Public Comment on the Proposed Rule on Title IX Regulations

To the US Department of Education and Secretary DeVos,

The MIT Graduate Student Council (GSC) represents the 6,900 graduate students of the Massachusetts Institute of Technology (MIT) in all matters concerning their welfare, academic opportunities, and overall health. Graduate Women at MIT (GWAMIT) is dedicated to the personal and professional development of female-identifying graduate students at MIT. Both GSC and GWAMIT are dedicated to advocating for measures that effectively prevent sexual harassment and assault, provide resources and support for survivors, and result in fair and timely investigations with appropriate consequences for perpetrators.

We believe that, overall, the proposed changes to the Title IX regulations will be detrimental to creating and maintaining the safe campus environment necessary for students of all gender identities to have equal access to education. Nationally, 18% of female students and 4% of male students have experienced nonconsensual sexual contact on campus.¹ About 20% of female students in the sciences have experienced harassment from faculty and staff, and this number rises to more than 25% for female engineering students, according to the National Academies 2018 report on the Sexual Harassment of Women (hereafter referred to as the National Academies Report).² Because sexual harassment affects a significant number of students, a disproportionate percentage of which are women, especially in the STEM fields, the MIT GSC and GWAMIT strongly oppose provisions in the new proposed regulations that would reduce the responsibility of recipients to address sexual harassment cases. We also strongly oppose provisions that will reduce the rate at which sexual harassment is reported to recipients through Title IX and by recipients to the public. We are also very concerned about the level of funding these proposed changes will require, which could cause recipients to either reduce funding for other programming benefiting students or increase tuition or fees in order to implement these changes.

Below, we describe our concerns with the following proposed changes: the definition of sexual harassment and actual knowledge (§106.30), the limiting of responsibility to harassment that occurs within an education program or activity of the recipient (§ 106.44(a)), the requirement for cross examination at live hearings (§ 106.45(b)(3)(vii)), and the option to use the "clear and convincing" evidence standard for sexual harassment cases (§106.45(b)(4)(i)).

§106.30: Definition of sexual harassment

In the proposed regulations, the definition of sexual harassment is changed from “unwelcome conduct of a sexual nature” to “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.” Because an incident would now need to meet all three conditions, "severe, pervasive, and objectively offensive," the types of cases a recipient could be responsible for would become limited. For example, according to the National Academies Report, gender harassment is the most common type of sexual harassment faced by women and includes demeaning comments and jokes. Although these comments are often pervasive, a recipient, as defined in the guidelines, might not interpret them as being severe, releasing themselves from the responsibility of handling these types of cases. However, one of the recommendations outlined in the National Academies Report is for "leaders in academic institutions and research and training sites [to] pay increased attention to and enact policies that cover gender harassment as a means of addressing the most common form of sexual harassment and of preventing other types of

¹ “Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct”, Westat (2015).
sexually harassing behavior." By allowing recipients to ignore sexist comments and jokes, this proposed change is in direct opposition to the recommendations issued by the National Academies for making "more rapid and sustained progress in closing the gender gap in science, engineering, and medicine." It also allows recipients to underreport to the public the number of sexual harassment incidents experienced by their students, which is potentially important information for prospective students when making a decision on where to enroll.

In addition to the detrimental effects on students, the change in the definition of sexual harassment has the potential to increase costs to recipients, contrary to the intention of the proposed regulations. Under this change, the recipient would not be required to address cases it deems to be some combination of severe, pervasive, and objectively offensive, but not meeting all three requirements. A recipient would therefore be put in the position of determining which types of cases to address formally through their Title IX office and which to address through other means. This makes the recipient more vulnerable to lawsuits coming from either a complainant claiming that their case should have been taken through the Title IX process, or a respondent claiming that the case should have been handled through other means.

§ 106.30: Definition of "actual knowledge" of sexual harassment

The proposed regulations define "actual knowledge" as "notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient." In contrast to the previous guidelines, in which professors, teaching assistants, and other authority figures had reporting obligations, some recipients may have only one individual to whom a complainant could report sexual harassment under the new regulations. Under the current policy, only 5-28% of incidents are reported to on-campus or off-campus resources, including those that are not required to report incidents to a recipient’s Title IX office, meaning an even smaller percentage of incidents are reported to a recipient’s Title IX office. Limiting the number of individuals who can receive reports of sexual harassment will further decrease reporting rates because complainants will have less choice in who they report an incident to. If they are uncomfortable reporting to the only choices they do have, they may simply choose not to report. Lower reporting rates mean less survivors of sexual harassment are having their cases investigated and resolved, and recipients are again underreporting to the public the number of sexual harassment incidents experienced by their students.

§ 106.44(a): Limiting of responsibility to harassment that occurs within an “education program or activity” of the recipient

Students interact with each other in many settings in which the recipient does not "own the premises," "exercise oversight, supervision, or discipline," or "fund, sponsor, promote, or endorse the event or circumstance." Examples include groups of students living together in an off-campus apartment or visiting an off-campus location for an event not sponsored by the recipient. If a student sexually harasses another student in this type of situation, the students in question may still regularly encounter each other in situations that are within a recipient’s “education program or activity,” which could be traumatic for the survivor and thus "jeopardize [the] person's equal access to the recipient's education program or activity." Therefore, we strongly disagree with this change to the Title IX regulations. Sexual harassment has an impact on the ability of students to access the recipient’s education program or activity far beyond just the time(s) of the incident(s). Therefore, recipients should be responsible for responding to all such conduct, regardless of the situation in which it occurs.

Furthermore, allowing the recipient to neglect cases that occurred in certain off-campus situations presents another situation that invites lawsuits from parties who feel that their case was handled under the wrong procedure. The recipient would be required to decide which cases to treat under the Title IX
procedure and which cases to resolve through other means. A respondent whose case was resolved via the Title IX process could claim that the case should have been resolved via other means, and a complainant whose case was handled via other means could claim that the case should have been resolved via the Title IX process. Handling these lawsuits would incur additional costs to the recipient, which is contrary to the intention of the proposed regulations.

§ 106.45(b)(3)(vii): Requirement to allow for cross examination at live hearings

The proposed regulations require that “the recipient’s grievance procedure must provide for a live hearing” where each party must “submit to cross-examination” by the other party’s advisor. While, in general, the provisions laid out in §106.45(b)(3) do seem to provide for a fair process for all parties involved since all parties are treated equally, allowing cross examination of the complainant at a live hearing by an advisor to the respondent is likely to result in additional trauma for the survivor while cross examination of the respondent by an advisor to the complainant is unlikely to have a similar impact. Furthermore, allowing cross examination by the parties’ advisors creates opportunities for advisors to “prey on suggestibility [of a witness] through narrowly framed, or confusing worded questioning” or “covertly expose the factfinder to impermissible suggestions and unfairly prejudicial information,” especially if the individual overseeing the hearing is not trained to prevent this.\(^3\) This will likely decrease the accuracy of the hearing, resulting in less fairness for all involved. Therefore, we suggest, if cross examination happens at all, that all questions are asked by a neutral intermediary that is able to receive suggested and follow up questions in real time from the parties involved and their advisors. The intermediary should be trained to filter and rephrase any questions such that the risk of traumatization is minimized.

However, there are a number of logistical and cost challenges associated with requiring cross examinations at all. In cases where the recipient provides a party with an advisor, the recipient or the advisor may be sued if the party is unhappy with the quality of the advisor. Furthermore, the recipient is likely to need to hire such an advisor since faculty and staff of the recipient may be unwilling to take on that liability, further increasing costs. The live hearings would also need to be overseen by a well-trained individual who is able to handle cross-examination. The recipient is again unlikely to find such a person among their faculty and staff, and any such individual that does exist amongst faculty and staff may be unwilling to take on any liability for the quality of the hearing. Therefore, the recipient is again likely to need to hire such an individual, increasing costs. The cost of hiring the necessary individuals to carry out the cross-examinations could be cost prohibitive, especially for recipients with less resources such as community colleges.

§ 106.45(b)(4)(i): Option to use the "clear and convincing" evidence standard for sexual harassment cases

The proposed regulations allow the recipient to “apply either the preponderance of the evidence standard or the clear and convincing evidence standard” instead of requiring the preponderance of the evidence standard. As previously stated, sexual harassment is highly underreported, even with the use of the preponderance of the evidence standard, with 14 - 29% of victims who chose not to report doing so because they “did not think anything would be done.”\(^1\) Allowing recipients to raise the standard to clear and convincing evidence will cause more victims to make that choice, further decreasing reporting rates and, therefore, the rate at which justice is served. The proposed regulations also give recipients the choice to use a higher standard of evidence for sexual harassment violations compared to other conduct

violations that carry the same maximum sanction. The reason given is “the heightened stigma often associated with a complaint regarding sexual harassment.” However, there is also a heightened stigma and shame associated with reporting an incident of sexual harassment, which would be a reason to allow sexual harassment violations to use a lower standard of evidence. The proposed regulations could also cause recipients to incur additional unexpected costs, again due to an increased number of lawsuits over whether the recipient made the correct choice in selecting the standard of evidence used.

Combining the three points made above, we believe that a single standard should be required, and it should remain the preponderance of the evidence standard. Most of the proposed changes to the way complaints are investigated help increase the fairness of the investigation, so increasing the standard of evidence is not necessary, especially in light of the decrease in reporting rates the higher standard is likely to cause.

Overall, the proposed changes to the Title IX regulations will be detrimental to creating and maintaining the safe campus environment necessary for students of all gender identities to have equal access to education. The MIT GSC and GWAMIT strongly oppose provisions in the new proposed regulations that would reduce the responsibility of recipients to address sexual harassment cases, reduce the rate at which sexual harassment is reported to recipients through Title IX and by recipients to the public, and impose increased costs on recipients.

Thank you for your time and consideration,

MIT Graduate Student Council
Graduate Women at MIT

Prepared by the External Affairs Board, Graduate Women at MIT, and the Diversity and Inclusion Subcommittee on behalf of the MIT Graduate Student Council and Graduate Women at MIT. January 2019.