From: Meehan, Anne
Sent: Thu, 10 Jun 2021 21:17:59 +0000
To: T9PublicHearing
Cc: O'Connell, Carly
Subject: Written Comment: Title IX Public Hearing (2020 amendments to the Title IX regulations)
Attachments: Higher-Ed-Community-Title-IX-Hearing-Submission.pdf

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

On behalf of the American Council on Education and 42 other higher education associations, attached please find our written comments for the Title IX Virtual Public Hearing.

Regards, Anne

Anne H. Meehan
Assistant Vice President, Government Relations
American Council on Education
One Dupont Circle, NW
Washington, DC 20036
Mobile: (202) 365-9152
ameehan@acenet.edu
www.acenet.edu

Click Here for COVID-19 Campus Resilience Resources

June 10, 2021

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-1100

Re: Written Comment: Title IX Public Hearing (2020 amendments to the Title IX regulations)

Dear Acting Assistant Secretary Goldberg:

On behalf of the higher education associations listed below, I write to provide comments for improving enforcement of Title IX of the Education Amendments of 1972 ("Title IX"), with specific focus on the 2020 amendments to the Title IX regulations, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 ("the Regulations"). We commend the Office for Civil Rights ("OCR") for its attentiveness to Title IX, and its prompt reconsideration of this recent regulatory action.

America's colleges and universities share Title IX's commitment that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[1] Higher education is constantly striving to ensure that campuses are safe, supportive, and responsive for all students, so that students can benefit from the widest possible array of educational opportunities.

Higher education institutions understand that they have a clear, unambiguous responsibility under Title IX to promptly and effectively respond to allegations of sexual harassment, including sexual assault. They are committed to developing and maintaining processes that address sexual misconduct in all its forms, support survivors, are fair to all parties, and are viewed as meeting these goals across a broad range of campus stakeholders. Doing so requires policies and procedures that are appropriate for the particular institution, and have a sensible level of simplicity and consistency, thereby providing flexibility for campuses to handle these often difficult cases fairly, reasonably and compassionately. Without these fundamental elements, campus communities

[1] 20 U.S.C. § 1681(a).

cannot develop and maintain familiarity with these processes and, most significantly, have confidence in them.

It is our hope that the work of the Department of Education ("the Department") to improve the Regulations will cause these fundamental elements to be emphasized and affirmed. It is also our hope that in the rulemaking process and in the enforcement of the regulations thereafter, the Department will consider higher education institutions to be collaborative and indispensable partners in this important work regarding our academic communities, and not treat us as impediments or opponents.

The Regulations are the most complex and challenging rules ever issued by the Department. Their micromanagement of campus disciplinary processes has discouraged survivors from participating in them, heightened confusion and concern, and imposed on every college and university in America an extremely problematic, "one-size-fits-all," court-like framework. This is antithetical to the unique campus educational environments that can vary from small public rural community colleges to larger private urban research universities; and it transforms institutional disciplinary processes into complex and expensive prosecutorial proceedings that actually inhibit colleges' and universities' ability to address the reasonable concerns of a complainant and respondent, ultimately undermining the goals of Title IX. Colleges and universities are not civil or criminal courts, nor should they be. The notion that they should establish a parallel judicial structure to accomplish what the judicial system is already responsible for makes no sense.

The Department now has an opportunity to make a significant, long-term contribution to helping America's higher education institutions continue their efforts to eradicate sexual harassment in their programs and activities. Reconsidering the Regulations and their flawed underpinnings can enable each college and university to sensibly refine its own campus processes, in order to stand the test of time and advance the aspirations of Title IX. We offer the following observations to guide the Department's initial consideration of likely revisions to the Regulations.[2]

---

[2] In response to OCR's 2018 notice of proposed rulemaking ("NPRM"), *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462 (Nov. 29, 2018), a twenty-eight page letter was submitted by sixty-one higher education associations, including many of the same associations listed at the end of this letter. If and when OCR issues another NPRM addressing aspects of the Regulations, it can expect a similarly detailed assessment and recommendations.

We begin by noting that **the Regulations are antithetical to the fundamental educational nature and objectives of campus student disciplinary processes**. Campuses can best respond to allegations of sexual assault by using processes that are part of, or at least align with, their institutional student codes of conduct. These codes do not, as a first priority, seek to punish. Rather, they assure that the complainant and the respondent are entitled to a fair and impartial process; that there is prompt and equitable resolution; that the remedies prevent the recurrence of sexual assault; and that they appropriately address the impact on the individuals involved and the larger college community.

Again, **colleges and universities are not courts, nor should they be. They do not convict people of crimes, impose criminal sanctions, or award damages.** They do not—and ought not—have court system infrastructures such as trained judges, prosecutors and litigators, private investigators, crime labs, rules of evidence and procedures, subpoena power, etc. Yet, **the Regulations force campuses to turn their disciplinary proceedings into legal tribunals with highly prescriptive, court-like processes**. These processes are run by campus administrators, often aided by faculty and students. By imposing highly technical legal standards and complex processes onto these institutional disciplinary proceedings, the Regulations inhibit, rather than enhance, campuses from addressing allegations of sexual assault in a reasonably prompt and effective manner. For example, requiring non-lawyer campus administrators to make immediate "rulings" about the permissibility of every question during a live hearing, or whether they comport with rape-shield law, imposes expectations and burdens not even required of seasoned trial judges. Further, in a purported attempt to "simplify" the complex proceedings required by the Regulations, they require recipients to exclude virtually all statements, text messages, etc., made or sent by an individual who does not answer every relevant cross-examination question at a hearing, even if such information (for example, a texted admission of responsibility) would be highly probative of whether institutional policy was or was not violated. Moreover, the Regulations' definition of "relevance" is so broad that institutions have very little leeway to exclude duplicative, marginal, or unduly prejudicial information. These legalistic and counterintuitive requirements have made it more difficult for campuses to prevent and address sexual assault, protect survivors, and treat both parties fairly and equitably.

The Regulations mandate that every campus must provide a "live hearing" with direct cross-examination by the party's advisor of choice or an advisor supplied by the institution. A "live hearing" with direct cross-examination is not necessary in order to provide a thorough and fair process for determining the facts of a matter and a means for the parties to test the credibility of the other party and other witnesses.[3] This

[3] The Regulations relied heavily on the rationale of *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), a decision by two members of a three-judge panel that actually recognizes that permitting a

requirement is deeply problematic in many respects. It creates a chilling effect on the willingness of survivors and, of equal importance, witnesses to participate in a campus proceeding and raises serious concerns about the potential for unnecessary re-traumatization of survivors.[4] It raises serious equity concerns, as it can tip the scales in favor of a party who is able and motivated to pay for a high-priced litigator, while the other may not be willing or motivated to do so. It may also perpetuate within campus systems the same systemic racism concerns that exist with respect to the criminal justice system.

The Regulations' legalistic pre-and post-hearing mandates, such as those pertaining to the requirements for notice of the filing of a formal complaint, and the mechanisms for appealing from determinations, are not subject to the sorts of limitations and rulings provided by judicial codes and judges in courts of law. This only contributes to confusion, acrimony, and further litigation. The Regulations' requirement that institutions must formally "dismiss" a complaint that does not fit within the Regulations' narrowed definition of sexual harassment and allow appeals of such determinations is particularly onerous, unnecessary and confusing for parties. The requirement that a respondent receive immediate notification when a formal complaint is received is also problematic. This can cause significant difficulties when the complaint involves a crime being investigated by law enforcement, which is not yet ready for the respondent to know a complaint has been filed because it may hamper their investigative efforts. We agree that appeals, if an option at all, should be offered equally to both survivors and accused students, but campuses should be permitted to determine if and how appeals will be provided.

The Regulations inappropriately extend these court-like and prescriptive processes to sexual harassment allegations involving employees. While institutions clearly have responsibilities to address sexual harassment involving employees, applying the

---

respondent to personally cross-examine the complainant may not be required, due to concerns about resulting emotional trauma, and applies only to public institutions in the Sixth Circuit. Given the substantial contrary authority from other federal courts, the use of this decision to create a nationwide mandate is deeply troubling. See, e.g., *Haidak v. Univ. of Mass. at Amherst*, 933 F.3d 56 (1st Cir. 2019) (rejecting rationale of two-judge opinion in *Doe v. Baum*, and finding that even at a public institution to which Constitutional due process principles apply, live cross-examination by parties or advisors was not required, and that an "inquisitorial" system in which a neutral campus official asks questions satisfies Constitutional due process requirements); *Doe v. Belmont Univ.*, 334 F. Supp. 3d 877, 893 (M.D. Tenn. 2018) (finding that cross-examination was not required at private universities and noting that opportunity for parties to review and respond to an investigative report, written statements, and other evidence provided adequate means for respondent to challenge veracity of complainant's claims).

[4] Two schools reported that lawyers' delay had caused their complainants such frustration with the process that they transferred to another university, feeling as though they did not receive a prompt, nor timely, response from the university.

Regulations in the employee-respondent context is both unwise and unworkable. It requires an unnecessary, costly, complex, time-consuming, and wholesale overlay of Title IX processes developed with students as the primary focus, and a redesign of campus human resources functions. We fail to see the logic for extending Title IX procedures to these cases, when sexual harassment involving employees has been successfully addressed under Title VII for years.

Significantly, the Regulations make it more difficult for colleges and universities to address sexual misconduct by their employees and, in some instances, employees now are less likely to face corrective action for sexual misconduct than for other forms of employee malfeasance. For example, an investigation may reveal sufficient evidence of sexual misconduct to take disciplinary action, but a survivor or relevant witness may decline to participate in a hearing, meaning that a finding of a policy violation is much less likely and, absent that finding, the employer may not be able to act on the matter. (If the misconduct at issue were any other form of misconduct, a hearing would not be required and the employer would be able to take corrective action consistent with its employment policies and procedures.)

Under the Regulations, colleges and universities now have to follow stringent procedures even for at-will employees, meaning that at-will employees are also now much less likely to be subject to corrective action for engaging in sexual misconduct than for other types of misconduct. Many institutions must also re-negotiate union contracts so that the process for addressing sexual misconduct complaints against union members is consistent with the Regulations. In some instances unions are refusing to renegotiate. In others, the unions have insisted that after the entire process outlined in the Regulations concludes, including the appeal process, the employer must then begin the disciplinary process outlined in the collective bargaining agreement, including arbitration.

Title VII requires that an employer, including institutions of higher education, take action when the employer "knew or should have known" about sexual harassment. But, the Regulations can make it difficult for higher education employers to fulfill this obligation in cases where it learns of sexual harassment but cannot handle it under Title VII-compliant procedures because, again, a survivor or witness declines to submit to cross-examination at a live hearing, resulting in a Regulations-driven outcome that does not support the institution's ability to take disciplinary action. Simply put, the Regulations have significantly and negatively impacted higher education's ability to address sexual misconduct allegations against its employees.

The Regulations fail to recognize the myriad other federal, state and local laws, judicial precedent, institutional commitments and values regarding the handling of sexual harassment with which campuses must also comply. This, of course, includes

state legislation that may dictate specifically how institutions must respond to and address sexual harassment complaints. As a result, the Regulations exacerbate a confusing maze of overlapping and inconsistent obligations for campuses. We implore OCR to be cognizant of the need to provide flexibility to ensure campuses can navigate the multitude of different legal requirements and institutional culture and values. Federal policy initiatives, especially under Title IX, have an important impact on campuses. But, Title IX is not the only source of law, guidance, and philosophy driving the efforts by higher education institutions. OCR and its regulations and policies implementing and enforcing Title IX need to give institutions enough flexibility to also attend to other legal and other obligations—no matter their source— when resolving sexual harassment allegations.

The Regulations also provide insufficient flexibility to allow campuses to choose between using a "preponderance of evidence" or "clear and convincing" evidentiary standard. By limiting an institution's ability to choose which of these evidentiary standards to apply in different types of campus disciplinary proceedings pertaining to sexual harassment, the Regulations unnecessarily and inappropriately neutralize a broad range of significant campus inputs, including those offered by students, faculty shared governance, and employees' collective bargaining.

We appreciate that the Regulations allow campuses to use informal resolution processes when both parties are fully informed of this option and voluntarily consent. Students often prefer these options to more formal campus disciplinary proceedings, and it is important to respect their wishes to the greatest extent possible. These informal resolution processes are even more crucial now, since many students are unwilling to go through the prescriptive, and potentially traumatizing, courtroom-like process dictated by the Regulations. While the Regulations' provisions regarding informal resolution are helpful, they still manage to restrict colleges' and universities' sensible use of these alternatives. For example, the Regulations prohibit an institution from offering an informal resolution process until after a formal complaint is filed. Yet, the timing or filing a formal complaint has nothing to do with whether informal resolution is best under the circumstances.

Everyone benefits from clarity regarding the scope of Title IX jurisdiction. **However, the Regulations require colleges and universities to adopt a new Title IX-specific definition of "sexual harassment" that is inconsistent with Title VII's definition, and also with definitions contained in campus sexual misconduct policies.[5] The Regulations also**

[5] This definition in the Regulations was drafted to capture conduct that is so "severe" *and* "pervasive" *and* "objectively offensive" that it effectively denies a person equal access to the recipient's education program or activity. Notably, this construction runs counter to the OCR's prior guidance regarding discriminatory harassment, and also is inconsistent with the "severe" *or* "pervasive" offensive

raise questions about precisely what conduct will be considered to have occurred within a "program or activity." Determining whether a particular case meets these definitional and jurisdictional requirements, particularly at the initial stages of a case prior to an investigation, can be challenging. It also raises serious compliance questions, given the strict and formal processes that the Regulations require to be followed should the alleged conduct be determined to fall within Title IX's scope. Any revised regulations should clearly define what conduct is included within the scope of Title IX, while being equally clear that the Regulations do not prevent or hamper institutions from choosing to address sexual misconduct that falls outside the scope of Title IX.

The Regulations have driven up the costs and burden of compliance at a time when colleges and universities are struggling with revenue losses and increased costs due to the pandemic. The prior Administration grossly underestimated the cost of this massive Title IX regulatory package. Redesigning campus policies and procedures for the 2020-21 academic year to align with the Regulations was costly, to be sure, but the ongoing compliance costs are at least as burdensome. For example, outside, contracted adjudicators can easily cost $300-500 an hour, with campuses often needing to prepay these hearing officers for a possible appeal, in order to ensure their availability. The length of the hearing can vary depending on the complexity of the case, and it is not unheard of to have numerous witnesses testifying. Given the trial-like complexity of the processes mandated by the Regulations, campuses also must continually spend significant time and money training new staff, and refreshing existing staff, on these new procedures, as well as hiring outside counsel to advise them on compliance with these requirements. Because the Regulations require campuses to provide advisors for any party who does not have one, institutions must properly train a standby cadre of advisors, which is both time consuming and can be costly. For some institutions, this means hiring outside attorneys, because there is no internal capacity or because the campus culture requires it. The net effect of the Regulations is to redirect resources toward compliance and away from helping prevent sexual harassment, including sexual assault, and providing additional resources to support survivors. Just as importantly, there is a human cost associated with the reduction of persons willing to access and continue to participate in a legalistic, litigation-oriented process.

When considering revising the Regulations, **we urge OCR to keep the "long game" in mind, and look for solutions that are broadly supported by stakeholders**. It is harmful to have constant churn and pendulum swings. This invites further Title IX regulatory and enforcement changes with every new administration. We encourage a framework that is less prescriptive and provides flexibility for campuses to ensure that survivors are not

---

conduct standard applied by courts in Title VII cases. [add citations]

denied their ability to participate in their education programs, while ensuring fair processes for all. The Clery Act offers a possible model–it outlines some fundamental principles that all campus policies must provide, but leaves flexibility to institutions to determine the specifics of how they meet those principles in ways that are most appropriate for their campus and institutional mission.[6]

We appreciate the opportunity to provide these comments at this time, and look forward to providing additional perspective during a formal notice and comment regulatory process that ensures the Department considers comments from a variety of stakeholders. We also look forward to working with the Department to ensure a collaborative relationship with institutions that can truly encourage and enable them to seek and receive technical assistance from OCR. Colleges and universities remain committed to advancing Title IX's objectives, and optimally addressing sexual harassment and sexual assault on their campuses, not only because they take their legal obligations seriously, but also because it is the right thing to do.

Sincerely,

(b)(6)

Ted Mitchell
President

On behalf of:

American Association of Collegiate Registrars and Admissions Officers
American Association of Colleges for Teacher Education
American Association of Community Colleges
American Association of State Colleges and Universities
American College Personnel Association
American Council on Education
American Dental Education Association
APPA, "Leadership in Educational Facilities"
Association of American Colleges and Universities
Association of American Universities

[6] 20 U.S.C. §1092(f)(8).

Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Independent California Colleges and Universities
Association of Independent Colleges & Universities in Massachusetts
Association of Independent Colleges and Universities in Pennsylvania
Association of Independent Colleges and Universities of Rhode Island
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Connecticut Conference of Independent Colleges
Council for Advancement and Support of Education
Council for Christian Colleges & Universities
Council of Graduate Schools
Council of Independent Colleges
Council on Social Work Education
Higher Education Consultants Association
Hispanic Association of Colleges and Universities
Independent Colleges of Washington
Maryland Independent College and University Association
NASPA - Student Affairs Administrators in Higher Education
National Association for Equal Opportunity in Higher Education
National Association of College and University Business Officers
National Association of Colleges and Employers
National Association of Diversity Officers in Higher Education
National Association of Independent Colleges and Universities
National Collegiate Athletic Association
New England Commission of Higher Education
North Carolina Independent Colleges and Universities
Phi Beta Kappa Society
Southern Association of Colleges and Schools Commission on Colleges
Tennessee Independent Colleges and Universities
TMCF

From: Meehan, Anne
Sent: Fri, 11 Jun 2021 19:00:31 +0000
To: T9PublicHearing
Cc: O'Connell, Carly
Subject: Written Comment: Title IX Public Hearing (2020 amendments to Title IX regulations)
Attachments: Higher-Ed-Community-Title-IX-Hearing-Submission.pdf

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Attached please find an updated written comment from ACE and 44 higher education associations. Our statement has not changed, but we are sending an updated version to reflect two additional higher education associations that asked to be included as signers.

Thank you! Anne

Anne H. Meehan
Assistant Vice President, Government Relations
American Council on Education
One Dupont Circle, NW
Washington, DC 20036
Mobile: (202) 365-9152
ameehan@acenet.edu
www.acenet.edu

Click Here for COVID-19 Campus Resilience Resources

June 10, 2021

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-1100

Re: Written Comment: Title IX Public Hearing (2020 amendments to the Title IX regulations)

Dear Acting Assistant Secretary Goldberg:

On behalf of the higher education associations listed below, I write to provide comments for improving enforcement of Title IX of the Education Amendments of 1972 ("Title IX"), with specific focus on the 2020 amendments to the Title IX regulations, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 ("the Regulations"). We commend the Office for Civil Rights ("OCR") for its attentiveness to Title IX, and its prompt reconsideration of this recent regulatory action.

America's colleges and universities share Title IX's commitment that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[1] Higher education is constantly striving to ensure that campuses are safe, supportive, and responsive for all students, so that students can benefit from the widest possible array of educational opportunities.

Higher education institutions understand that they have a clear, unambiguous responsibility under Title IX to promptly and effectively respond to allegations of sexual harassment, including sexual assault. They are committed to developing and maintaining processes that address sexual misconduct in all its forms, support survivors, are fair to all parties, and are viewed as meeting these goals across a broad range of campus stakeholders. Doing so requires policies and procedures that are appropriate for the particular institution, and have a sensible level of simplicity and consistency, thereby providing flexibility for campuses to handle these often difficult cases fairly, reasonably and compassionately. Without these fundamental elements, campus communities

[1] 20 U.S.C. § 1681(a).

cannot develop and maintain familiarity with these processes and, most significantly, have confidence in them.

It is our hope that the work of the Department of Education ("the Department") to improve the Regulations will cause these fundamental elements to be emphasized and affirmed. It is also our hope that in the rulemaking process and in the enforcement of the regulations thereafter, the Department will consider higher education institutions to be collaborative and indispensable partners in this important work regarding our academic communities, and not treat us as impediments or opponents.

The Regulations are the most complex and challenging rules ever issued by the Department. Their micromanagement of campus disciplinary processes has discouraged survivors from participating in them, heightened confusion and concern, and imposed on every college and university in America an extremely problematic, "one-size-fits-all," court-like framework. This is antithetical to the unique campus educational environments that can vary from small public rural community colleges to larger private urban research universities; and it transforms institutional disciplinary processes into complex and expensive prosecutorial proceedings that actually inhibit colleges' and universities' ability to address the reasonable concerns of a complainant and respondent, ultimately undermining the goals of Title IX. Colleges and universities are not civil or criminal courts, nor should they be. The notion that they should establish a parallel judicial structure to accomplish what the judicial system is already responsible for makes no sense.

The Department now has an opportunity to make a significant, long-term contribution to helping America's higher education institutions continue their efforts to eradicate sexual harassment in their programs and activities. Reconsidering the Regulations and their flawed underpinnings can enable each college and university to sensibly refine its own campus processes, in order to stand the test of time and advance the aspirations of Title IX. We offer the following observations to guide the Department's initial consideration of likely revisions to the Regulations.[2]

---

[2] In response to OCR's 2018 notice of proposed rulemaking ("NPRM"), *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462 (Nov. 29, 2018), a twenty-eight page letter was submitted by sixty-one higher education associations, including many of the same associations listed at the end of this letter. If and when OCR issues another NPRM addressing aspects of the Regulations, it can expect a similarly detailed assessment and recommendations.

We begin by noting that **the Regulations are antithetical to the fundamental educational nature and objectives of campus student disciplinary processes**. Campuses can best respond to allegations of sexual assault by using processes that are part of, or at least align with, their institutional student codes of conduct. These codes do not, as a first priority, seek to punish. Rather, they assure that the complainant and the respondent are entitled to a fair and impartial process; that there is prompt and equitable resolution; that the remedies prevent the recurrence of sexual assault; and that they appropriately address the impact on the individuals involved and the larger college community.

Again, **colleges and universities are not courts, nor should they be. They do not convict people of crimes, impose criminal sanctions, or award damages.** They do not—and ought not—have court system infrastructures such as trained judges, prosecutors and litigators, private investigators, crime labs, rules of evidence and procedures, subpoena power, etc. Yet, **the Regulations force campuses to turn their disciplinary proceedings into legal tribunals with highly prescriptive, court-like processes**. These processes are run by campus administrators, often aided by faculty and students. By imposing highly technical legal standards and complex processes onto these institutional disciplinary proceedings, the Regulations inhibit, rather than enhance, campuses from addressing allegations of sexual assault in a reasonably prompt and effective manner. For example, requiring non-lawyer campus administrators to make immediate "rulings" about the permissibility of every question during a live hearing, or whether they comport with rape-shield law, imposes expectations and burdens not even required of seasoned trial judges. Further, in a purported attempt to "simplify" the complex proceedings required by the Regulations, they require recipients to exclude virtually all statements, text messages, etc., made or sent by an individual who does not answer every relevant cross-examination question at a hearing, even if such information (for example, a texted admission of responsibility) would be highly probative of whether institutional policy was or was not violated. Moreover, the Regulations' definition of "relevance" is so broad that institutions have very little leeway to exclude duplicative, marginal, or unduly prejudicial information. These legalistic and counterintuitive requirements have made it more difficult for campuses to prevent and address sexual assault, protect survivors, and treat both parties fairly and equitably.

The Regulations mandate that every campus must provide a "live hearing" with direct cross-examination by the party's advisor of choice or an advisor supplied by the institution. A "live hearing" with direct cross-examination is not necessary in order to provide a thorough and fair process for determining the facts of a matter and a means for the parties to test the credibility of the other party and other witnesses.[3] This

[3] The Regulations relied heavily on the rationale of *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), a decision by two members of a three-judge panel that actually recognizes that permitting a

requirement is deeply problematic in many respects. It creates a chilling effect on the willingness of survivors and, of equal importance, witnesses to participate in a campus proceeding and raises serious concerns about the potential for unnecessary re-traumatization of survivors.[4] It raises serious equity concerns, as it can tip the scales in favor of a party who is able and motivated to pay for a high-priced litigator, while the other may not be willing or motivated to do so. It may also perpetuate within campus systems the same systemic racism concerns that exist with respect to the criminal justice system.

The Regulations' legalistic pre-and post-hearing mandates, such as those pertaining to the requirements for notice of the filing of a formal complaint, and the mechanisms for appealing from determinations, are not subject to the sorts of limitations and rulings provided by judicial codes and judges in courts of law. This only contributes to confusion, acrimony, and further litigation. The Regulations' requirement that institutions must formally "dismiss" a complaint that does not fit within the Regulations' narrowed definition of sexual harassment and allow appeals of such determinations is particularly onerous, unnecessary and confusing for parties. The requirement that a respondent receive immediate notification when a formal complaint is received is also problematic. This can cause significant difficulties when the complaint involves a crime being investigated by law enforcement, which is not yet ready for the respondent to know a complaint has been filed because it may hamper their investigative efforts. We agree that appeals, if an option at all, should be offered equally to both survivors and accused students, but campuses should be permitted to determine if and how appeals will be provided.

The Regulations inappropriately extend these court-like and prescriptive processes to sexual harassment allegations involving employees. While institutions clearly have responsibilities to address sexual harassment involving employees, applying the

---

respondent to personally cross-examine the complainant may not be required, due to concerns about resulting emotional trauma, and applies only to public institutions in the Sixth Circuit. Given the substantial contrary authority from other federal courts, the use of this decision to create a nationwide mandate is deeply troubling. See, e.g., *Haidak v. Univ. of Mass. at Amherst*, 933 F.3d 56 (1st Cir. 2019) (rejecting rationale of two-judge opinion in *Doe v. Baum*, and finding that even at a public institution to which Constitutional due process principles apply, live cross-examination by parties or advisors was not required, and that an "inquisitorial" system in which a neutral campus official asks questions satisfies Constitutional due process requirements); *Doe v. Belmont Univ.*, 334 F. Supp. 3d 877, 893 (M.D. Tenn. 2018) (finding that cross-examination was not required at private universities and noting that opportunity for parties to review and respond to an investigative report, written statements, and other evidence provided adequate means for respondent to challenge veracity of complainant's claims).

[4] Two schools reported that lawyers' delay had caused their complainants such frustration with the process that they transferred to another university, feeling as though they did not receive a prompt, nor timely, response from the university.

Regulations in the employee-respondent context is both unwise and unworkable. It requires an unnecessary, costly, complex, time-consuming, and wholesale overlay of Title IX processes developed with students as the primary focus, and a redesign of campus human resources functions. We fail to see the logic for extending Title IX procedures to these cases, when sexual harassment involving employees has been successfully addressed under Title VII for years.

Significantly, the Regulations make it more difficult for colleges and universities to address sexual misconduct by their employees and, in some instances, employees now are less likely to face corrective action for sexual misconduct than for other forms of employee malfeasance. For example, an investigation may reveal sufficient evidence of sexual misconduct to take disciplinary action, but a survivor or relevant witness may decline to participate in a hearing, meaning that a finding of a policy violation is much less likely and, absent that finding, the employer may not be able to act on the matter. (If the misconduct at issue were any other form of misconduct, a hearing would not be required and the employer would be able to take corrective action consistent with its employment policies and procedures.)

Under the Regulations, colleges and universities now have to follow stringent procedures even for at-will employees, meaning that at-will employees are also now much less likely to be subject to corrective action for engaging in sexual misconduct than for other types of misconduct. Many institutions must also re-negotiate union contracts so that the process for addressing sexual misconduct complaints against union members is consistent with the Regulations. In some instances unions are refusing to renegotiate. In others, the unions have insisted that after the entire process outlined in the Regulations concludes, including the appeal process, the employer must then begin the disciplinary process outlined in the collective bargaining agreement, including arbitration.

Title VII requires that an employer, including institutions of higher education, take action when the employer "knew or should have known" about sexual harassment. But, the Regulations can make it difficult for higher education employers to fulfill this obligation in cases where it learns of sexual harassment but cannot handle it under Title VII-compliant procedures because, again, a survivor or witness declines to submit to cross-examination at a live hearing, resulting in a Regulations-driven outcome that does not support the institution's ability to take disciplinary action. Simply put, the Regulations have significantly and negatively impacted higher education's ability to address sexual misconduct allegations against its employees.

The Regulations fail to recognize the myriad other federal, state and local laws, judicial precedent, institutional commitments and values regarding the handling of sexual harassment with which campuses must also comply. This, of course, includes

state legislation that may dictate specifically how institutions must respond to and address sexual harassment complaints. As a result, the Regulations exacerbate a confusing maze of overlapping and inconsistent obligations for campuses. We implore OCR to be cognizant of the need to provide flexibility to ensure campuses can navigate the multitude of different legal requirements and institutional culture and values. Federal policy initiatives, especially under Title IX, have an important impact on campuses. But, Title IX is not the only source of law, guidance, and philosophy driving the efforts by higher education institutions. OCR and its regulations and policies implementing and enforcing Title IX need to give institutions enough flexibility to also attend to other legal and other obligations—no matter their source— when resolving sexual harassment allegations.

The Regulations also provide insufficient flexibility to allow campuses to choose between using a "preponderance of evidence" or "clear and convincing" evidentiary standard. By limiting an institution's ability to choose which of these evidentiary standards to apply in different types of campus disciplinary proceedings pertaining to sexual harassment, the Regulations unnecessarily and inappropriately neutralize a broad range of significant campus inputs, including those offered by students, faculty shared governance, and employees' collective bargaining.

We appreciate that the Regulations allow campuses to use informal resolution processes when both parties are fully informed of this option and voluntarily consent. Students often prefer these options to more formal campus disciplinary proceedings, and it is important to respect their wishes to the greatest extent possible. These informal resolution processes are even more crucial now, since many students are unwilling to go through the prescriptive, and potentially traumatizing, courtroom-like process dictated by the Regulations. While the Regulations' provisions regarding informal resolution are helpful, they still manage to restrict colleges' and universities' sensible use of these alternatives. For example, the Regulations prohibit an institution from offering an informal resolution process until after a formal complaint is filed. Yet, the timing or filing a formal complaint has nothing to do with whether informal resolution is best under the circumstances.

Everyone benefits from clarity regarding the scope of Title IX jurisdiction. **However, the Regulations require colleges and universities to adopt a new Title IX-specific definition of "sexual harassment" that is inconsistent with Title VII's definition, and also with definitions contained in campus sexual misconduct policies.[5] The Regulations also**

[5] This definition in the Regulations was drafted to capture conduct that is so "severe" *and* "pervasive" *and* "objectively offensive" that it effectively denies a person equal access to the recipient's education program or activity. Notably, this construction runs counter to the OCR's prior guidance regarding discriminatory harassment, and also is inconsistent with the "severe" *or* "pervasive" offensive

raise questions about precisely what conduct will be considered to have occurred within a "program or activity." Determining whether a particular case meets these definitional and jurisdictional requirements, particularly at the initial stages of a case prior to an investigation, can be challenging. It also raises serious compliance questions, given the strict and formal processes that the Regulations require to be followed should the alleged conduct be determined to fall within Title IX's scope. Any revised regulations should clearly define what conduct is included within the scope of Title IX, while being equally clear that the Regulations do not prevent or hamper institutions from choosing to address sexual misconduct that falls outside the scope of Title IX.

The Regulations have driven up the costs and burden of compliance at a time when colleges and universities are struggling with revenue losses and increased costs due to the pandemic. The prior Administration grossly underestimated the cost of this massive Title IX regulatory package. Redesigning campus policies and procedures for the 2020-21 academic year to align with the Regulations was costly, to be sure, but the ongoing compliance costs are at least as burdensome. For example, outside, contracted adjudicators can easily cost $300-500 an hour, with campuses often needing to prepay these hearing officers for a possible appeal, in order to ensure their availability. The length of the hearing can vary depending on the complexity of the case, and it is not unheard of to have numerous witnesses testifying. Given the trial-like complexity of the processes mandated by the Regulations, campuses also must continually spend significant time and money training new staff, and refreshing existing staff, on these new procedures, as well as hiring outside counsel to advise them on compliance with these requirements. Because the Regulations require campuses to provide advisors for any party who does not have one, institutions must properly train a standby cadre of advisors, which is both time consuming and can be costly. For some institutions, this means hiring outside attorneys, because there is no internal capacity or because the campus culture requires it. The net effect of the Regulations is to redirect resources toward compliance and away from helping prevent sexual harassment, including sexual assault, and providing additional resources to support survivors. Just as importantly, there is a human cost associated with the reduction of persons willing to access and continue to participate in a legalistic, litigation-oriented process.

When considering revising the Regulations, **we urge OCR to keep the "long game" in mind, and look for solutions that are broadly supported by stakeholders**. It is harmful to have constant churn and pendulum swings. This invites further Title IX regulatory and enforcement changes with every new administration. We encourage a framework that is less prescriptive and provides flexibility for campuses to ensure that survivors are not

---

conduct standard applied by courts in Title VII cases. [add citations]

denied their ability to participate in their education programs, while ensuring fair processes for all. The Clery Act offers a possible model–it outlines some fundamental principles that all campus policies must provide, but leaves flexibility to institutions to determine the specifics of how they meet those principles in ways that are most appropriate for their campus and institutional mission.[6]

We appreciate the opportunity to provide these comments at this time, and look forward to providing additional perspective during a formal notice and comment regulatory process that ensures the Department considers comments from a variety of stakeholders. We also look forward to working with the Department to ensure a collaborative relationship with institutions that can truly encourage and enable them to seek and receive technical assistance from OCR. Colleges and universities remain committed to advancing Title IX's objectives, and optimally addressing sexual harassment and sexual assault on their campuses, not only because they take their legal obligations seriously, but also because it is the right thing to do.

Sincerely,

(b)(6)

Ted Mitchell
President

On behalf of:

American Association of Collegiate Registrars and Admissions Officers
American Association of Colleges for Teacher Education
American Association of Community Colleges
American Association of State Colleges and Universities
American College Personnel Association
American Council on Education
American Dental Education Association
American Indian Higher Education Consortium
APPA, "Leadership in Educational Facilities"
Association of American Colleges and Universities

[6] 20 U.S.C. §1092(f)(8).

Association of American Universities
Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Independent California Colleges and Universities
Association of Independent Colleges & Universities in Massachusetts
Association of Independent Colleges and Universities in Pennsylvania
Association of Independent Colleges and Universities of Rhode Island
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Connecticut Conference of Independent Colleges
Council for Advancement and Support of Education
Council for Christian Colleges & Universities
Council of Graduate Schools
Council of Independent Colleges
Council on Social Work Education
Higher Education Consultants Association
Hispanic Association of Colleges and Universities
Independent Colleges of Washington
Maryland Independent College and University Association
NASPA - Student Affairs Administrators in Higher Education
National Association for Equal Opportunity in Higher Education
National Association of College and University Business Officers
National Association of Colleges and Employers
National Association of Diversity Officers in Higher Education
National Association of Independent Colleges and Universities
National Collegiate Athletic Association
New England Commission of Higher Education
North Carolina Independent Colleges and Universities
Phi Beta Kappa Society
Southern Association of Colleges and Schools Commission on Colleges
Tennessee Independent Colleges and Universities
TMCF
WASC Senior College and University Commission