January 30, 2019

Brittany Bull  
U.S. Department of Education  
400 Maryland Ave., SW

Room 6E310

Washington, D.C. 20202

Dear Ms. Bull:

We, the Emory University Graduate Student Government Association (GSGA), strongly oppose the proposed changes to the Department of Education’s Title IX Regulations through the notice of proposed rulemaking (NPRM) of November 29, 2018.

GSGA represents all graduate schools and programs at Emory University, including the Allied Health Programs, Candler School of Theology, Goizueta Business School Graduate Programs, Laney Graduate School of Arts and Sciences, Nell Hodgson Woodruff School of Nursing Graduate Programs, Rollins School of Public Health, School of Law, and School of Medicine. These schools and programs have over 7,000 graduate and professional students currently enrolled. As the singular voice for Emory’s graduate and professional student community, GSGA recognizes the important balance between protecting the rights of victims while also ensuring a fair process for the accused.

It is critical that the higher education community and other relevant stakeholders shape the NPRM for how colleges and universities respond to allegations of campus sexual assault and misconduct.

GSGA takes very seriously our responsibilities to: educate members of the Emory community about sexual harassment, sexual assault, and prevention; encourage students to report sexual harassment, including sexual assaults; support all students impacted by sexual harassment, including sexual violence; and ensure all students involved have access to support services and fair and equitable processes. We are also deeply committed to ensuring the safety and wellbeing of students, faculty, staff, and all those who enter our community of learning, and complying with federal civil rights laws.

Informed by the graduate student experience at Emory University, GSGA offers the following comments on the Department of Education’s (“the Department’s”) draft Title IX regulation for assuring a fair process for with sexual misconduct allegations:

1. **Retain the existing broader definition of sexual harassment, which would protect the educational institution’s ability to investigate misconduct.**

The guidance that was published in 2014 defined sexual harassment broadly as “unwelcome conduct of a sexual nature,” that includes “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”

The NPRM defines sexual harassment as:

(i) 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;

(ii) Unwelcome conduct on the basis of sex that so severe, pervasive, and

objectively offensive that it effectively denies a personal equal access to the

recipient’s education program or activity; or

(iii) Sexual assault as defined in 34 CFR 668.46(a).

This narrow definition does not account for behavior, which could be injurious to the student, but fails to rise to the level of “severe” or “pervasive” sexual conduct that “denies a personal equal access to the recipient’s education program or activity.” This new definition severely infringes upon a school’s ability to advocate for students who are victims of unwanted sexual behavior.

1. **Allow universities to investigate all incidents of sexual harassment or assault involving university faculty, students, and staff, regardless of where the encounter took place rather than limiting investigations to only incidents directly related to educational programs and activities.**

The NPRM bars schools from investigating sexual harassment that does not occur in the student’s program or during a university or college activity. Section 106.45(b)(iii)) also states that “[i]f the conduct alleged by the complainant would not constitute sexual harassment as defined in § 106.30 even if proved or did not occur within the recipient’s program or activity, the recipient must dismiss the formal complaint with regard to that conduct.”

Acts of sexual violence by one student against another student frequently occur off-campus. Students, generally, at all universities go off-campus for many reasons, at Emory University, all graduate and professional students live off-campus because Emory does not provide graduate student housing. Since Emory’s entire graduate and professional community lives off-campus, sexual assault would most likely occur at an off-campus location. While the initial act of sexual assault may have occurred off-campus, the fallout of that situation is brought onto campus when the person who was assaulted has to face their assailant in class and on-campus. The trauma stemming from the initial sexual assault can be further exacerbated by sharing a campus, program, or classes with the perpetrator. The inability for schools to investigate incidents that occur off-campus hampers students’ ability to access the resources that the university provides and prevents perpetrators from being held accountable. If the incident does not occur within a program or activity but may affect a student’s education, then the university should be empowered to investigate.

1. **Utilize the existing preponderance of evidence standard rather than the clear and convincing standard of evidence as the burden of proof required to prove an alleged assailant’s guilt.**

Universities should be free to decide that certain evidentiary standards are better suited to particular violations since the evidence available for some matters is much simpler than for other violations. Requiring an institution to use the same evidentiary standard for all university- or college-related violations is patently unfair.

For instance, plagiarism investigations and adjudications —which, like sexual harassment, can lead to expulsion in some cases—are often based on facts that are not personally-sensitive, nor easily verifiable (especially in light of plagiarism software) without witness testimony. Plagiarism can easily be proved by comparing one document to another, while sexual assault allegations require a much more rigorous fact-finding endeavor. A university can reasonably require a higher standard of proof for a plagiarism violation because, in that context, factual uncertainty might signal more strongly that a student is not actually responsible. In contrast, in cases of sexual harassment where fact-finding is more nuanced, complicated, and frequently dependent on witness testimony, a university might reasonably determine that holding plagiarism violations to a higher evidentiary standard is appropriate based on information it would expect to have available for adjudicating such matters.

There are similarly good reasons to permit different processes or standards of evidence for university faculty and staff than for students. For example, a university may conclude that a higher evidentiary burden should be required for dismissing a tenured professor or long-serving university staff person compared to a non-tenured professor or student.

1. **Allow institutions of higher education to remove an accused student from classes that they share with the victim, even if the victim opts out of formal proceedings.**

Universities should be able to remove a student accused of sexual assault against a fellow student if those students are enrolled in class together. Neither the accused nor the accuser should be academically penalized if the accuser does not want to go through the formal adjudicatory process within the university or college. The NPRM outlaws forms of conflict resolution practice that has been shown to be effective and educationally beneficial. Without these types of accommodations, the burden can fall on the victim to remove themselves from a class or program, even one that is critical to their academic progress.

There are many reasons why a victim may not choose not to undergo a formal complaint process. They may feel that the benefits of a formal complaint are not worth the further traumatization and humiliation of a public process. Especially when there are graduate students involved, the student may not wish to testify in a public way that reflects badly on an administrator a faculty member who they may be dependent on for recommendations. Even if students want to participate in the formal adjudicatory process, they might not be physically able to participate due to a medical condition or if the formal investigation is scheduled for a time when they are not on campus for any number of reasons.

The principle of regulatory flexibility counsels in favor of giving universities as much leeway as possible to devise compliant processes for responding to allegations of sexual harassment for their campus community. Educational institutions should have the freedom to take actions for the benefit of both parties, even when a victim is not willing or able to undergo the formal process.

1. **Do not allow institutions of higher education to require mediation for sexual assault charges.**

The 2011 and 2014 guidance stated that mediation was not an appropriate adjudicatory process, even if the mediation was voluntary. Mediation can force both parties to admit fault which can have negative consequences for both the accuser and the accused. The NPRM allows mediation to be used as an informal solution between parties according to 106.45 Grievance Procedures for Formal Complaints of Sexual Harassment.

It is useful for educational institutions to have options other than a formal investigation when working with students. As outlined previously, students may be unwilling or unable go through a formal investigation. However, mediation should not be the required alternative to a formal adjudicatory process. Mediation is appropriate in the school setting when two or more students have a conflict where a middle ground could be foreseeably reached, such as two roommates who have a dispute over their living arrangements. But mediation is not appropriate remedy to accusations of sexual assault or misconduct because there is no middle ground to be found between an accuser and the accused.

1. **Do not allow institutions of higher education to delay a sexual assault or misconduct investigation due to “a concurrent law enforcement investigation.”**

The NPRM allows for investigations to be delayed for “good cause” including if there is a “concurrent law enforcement activity” or investigation. Specifically, “if a concurrent law enforcement investigation has uncovered evidence that the police plan to release on a specific timeframe and that evidence would likely be material to determining responsibility, a recipient could reasonably extend the timeframe of the grievance process in order to allow that evidence to be included in the final determination of responsibility.” Under this rule, it would be possible for an educational institution to delay a sexual assault or misconduct investigation for months, to the immediate detriment of the complainant’s educational access.

The Department should maintain the position it adopted in the 2011 Dear Colleague Letter and make clear that a “school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime.” Furthermore, as the Dear Colleague Letter states, “schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting.”

1. **Do not require educational institutions to have formal adjudicatory proceedings that resemble federal or state courts.**

The NPRM mandates that universities develop an adversarial, hearing-based system with many features of the criminal justice system. In doing so, the NPRM ignores the fact that internal disciplinary processes at a college or university are separate and distinct from the adversarial procedures that govern the criminal and civil justice systems. Requiring universities to incorporate certain elements of the courtroom experience into Title IX hearings will not create a fairer process for seeking truth.

The cross-examination process can be traumatizing and humiliating, not just for the accuser and the accused, but for third-party witnesses as well. Cross-examination also likely undermines other educational goals like teaching acceptance of responsibility or providing avenues for the accused to make amends. There are other ways to address issues of credibility that do not involve live cross-examination by attorneys or attorney like representatives. For example, institutions could allow attorneys to appear as non-participating advisors. Or they could allow for questioning through a panel—a process that two California appellate courts recently held met the requirements for a fair hearing and process. *See Doe v. Claremont McKenna College*, 25 Cal. App. 5th at 1065; *Doe v. University of Southern California*, (2018) (slip opinion). Alternatively, the NPRM could allow both parties to submit written questions, protecting both the complainant and respondent. This would also allow a student who did not participate in the cross-examination to submit a statement, which the current regulation does not allow.

For these reasons, GSGA urges the Department of Education to revise its NPRM to better protect all individuals on university and college campuses across the country. Since it was enacted, Title IX has been critical making our Emory community safer and ensuring that everyone, regardless of gender, has equal access to education. The new regulations will infringe upon Emory University’s autonomy and make it more difficult for the school to effectively protect the rights of all students, faculty, and staff members.

Sincerely,

The Emory University Graduate Student Government Association