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STATE OF COLORADO
DEPARTMENT OF LAW

January 28, 2019

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

**RE: Public Comment - Proposed Rule, Title IX of the Education Amendments of 1972
(Docket ED-2018-OCR-0064)**

Dear Secretary DeVos:

I offer the following comments from the Office of the Colorado Attorney General regarding the notice of proposed rulemaking titled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” (“Proposed Rule”) issued on November 29, 2018, by the U.S. Department of Education (“Department”). These comments focus on the Proposed Rule’s impact on Colorado’s institutions of higher education (“IHEs”).

The Colorado Attorney General’s Office is deeply concerned that the Proposed Rule falls short on the crucial statutory objective of protecting survivors of campus sexual assault and harassment, and is insufficient to prevent and deter such actions from happening in the first place. In its current form, the procedures required by the Proposed Rule deny survivors the dignity, equality, and equal rights to education that Title IX aims to protect.

This Comment addresses the Proposed Rule’s specific inquiries into “whether it is desirable to require a uniform standard of evidence for all Title IX cases” and whether, pursuant to Executive Order 13132, the Proposed Rule will have serious “federalism implications” for the functioning of state and local government institutions. Here, our position is simple: even if the Department *permits* IHEs to use the processes outlined in the Proposed Rule, the Department should not *require* their adoption by IHEs. Rather, IHEs that have created grievance procedures in compliance with the Department’s previous guidance should be permitted to retain those systems if they so choose.

Previous guidance issued by the Department under the prior Administration provided sound processes to protect victims, and was consistent with Title IX’s stated legislative purpose. For this reason, we find the Proposed Rule unnecessary. If the Department adopts some version

of the Proposed Rule, however, we call on it to: (1) include in the final rule flexibility to allow IHEs the option to retain their existing processes that protect victims and ensure adequate due process protections; and (2) permit IHEs to implement Title IX in a manner that allows them to avoid costly implementation challenges.

Under the existing guidelines and other federal laws, Colorado IHEs created grievance procedures that address due process concerns and offer safety and support for sexual assault and harassment survivors. As currently drafted, the Proposed Rule requires Colorado IHEs to undergo costly and administratively difficult changes to these well-established systems. Such disruptive changes would impose substantial burdens on Colorado IHEs, requiring the abandonment of approaches that work well – all in favor of an untested approach dictated by the federal government. Colorado lawmakers and IHEs are devoted to the implementation of policies, procedures, and state laws that are currently in place, and are working effectively to meet the requirements of Title IX. For this reason, we object to both the Department’s proposal of a binding federal mandate (that would displace Colorado’s effective protections now in place) and the threat of revoking federal funding for Colorado colleges and universities that fail to meet any newly imposed federal mandate.

We request that the Proposed Rule not be adopted on the ground that it is inconsistent with Title IX. If the Proposed Rule is adopted, we request that its implementation not prevent Colorado IHEs or the State of Colorado from retaining, or further enhancing, existing laws and procedures that provide protections for victims and due process for respondents. Consequently, we urge the Department to amend the Proposed Rules to offer flexibility to states, and to respect Colorado’s ability to set its own laws, policies and processes to govern Colorado’s higher education system, without federal financial penalties to Colorado colleges and universities.

Thank you for your consideration of these comments. Should you have questions, please contact me or Kurt Morrison with the Colorado Department of Law at (720) 508-6547.

Sincerely,

A handwritten signature in cursive script that reads "Philip J. Weiser". The signature is written in dark ink and is positioned above the typed name of the sender.

Philip J. Weiser
Colorado Attorney General

cc: Speaker KC Becker, Colorado House of Representatives
President Leroy Garcia, Colorado Senate
Rep. Barbara McLachlan, Chair, Committee on Education, Colorado House of Representatives

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Sen. Nancy Todd, Chair, Committee on Education, Colorado Senate

Ms. Natalie Hanlon Leh, Chief Deputy Attorney General, Department of Law

Mr. Eric Olson, Solicitor General, Department of Law

Mr. Kurtis Morrison, Deputy Attorney General for Intergovernmental Affairs, Department of Law