



OFFICE OF THE PRESIDENT

Anthony P. Monaco, *President*

January 30, 2019

Via Federal eRulemaking Portal

Brittany Bull
Attorney Advisor
U.S. Department of Education
400 Maryland Avenue S.W., Room 6E310
Washington DC 20202

***Re: Comments on Proposed Title IX Regulations
ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14***

Dear Attorney Bull:

As President of Tufts University, I am writing in response to the Department of Education's Notice of Proposed Rulemaking to amend regulations implementing Title IX of the Education Amendment Act of 1972. Tufts prohibits discrimination based on all protected classes in its programs and activities, and the university is committed to and will continue to be committed to compliance with federal, state and local civil rights laws, including Title IX. Tufts also has high expectations for the conduct of its community members aligned with the institution's core values which include the important principles of mutual dignity and respect. We also expect all community members to act in concert with the university's commitment to the safety, equal access and well-being of those in our community.

Tufts shares Secretary DeVos' interest in a Title IX program grounded in principles that, as cited in the preamble to the proposed regulations, include, "the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not pre-determined." However, we are greatly concerned with several aspects of the proposed regulations that would impede or reverse our progress in addressing and preventing sexual misconduct in our community. We are deeply committed to continuing our efforts to eradicate sexual misconduct from our community and strongly urge the Department to reject any changes that would be counterproductive to that goal.

While Tufts University supports the comment letter submitted by the *Association of Independent Colleges and Universities (AICUM)*, I write separately here to share some Tufts-specific experience and feedback on the proposed regulations.

Definition of Sexual Harassment

Tufts has made significant strides over the past decade in identifying best practices for appropriately preventing and addressing sexual misconduct in our community, consistent with our commitment to the safety, equal access and physical and emotional wellbeing of our community members. Since the Department's 2011 Dear Colleague Letter, Tufts policy has applied to a wide range of sexual misconduct including sexual violence and harassment, sexual exploitation, stalking, relationship violence, and other aspects of sex and gender discrimination. And, since 2011, Tufts has experienced an increase of almost 500% in reports of sexual misconduct under its policy, a measure of our program's success. Narrowing the definition of sexual harassment and restricting the actions available to address conduct that violates current institutional policies and conduct standards will erode this progress and negatively impact our community's overall safety.

The proposed revisions effectively limit the definition of sexual harassment. Coupled with a school's obligation to immediately dismiss formal allegations that go beyond this revised definition, this proposed standard would substantially limit the range of sexual misconduct that must be addressed and would deter students and other members of our community from reporting inappropriate and harmful, though not "illegal" conduct.

The Department's proposed and more restrictive definition of sexual harassment would prevent Tufts from being able to fairly address unwelcome conduct *before* it becomes severe and pervasive which is in the interest of *all* of our community members. As was our concern with the Department's recent narrowing of its previous position on the definition of gender, a narrowed definition of harassment presents a great risk of further silencing, erasing and discouraging the experiences of members of the LGBTQI community as well as those of the disabled and students of color communities who not only frequently under-report but may also frequently endure significant harassment and bullying before coming forward.

In our experience, encouraging reporting is paramount to stopping discrimination in its tracks, supporting and providing appropriate resources for our community members, identifying and addressing patterns and trends, and educating all members of our community on issues critical to sexual misconduct prevention such as sex/gender bias and consent. As an institution of higher education, our mission compels us to provide timely education to prevent and interrupt cycles of violence and discrimination in our society. Given the concerning implications of the proposed definition of sexual harassment, only a few of which are outlined in this letter, we object to this proposed change and encourage the Department to re-align its approach with its commitment to condemning and preventing sexual misconduct in the educational setting.

Scope of Title IX's Reach

The proposed regulations as drafted will limit schools' investigative responsibilities to formal complaints about incidents that occur only on campus property or within an educational program or activity. However, just as serious as a sexual assault that occurs on campus is one involving our community members at any of the many off-campus residences in which many of our undergraduates, graduates and employees live. And harassment that occurs on-line may have the same impact as harassment that occurs in person on our campus. As it remains unclear whether the Department will support a school's decision to maintain institutional sexual misconduct policies and procedures which currently address the conduct of community members at off-campus events not sponsored by the University (e.g. social events, academic and athletic conferences, travel or study abroad) this needs to be clarified with support for a school's discretion. With approximately 35% of our undergraduate students living off campus and most of our graduate students and employees living off campus, we must have policies and procedures that do not categorically ignore these behaviors simply because of differences in geography.

The Department's proposed limitation in Title IX's reach ignores the reality of a university community in the 21st century – more and more institutions are unlimited by campus geography or international borders. To impose an enforcement boundary at the campus perimeter would unduly limit the school's ability to meaningfully address sexual misconduct in our community, hinder accountability and most assuredly inhibit reporting. We urge the Department to re-consider this limitation given the expected negative impact this will have on the well-being of our communities and the progress we (and countless other institutions) have made in preventing and addressing sexual misconduct in our communities. We also emphatically reiterate the importance of the Department giving each institution the flexibility to define the scope of its own policies' reach.

Hearings

Years ago, in response to various concerns raised by community members, Tufts decided to move away from the hearing process in sexual misconduct matters. These concerns, which resurfaced in response to the Department's proposed regulations, included the experience that the prospect of a face-to-face hearing deterred reporting and prevented a full review of sexual misconduct allegations. Instead, Tufts adopted an investigator-based model that, in student cases, includes the submission of an investigative report to both parties for their review and optional response, and an independent adjudicatory panel for reaching a determination of responsibility. A separate appeals panel, available to both parties, also provides additional review and a final determination. In employee cases, we also use an investigator-based model and the employing department determines any necessary corrective or disciplinary action. Because the parties and witnesses in both processes are not required to attend any formal hearing where they face each other or are subjected to direct cross-examination akin to a court proceeding, our current approach

treats both the complainant and respondent in an equitable manner while also maximizing the privacy and well-being of all individuals involved.

Following our decision to move away from the hearings process, the reporting of sexual misconduct matters and the pursuit of formal investigations and disciplinary action in these cases substantially increased. Prior to 2011 Tufts community members did not report sexual misconduct to a central office, impeding a unified response, prevention work and the ability to track patterns, trends or types of cases. Today we are able to respond more fully, more swiftly and more consistently when misconduct occurs and we are often able to prevent harm to our community members because we are able to educate and address concerns in advance.

We are concerned that the proposed regulations' requirement of a formal, adversarial court-like hearing for sexual misconduct matters would significantly and negatively impact our community members' emotional and physical well-being and be detrimental to Tufts' ability to ensure a safe and accountable campus. The imposition of live hearings for such matters would further inhibit the community's trust in our adjudication process, undermine the integrity of the proceedings and ultimately discourage critical reporting of sexual misconduct. We do not want to regress to a time when individuals affected by sexual misconduct in our communities were afraid to come forward, and did not. We strongly object to reverting to a process that would interfere with our ability to appropriately address and prevent sexual misconduct. Therefore, we urge the Department to retain its current position which provides each school the flexibility to choose appropriate procedures for their own community and to address sexual misconduct (and discrimination in general) guided by principles such as promptness, equity and impartiality for all.

Standard of Proof

We also urge the Department to permit schools to retain the flexibility to determine the standard of proof applicable to their disciplinary matters, including sexual misconduct matters. Tufts uses the "preponderance of the evidence" standard for all discrimination cases, including sexual misconduct matters, and in most other comparable student and employee disciplinary matters. This is the standard we have used for decades in discrimination matters and the one that is appropriate given the non-judicial nature of these internal proceedings. We also recognize that the preponderance of the evidence standard is consistent with the legal standard applicable to these cases in the civil context. As a result, we object to a standard inconsistent with our historical approach to these cases and any standard which would serve as a barrier and deterrent to reporting and addressing sexual misconduct in our community.

Responsible Employees

Under the proposed regulations, a school is only responsible under Title IX if a report is made directly to its Title IX Coordinator or any employee with the authority to take corrective action. While it is unclear whether this aspect of the proposed regulations was intended to eliminate the obligations assigned by an institution to its “responsible employees,” the departure from the prior “responsible employee” standard is problematic. It makes it harder for students and community members to identify appropriate individuals for reporting purposes and will inevitably lead to fewer reports. It may also present a threat to the safety of our communities by impeding the university’s ability to respond to conduct of concern.

In the past few years, Tufts has expanded the number of employees who are responsible for reporting sexual misconduct in order to provide students more options and opportunities to report these matters. Tufts’ Office of Equal Opportunity (OEO) requires regular in-person training for faculty and staff members about their reporting rights and responsibilities under the university’s accommodation, non-discrimination and sexual misconduct policies. Our three-hour in-person and interactive employee training outlines our expectations regarding sexual misconduct, including our requirement that all members of our community (except those few who hold a confidential status) are required to report promptly any allegations of sexual misconduct or other discrimination, harassment or bias to the OEO. OEO also conducts mandatory 75-minute in-person trainings for all first-year undergraduate and graduate school students to ensure everyone understands their expectations and obligations. Over 85% of our faculty and staff have attended this training in the last four years, and in the last five years, over 90% of our first-year students received their in-person training in the first 8 weeks of their first semester in our community. These educational and prevention measures ensure that reported conduct will be privately handled by one known source, OEO, staffed with professionals trained in managing and investigating such matters with attention to institutional patterns and trends.

As a result of this work over the years, the obligation for responsible employees to report sexual misconduct is ingrained in our culture. It is important to note that for an institution the size of Tufts, the vast majority of students report sexual misconduct to a mentor, advisor or trusted staff or faculty member, not directly to the Title IX Coordinator, whose office may not even be in their same zip code. The ultimate goal at Tufts is for a trusted staff or faculty member, or “responsible employee,” to help students connect with the Title IX Coordinator who can provide information about resources and support. Ultimately, Tufts does not want to make it harder for its community members to report sexual misconduct. Therefore, we ask the Department to clarify this aspect of any final regulations and guarantee that schools will be able to identify their own responsible employees for initiating reports of sexual misconduct and other discrimination, harassment and bias.

Conclusion

I appreciate the opportunity to provide feedback to the Department on its notice of proposed rulemaking to amend the Title IX regulations. We are deeply committed to continued progress in preventing and addressing any discrimination in our communities. We believe in fairness and process for all and will continue to apply it to all parties – something we have worked hard to accomplish. We are proud of the work we have done and recognize that our efforts have been crucial to enhancing our Title IX program over time. We are happy to discuss our work at any time, and would welcome an opportunity to share our perspectives further.

Respectfully submitted,

A handwritten signature in cursive script that reads "A.P. Monaco". The signature is written in black ink and is positioned above the typed name.

Anthony P. Monaco
President
Tufts University