



**Statement of Andy Brantley**

**Before the  
United States Equal Employment Opportunity Commission**

**At the  
Industry Leaders Roundtable Discussion on Harassment Prevention**

**March 20, 2019**

Good morning, Chair Lipnic and Commissioner Burrows. Thank you for convening this roundtable and inviting me to participate. I am Andy Brantley, president and chief executive officer of the College and University Professional Association for Human Resources, known as CUPA-HR. Prior to joining CUPA-HR, I was associate vice president and chief human resources officer for the University of Georgia (UGA) in Athens, Georgia. Before my arrival at UGA in January 2001, I served as the assistant vice president for business administration and director of human resources at Davidson College, a private college in Davidson, North Carolina.

CUPA-HR serves as the voice of human resources (HR) in higher education, representing more than 31,000 HR professionals and other campus leaders at more than 2,000 colleges and universities across the country, including 93 percent of all U.S. doctoral institutions, 78 percent of all master's institutions, 53 percent of all bachelor's institutions and 500+ two-year and specialized institutions. Higher education employs more than 3.9 million workers nationwide, with colleges and universities in all 50 states.

Nearly all of CUPA-HR's members have some responsibility for compliance with Title VII of the Civil Rights Act of 1964, the Equal Pay Act and similar state laws prohibiting sex discrimination in employment. In addition, approximately 50 percent of our membership has reporting and compliance responsibilities under Title IX of the Education Amendments of 1972. The primary driver behind our members' efforts to ensure equal opportunity in employment and education, however, is not legal responsibilities, but rather their unwavering commitment to diversity, inclusion, access and equitable practices as a means to achieve excellence in higher education. We are pleased to join the many industries represented at this roundtable to discuss this critical issue.

While helping members build diverse and inclusive workplaces has long been a focus of CUPA-HR, the well-publicized incidents of employment-related sexual harassment and assault that have come to light in the last few years made clear to us that we can and must do more. For CUPA-HR, this has meant leveraging access to the 30,000 higher education HR professionals in our membership to harness their expertise, bring greater attention to the problem of sexual



harassment and provide additional education on harassment prevention. We have done so by increasing direct member engagement to better identify the challenges and successes our members have faced in fighting sex discrimination. We have leveraged what we learned via this engagement by making qualitative changes to and significantly increasing the number of member communications, resources and professional educational opportunities on this issue. We also employ this expertise to engage policy makers in an effort to improve applicable laws and regulations.

To be effective and impactful as an association, we must strive to understand the key challenges faced by our member organizations and the actions they are taking to address these challenges. We must also move quickly to create and curate programs, resources and best practices to help our members meet these challenges.

In January 2018, I wrote a blog post titled, “Strategies for Eliminating Sexual Harassment in Higher Education (and It’s Not Simply More Training).” In that post, I emphasized that we cannot simply “train away” harassment. Training and heightening awareness will always be important, but we must be committed to creating and sustaining workplace cultures that do not tolerate harassment in any way, shape or form. Many employers regularly check the training compliance box, but as we have seen played out across the country, checking this box is not enough stop these egregious behaviors. In this blog post, I also emphasized that a precondition of successfully combating harassment is ensuring that the campus environment is one where women can and do have leadership roles.

On April 19, 2018, Lynn A. Clements, Esq., director of regulatory affairs at Berkshire Associates Inc., led our highest-attended webinar of the year (with more than 900 participants) on the topic of sexual harassment and pay equity claims in higher education. Before beginning her work at Berkshire, Clements was acting director/deputy director of the policy division of the Office of Federal Contract Compliance Programs (OFCCP) and policy advisor at the Equal Employment Opportunity Commission (EEOC). In the webinar, Clements recommended that higher education HR leaders:

- Evaluate vulnerable work environments and risky employment practices
- Audit and update harassment policies
- Review confidentiality and mandatory arbitration provisions of employment agreements
- Conduct effective anti-harassment messaging and training
- Revamp investigative procedures to address contemporary issues and ensure accountability



In July 2018, the chair of CUPA-HR's national board of directors led the board through an activity to identify current campus challenges related to sexual harassment and assault, and examples of programs and resources used to create a more inclusive campus culture. We facilitated a similar activity with our four region boards. What we discovered from our work with association leaders include the following:

- The increased willingness of people to speak out has led to a reassessment of the processes for addressing harassment at higher education institutions. Many campuses have also increased the number of employees who are able to quickly and professionally manage the review process.
- There is much more pressure from leaders, employees, students and parents to quickly resolve claims of harassment and assault. As we all know, due process is required and cannot always occur as quickly as everyone (including the investigators) would like.
- Students and employees are becoming more vocal, including the use of social media, when there is no finding or a finding that is different than the outcome they wanted or expected. They are using social media to challenge the process and the outcomes.

During those same activities with our national and region boards, we asked them to share important actions being taken on their campuses to address these and other challenges. Their responses included the following:

- Using two investigators (typically male and female) to address claims of harassment or assault.
- More clearly defining what is a Title VII harassment claim and what is a Title IX claim.
- More frequent use of law firms and other external investigators to investigate claims to help ensure an unbiased and timely review.
- Weekly meetings of human resources, public safety and those in offices charged with handling claims of sexual harassment and sexual assault.
- Title IX office leaders spending more time proactively engaging with students and other campus leaders outside of their compliance and investigative responsibilities.
- Heightening awareness of bystander intervention and reporting responsibilities for all employees.

As mentioned above, we also leverage our members' expertise to provide input to policy makers on possible improvements to laws and regulations. In this regard, we would like to highlight one issue — greater coordination among federal agencies and to the extent possible state and local agencies. Higher education institutions are unique employers in that we are responsible for Title VII and Title IX compliance and many of our members are federal government contractors and/or grant recipients. The number and appalling nature of the recent high-profile incidents of



sexual harassment and assault has federal, state and local government agencies investigating what steps they can and should take to better address the issue. We strongly encourage the EEOC to work closely with these other agencies to help ensure consistency and streamline reporting obligations in an effort to avoid unnecessary conflicts, overlap, confusion and undue burdens.

For example, we urge the EEOC to work with the National Science Foundation (NSF) and the National Institutes of Health to ensure that these and similar agencies do not create differing definitions of harassment as part of grantees' reporting obligations. NSF recently changed its reporting obligations, and CUPA-HR provided input, but EEOC coordination would have also been helpful. Similarly, we urge the Commission to work with the Department of Education on how to address circumstances where Title IX and Title VII may overlap and provide guidance on how higher education employers can best navigate these situations. The Department is currently revisiting its Title IX guidance, and we provided comments suggesting they work with the EEOC on this matter. Attached is a copy of those comments.

I have attached a list of resources CUPA-HR provides to members on harassment as an appendix to this testimony. As evidenced by the list, we take very seriously our responsibility to provide communications, resources and programs to help higher education leaders create a more inclusive higher education community and address sexual harassment and assault on campus. We have also redoubled our efforts on member resources and education, updating and increasing the number of web pages and community forums, online toolkits, webinars and virtual workshops and conference sessions focused on harassment prevention.

As noted at the beginning of my testimony, we must be committed to creating and sustaining workplace cultures that do not tolerate harassment in any way, shape or form. As demonstrated by the work of our leaders, the work of our staff, and my presence here today, CUPA-HR is committed to not only providing resources to address these challenges, but also to helping higher education institutions create and sustain a diverse, inclusive culture where harassment does not occur.

Thank you again for the opportunity to participate in this roundtable.



## Appendix

### Recent Leader Engagement

- July 2018 meeting of the national board of directors included a segment focused on how the #MeToo movement shapes our work as higher education HR leaders
  - Outcomes of this discussion used to shape programs and services
- September 2018 meetings with our four region boards included a segment focused on how the #MeToo movement shapes our work as higher education HR leaders
  - Outcomes of this discussion used to shape programs and services

### Resources

- Dedicated CUPA-HR [Landing Page for Sexual Harassment Resources](#) (includes toolkit reference, articles, blog posts, [training videos](#) with facilitator guides)
- Dedicated Community Forum for [Title IX discussions](#)
- [CUPA-HR Creating Inclusive Communities](#) project
- [CUPA-HR Diversity, Equity and Inclusion Maturity Index](#)
- [CUPA-HR Inclusion Cultivates Excellence Award](#)
- Knowledge Center (members-only) Toolkits:
  - [Title IX and Sexual Harassment Toolkit](#)
  - [Investigations Toolkit](#)
  - [Civil Rights Act of 1964](#)
  - [Ethics](#)
  - [Diversity, Equity and Inclusion](#)
  - [HR Risk Management](#)

### Recent Webinars

- [October 11, 2017](#): Facing the Challenges of DOE’s Recent Title IX Interim Guidance (public: event recording and supplemental materials are available on the CUPA-HR website)
- [April 4, 2017](#): The Intersection of the Clery Act (VAWA) and Title IX: Implications for Sexual Misconduct Complaints and Institutional Response (public: event recording and supplemental materials are available on the CUPA-HR website)
- [Quarterly Washington Updates With CUPA-HR’s Government Relations Team](#) (these events mention critical issues, such as Title VII, VAWA and Title IX, as they arise and are for CUPA-HR members only)
- [April 19, 2018](#): How the #MeToo and Pay Equity Movements Impact Higher Education — And What to Do About It. This session was led by Lynn A. Clements, Esq., director of regulatory affairs at Berkshire Associates Inc. Before beginning her work at Berkshire, she was acting director/deputy director of the policy division of OFCCP and policy advisor at the EEOC. More than 900 higher education leaders participated in this webinar. (public: event recording and supplemental materials are available on the CUPA-HR website)



### E-Learning Courses

- [CUPA-HR Boot Camp](#) (learning modules [here](#))

### Virtual Workshops

- Hosted a Title IX virtual workshop, “Tips, Tools and Expert Advice for Title IX Coordinators” on May 12, 2016

### Annual Conferences

- Every CUPA-HR [annual conference](#) includes a full-day workshop and a track throughout the conference focused on creating and sustaining a more diverse, inclusive campus community
- In 2017, CUPA-HR hosted two half-day workshops, “Institution Responses to Sexual Misconduct Complaints: Title IX, Clery and the HR Professional”
- Annual conference concurrent programming: Over the past several years, we’ve invited higher ed HR professionals to present on Title VII, Title IX and Clery. Some examples:
  - Title IX and VAWA 101: Everything HR Should Know, But Is Afraid to Ask
  - Building Powerful Partnerships: Title IX, Faculty and Advocates
  - Retaliation Claims: Recent Developments and How to Respond

### 2019 Spring Learning Events

- Spring learning events in [Washington, DC](#) and [Seattle, WA](#) will include sessions led by region leaders focused on how the #MeToo movement has created a call to action on campus

### Recent Communications

- Blog Posts
  - [How to Conduct a Thorough Title IX Investigation](#) (March 2017)
  - [3 Tips for Training Employees on Title IX](#) (June 2017)
  - [3 Activities to Engage Participants Through In-Person Sexual Harassment Training](#) (October 2017)
  - [HR’s Role in Managing Bullying and Harassment at Work](#) (December 2017)
  - [Strategies for Eliminating Sexual Harassment in Higher Ed \(and It’s Not Simply More Training\)](#) (January 2018)
  - [How Institutions Are Leveraging Partnerships and Education to Address Sexual Harassment and Assault on Campus](#) (February 2018)
  - [Second Circuit Court Rules That Title VII Covers Sexual Orientation Claims](#) (March 2018)
  - [4 Ways to Mitigate Risk Related to Sexual Misconduct and Harassment on Campus](#) (September 2018)
  - [National Science Foundation Issues New Harassment Reporting Requirement](#) (October 2018)
  - [CUPA-HR Submits Comments on Proposed Rule Amending Title IX Regulations](#) (February 2019)



- Washington Insider Alerts
  - [Department of Education Issues New Interim Guidance on Campus Sexual Misconduct](#) (September 2017)
  - [Department of Education Issues Proposed Rule on Title IX](#) (November 2018)
- The Higher Education Workplace Magazine
  - A Thoughtful Approach: How to Conduct Impactful, Engaging In-Person Sexual Harassment Training (January 2018)
  - Courts and EEOC Take a Fresh Look at Title VII as It Applies to Sexual Orientation and Gender Identity Discrimination (May 2018)
  - [That Could Never Happen Here: Compliance and Safety Imperatives for Today's College Campus](#) (September 2018)
  - A Blueprint for Conducting a Fair, Legal, Comprehensive Internal Civil Rights Investigation (September 2018)
  - A Practical Approach to Mitigating Risk Related to Workplace Harassment and Pay Equity (September 2018)

#### Recent Research

- [The Gender Pay Gap and the Representation of Women in Higher Education Administrative Positions: The Century So Far](#)
- [Representation and Pay of Women of Color in the Higher Education Workforce](#)
- [The Representation and Pay of Women and Minorities in Higher Education Administration: Institutions That Are Getting It Right](#)



**College and University Professional  
Association for Human Resources**

January 30, 2019

Secretary Betsy DeVos  
c/o Brittany Bull  
U.S. Department of Education  
400 Maryland Ave., SW  
Room 6E310  
Washington, D.C. 20202

**Re: Docket ID ED-2018-OCR-0064**

Dear Secretary DeVos:

On behalf of the College and University Professional Association for Human Resources (CUPA-HR), thank you for the opportunity to comment on the Department's November 29, 2018, notice of proposed rulemaking ("NPRM" or "proposed rule") amending regulations implementing Title IX of the Education Amendments of 1972 ("Title IX"), Docket ID ED-2018-OCR-0064.

CUPA-HR serves as the voice of human resources (HR) in higher education, representing more than 30,000 human resources professionals and other campus leaders at over 2,000 colleges and universities across the country, including 93 percent of all U.S. doctoral institutions, 78 percent of all master's institutions, 53 percent of all bachelor's institutions and over 500 two-year and specialized institutions. Higher education employs over 3.9 million workers nationwide, with colleges and universities in all 50 states.

CUPA-HR members are committed to diversity, inclusion, access and equitable practices as a means to achieving excellence in higher education. Our members have a strong interest in the proposed rule, as our surveys indicate that at least 50 percent of our membership has some Title IX compliance and reporting responsibilities. In addition, aspects of the NPRM could be read to impose specific process requirements on institutional responses to faculty and staff conduct, thereby inhibiting, and otherwise impacting, how higher education HR professionals manage policies and claims involving *employment* discrimination.

CUPA-HR joins and fully supports the [comments filed by American Council on Education \(ACE\)](#) and urges the Department to adopt in any final rule the changes proposed by ACE. CUPA-HR files these additional comments to bring attention to the possible impact a final rule could have on how institutions address *employment* discrimination and to suggest changes that will enhance the rule's clarity and ease of implementation. The Department states in the NPRM that the proposed regulations would apply to sexual harassment by students, employees and third parties and requested comments on "whether there are any parts of the proposed rule that will prove

unworkable in the context of sexual harassment by employees, and whether there are any unique circumstances that apply to processes involving employees that the Department should consider.”

It appears that the Department designed the grievance procedures in the NPRM to address concerns regarding claims of sexual harassment against students, and to help ensure students have equal access to education. The relationship between an institution and its students and the related rights and responsibilities, legally and otherwise, fundamentally and significantly differs from relationship between an institution and its employees. As a result, the grievance procedures in the NPRM are not workable in the employment context.

For this reason, we ask the Department to clearly state the scope of the final rule and only require the use of any grievance procedures contained in the final rule with respect to sexual harassment allegations where the respondent is a *student*.<sup>1</sup> Specifically, we ask the Department to state in any final rule that, while an institution may have obligations informed by Title IX to effectively address sexual harassment allegations against employees, the NPRM’s grievance procedures are not required to be applied in those contexts. Rather, such situations will be governed by Title VII of the Civil Rights Act of 1964 (Title VII) and similar state and local laws.

All CUPA-HR member institutions are subject to the provisions in Title VII that bar employment discrimination based on, among other things, sex. In addition, many of our members are subject to similar state and local anti-discrimination laws. These federal, state and local laws, related court cases, regulations and guidance create a regulatory framework detailing how employers should (1) address claims of discrimination and (2) create policies to proactively discourage employment discrimination based on sex and other characteristics.<sup>2</sup> Institutions have spent decades developing, honing and implementing policies that comply with the requirements of this regulatory framework and are designed to promote work environments free of harassment and unlawful discrimination.

The NPRM’s grievance procedures appear, at times, inconsistent with these policies and widely accepted best practices for complying with the aforementioned regulatory framework and

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<sup>1</sup> We acknowledge that in the case of a student accused of sexually harassing an employee, any disciplinary proceeding against the student-respondent involving his or her status as a student would be informed by the final rule’s grievance procedures. We suggest the Department consult with the Equal Employment Opportunity Commission and issue joint guidance on how to minimize potential conflicts between the obligations to claimants under Title VII and respondents under Title IX. We do not believe the grievance process should apply to any possible adverse *employment* action against a student employee, however, where the job in question is not an integral part of the educational program and thus the adverse action would not impact the student’s equal access to an education. For example, if the student works at the dining center on campus and is accused of harassment on the job, the employer should be permitted to follow its policies for addressing employment discrimination rather than any grievance process contained in a final rule. We acknowledge, however, additional discipline against the student with respect to his or her role as a student of the institution would be informed by the grievance processes in the final rule.

<sup>2</sup> See, e.g., EEOC Laws, Regulations and Guidance (<https://www.eeoc.gov/laws/types/sex.cfm>); EEOC Select Task Force on the Study of Harassment in the Workplace ([https://www.eeoc.gov/eeoc/task\\_force/harassment/index.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/index.cfm)); California Requirements for Sexual Harassment Training (<https://www.dfeh.ca.gov/resources/frequently-asked-questions/employment-faqs/sexual-harassment-faqs/>); and Massachusetts Requirements for Posters, Policies and Recommended Training (<https://www.mass.gov/service-details/about-sexual-harassment-in-the-workplace>). All websites were visited on January 22, 2019.

underlying laws.<sup>3</sup> While the federal courts are split as to whether an employee can pursue a private right of action under both Title VII and Title IX, federal agencies are required to guard against creating duplicative or conflicting regulatory obligations.<sup>4</sup>

If the grievance procedures in any final rule are required for allegations against employees, colleges and universities would need to substantially revise employment policies and engage in extensive and time-consuming efforts to revise faculty handbooks and codes under a process of shared governance. Unionized employers would need to renegotiate collective bargaining agreements. Non-unionized employers, including those in states that recognize the doctrine of employment-at-will, would be subject to new, extensive and unduly burdensome procedural obligations when seeking to address allegations of sexual harassment currently governed by Title VII and state laws. Many of these institutions also may need to renegotiate contracts that contain specific discipline procedures with employees. There will also be substantial costs related to making these changes and resulting from the confusion and related litigation over possible conflicts between the Title IX rules and employer obligations under Title VII and state and local laws.

Set forth below are specific changes we believe ensure any final rule does not create parallel and possibly conflicting requirements for addressing employment discrimination on campus, which would dramatically increase the rule's cost and render the NPRM's regulatory impact estimate under Executive Order 13563 invalid.

- *Standard of Proof (34 CFR §106.45(b)(4)(i))*
  - To the extent the Department elects to issue final regulations addressing the burden of proof, the scope of those regulations should be limited to disciplinary proceedings against students and not against an employee of a college or university.

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<sup>3</sup> The NPRM's procedures could interfere with the institution's duty to promptly address harassment and discrimination and the well-developed and widely accepted HR practices aimed at meeting that duty. Areas of conflict or possible conflict include: the NPRM's requirement for a live hearing with cross examination by assigned advisors of choice; difference in threshold definitions of prohibited conduct/sexual harassment; and prohibition against the single investigator model. For example, the grievance procedures in many cases would interfere with prompt action against an employee who has been repeatedly warned and progressively disciplined for sexually harassing behavior. Another example might be where two students report a professor's inappropriate comments and seven other students say they observed the behavior, but none of the nine students want to participate in any kind of public process. The university might have difficulty meeting its obligation to address known discrimination if the grievance procedure applied. The power dynamics between students and faculty, or other persons of authority, amplify concerns that the grievance procedures may chill reporting of harassment.

<sup>4</sup> See *President's January 30, 2017, Executive Order on Reducing Regulation and Controlling Regulatory Cost* (<https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/> - last visited on January 22, 2019); *Executive Order 13563 – Improving Regulation and Regulatory Review* (<https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>). As noted in the ACE comments, “[t]he Department should proceed cautiously when considering regulatory changes that would impact the personnel of colleges and universities. Congress was concerned about the potential for overreach when it created the Department in 1979 and included in the General Education Provisions Act a clear prohibition that the Department may not exercise any ‘direction, supervision, or control’ ‘over the . . . administration, or personnel of any educational institution . . .’” ACE comments at note 14; see also 20 U.S.C. 3403 available at <https://www.law.cornell.edu/uscode/text/20/3403> last visited on January 22, 2019.

The requirement to synchronize the standard with other types of institutional disciplinary proceedings should be dropped.

- *Grievance Procedures (34 CRF §106.45)*
  - The final rule's grievance procedures should be limited to sexual harassment allegations involving student-respondents. The rule should specifically state that the procedures by which colleges and universities respond to allegations of sexual harassment where the respondent is an employee are governed by Title VII and its implementing regulations, and similar state and local laws addressing discrimination in employment.

Thank you for the opportunity to provide comments on this NPRM. Like you, CUPA-HR members are committed to ending unlawful discrimination, including sexual harassment and sexual assault on campus. We appreciate the Department's efforts and request that you make the changes proposed in these comments as well as the comments we joined that were filed by ACE. Please do not hesitate to reach out to me to discuss any of the issues we have raised in these comments or on other issues where we may be of assistance.

Respectfully Submitted,

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