

The Honorable Betsy DeVos  
Secretary, U.S. Department of Education  
Washington, D.C. 20202

Date: January 28, 2019

Re: Docket ID ED-2018-OCR-0064, RIN 1870-AA14

Dear Madam Secretary:

Founded in 1861, the University of Washington is the flagship public university for the State of Washington. As a world-class university whose fundamental mission is to serve the public in as many ways as possible, we take seriously our responsibility to protect *all* of our students and employees<sup>1</sup> from gender-based discrimination, harassment, and violence. We are equally committed to a fair and neutral conduct process with due process protections that reaches conclusions of responsibility based on available factual evidence—not on stereotypes, assumptions, or biases (implicit or otherwise).

The University is committed to being a leader and model within higher education for achieving gender equity, and to providing and maintaining a respectful learning and working environment free from sexual harassment, sexual violence, and gender discrimination. In our efforts to achieve these goals, the University has committed significant resources to developing policies, procedures, and practices that advance these objectives across our campuses. This includes fostering an environment that makes reporting misconduct a process recognized as supportive of survivors and that ensures strong due process protections for students accused of misconduct—especially those facing suspension or dismissal.

It is in this context that we respectfully submit our comments in response to the Notice of Proposed Rulemaking (NPRM) published on November 29, 2018. We appreciate this opportunity to share our thoughts and experiences with the Department of Education. Based on our analysis, the proposed regulations raise the following primary concerns for institutions of higher education:

- In practice, the proposed regulations would require many colleges and universities to implement two different grievance processes: one for conduct that meets the narrow proposed regulatory definition of sexual harassment, and one for conduct that violates the institution's definition of sexual harassment, which is typically based on other federal and state law obligations as well as the institution's commitment to gender equity. A two-track conduct system will be unnecessarily confusing and provide no benefit to survivors, respondents, or recipients.
- The detailed nature of the requirements included in the proposed regulations would require the University of Washington, and likely other institutions of higher education, to revise its student conduct code, a process that is mandated by

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<sup>1</sup> The majority of our comments relate to student conduct in higher education. For our thoughts regarding the application of the proposed rules to employees, please see our response to Directed Question 3, in Section II(B), below.

law to be done through state rulemaking, which is resource heavy, arduous, and time intensive.<sup>2</sup>

- The requirement in proposed 106.44(b)(2)<sup>3</sup> to initiate a formal complaint contrary to survivors' wishes may be harmful to survivors and would be against best practices where no individualized risk assessment has been performed.
- The requirement in proposed 106.45(b)(3) that grievance proceedings must be dismissed where the alleged misconduct would not meet the proposed definition of sexual harassment if true appears to be contrary to the Department's stated intent to allow recipients to maintain a broader standard in their own conduct codes. This provision would likely also be used to support legal challenges against institutions' student conduct proceedings related to conduct that does not fit within the Department's proposed narrow definition of sexual harassment.
- The requirement for live hearings in proposed 106.45(b)(3)(vii) encompasses more conduct than it should. Live hearings are less effective in educating respondents than alternative processes when suspension and dismissal are not potential outcomes of the alleged misconduct, so long as other due process protections are in place. Live hearings are also arduous and time consuming.
- Requiring recipients to pay for advisors for students during live hearings, as in proposed 106.45(b)(3)(vii), would be unduly burdensome on recipients, would create confusion as to the limited role played by advisors, and would be out of step with respect to appropriate due process protections in student conduct proceedings. In addition, postsecondary students frequently find a more legalistic process—which would almost certainly result from the inclusion of advisors to conduct cross-examination—more intimidating and less accessible.
- The apparent prohibition of all hearsay evidence in proposed 106.45(b)(3)(vii), including types of hearsay evidence commonly recognized as reliable and permitted in criminal proceedings, would be counter to established legal principles regarding standards of evidence applicable to administrative proceedings generally, and would make the process overly legalistic and unnecessarily burdensome on parties and witnesses.

In response to the Directed Questions, several areas stand out:

- The applicability of the provisions within the proposed regulations should be differentiated by type of school, not by age (Directed Question 2).
- Proposed regulations 106.44 and 106.45 should not apply to employees (Directed Question 3).
- Postsecondary schools should retain the discretion to select their own standard of evidence (Directed Question 6).

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<sup>2</sup> If these proposed regulations are formally adopted, time would be needed before they went into effect to allow for the state rulemaking process.

<sup>3</sup> To aid in readability, the University only uses full citations to the proposed regulations when referencing language in the preamble. Full citation form is not utilized in referencing the proposed regulations themselves. Instead, the University writes "proposed [number of the proposed regulation]."

- Proposed 106.45 (b)(3)(viii) should simply require that all relevant evidence, including all exculpatory evidence, be shared with parties (Directed Question 7).

These concerns are discussed in detail below. In addition, in Section III, an overview of the University of Washington’s current student conduct process is included for the Department’s reference. The University believes that its current processes are more effective in ensuring *all* students, employees, and guests are not “excluded from participation in, . . . denied the benefits of, or . . . subjected to discrimination”<sup>4</sup> in the University’s education programs and activities than would result from putting the proposed regulations into practice. We hope that you find our comments useful and that our experiences and perspective aid in the rulemaking process.

**I. Where Effective Due Process Protections Are Already in Place, the Proposed Regulations Are Overly Burdensome and Undermine More Effective Practices.**

The University of Washington utilizes a coordinated system of initiatives, programs, and services to collectively protect educational access, advance gender equity, and prevent and respond to sexual harassment, sexual violence, and gender discrimination in its learning and working environments. We respectfully submit that certain of the proposed regulatory changes (discussed in detail below) would undercut more suitable policies and practices, such as those in place at the University of Washington, which we believe are more effective and efficient in working to ensure gender equality on our campuses than the regulations proposed in the NPRM. Because these provisions in the proposed regulations are unnecessarily and inappropriately prescriptive and restrictive, they would result in both increased expense for many recipients and confusion for students, employees, and those working with them.

**A. The Narrowness of the Proposed Definitions in 106.30 Will Contribute to Confusion for Students and Added Expense for Institutions, Given the Prescriptiveness of the Other Proposed Regulations and the Obligations that Exist Under Other Law and Established Institutional Practices.**

In addition to Title IX, institutions of higher education (especially state institutions) are subject to many other laws and established institutional policies and practices relating to addressing and preventing sex discrimination in general, and sexual harassment and sexual assault in particular. All public institutions are, of course, subject to Title VII of the Civil Rights Act of 1964, and most, if not all, are also subject to Executive Order 11246 (establishing nondiscrimination requirements in government contracting). The University of Washington, by way of example, is also subject to the Washington Law Against Discrimination<sup>5</sup> and a Washington State law entitled Gender Equality in Higher Education.<sup>6</sup> In addition, the University,

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<sup>4</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a).

<sup>5</sup> RCW 49.60 *et seq.*

<sup>6</sup> RCW 28B.110 *et seq.*

like many other recipients, has long-established institutional policies and practices regarding a broad range of gender discrimination<sup>7</sup> and sexual misconduct.<sup>8</sup>

***1. Implementation of the Proposed Regulations Would Require Many Institutions To Develop Two Grievance Processes.***

None of these other laws or institutional policies are limited to addressing sexual harassment as narrowly defined in proposed 106.30.<sup>9</sup> Accordingly, like many other recipients, the University is, both legally and as a matter of established policies and procedures, obligated to address conduct that falls under a broader definition of sexual harassment and sexual misconduct. As such, in order to meet their obligations under both the proposed regulations and other legal and institutional obligations, the University and other recipients would be required to create a conduct code and system that recognizes two types of sexual harassment—one that would meet the Title IX regulatory definition and a broader standard that meets other federal and state legal obligations and the University’s expectations for behavior.

As just one specific example, the University of Washington, like many institutions, believes it is imperative to hold its students accountable under its conduct code for sexual misconduct (including but not limited to sexual assault) that occurs off campus<sup>10</sup> and outside of University-sponsored programs or activities where the victim of the misconduct is another member of the University community. Such conduct would not constitute “sexual harassment” under the proposed regulations, even though it may significantly affect a survivor’s ability to fully participate in and benefit from University programs and activities. Nor would it form the basis for action under the proposed regulations even if an individualized assessment determined that a health and safety risk existed for the University community, such as if there were repeated reports of sexual misconduct relating to the same alleged perpetrator.

To address this off-campus misconduct, the University would be compelled to rely on its own conduct code, which would need to be broader than the proposed regulations. This appears to be permitted by the preamble,<sup>11</sup> but—in practice—such a system would be incredibly confusing for students, their advisors, and University administrators. In addition, the creation and use of two separate grievance processes would be unnecessarily costly and burdensome for recipients to implement and manage. Indeed, a significant amount of employee time would be spent simply addressing the confusion caused by such a system.

The issue, however, is not caused solely by the narrowness of the proposed definition of sexual harassment. The Department could, in fact, limit the Office for Civil Rights’ enforcement of sexual harassment to the proposed definition without the ramifications discussed in these

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<sup>7</sup> The University, consistent with state law, applies its prohibition on sexual harassment to gender-based harassment, including harassment based on gender identity and expression.

<sup>8</sup> See, e.g., Nondiscrimination and Affirmative Action, Executive Order 31, available at [uw.edu/admin/rules/policies/PO/EO31.html](http://uw.edu/admin/rules/policies/PO/EO31.html) (last accessed 12/28/2018 at 10:43 a.m.).

<sup>9</sup> See, e.g., *Antonius v. King County*, 153 Wash. 2d 256, 261, 103 P.3d 729 (2004).

<sup>10</sup> According to the University of Washington’s most recent campus climate survey, 71.3% of students who were sexually assaulted reported that their sexual assault occurred off campus.

<sup>11</sup> While the preamble appears to permit recipients to maintain a broader code of conduct related to sexual misconduct than is included in the proposed regulations, the language of proposed 106.45(b)(3) requiring dismissal of a conduct proceeding with respect to *conduct* that does not meet the proposed narrow definition of sexual harassment is confusing and would likely result in legal challenges.

comments (causing confusion for students, chilling reporting, and compromising the effectiveness of the Title IX Coordinator), if the proposed regulations regarding mandatory filing of formal complaints against survivors' wishes (106.44(b)(2)), mandatory dismissal of complaints (106.45(b)(3)), mandatory live hearings even when suspension or dismissal are not potential outcomes (106.45(b)(3)(vii)), and recipient-paid-for advisors (106.45(b)(3)(vii)) were eliminated or substantially altered. With such changes, the Department may be able to strike the balance it is perhaps attempting to achieve. Institutions of higher education could continue to pursue gender equity with effective due process protections utilizing their own conduct codes, which have been diligently developed with *all* applicable laws and institutional values in mind. At the same time, the Department of Education could determine that the Office for Civil Rights will investigate only those Title IX cases that meet the proposed definition of sexual harassment.

**2. *The Phrase “Effectively Denies a Person Equal Access to the Recipient’s Education Program or Activity” Is Unclear.***

It is unclear what is meant by “effectively denies a person equal access to the recipient’s education program or activity” in subsection (2) of the proposed definition of sexual harassment in 106.30. Many institutions, including the University of Washington, consider off-campus sexual misconduct by a student to potentially deny a survivor equal access to the school’s education programs or activities because, for example, sharing a class with one’s rapist would make it incredibly challenging to focus on the course and obtain the same educational value as if the sexual assault had not occurred. It is clear from the definition of “formal complaint” in proposed 106.30—which limits complaints to conduct that occurs within an institution’s education program or activity—that the Department does not share this perspective. It is unclear, however, how the Department interprets the phrase “effectively denies a person equal access to the recipient’s education program or activity.” Additional guidance on the Department’s interpretation of that phrase would be beneficial to recipients.

**3. *The Proposed Definition of “Actual Knowledge” Has the Effect of Incentivizing Institutions to Shield Their Title IX Coordinators from Reports of Sexual Misconduct.***

The proposed definition of “actual knowledge” in 106.30 incentivizes recipients to keep their Title IX Coordinator uninformed of allegations of sexual misconduct that are learned of elsewhere in the institution. Under the proposed regulations, actual knowledge will not be imputed to the Title IX Coordinator if it does not exist. There is a safe harbor associated with a lack of actual knowledge<sup>12</sup> and an obligation to act that only arises when actual knowledge exists.<sup>13</sup> Because of how these provisions interact, the current proposed regulations encourage recipients to shield their Title IX Coordinators from actual knowledge. A good Title IX regulation needs to empower Title IX Coordinators to have access to more and better information about what is occurring on their campuses—not create an incentive for recipients to establish processes under which the Title IX Coordinator is not fully informed. This concern becomes especially noticeable when the proposed definition of actual knowledge is read in connection with proposed 106.44(b)(2), as more fully discussed below.

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<sup>12</sup> Proposed 106.44(b)(4).

<sup>13</sup> Proposed 106.44(b)(2).

**B. Proposed 106.44(b)(2) Would Inappropriately Require the Initiation of Conduct Proceedings Against Survivors' Wishes, Even Where There Is Little Chance of the Proceedings Being Meaningful and When No Individualized Risk Assessment Has Been Performed.**

Proposed 106.44(b)(2) would require an institution's Title IX Coordinator to file a formal complaint when two or more survivors report conduct that would constitute sexual harassment, if true,<sup>14</sup> when the survivors are unwilling to do so. This requirement is a step backward from widely accepted best practices and could have significant negative ramifications for survivors, respondents, and the safety of the University community.

Based on our experience, including the reports of our confidential victim advocates, this proposal would have a chilling effect on reporting, with survivors choosing not to come forward because of the risk that their report will be disclosed without their consent. Any chilling effect on reporting negatively impacts our ability to provide supportive measures to survivors and impairs our ability to provide for the safety and security of the University community.

In addition, this proposed regulation requires Title IX grievance procedures to be brought against respondents when there is no survivor desire for that to occur and little chance the respondent will be found responsible under the student conduct code. It is always challenging for a student to be found responsible for sexual misconduct when the survivor is not a participant in the conduct proceeding. Even more so with proposed 106.45(b)(3)(vii), which states that if a person does not submit to cross-examination at the hearing, the decision-maker may not rely on any statement of that person. This prohibition on essentially all hearsay makes it nearly impossible for a respondent to be held responsible in a conduct proceeding where the survivor(s) elect not to participate.

We respectfully submit that a process requiring an individualized assessment of whether to proceed when doing so is contrary to the survivor's wishes is more appropriate at institutions of higher education. For example, at the University of Washington, whenever a complainant requests that their information be kept confidential or that no conduct proceeding be initiated, the University completes an individualized safety assessment—balancing the survivor's request with the University's obligation to provide a safe and nondiscriminatory environment for all community members. In performing this assessment, the University considers:

- 1) The nature and scope of the reported conduct, including whether the reported conduct involved physical force or the use of a weapon;
- 2) The potential impact on the complainant of moving forward, particularly in reports involving intimate partner violence;
- 3) The respective ages and roles of the complainant and respondent, including whether the complainant is (or was at the time of the reported conduct) a minor under the age of 18;

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<sup>14</sup> The proposed regulation reads, "that could constitute sexual harassment," rather than stating conduct that "would constitute sexual harassment, if true." The University is assuming that the latter is what is meant by the proposed regulation. Additional clarity on this language would be beneficial, if it becomes part of a final regulation.

- 4) The risk posed to any individual or to the campus community by not proceeding, including the risk of additional violence;
- 5) Whether there have been other complaints to the University related to similar behavior about the same respondent (if known);
- 6) Whether the respondent has a history of convictions or records from a prior school indicating a history of harassment/misconduct, if such records are available;
- 7) Whether the respondent threatened further sexual violence or other violence against the complainant or others;
- 8) Whether the report reveals a pattern of conduct at a given location or by a particular group such that there is an increased risk of future acts of sexual misconduct under similar circumstances; and
- 9) Whether the conduct included multiple respondents.<sup>15</sup>

In nearly all cases, the University has determined that the survivor's request can be honored. In those instances, the University also evaluates whether additional steps should be taken, such as providing supportive measures to the survivor, providing targeted training or prevention programs, or providing other services tailored to the individual situation.<sup>16</sup>

The bright-line rule included in the proposed regulations would inappropriately require the initiation of a grievance process against a survivor's stated desire regardless of any other considerations. Bright-line rules cannot capture the complexity of these situations: the potential of retraumatizing the survivor through the conduct process, the safety risk to the University community, and even the nature of the conduct at issue are all sophisticated concerns with much nuance. A process (such as the one used at the University of Washington) that allows but does not require the initiation of conduct proceedings following an individualized assessment of risk, and a balancing of that risk against the survivor's stated desires, is a more sophisticated approach. It also better protects the interests of respondents, survivors, and university communities.

### **C. The Purpose of the Language in Proposed 106.45(a) Regarding What May Constitute Discrimination on the Basis of Sex Is Unclear.**

The purpose and function of proposed 106.45(a), which provides that a recipient's treatment of a complainant or respondent may constitute discrimination on the basis of sex, is unclear. Is it intended to open up another avenue of matters that the Office for Civil Rights will investigate beyond those that fall within the proposed definition of sexual harassment? Is it intended to emphasize that there is a cause of action for respondents who are discriminated against on the basis of gender?<sup>17</sup> Overall, this proposed regulation seems to say no more than that discriminatory conduct based on gender is prohibited by Title IX. Given that its purpose is

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<sup>15</sup> Student Governance & Policy 210(4)(G), available at [uw.edu/admin/rules/policies/SGP/SPCH210.html#4](http://uw.edu/admin/rules/policies/SGP/SPCH210.html#4).

<sup>16</sup> *Id.*

<sup>17</sup> If so, this appears to be unnecessary in light of, e.g., *Yusuf v. Vassar College*, 35 F.3d 709, 715-16 (2d Cir. 1994).

murky and it will be relied upon in litigation by complainants and respondents, which are always costly for recipients to defend, the benefit of including such a provision is not apparent.

**D. The Mandatory Dismissal of Formal Complaints in Proposed 106.45(b)(3) Would, at Best, Cause Unnecessary Confusion, and Would Likely Lead to Burdensome Legal Challenges.**

The language in proposed 106.45(b)(3) requiring the dismissal of formal complaints with respect to conduct that does not meet the narrow definition of sexual harassment, as defined in proposed 106.30, is confusing and will potentially lead to unintended results. While the Department's preamble to the proposed regulation states that "[t]he Department emphasizes that a recipient remains free to respond to conduct that does not meet the Title IX definition of sexual harassment, or that did not occur within the recipient's program or activity,"<sup>18</sup> it appears that the Department fails to recognize several problematic scenarios that could arise under the language of the proposed regulations:

- At a minimum, implementation of this proposed regulation would require institutions to develop a *two-track* conduct system: one that follows the prescriptive regulatory process where the proposed definition of sexual harassment may be demonstrated, and another process where only the institution's own (typically broader) definition of sexual harassment may be shown. This will turn out to be the case because the process prescribed by the proposed regulations is so burdensome and expensive that it could not and should not be used in all conduct proceedings.
- Students would not understand why the same conduct would be handled differently if it occurs in a residence hall versus an apartment just off campus. Nor will they understand why the same misconduct will be handled differently if it occurs in a fraternity house versus an off-campus apartment shared by several student-athletes. These disparities will lead to perceptions of unfairness and disparate treatment, which in turn will lead to a decrease in trust in the University and a lower percentage of sexual misconduct being reported. When matters are not being reported to the University, it cannot adequately support its students or work to keep the University community safe.
- There would almost certainly be legal challenges brought by respondents to schools carrying out conduct proceedings under the institution's own conduct codes if the regulation *mandates dismissal of complaints* with respect to that conduct where the proposed regulatory definition of sexual harassment could<sup>19</sup> not be met if the allegations were true. Litigation is costly and burdensome, with those costs at the University of Washington being borne by taxpayers, students, and their families. If the proposed regulation were to be otherwise preserved, we suggest that the language be changed from "with regard to that conduct"<sup>20</sup> to

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<sup>18</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,475 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

<sup>19</sup> As noted above, the proposed regulation reads, "that could constitute sexual harassment," rather than stating conduct that "would constitute sexual harassment, if true." The University is assuming that the latter is what is meant by the proposed regulation. Additional clarity on this language would be beneficial, if it becomes part of a final regulation.

<sup>20</sup> Proposed 106.45(b)(3).

“with regard to that charge” and make it clear that conduct that does not meet the proposed regulatory definition of sexual harassment will not be subject to enforcement by the Department, but may be prohibited by a recipient’s own conduct code.

- The proposed regulatory text appears to conflict with the language in the preamble that expresses an intent by the Department not to limit the ability of institutions of higher education to address sexually motivated misconduct that is beyond the scope of the proposed regulations.
- Making these changes will require the University to alter its Student Conduct Code and several institutional policies and protocols. The changes to the Student Conduct Code are subject to rulemaking under *state* law, which is an arduous and time-consuming process.

*In summary, effectively requiring institutions to use different conduct processes depending on whether the federal definition of sexual harassment is met will be unnecessarily confusing to students, while providing neither students nor universities with any real benefit. In the University’s case, the proposed process would provide no greater protections (due process, supportive measures, or otherwise) than the University’s current process, but it would create unnecessary confusion and increased costs to the University. This seems to be at odds with the Department’s goals.*

**E. The Provisions in Proposed 106.45(b)(3)(vii) Requiring Live Hearings, Requiring University-Paid-For Advisors to Conduct Cross-Examination, and Prohibiting Reliance on Any Hearsay Evidence Are Unnecessarily Prescriptive and Would Create Confusion and Increase Costs for Recipients.**

Proposed 106.45(b)(3)(vii) contains three especially problematic provisions. It would require live hearings in all cases meeting the narrow definition of sexual harassment in proposed 106.30, regardless of whether suspension or dismissal is a potential sanction. It would require recipients to provide parties with an advisor aligned with their interests to perform all cross-examination. It would mandate that if a witness does not submit to cross-examination at the hearing, then the decision-maker may not rely on any statement of that witness in reaching his or her determination. These provisions are overly prescriptive and unnecessary to protect respondents’ due process rights, and the confusion they cause would ultimately be detrimental to all students and potentially to the safety and security of college and university communities.

***1. Live Hearings Are Not Appropriate Where Suspension and Dismissal Are Not Potential Sanctions.***

As is true for many state institutions, live hearings are required by the University of Washington when a student is facing potential suspension or dismissal,<sup>21</sup> and that level of due process protection makes sense when that degree of sanction is at issue. Proposed 106.45(b)(3)(vii), however, does not draw that distinction. It requires full hearings whenever a

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<sup>21</sup> As described in Section III(B), below, the University of Washington is subject to the state Administrative Procedure Act (RCW 34.05 et seq.), which has been interpreted to require live hearings for higher-education conduct proceeding that may result in suspension or dismissal. *Arishi v. Washington State Univ.*, 196 Wash. App. 878, 385 P.3d 251 (2016).

formal complaint is made alleging sexual harassment under proposed 106.30—even if the potential sanction for the conduct is less than suspension.

Requiring full hearings when suspension or dismissal is not a potential outcome is neither in the best interests of students nor warranted under an appropriate balancing of the relevant factors. While appropriate due process protections are always important, the level of process that is due is dependent on a balancing of the interests at stake.<sup>22</sup> The interests of (1) having speedy resolutions— for both learning efficacy and the stress on the student(s) involved, and (2) decreasing the administrative burden and cost, become more compelling (thereby weighing in favor of allowing a less formal proceeding) when suspension and dismissal are not potential outcomes.

## ***2. The Proposed Requirement that Schools Provide Students with Advisors for Cross-Examination Should Be Removed.***

The requirement in proposed 106.45(b)(vii) that schools must provide advisors to complainants and respondents involved in full hearings in order for them to conduct cross-examination would be unprecedented as a matter of due process considerations, and would be costly to implement and maintain, administratively burdensome, and confusing for students. To provide some real-world context: Since the University's current code of conduct went into effect on August 17, 2018, it has held ten live conduct hearings. Those hearings lasted an average of eight hours. Because cross-examination occurs throughout the hearings, advisors would need to be present for the entire hearing. In addition, because advisors would (under the proposed regulations) need to be aligned with the parties and able to conduct cross-examination, they would require some familiarity with the case file in advance of the hearing. Assuming five hours<sup>23</sup> of preparation per advisor per hearing, a minimum of 26 hours of advisor time would have been required for each hearing (for a total of at least 260 hours of advisor time across the ten hearings), had the proposed regulation been in place.

Further, because cross-examination is a skill in which only attorneys are trained, it is difficult to imagine anyone other than an attorney acting as a student's advisor during Title IX hearings. In fact, in some states, including potentially Washington State, the representation of a student during an administrative hearing may constitute the practice of law, and may only be able to be performed by an attorney. Accordingly, the proposed regulation would effectively amount to a requirement that students be provided with legal counsel (at least for the purpose of cross-examination) at (for public institutions) state expense. Well-established case law makes clear that the provision of legal counsel at state expense is required as a matter of due process and fundamental fairness only in a very limited set of circumstances outside of the criminal arena.<sup>24</sup> Establishing an equivalent requirement in student conduct proceedings would be completely unprecedented and would make those processes unnecessarily legalistic. In addition, it would put both the students and the attorneys in a challenging situation, as it would be difficult—if not

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<sup>22</sup> See generally *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948, 952 (1978).

<sup>23</sup> This is a conservative estimate, as the case files, to which the parties have access, frequently exceed 400 pages.

<sup>24</sup> See, e.g., *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 101 S. Ct. 2153 (1981) (holding that failure to appoint counsel for indigent parents in proceeding for termination of parental status did not deprive parent of due process).

impossible—on both the students’ and the advisors’ parts for the advisors to only assist with cross-examination and not otherwise represent the students during other parts of the hearing.<sup>25</sup>

Moreover, oral cross-examination conducted by advisors is not necessary to either protect the due process rights of respondents or to act in a relatively trauma-informed manner toward complainants. The University of Washington’s current process, explained in Section III(B)(1), below, is more effective at ensuring both that the complainant is addressed in a trauma-informed manner and that the respondent is afforded strong due process protections. Our students—both complainants and respondents—have consistently told us that they want the student conduct process to feel less legal and less formal. Adding the requirement that advisors (most likely attorneys) be provided at institutional expense in every live hearing would be going in the wrong direction.

**3. *The Proposed Provision Disallowing Reliance on Any Testimony of a Witness if They Do Not Submit to Cross-Examination at the Hearing Must Be Clarified.***

The final sentence of proposed 106.45(b)(3)(vii) provides as follows: “If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.” At best, this sentence is confusing. When read literally, it appears to mean that *no* traditional hearsay exceptions (even those that would be permitted at a criminal trial) may be used and no hearsay evidence at all may be considered. It is possible that it is not intended to be so entirely restrictive. For example, it may only be intended to prohibit reliance on testimony given on direct examination at the hearing if the person who testifies refuses to answer questions on cross-examination, but this interpretation is not clear from the plain language of the proposed regulation.

Even under this less restrictive reading, the proposed language is inappropriate. In Washington State, as in other states that have adopted the Uniform Administrative Procedures Act, a decision-maker in an agency administrative proceeding may typically rely on hearsay evidence even in formal adjudicative proceedings when “it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.”<sup>26</sup> For example, where a witness has already verified a summary of their statement in writing, but is unavailable for the hearing, the decision-maker could rely on facts included in that summary. The proposed regulation would arguably prohibit such reliance, and the University does not believe such a prohibition would meaningfully increase due process protections for respondents or increase the likelihood of determining the truth in student conduct proceedings.

**II. University of Washington’s Responses to Directed Questions 2, 3, 6, 7, and 9.**

**A. The Applicability of the Provisions Contained Within the Regulation Should Be Differentiated by Type of School, Not Age (Directed Question 2).**

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<sup>25</sup> The University of Washington allows students to retain their own attorneys and allows attorneys to represent students in live hearings, pursuant to Washington State’s APA. RCW 34.05.428.

<sup>26</sup> RCW 34.05.452(1).

The University of Washington, like many institutions of higher education, always has students under the age of 18 enrolled in its programs. Although there are other examples, the most common are incoming freshmen who have not yet turned 18. The majority of these students turn 18 sometime during their freshman year. Treating these students, or other students who are not yet 18, differently based on age would be confusing to students and administratively impractical—especially if allegations spanned the time prior to and after a student turned 18.

As is the case with the Family Educational Rights and Privacy Act (FERPA), differences in the application of any regulations should be based on the type of school a student is attending—primary, secondary, or postsecondary—not age. *See* 34 C.F.R. §99.3 (defining an eligible student as “a student who has reached 18 years of age or is attending an institution of postsecondary education”). A different result would be wholly impractical at postsecondary institutions, requiring different processes depending entirely on the age of the student. Moreover, it would be an aberration from the expectations of students otherwise. *All students at the University of Washington are subject to the same Student Conduct Code, regardless of age. They all currently have the same due process protections under that Code and under the state Administrative Procedure Act. To treat students differently on the basis of age only with respect to the limited area covered by the proposed regulations would not benefit students or recipients.*

### **B. The Subpart D Proposed Regulations Should Not Apply to Employees (Directed Question 3).**

The preamble states that the proposed regulations, like existing regulations, would apply to both students and employees. However, this statement ignores the organization of the current regulation, which is divided into several subparts. These subparts provide insight as to whether the particular regulation is intended to apply to students, employees, or both.

The proposed regulations all fall under subparts A, B, and D of 34 C.F.R §106. Subpart A is the introduction section, which applies to both students and employees. Putting aside the substance of the proposed regulations, the University has no overarching objection to this section applying to both students and employees. Subpart B involves what entities the Title IX regulations cover, rather than regulations applicable to students or employees more generally.

Subpart D of 34 C.F.R. §106 applies to Discrimination on the Basis of Sex in Education Programs or Activities, and it appears to be focused on students—although it explicitly includes employees in 106.31(b)(6) and 106.31(d). Notably, Subpart E applies to Discrimination on the Basis of Sex in Employment in Education Programs or Activities. The current proposed regulations include no proposed changes to Subpart E.

Proposed 106.44 and 106.45 include the most sweeping changes in the proposed regulations. As currently written, it is evident that these proposed regulations are targeted toward students in higher education. Since they fall under Subpart D, it also appears that they are intended to apply only to students. The preamble confuses this issue. For example, it states that “the recipient’s code of conduct and grievance procedures [would] apply to all students *and*

employees.”<sup>27</sup> In the direct questions, it also states, “the proposed regulations would apply to sexual harassment by students, employees, and third parties.”<sup>28</sup>

*Application of these regulations to employees would be impractical and would conflict with other employment obligations.* For example:

- A significant percentage of University staff, including temporary staff, are employed on an at-will basis.<sup>29</sup> Requiring certain protections, such as a full hearing in the event of an allegation of sexual harassment, confers rights on accused employees—including temporary employees—that do not otherwise exist under federal, state, or local law. *Conferring additional rights to those employees who are accused of sexual harassment is illogical and impractical, and it will lead to confusion and frustration among employees.*
- The definition of “sexual harassment” in 106.30 is significantly narrower than the definition applicable to employees under Title VII in that, in addition to being severe and pervasive, the harassment must “effectively den[y] a person equal access to the recipient’s education program or activity.” However, under Title VII, an employer would be obligated to take steps to end sexually harassing behavior well before the complainant is effectively denied access to his or her employment.
- Student-employees are still employees, and there may be times that it is appropriate to place them on administrative leave from their employment (whether paid or unpaid). Proposed 106.44(d) explicitly allows “non-student employees” to be placed on administrative leave. This leads to the logical conclusion that “student employees” may not be put on administrative leave. However, there is little justification for such a stance. For example, when a student employee is accused of sexual harassment in their workplace, the University may need to take action as an employer to remove the student employee from the work environment, even if the allegations are not of such a nature that the University would seek to emergency expel him or her as a student.
- The processes in 106.45 would cause extreme delay in the handling of sexual harassment allegations in the employment context, potentially causing employers to lose their *Faragher-Ellerth* defense, which requires that employers demonstrate that they have promptly corrected sexually harassing behaviors. Further, as *respondeat superior* applies when a tangible employment action occurs, the proposed process and its lengthy timeline would impose an extreme burden on institutions, who would have to face potentially higher damages and/or bear the cost of having an employee on extended administrative leave while the proposed process runs its course. In addition, current Title VII guidance requires employers to “undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred in violation of the

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<sup>27</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,482 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

<sup>28</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,483 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

<sup>29</sup> The University of Washington has over 10,000 at-will employees.

employer’s policy.”<sup>30</sup> Currently, best employment practices do not include a model such as that in proposed 106.45, which would require an extensive amount of process before the employer could take corrective action, nor is such a model needed for an employer to reach a reasonable conclusion regarding whether its policies<sup>31</sup> were violated.

- Requiring “actual knowledge” in the manner prescribed by the proposed regulations is contrary to and in conflict with existing employment law. For example, in the employment context, even where the harasser is not a supervisor, employers have a duty to take corrective action to correct harassment when the employer knew or should have known that the harassment was occurring.
- The processes in 106.45 are inconsistent with the University’s many collective-bargaining agreements. The processes proposed in 106.45 require an extensive amount of procedure to occur before the University could take an employment action with respect to a respondent employee (other than placing the employee on paid administrative leave). Presently, the University’s collective-bargaining agreements provide measures of due process to represented employees before an employment action such as termination is taken (notice, opportunity to respond, action to be taken only for just cause) and then provide a grievance procedure after the employment action is taken. The proposed procedures in 106.45, if applicable in the employment context, would require completion of a grievance procedure before an employment action such as termination could be taken, but only for a particular subset of misconduct captured by the proposed regulation’s definition of sexual harassment. This result seems illogical and would afford a subset of employees a greater level of process than even that bargained for by their union.
- In addition to Title VII, state law in Washington defines sexual harassment more broadly than the definition included in the proposed regulations. *Providing employees accused of sexual harassment that fits within the Department’s narrow proposed definition with different rights and processes than those who are accused of misconduct under state law or under the University’s policies and procedures is illogical and would be confusing to employees.*

Moreover, in the event that the proposed regulations, including proposed 106.44 and 106.45, were to apply to employees, the University’s concerns stated above regarding students would also apply to employees, e.g., the cost of providing advisors to all parties in full hearings would be unduly burdensome on recipients.

### **C. Postsecondary Schools Should Retain the Discretion to Select Their Own Standard of Evidence (Directed Question 6).**

While the potential consequences of a finding of responsibility under a student conduct code are not insignificant—and can include dismissal from the institution, including in cases

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<sup>30</sup> See Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice 915.002 (6/18/99).

<sup>31</sup> In the employment context, the current law references the employer’s own policies, which for the University do not match the proposed definition of sexual harassment. See, e.g., Nondiscrimination and Affirmative Action, Executive Order 31, available at [uw.edu/admin/rules/policies/PO/EO31.html](http://uw.edu/admin/rules/policies/PO/EO31.html) (last accessed 12/28/2018 at 10:43 a.m.).

where a student has earned all necessary credit for graduation—they do not involve jail time or registration as a sex offender. The University of Washington believes that—given the legal confines of the investigation and the potential consequences to students—“preponderance of the evidence” is the correct standard of proof in student conduct matters.

The University of Washington uses the “preponderance of the evidence” standard in all matters, and intends to continue to do so. We see no reason for a single standard to be mandated for all schools, and we do not believe that the “clear and convincing” standard would be appropriate for student conduct or employment matters at the University of Washington. *With respect to employment matters, mandating a “clear and convincing” standard is contrary to the entire premise of at-will employment. Further, collective-bargaining units routinely bargain regarding issues of employee conduct, investigations, and discipline. It is unclear that the Department of Education has the ability to impose a specific legal standard in employment matters. Moreover, there is no benefit to the federal government stepping into this area.*

With respect to students, Title IX matters always present a challenge of ensuring due process to accused students, providing support to survivors, and ensuring the safety of the campus community. In undertaking often complex investigations, institutional investigators do not have the same tools at their disposal as police. For example, University investigators can request students provide them with cell phone records, text messages, and social media documentation, but do not have the ability to seize and search electronic devices or compel the production of documents where a student opposes production or the investigator has reason to believe the production is incomplete. Nor do investigators have access to forensics, or even the ability to physically inspect many locations.<sup>32</sup> Without these tools and resources, a “clear and convincing” standard can be challenging to meet and can be an impediment to institutions’ efforts to maintain safe campuses, equally accessible to all genders. In the *educational* setting, therefore, the “preponderance” standard strikes the correct balance between due process and safety.

The University understands the inclination that allegations of sexual harassment by employees should be taken at least as seriously as allegations of sexual harassment by students; however, requiring the same standard to be used in employment matters as in student misconduct matters is likely not the best way to achieve that goal. Employment law is already well established, and a myriad of state and federal obligations exist in that arena. Moreover, the concept that fewer protections might apply to employees accused of sexual misconduct than to students (i.e., employment matters subject to a “preponderance” standard while student conduct matters are subject to a “clear and convincing” standard) may not be problematic because employees are more typically in a position of a power discrepancy with students. As such, holding employees to a higher standard of conduct (and a lower standard of evidence) than students would not be fraught with the same concerns.

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<sup>32</sup> Having those powers would unduly delay proceedings absent a substantial increase in the number of investigators on each campus.

**D. Proposed 106.45(b)(3)(viii) Should Simply Require All Relevant Evidence, Including Potentially Exculpatory Evidence, Be Shared with Parties (Directed Question 7).**

The proposed language of 106.45(b)(3)(viii) is confusing. It requires all evidence “directly related to the allegations” be shared with the parties, including evidence upon which the recipient “does not intend to rely” in reaching its determination. In the directed question, the Department cites a provision of FERPA<sup>33</sup> as the source of the “directly related” language contained in the proposed regulations. However, this provision of FERPA simply defines an education record as materials that contain information “directly related” to a student.<sup>34</sup> *FERPA does not further define “directly related.” Nor does it have equivalent “does not intend to rely” language, which causes substantial confusion in understanding the intent of the proposed regulation.*

It is completely unclear how there could be evidence that is directly related to an allegation that would not be utilized in determining the outcome of a conduct proceeding. Regardless of whether the evidence supports a finding of responsibility, evidence that pertains to the allegations would need to be considered by the decision-maker before a conclusion could be drawn as to its credibility and weight. That said, it is not uncommon for irrelevant, extraneous information to be received by an investigator—such as when an email snapshot is taken in an employment case that contains all of the employee’s emails during a certain time, or when a student provides his or her medical records only a portion (or none) of which may be relevant to the allegations. In many situations, these documents are simply irrelevant to the Title IX allegations, and there should be no need to produce them at all. In other cases, only portions of the collected documents are relevant, and they are more appropriately redacted because other portions are irrelevant and may contain, for example, information of a personal nature that is confidential and could be abused, such as pregnancy status, medical diagnoses, or home address.

Currently, at the University of Washington, in student-conduct proceedings that may result in suspension or dismissal, all relevant evidence is shared with the parties prior to the hearing. Irrelevant personal information, such as phone numbers and email addresses, is redacted. Other irrelevant information simply is not included in the case file shared with the parties or is redacted from the case file, when it is comingled with relevant information.

To the extent this provision is included in the final regulations, we respectfully suggest that the FERPA language be stricken and that more typical evidentiary-based language be substituted. For example: simply requiring that relevant evidence, including exculpatory evidence, be shared with the parties. There is a greater common understanding of the term “relevant” than of the term “directly related,” making it less likely to lead to confusion and misapplication.

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<sup>33</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,476-61,4776 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) (discussing 20 U.S.C. 1232g(a)(4)(A)(i)).

<sup>34</sup> There is more to the definition of an education record under FERPA; it simply is not relevant to this discussion. *See* 20 U.S.C. 1232g(a)(4)(A)(i).

### **E. The University of Washington Uses Zoom for Its Title IX Hearings (Directed Question 9).**

The University of Washington uses Zoom<sup>35</sup> for all of its Title IX hearings. Computers are set up for the respondent, the complainant, the hearing officer, and the conduct officer. All of these computers have a live Zoom video feed and a live chat function. Both respondents and complainants are provided the options of sitting in the hearing room, in a private conference room, or remotely (using their own computer). Parties are not obligated to have their video feed live during the hearing. Witnesses testify live in the hearing room, if they are available to do so. If not, they testify either via Zoom or by telephone.

We have found the cost of Zoom to be reasonable for our institution.<sup>36</sup> The Zoom chat function is used for cross-examination. The hearing officer does the initial questioning of all witnesses, after which each party is allowed to follow up with additional questions. The questions are submitted in writing, via the Zoom chat feature. All parties can view the questions in real time. Objections are made and argued orally. The hearing officer then asks the question (rephrased, if appropriate after objections) of the witness, and the witness responds. Additional follow-up is permitted, as in traditional cross-examination. This model strikes the balance of avoiding direct, oral cross-examination, which can be traumatic for survivors, while affording a full opportunity for cross-examination questioning to protect the respondent's due process interests. The Zoom chat history is retained, in case of a later challenge to the hearing officer's ruling on a cross-examination question. The hearing is transcribed by a court reporter, so the video feed is not retained.

Zoom has been an effective and pragmatic solution for the University of Washington in its Title IX hearings. We believe this technology and similar platforms are certainly more cost-effective than it would be to require the University to retain advisors to perform cross-examination for the parties. We also believe that this process is more trauma-informed than the process included in the proposed regulations. We have had no major technology issues with parties participating from different rooms or locations (including different countries) using this system.

## **III. The Proposed Regulations Create Confusion in Both Interpretation and Application.**

### **A. The Proposed Title IX Regulations Vary Considerably from Regulations Related to Race and Disability, the Other Two Areas that OCR Enforces.**

The proposed Title IX regulations are incredibly prescriptive in nature—especially the proposed sections 106.44 and 106.45. Neither the regulations that pertain to race<sup>37</sup> nor the regulations that pertain to disability<sup>38</sup> are nearly as prescriptive in their requirements. For example, only the proposed Title IX regulations direct institutions of higher education that they

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<sup>35</sup> <https://zoom.us>

<sup>36</sup> Additional costs include the time necessary to coordinate the technical logistics and the purchase and maintenance of computers and related equipment (screen and telephones, if used).

<sup>37</sup> 34 C.F.R. pt. 100

<sup>38</sup> 34 C.F.R. pt. 104. *See also* 28 C.F.R. pt. 35.

must hold quasi-judicial hearings. Only the proposed Title IX regulations direct institutions of higher education that they must pay for advisors, aligned with the students, as part of the school's internal grievance process. Only the proposed Title IX regulations explicitly address how evidence should be shared among parties during the grievance process.

If a grievance process is to be prescribed at all, one akin to the model set forth in the Disability Regulations, 34 C.F.R. 104.7(b), would be a better fit nationally, where there is already a myriad of competing state and local obligations. Section 104.7(b) simply requires the adoption of “grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part.” This simple statement seems to get to the crux of what the Department is attempting to do in the proposed regulations—ensure due process for accused students and ensure a prompt and equitable resolution of complaints. *The Department’s attempts to prescribe specific solutions, rather than directing schools to meet overarching standards, is problematic when dealing with a national landscape and with competing state and local laws.*

## **B. Washington State’s Administrative Procedures Act Applies to Student Conduct Proceedings in Higher Education, Already Ensuring Due Process Protections to Respondents in Title IX Proceedings.**

The University of Washington is no stranger to due process protections in its student conduct proceedings. The State of Washington’s Administrative Procedure Act (APA), RCW 34.05 *et seq.*, applies to student conduct proceedings in higher education. Under the state APA, hearings are required in the event that a student is facing suspension or dismissal.<sup>39</sup> There are numerous due process protections that state law requires in conjunction with a conduct hearing, including:

- Presiding officer free of bias, prejudice, or other interest in the case: RCW 34.05.425;
- Representation is permitted: RCW 34.05.428;
- Notice: RCW 34.05.434;
- The opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence: RCW 34.05.449;
- Witnesses testify under oath: RCW 34.05.452;
- Ex parte communications with the decision-maker are prohibited: RCW 34.05.455;
- The presiding officer at the hearing may not be the investigator: RCW 34.05.458; and
- Written orders, including specific requirements to protect due process, neutrality, and the parties’ ability to appeal: RCW 34.05.461.

### ***1. A Brief Overview of the University of Washington’s Student Conduct Process***

In cases where suspension or dismissal are potential sanctions, conduct officers<sup>40</sup> perform an investigation in which they determine whether a neutral fact finder could determine, by a preponderance of the evidence, that the student is responsible for a violation of the University’s Student Conduct Code. If so, the conduct officer initiates a hearing. The conduct officers do not

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<sup>39</sup> See, e.g., *Arishi v. Washington State Univ.*, 196 Wash. App. 878, 385 P.3d 251 (2016).

<sup>40</sup> In Title IX cases, the conduct officers are Title IX investigators with specialized education and training.

make any determination regarding responsibility in cases that go to hearing. The hearing is presided over by a neutral hearing officer.

In Title IX cases, both the complainant and respondent receive access to the investigator's entire case file, which includes the investigative summary of evidence and a summary of every witness interview performed by the conduct officer.<sup>41</sup> Parties are also invited to recommend and object to witnesses for questioning at the hearing, and are able to object to portions of the case file and submit additional relevant evidence prior to the hearing. Initial determinations regarding witnesses and evidence are made following a prehearing conference, which has historically been held telephonically. Parties are permitted to be represented by attorneys and are able to be accompanied by advisors. Confidential victim advocates are available to work with survivors (regardless of whether survivors choose to participate in the conduct process).<sup>42</sup> Respondent resources are available to assist respondents in navigating the University's conduct process.

At the hearing, the hearing officer performs the majority of the questioning of every witness. After the hearing officer completes his or her questioning, the other parties are permitted to ask additional questions of each witness by submitting written questions through a Zoom (see Section II(E) for additional detail) chat feature. Any objections to questions are made orally. The hearing officer may raise his/her own objections to questions. Following discussion and ruling on objections, the question is then asked of the witness by the hearing officer. Follow-up questions are permitted. A record of the question as originally posed and as asked is preserved, so it can be reviewed in the event of later challenges. The questioning process is the same for all witnesses, including the complainant and the respondent.

Following the hearing, the hearing officer issues an initial order, which becomes a final order in 21 days unless a party seeks administrative review. Both complainants and respondents are permitted to seek administrative review under the University's conduct code. Administrative reviews are conducted by a three-member faculty panel and generally proceed solely on written materials. In the event that a student wishes to challenge the validity of the University's action after the conclusion of the conduct proceeding, judicial review is provided for by the state APA.<sup>43</sup>

## ***2. The University of Washington Uses Brief Adjudicative Proceedings When Suspension and Dismissal Are Not Potential Sanctions.***

In less severe cases, where a student is not facing suspension or dismissal, a hearing is not required.<sup>44</sup> In these cases, Washington state law permits a "brief adjudicative proceeding," which is similar to the single-investigator model. While there are due process protections in brief adjudicative proceedings, they are lesser protections than those afforded in hearings.<sup>45</sup> It seems appropriate that the due process protections increase as the potential sanctions become more

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<sup>41</sup> Every witness-interview summary is shared with the witness, and the witness is asked to confirm the accuracy of the summary. In addition, the conduct officer's original notes of every interview are included in the case file shared with the parties.

<sup>42</sup> See RCW 28B.112.030 (state statute ensuring confidentiality of survivor communications with campus-affiliated advocates).

<sup>43</sup> RCW 34.05.510 *et seq.*

<sup>44</sup> *Arishi*, 196 Wash. App. at 887.

<sup>45</sup> See RCW 34.05.482 *et seq.*

severe, and that efficiency and educational impact are balanced with those protections where loss of educational access is not a potential consequence.

These less rigid proceedings allow the University to act more quickly. Research conducted by the Association for Student Conduct Administrators and other professionals in the field indicates that from a student-development perspective, the sooner a student is able to engage on issues of responsibility and accountability, the more effective the process is in decreasing recidivism and increasing positive outcomes. This is important because the University of Washington's student conduct process is primarily educational in nature.

#### **IV. Conclusion**

In closing, the University of Washington would like to reiterate its commitment to fulfilling its Title IX requirements; in fact, we believe that we go beyond what is federally required—both currently and in the proposed regulations. The proposed regulations, unfortunately, would impede the University's ability to support its students and employees as they deal with sexual misconduct, and would also impede the University's ability to keep the University community safe from sexual misconduct. In other words, they would force the University to take a step backward in reaching the gender equity goals of Title IX—*where all students have equal access to educational programs and activities regardless of gender.*

We appreciate this opportunity to submit our comments on this critical set of issues.

Sincerely,

Ana Mari Cauce  
President  
University of Washington