberate indifference, and is therefore a violation of Title IX.

While the Institutions agree that *Davis* and *Gebser* properly set out their obligations, the Department’s Proposed Regulations fundamentally misunderstand *Gebser* and *Davis*. “Deliberate indifference” is not a measure of the quality (or quantity) of a school’s procedures for processing complaints of past acts of sexual harassment. It is an official decision by a recipient of federal funds not to address known, ongoing harassment, that subsequently subjects a student to additional harassment. *Davis* involved claims that a fifth grader had repeatedly harassed another student over a period of many months, the parents reported the conduct to the school, but the school did almost nothing about it. *Id.* at 633-35. The harassment thus continued unabated. *Id.* The Supreme Court held that a school does not violate Title IX simply because harassment occurs in its programs, but only where (1) “the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities,” *id.* at 633; (2) the school’s deliberate indifference “subjects” the student to sexual harassment, *id.* at 645;

¹ Section 106.45(a) states that “A recipient’s treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.” It is the *Gebser* and *Davis* line of cases that set out when, in practice, that is the case.

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and (3) the harassment caused by the school's deliberate indifference is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit" provided by the school. *Id.* at 633. In other words, deliberate indifference is not a measure of the process a school has in place to address past incidents of sexual harassment, but is instead an "an official decision by the recipient not to remedy" known, ongoing harassment, such that the school's own actions "subject" the student to harassment by allowing it to continue. *Gebser*, 524 U.S. at 290 (internal quotation marks and citation omitted); see *Doe v. University of Kentucky*, 2019 U.S. Dist. LEXIS 8897_at*33-*34 (E.D. Ky. Jan. 18, 2019) ("Whether the University failed to discipline is not the question before this Court. Instead, in this lawsuit, [Plaintiff] must turn her focus to whether the University acted 'clearly unreasonably' in attempting to prevent any harassment. This aspect of Doe's Complaint takes issue with the University's administrative *process* rather than its alleged indifference to Plaintiff's *harassment*. The Court agrees that, on the facts before it, complaining about the process rather than the response to the alleged harassment itself is simply not actionable by Plaintiff under Title IX." (emphasis in original)).

Rather than requiring a specific, uniform response to sexual harassment in educational programs, *Davis* makes crystal clear that Title IX **does not** require schools to engage in any particular action aimed at bringing harassment to a stop, including a disciplinary response: "We stress that our conclusion here – that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment – does not mean . . . **that administrators must engage in particular disciplinary action.**" *Davis*, 526 U.S. at 648 (emphasis added). It emphasized that "courts should refrain from second guessing the disciplinary decisions made by school administrators" and that "[s]chool administrators will continue to enjoy the flexibility they require" in responding to student misconduct. *Id.* Title IX does not require schools to "remedy" peer harassment through particular methods, nor does it require schools to provide any particular process or remedy that a student may want. *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000) ("[v]ictims do not have a right to particular remedial demands" under Title IX). "On the contrary, [schools] must merely respond to known peer harassment in a manner that is not clearly unreasonable." *Davis*, 526 U.S. at 649.

Thus, under *Davis*, schools must address a situation, but are not required to engage in disciplinary action specifically. See, e.g., *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1123 (10th Cir. 2008) ("Many factors in the record counseled caution in determining whether discipline was appropriate in this case, and the district's judgment call not to pursue discipline was not clearly unreasonable and deliberately indifferent."). Nor are schools required to follow any particular procedures in responding to sexual harassment. Indeed, courts routinely hold that deliberate indifference is not shown simply by pointing out that a school deviated from its own policy. *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d

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156, 169 (5th Cir. 2011) (“A district’s ‘failure to comply with [its] regulations . . . does not establish the requisite . . . deliberate indifference.’” (alteration in original; quoting *Gebser*, 524 U.S. at 291-92)); *Facchetti v. Bridgewater Coll.*, 175 F. Supp. 3d 627, 638 (W.D. Va. 2016) (“[A] Title IX defendant’s failure to comply with its own policy does not prove deliberate indifference, under clear Supreme Court precedent.”); *Doe v. Bd. of Educ. of Prince George’s County*, 982 F. Supp. 2d 641, 657 (D. Md. 2013) (“[T]he Supreme Court has held that the failure to follow sexual harassment grievance procedures does not prove deliberate indifference under Title IX.”). In fact, in *Gebser* itself, the Supreme Court held that a school’s failure to have in place any grievance procedures **at all** was not deliberate indifference or actionable discrimination under Title IX. *Gebser*, 524 U.S. at 291 (holding that a school’s failure to adopt grievance procedures for resolving sexual harassment claims does not, by itself, constitute discrimination under Title IX).

Years of case law interpreting Title IX makes clear that schools should have flexibility and discretion in responding to sexual harassment. If the absence of a grievance procedure is not deliberate indifference, then it cannot be deliberate indifference – and thus a violation of Title IX – to use a process without cross-examination, to use one standard or proof over another, or to use a single investigator model or some other model of adjudication. Courts have, in fact, regularly found that a school’s use of one procedure over another in a disciplinary proceeding does not constitute deliberate indifference, nor are particular shortcomings in an investigation or hearing actionable under Title IX. *See, e.g., Oden v. Northern Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006) (holding that college’s nine-month delay in proceedings was not deliberately indifferent, even if it may have been negligent and in violation of school’s own policy); *Karasek v. Regents of the Univ. of Cal.*, No. 15-cv-03717-WHO, 2016 U.S. Dist. LEXIS 98949, at *45-46 (N.D. Cal. July 28, 2016) (finding allegations that the university failed to update plaintiff during its investigation and disciplinary process were, at most, “nonactionable negligence, laziness, or carelessness,” and not deliberate indifference); *Preusser v. Taconic Hills Cent. Sch. Dist.*, No. 1:10-CV-1347 (MAD/CFH), 2013 U.S. Dist. LEXIS 7057 (N.D.N.Y. Jan. 17, 2013) (“Upon receipt of a Title IX grievance, a school district is not required to proceed in a particular manner, even if there are policies in place that would appear to require the initiation of a formal investigation.”).

Thus, in the context of sexual harassment involving members of a school’s community, a school violates Title IX only if it has knowledge of sexual harassment and fails to take some measures reasonably calculated to stop it. *See K.C. v. Cty. Schs.*, 306 F. Supp. 3d 970, 982 (W.D. Ky. 2018) (“in nearly every case discussing deliberate indifference regarding a school’s *response* to reports of harassment, abuse, or discrimination, the Sixth Circuit’s focus has been on whether the school could have or should have done [things] differently in order to bring the . . . harassment to a *stop*.” (emphasis and alterations in original)). The Supreme Court has

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flatly rejected the notion that schools must follow a particular set of guidelines in processing sexual harassment complaints about past behavior. Rather than following *Gebser* and *Davis*, the Proposed Regulations turn those decisions on their heads.

B. *Title IX Does Not Require That Schools Provide “Due Process” to Students in Disciplinary Proceedings Involving Sexual Harassment, and “Due Process” is Inapposite for Private Institutions*

Each of the Institutions is dedicated to providing fundamental fairness to each complainant and respondent in every case, consistent with their local state law, as well as providing a non-discriminatory process for adjudicating complaints of sexual harassment. Notions of fundamental fairness, however, are quite different from “due process,” a set of specific, procedural protections used in criminal law and other settings involving deprivation of rights guaranteed by the state. Private institutions, including the signatories of this letter, are not arms of the state. *See State v. Schmid*, 423 A.2d 615, 620 (1980) (“A private college or university, however, stands upon a different footing in relationship to the state. Such an institution is not the creature or instrument of state government.”); *M.B. v. McGee*, Civil Action No. 3:16cv334, 2017 U.S. Dist. LEXIS 44796, at *27 n.20 (E.D. Va. Mar. 24, 2017); *Bleiler v. College of the Holy Cross*, Civ. A. No. 11-11541-DJC, 2013 U.S. Dist. LEXIS 127775, at *13 (D. Mass. Aug. 28, 2013); *Kelley v. Univ. of Richmond*, Civil Action No. 3:06CV203-JRS, 2006 U.S. Dist. LEXIS 35925, at *6-7 (E.D. Va. June 2, 2006). There is simply no authority to transform private institutions into state actors under a statute that is designed to prevent intentional gender discrimination.

There is no obligation under Title IX to employ any particular form of disciplinary proceedings, nor does Title IX require cross-examination, live hearings, or any of the other procedures the Department intends to require. This is, of course, consistent with decades of case law observing that courts should not re-try a college’s internal disciplinary matters, and generally establishing the appropriate standard as one of fundamental fairness. *See, e.g., Napolitano v. Princeton Univ. Trustees*, 453 A.2d 263, 275 (1982) (“We agree with the trial judge that he should not have become a super-trier under due process considerations.”); *Clayton v. Trustees of Princeton Univ.*, 608 F. Supp. 413, 415 (D.N.J. 1985) (“My conclusion in this case is that Princeton has accorded Mr. Clayton fundamental fairness in convicting him of cheating, and that is all that the law requires.”); *Fellheimer v. Middlebury College*, 869 F. Supp. 238, 244 (D. Vt. 1994) (“Thus it is clear that Constitutional due process standards should not be used to judge the College's compliance with its [policies].”)

Moreover, concepts of “due process” are distinct from Title IX’s prohibition against intentional discrimination on the basis of sex. In fact, it is well settled, in case law

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involving claims brought by respondents,² that Title IX does not require schools to provide a set of procedures that conform with notions of “due process.” While a school can violate Title IX if a flawed process or procedure has led to an erroneous outcome, that is so *only* if the erroneous outcome was motivated by the student’s sex. Courts have held that their role under Title IX is “neither to advocate for best practices or policies nor to retry disciplinary proceedings.” *Yu v. Vassar College*, 97 F. Supp. 3d 448, 461 (S.D.N.Y. 2015). Rather, the sole question under Title IX is whether, when a school disciplines a student “for sexually assaulting a fellow student, it discriminated against him based on his gender in violation of Title IX.” *Id.*; *see also Doe v. Colgate Univ. Bd. Of Trustees*, — Fed. App’x —, 2019 U.S. App. LEXIS 1258, at *13 (2d Cir. Jan. 15, 2019) (“Assuming that his insistence that the sexual encounters were consensual was sufficient to raise a disputed issue of material fact on the question of misconduct, to resist summary judgment John Doe must demonstrate a genuine dispute of material fact as to whether Colgate’s actions were motivated by gender bias.”). Thus, “[m]ere allegations a flawed proceeding ‘led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination’ does not satisfy an erroneous outcome claim.” *Saravanan v. Drexel Univ.*, Civ. A. No. 17-3409, 2017 U.S. Dist. LEXIS 166940, at *9 (E.D. Pa. Oct. 10, 2017) (quoting *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994)). There must instead be a causal connection between the flawed process and a student’s gender, such that the school can be said to have engaged in the action *because of* the student’s gender. *See Colgate*, 2019 U.S. App. LEXIS 1258 at *13; *Doe v. Miami Univ.*, 882 F.3d 579, 593 (6th Cir. 2018).

Thus, failure to have in place certain policies, like cross-examination, live hearings, or the right to counsel, does not violate Title IX, absent a showing that the school’s disciplinary actions were motivated by the student’s gender. *See, e.g., Gebser*, 524 U.S. at 291 (school’s failure to adopt grievance procedures for resolving sexual harassment claims does not itself constitute discrimination under Title IX); *Yusuf*, 35 F.3d at 715 (“[A]llegations of a procedurally or otherwise flawed proceeding that has led to adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss.”); *Doe v. Trs. of the Univ. of Pa.*, 270 F. Supp. 3d 799, 822-23 (E.D. Pa. 2017) (same); *Yu*, 97 F. Supp. 3d at 462-71 (rejecting arguments that various alleged procedural flaws in process, including refusal to allow live cross-examination violated Title IX, where there were no allegations that the actions were motivated by gender bias).³

² As to Section 106.45(a)’s statement that “A recipient’s treatment of the respondent may also constitute discrimination on the basis of sex under Title IX,” this line of cases explains when that is so.

³ In fact, even where a process is written in a way that favors the accuser, rather than the accused, courts routinely dismiss Title IX claims because victims of sexual assault can be of any gender, and a “victim-centered approach does not raise an inference of gender bias.” *Rossley v. Drake Univ.*, No. 4:16-cv-00623-RGE, 2018 U.S.

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In the commentary to the Proposed Regulations, the Department relies heavily on *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), for the proposition that cross-examination and live hearings should be required in Title IX cases. *Baum*, however, involved a public university and that portion of the decision rested entirely on the Due Process Clause to the United States Constitution. *Id.* at 581. In discussing the Title IX claim, the court found that the lack of cross-examination might show an erroneous outcome, but went on to hold that the plaintiff must also show that the University’s actions were motivated by gender bias to prove a Title IX claim – due process is not an element of a Title IX claim. *Id.* at 586-87.⁴

* * *

The Department misinterprets Title IX. Title IX does not require schools to engage in all the detailed processes set out in the Proposed Regulations and/or to require private institutions to follow novel concepts of “due process” in internal, private student discipline proceedings. Schools may not discriminate against members of their communities “on the basis of sex.” But it is not sex discrimination to decide that cross-examination by attorneys is an unreasonable way to resolve internal student discipline issues. Because the Department lacks the authority to do what it is proposing, it should reconsider the Proposed Regulations.

II. As a Matter of Policy, Schools Should Have Flexibility to Decide What Model of Adjudication Works Best at Their Own Institutions

Setting aside the question of appropriate authority to require extraordinarily burdensome and costly processes at every institution of higher education in the country, experience and legal precedent indicate that institutions need flexibility to determine their own internal procedures in accordance with their missions, cultures, administrative structures, and other factors that vary from campus to campus. The Institutions – and presumably schools throughout the Nation – will continue their hard work to create processes that work best for *both*

Dist. LEXIS 184836, at *58 (D. Iowa Oct. 12, 2018); *Doe v. Coll. of Wooster*, 243 F. Supp. 3d 875, 886 (N.D. Ohio 2017) (“[d]emonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against alleged perpetrators, is not equivalent of demonstrating bias against male students” (internal quotation marks omitted)); *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 778 (S.D. Oh. 2015) (same); *King v. Depauw Univ.*, No. 2:14-cv-70, 2014 U.S. Dist. LEXIS 117075, 2014 WL 4197507, at *10 (S.D. Ind. Aug. 22, 2014) (same); *Haley v. Virginia Commonwealth Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996) (stating that “a bias against people accused of sexual harassment and in favor of victims . . . indicate[s] nothing about gender discrimination”).

⁴ *Baum* is also a single decision from the Sixth Circuit, and it is far from clear whether it would be followed by other courts. See, e.g., *Doe v. Princeton Univ.*, 2019 U.S. Dist. LEXIS 4449 at *21 (D.N.J. Jan. 9, 2019) (questioning whether Third Circuit would follow *Baum*).

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complainants and respondents in sexual harassment matters. Our communities demand it. We face the risk of lawsuits if we don't get cases right. And it is simply the right thing to do by our students.

But one size does not fit all. Methods that might work well at one institution might not work well at another. A live hearing might make sense at a large public institution which has administrators with experience in conducting such hearings. By contrast, a smaller, rural school might find that, with fewer resources and employees, some other model, such as a single investigator model, utilizing an outside professional with relevant experience, is the best fit for them. Moreover, the Proposed Regulations' inflexible approach and rigid rules will limit the Institutions' ability to adjust their policies based on experience in years to come.

By dictating the precise procedures that every school in the country must follow in investigating and adjudicating Title IX cases, the Department would deprive schools of the flexibility they need to adopt policies and procedures that fit best for their institution. Under Title IX and in other contexts, including disciplinary matters and academics, courts have long recognized that colleges and universities – particularly private ones – are each unique, and their internal decisions should be subject to considerable deference. *See, e.g., Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (“When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty’s professional judgment.”); *Rost*, 511 F.3d at 1123 (“[W]e are discouraged from second-guessing school disciplinary decisions.”); *Doe v. Hamilton Cty. Bd. of Educ.*, 329 F. Supp. 3d 543, 570 (E.D. Tenn. 2018) (Title IX “is not an open invitation for courts, which are often unacquainted with the realities of and constraints on school discipline, to second-guess school actions with the benefit of hindsight” (internal quotation marks and brackets omitted)); *Swartley v. Hoffner*, 734 A.2d 915, 921 (Pa. Sup. Ct. 1999) (“[I]t is not the place of this Court to second-guess academic decisions and judgments made in colleges and universities.”); *Boehm v. Univ. of Penn. Sch. of Vet. Med.*, 573 A.2d 575, 579 (Pa. Super. Ct. 1990) (“[C]ourts are more reluctant to interfere in the disciplinary proceedings of a private college than those of a public college” because “[a] majority of courts have characterized the relationship between a private college and its students as contractual in nature. Therefore, students who are being disciplined are entitled only to those procedural safeguards which the school specifically provides.”). Institutions that handle these cases every day are simply better positioned than the federal government to decide what works best for them.

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III. Specific Concerns with the Procedures in the Proposed Regulations

Putting aside our overall concerns with the Department's efforts to dictate the specifics of schools' internal disciplinary processes, many of the more than 50 specific requirements are problematic. These ambiguities and practical challenges are further evidence that it is not wise for the Department to dictate elaborate regulations as to the details of student disciplinary proceedings, since the only "fix" for problems discovered in implementation will be a lengthy regulatory process. We highlight below some of our specific concerns.

A. *Mandating that Schools Have Live Hearings with Cross-Examination Will Likely Increase Complexity, Costs, and Delays, and May Deter Reporting*

While cross-examination may be an important element in court proceedings, colleges and universities are not courts, nor should they be. They are educational institutions whose primary functions include educating their students and providing a safe and welcoming environment for their communities. Those found responsible for sexual harassment will not be sent to jail. The maximum penalty an institution can utilize is to require a student to leave. Thus, a school disciplinary proceeding is an internal, administrative proceeding that decides only whether the school's policies have been violated.

Administrative proceedings can – and, on a daily basis in a variety of contexts, do – reach reliable results without adversarial cross-examination. In fact, even with respect to public schools who are subject to the Due Process Clause, as of today, only the United States Court of Appeals for the Sixth Circuit has held that cross-examination is required under principles of due process. Other Courts of Appeals have held that cross-examination at a student disciplinary proceeding in state schools is not an essential element of due process. *See, e.g., Gorman v. University of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988) (“As for the right to cross-examination, suffice it to state that the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases.” (citing *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961)). We are aware of no authority for the proposition that the right to cross-examine witnesses is required at a private institution. *See Doe v. Belmont Univ.*, 334 F. Supp. 3d 877, 894 (M.D. Tenn. Sept. 27, 2018) (noting that *Baum* did not apply to a private school, and instead the procedures due were those set out in the agreement between the school and the student).

We are likewise unaware of another context where the federal government has dictated that a private entity is prohibited from making a decision as to whether its internal policies have been violated unless it provides a live hearing with cross-examination. For

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example, Title VII also prohibits discrimination on the basis of sex (as well as other characteristics). While the stakes are high when continued employment is at issue, any employer is free to fire an employee for sexual harassment based on whatever administrative process it deems appropriate for adjudicating such claims.

In other contexts, both public and private, auditors, investigators, and regulators regularly conduct investigations that form the basis for a decision, without adversarial cross-examination. For example, when the Department of Education's Office for Civil Rights conducts an investigation into violations of Title IX, schools have no right to question witnesses (or even to know who they are). Presumably, the Department nevertheless believes the procedures set out in its Case Processing Manual are both fair and producing reliable results.

That numerous private (and even public) entities have for decades conducted internal administrative proceedings without live hearings or cross-examination belies the notion that they are essential to obtaining reliable results. To the contrary, fair and reliable outcomes can be achieved through any number of methods of investigation and adjudication. In non-panel models, where the investigator gathers the evidence and the investigator or an independent adjudicator makes a decision, well-trained investigators and adjudicators will test the assertions of all parties, including asking questions that probe the veracity of each party's account. Similarly, for schools that use a hearing model, a well-trained panel or adjudicator will ask the same type of probing questions that a single investigator would. Many of the Institutions have procedures in place that allow the parties to submit questions challenging facts and credibility through means other than live, adversarial cross-examination.

There are numerous practical problems with requiring live cross-examination by an advisor, which are left unresolved by the Department, leaving colleges and universities to wade into unknown territory. For example:

- The Proposed Regulations would require schools to allow attorneys to conduct cross-examination on behalf of parties. This will most certainly turn classrooms into courtrooms, increasing the length of proceedings and the complexity of managing such hearings. And, particularly at smaller schools like the Institutions, it may be unreasonable to expect college faculty and administrators to act as judges, controlling the conduct of professional advocates. Adversarial cross-examination will require the adjudicator to make real-time evidentiary decisions, including application of Proposed Section 106.45(b)(3)(vii)'s prohibitions on prior sexual history. The lack of clear rules as to the scope of cross-examination also means that lawyers might use lengthy, repetitive and aggressive cross-

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examination to harass witnesses and encourage them to withdraw their claims. Schools may be forced to hire judges or lawyers to oversee such proceedings.

- Section 106.45(b)(3)(vii) states that “[i]f a party does not have an advisor present at the hearing, the recipient must provide the party an advisor aligned with that party for to [sic] conduct cross-examination.” What does it mean to provide an advisor “aligned” with that party? Further, it is unreasonable to require schools to provide a faculty member or administrator to conduct cross-examination, like an attorney, at a live hearing with an attorney on the other side. The Institutions’ staff and faculty have different professional experiences and few are legally trained. Moreover, much as a lawyer would be required to do before a trial, these educators would be required to extensively study the entire record to prepare for cross-examination. Schools may find these positions nearly impossible to fill on a volunteer basis and may need to incur new costs. Moreover, last-minute requests for advisors will undoubtedly cause delays and re-scheduling.
- Section 106.45(b)(3)(vii) states that “If a party or witness does not submit to cross-examination at the hearing, the decision-maker *must* not rely on any statement of the party or witness in reaching a determination regarding responsibility.” (Emphasis added). This creates a rule even more stringent than the Federal Rules of Evidence, which at least have numerous hearsay exceptions. Again, we are aware of no other regulation forbidding a private entity from giving weight to a written statement in an internal proceeding determining whether internal policies were violated. The proposed rule would require that every single witness – no matter how minor the factual point, whether contested or uncontested – must appear at hearings, making them exponentially longer and more complicated. Must they appear in person? For an unlimited period of time? Also, what is a “statement” of the party? Does the rule mean that written evidence, such as text messages, may not be considered without the witnesses’ appearance? What if the Respondent confesses in a text message but decides not to appear? What if a witness with exculpatory evidence moves across the country, dies, or otherwise becomes unavailable? Such a binary, restrictive rule will not work well in practice. It is a prime example of why schools should have flexibility to determine what works

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and does not work based on their years of handling such cases, rather than having rules dictated to them by the Department of Education.

Finally, and perhaps most importantly, adversarial cross-examination will unnecessarily increase the anxiety of both parties going through the process. For complainants in particular, this may lead them to simply not come forward or utilize the school's process, no matter how meritorious their claims may be. As a result, our campuses will be less safe. Such a result is fundamentally inconsistent with the goal of Title IX and the Institutions' goals, which is to have educational programs and activities that are free from sexual harassment, in all of its forms.

B. *The Proposed Regulations Should Not Cover Employees*

As explained above, while Title VII also prohibits discrimination on the basis of sex, it does not require the type of detailed disciplinary proceedings set out in the Proposed Regulations. While a private employer could presumably fire an employee for sexual harassment after conducting an internal investigation, a college or university receiving federal funds would be required to first give the employee a live hearing with cross-examination. This makes no sense whatsoever. Why should private employees in every industry but higher education be subject to the general rules governing at-will employees, while employees at private colleges and universities are suddenly vested with certain "due process" rights? Such a result also makes no allowances for collective bargaining agreements, state law variances, and other complexities within the legal context for employment. Indeed, the Proposed Regulations create the risk of conflicts with employers' obligations under Title VII and state law. The problem is particularly acute with respect to students who are also employees, creating yet another layer of intersecting laws and guidance. Schools would likely need to re-write all of their employment policies which, particularly with respect to faculty policies, could be extremely time consuming and challenging.

C. *The Proposed Regulations Should Not Require Schools to Dismiss Complaints Involving Conduct that Occurs Outside of its Programs or Activities or Falls Outside of the Department's Precise, Limited Definition of "Sexual Harassment"*

Section 106.45(b)(3) states that if the conduct alleged in a formal complaint "would not constitute sexual harassment as defined" by the Proposed Regulations or "did not occur within the recipient's program or activity, the recipient *must* dismiss the formal complaint with regard to that conduct." (Emphasis added.) At a minimum, the word "must" should be changed to "may." **Requiring** a school to dismiss a complaint involving a sexual assault that

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occurs between two students, because it happened across the street from campus rather than on campus, is problematic in several respects.

First, there are definitional problems. The definition of “sexual harassment” includes an evaluation of whether the conduct is “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s educational program or activity.” As the whole purpose of having an investigation is to decide this issue, it makes little sense to *require* schools to dismiss claims at the outset on this basis. Nor is there clear guidance as to what it means for conduct to occur within an institution’s “programs or activities.” Indeed, the question has spawned considerable litigation. *See, e.g., Feminist Majority Foundation v. Hurley*, 2018 U.S. App. LEXIS 35556 (4th Cir. Dec. 19, 2018) (competing majority and dissenting opinions over whether statements on anonymous social media platform were made in the school’s programs or activities). How are schools to define this issue in their policies if the courts cannot? The lack of clear definitions will invite litigation against schools, with allegations that the school did not dismiss a complaint based on one party’s interpretation of these definitions.

Second, while the Department seems in the Preamble to intend to permit schools to handle off-campus conduct or other forms of sexual harassment that do not meet the Department’s definitions under a separate code of conduct, the proposed regulatory language uses the mandatory phrasing that schools “must dismiss” such reports. Assuming that in all cases it is perfectly clear where, when, and how the events occurred is counter to the experience at many of the Institutions that these issues are often contested and must be determined by the investigation and adjudication itself. Conceptually, there is no principled reason why a school should not be permitted to handle these issues under the same set of procedures under which it handles Title IX matters. Requiring yet another set of policies and procedures for handling sexual assault complaints depending on their geography will be confusing to our communities, and is an unnecessary additional administrative burden.

Relatedly, the definition would arguably prevent schools from adjudicating claims where the victim is not a student (even if the perpetrator is), since non-students generally do not participate in the school’s educational programs. This creates the risk of incentivizing assailants to target students who are not members of their own school’s community, which is of particular concern to single-sex schools whose students might be the target of such activity. Schools should have the flexibility to take disciplinary action against their students where their conduct – even if occurring off-campus or involving a victim who is not a student or employee – presents an ongoing risk to members of its community or is inconsistent with the school’s mission and values. At many of the Institutions, it is common practice for our students to socialize on other local campuses. This mandate increases the risk to their students, who are already more

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vulnerable by virtue of being in unfamiliar places. They will be far more appealing as targets for violence if a perpetrator's institution would be prevented from pursuing Title IX disciplinary action for such conduct. It also potentially creates an unprincipled set of distinctions where a student could be held responsible for a fight in a bar that occurs off-campus, but the school might not be permitted to hold a student responsible for a sexual assault that occurs off-campus.

D. *The Proposed Regulations Should Not Require Schools to Bring a Formal Complaint Based Solely on Two Reports of Misconduct*

Section 106.44(b)(2) of the Proposed Regulations states that “When a recipient has actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator *must* file a formal complaint.” (Emphasis added). While it may well be appropriate for a school to act on its own if it has more than one report involving a respondent, the Proposed Regulations improperly remove the school's discretion to evaluate each case on its merits. There may be circumstances where a complainant reports sexual harassment, but is adamant that no action be taken. Traditionally, schools have weighed that request against the broader interest in campus safety, and sought to honor the complainant's request where they can. (Indeed, New York Law *requires* colleges and universities to do this. *See* N.Y. Educ. Law § 129-B).⁵ Two reports against one individual might raise a broader safety issue. But they might not, particularly where one or more of the prior reports does not relate to sexual assault, or where the individual accused is no longer a student.

This Proposed Rule is also in tension with the requirement in § 106.45(c)(3)(vii) that schools disregard statements provided by witnesses or parties at a hearing who do not submit to cross-examination. If the alleged victims are unwilling to participate in the process, and be subject to cross-examination, then the adjudicator is not permitted to hear the complainant's account. How could the complaint then result in any findings? If any formal complaint filed by the school is doomed to failure from the start, why should it be required at all?

Schools should have the flexibility to weigh the facts and circumstances of each case to determine whether independent action by the institution – perhaps against the wishes of complainants – is required. The Proposed Regulations fail to appreciate that each of these situations turns on its own facts, is nuanced, and should not be governed by a single set of inflexible rules for every institution in the United States.

⁵ It does not appear that the Department has carefully considered how its Proposed Regulations may conflict with state laws, which will create even more uncertainty and confusion.

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E. *The Proposed Regulations Should Not Inflexibly Require Schools to Disclose All Evidence Obtained During the Course of the Investigation*

Section 106.45(c)(viii) would require schools to allow both parties to review all evidence “that is directly related to the allegations raised in a formal complaint, including evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility.” Investigators sometimes receive highly confidential information during the course of an investigation, ranging from medical records, to family information, to mental health counseling notes. They may also receive highly sensitive documents, including photographs or videos that should not be shared in a way that could lead to misuse. Schools should have flexibility to redact or withhold such information, at least where it is not sufficiently relevant that it will be considered by the adjudicator.

Again, the Department is proposing a rule of disclosure that is even broader than what would happen in a court proceeding. Under the Federal Rules of Civil Procedure, for example, parties are entitled to discovery only of information “relevant to any party’s claims.” Fed. R. Civ. P. 26(b)(1). And, courts have discretion (as well as enforcement authority) to order that certain highly confidential, personal or otherwise sensitive information not be disclosed or be disclosed only subject to certain terms or conditions. Fed. R. Civ. P. 26(c) (allowing court to limit the scope of discovery to protect a party “from annoyance, embarrassment, oppression, or undue burden or expense”). Under the Department’s Proposed Regulations, schools will apparently have no discretion whatsoever to protect parties from the disclosure of information that will not even be seen by the adjudicator in the case. This makes no sense.

This provision, along with the provision requiring schools to bring a formal complaint upon two reports of misconduct, may discourage complainants who seek assistance, rather than disciplinary action, from coming forward, stymying Title IX’s purpose of ensuring educational environments free of discrimination. Particularly at smaller schools like the Institutions, students can feel social pressure not to report misconduct. If students know that their wish to maintain confidentiality will be overridden if another complainant reports misconduct involving the same respondent, or if they know that private, potentially embarrassing information, including medical or mental-health records, will be disclosed, they may be much less likely to seek the assistance and resources from the school to address the effects of the incident.

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F. *The Proposed Regulations Should Allow Institutions Flexibility to Choose the Appropriate Burden of Proof for Their Disciplinary Proceedings*

Section 106.45(b)(4)(i) of the Proposed Regulations states that schools can use either the preponderance of evidence standard or the clear and convincing evidence standard, but contains important limitations. Specifically a school may use the preponderance of evidence standard only if (1) it also uses that standard in all other disciplinary matters that have the same potential maximum penalty; and (2) it uses the same standard for both employees (including faculty) and students.

Schools should have the flexibility to make their own decisions on the appropriate burden of proof to use in their internal disciplinary proceedings. The Proposed Regulations would indirectly regulate the standard of proof schools use in other disciplinary proceedings. This result does not make sense in practice, nor is it legally appropriate. For example, a school may have an automatic penalty of expulsion for certain academic misconduct. In such cases, it may make sense to have a clear and convincing evidence standard for academic misconduct where the penalty is automatic, but a different standard where the sanction can vary based on the nature of the conduct. It is both impractical and unwise to dictate that the same standard must be used for employees, faculty, and students. Employees might be subject to collective bargaining agreements that require a certain level of proof. Tenured faculty are typically subject to requirements and protections that have been negotiated over time, through shared governance processes, and are embodied in faculty codes or handbooks.

G. *The Proposed Regulations Should Allow Schools to Place Reasonable Restrictions on Disclosure of Information During Investigations*

Section 106.45(b)(3)(iii) of the Proposed Regulations states that a school must “not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.” The Department should not restrict schools from placing reasonable restrictions on disclosure of information during investigations. During the course of the investigation, having details of the information under investigation published to social media, in student newspapers, or other platforms, risks the fairness and integrity of the investigations. Moreover, many Institutions already wrestle with multiple complaints from participants in the process about defamation, misrepresentation and retaliation. This is especially so on small campuses, where students tend to know each other and information spreads far faster than the institutional investigation will proceed, especially under the Proposed Regulations. Further, the Proposed Regulations appropriately put the burden on the school to conduct investigations and prove responsibility; it is therefore unclear why the regulations give the parties unfettered rights to “gather” relevant evidence, rather than encouraging them to share it with the institution.

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H. *The Proposed Regulations Should Not Put Immovable Timelines on Review of Evidence and the Investigation Report*

Section 106.45(b)(3)(viii) & (ix) would require schools to give each party “at least ten days” to submit a response to evidence used in the investigation and then “at least ten days” to review the investigative report before a hearing. While parties should be given time to review the evidence and report, the Department should not mandate the time periods because, again, one uniform rule does not fit all circumstances schools face in practice. There may well be reasons to expedite proceedings in certain circumstances. For example, incidents that are reported that include significant violence or other contributing factors to deem a student “a risk to the campus community” may result in interim measures being put in place. This may be separation from another student with a shared class or it may be an interim suspension which separates a student from the institution for the duration of the conduct process. These interim measures can have significant impacts on the parties, particularly a Respondent who is separated from the institution. Schools should have the flexibility to expedite proceedings in a way that allows both thoroughness and fairness. As with other aspects of the Proposed Regulations, here the Department is suggesting a rule more rigid than in court proceedings, where courts routinely can and do expedite hearings where time is of the essence.

I. *Other Issues*

We note several other issues the Department should consider if it declines to revisit and refine the Proposed Regulations:

First, the Proposed Regulations should make clear that a school’s compliance with the regulations does not violate the Federal Educational Rights and Privacy Act (“FERPA”). Proposed §106.6(e), which states: “The obligation to comply with this part is not obviated or alleviated by the FERPA statute or regulations,” does not clearly do this. The Clery Act Regulations, at 34 C.F.R. § 668.46(l) do, and these regulations should be just as clear.

Second, the Proposed Regulations should make clear that they do not create any civil liability. As explained above, the Proposed Regulations appear to be based on a fundamental misunderstanding of Title IX and are inconsistent with well-settled case law. If the Department chooses to regulate in a way inconsistent with the case law, it should make clear that it is not intending to create a standard for civil liability.

Third, the Proposed Regulation will require schools to completely re-write their policies and procedures and set up new systems for adjudicating Title IX cases. It will also require them to re-train all of those responsible for implementing Title IX on these new policies

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and procedures. This will take time. The regulations should have a lengthy implementation period – at least eight months – and an effective date of July 1, at the beginning of the academic year, to allow schools to develop new policies and procedures, conduct training, and education their communities about the changes.

IV. Conclusion

We appreciate the opportunity to comment on the Proposed Regulations. The Department revoked its prior guidance in this area because it had “imposed these regulatory burdens without affording notice and the opportunity for public comment.” <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>. We hope that the Department will carefully consider our comments about the regulatory burden it is now imposing, which in many ways is even more onerous than the prior, revoked guidance. If a lesson was learned from the prior guidance, that lesson should have been that the federal government is not well-suited to dictating the detailed steps and procedures for all schools to handle complex, nuanced, internal disciplinary proceedings. We hope that the Department will learn from experience, and reconsider the wisdom of the regulations it is proposing.

The Institutions stand willing to assist the Department in any way we can.

Respectfully,

A handwritten signature in black ink, appearing to read "Michael E. Baughman". The signature is stylized and written in a cursive-like font.

Michael E. Baughman

MEB