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Attachments: WRITTEN COMMENT TITLE IX PUBLIC HEARING .CONFLICT OF INTEREST. ADVISORS. JURISDICTION. DISIMISSALS. HEARING PROCESSES. DAVIS STANDARD. TIMELINE. re ASUM.pdf

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DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

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SUBMITTED VIA-EMAIL

SUBMITTED ON BEHALF OF THE ASSOICATED STUDENTS OF THE UNIVERSITY OF
MONTANA

Committee On Equitable Education

Missoula, Montana

Respectfully submitted by,

Noah Durnell, Associated Students of the University of Montana, *President*

**WRITTEN COMMENT: TITLE IX PUBLIC HEARING (CONFLICT OF INTEREST,
ADVISORS, JURISDICTION, DISMISSALS, HEARING PROCESSES, DAVIS
STANDARD, TIMELINE)**

ASSOCIATED STUDENTS OF THE UNIVERSITY OF MONTANA

Committee On Equitable Education

Missoula, Montana

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Respectfully submitted,

Noah Durnell, Associated Students of the University of Montana, *President*

Responding to United States Department of Education Office for Civil Rights Notice Announcing Title IX Public Hearing requests one (1) and two (2).

“1) to ensure that schools are providing students with educational environments free from discrimination in the form of sexual harassment, which encompasses sexual assault and other forms of sexual violence; 2) to ensure that schools have grievance procedures that provide for the fair, prompt, and equitable resolution of reports of sexual harassment and other sex discrimination, cognizant of the sensitive issues that are often involved”

**ASSOCIATED STUDENTS OF THE UNIVERSITY OF MONTANA
RECOMMENDATIONS ON FEDERAL TITLE IX POLICY***

*See also oral public comment provided on June 11, 2021

June 10, 2021

Department of Education Office for Civil Rights:

Students at public institutions across the nation have a right to receive an education free from harm, discrimination, harassment, and retaliation, and the federal Title IX regulations are contrary to that goal.

As students at the University of Montana, we recognize the complexity of ensuring fair treatment for both sexual violence survivors and those accused of sexual violence. We commend our school for working each day to respond to such complaints and for working toward ensuring student access to education that is free from sexual discrimination, harassment, and retaliation. We further acknowledge the complex historic relationship between the University of Montana, the Department of Education, and Department of Justice. To the survivors who filed their original complaints against the University, Missoula Police Department, and Missoula County Attorney Office, we see you, we thank you, and our institution would not be what it is today without you. The relationship the DOE and UMT MOU has built has contributed to better practices at our school, increased accessibility, and reduced gaps in survivor services.¹ Again, we commend the University of Montana for pushing their policies toward compliance and recognize their policies are more progressive than small public schools across the nation.

The DeVos regulations have imposed burdens on students and faculty nation-wide, and especially in Montana. As students, our responsibility resides in supporting, encouraging, and advocating for student interests. We feel the current federal Title IX regulations are contradictory to student interests, goals, and educational accessibility. There are more humane ways for the federal policies to support both respondents and complainants, encourage transparency and accountability, and overall provide and expand access to educational programs and activities without practicing inequitable processes guided by protecting respondents and school liability.

The Committee on Equitable Education emphasizes the importance of recognizing the unique complexities that exist on small to mid- sized campuses across the nation. We understand that the University of Montana has been both. In 2013, at the pinnacle of our DOE MOU, our

¹ U.S. Dep't of Just., and Gary Jackson, Reg'l Dir., Office for Civ. Rts., U.S. Dep't of Educ., to Royce Engstrom, President., Univ. of Montana, and Lucy France, Univ. Couns., Univ. of Mont. (May 9, 2013); Katie Jo Baumgardner, no. 4, *Resisting Rulemaking: Challenging the Montana Settlement's Title IX Sexual Harassment Blueprint*, 89 *Notre Dame Law Review*, 1813—1819 (2014).

enrollment sat at over 14,950.² Today, in our enrollment crisis, just over 9,500 attend our university.³ While our reduced enrollment and increased Title IX staff seem to make the process easier for students, they are limited by the federal regulations and nature of having such an intertwined campus community and small community across the state.

In developing this committee, the Associated Students of the University of Montana recognize that students have a particular interest in matters relating to campus violence and sex and gender-based discrimination. However, this recognition is not unique.⁴

This Committee will continue to work on Title IX policies, including continuing this summer to track and analyze the April 6th letter and its proposed action steps. The Committee has registered to attend and provide, live and written public comment, at the Office for Civil Rights (OCR) proposed public hearings. Today, we begin by providing written public comment on the current regulations.⁵ In doing so, we believe the most efficient method of advocating for student safety, education, and accessibility is through *developing the most equitable and sustainable policy*.

Students are most harmed by the polarization of sexual, race, and gender-based violence on and off campus and the policies developed to respond. Title IX is inaccessible to non-legal trained professionals and more importantly students. Complex legal language and party polarization affects student's abilities to understand, respond, and assert their rights. To steer away from radical changes, we have narrowed our suggested recommendations to eight (8) key areas, deemed most problematic.

² University of Montana Common Data Set 2012-2013, available at https://www.umt.edu/institutional-research/documents/CDS_2012_13.pdf.

³ UM Enrollment Numbers Hold Steady Amidst Pandemic, available at <https://www.umt.edu/news/2021/02/020921enrl.ph>.

⁴ See generally The Student Government Association of the University System of Georgia, *Title IX Letter to the USG* (July 21, 2020); North Carolina State University, S. Res. 28, 100th Sen. (July 17, 2021) (Resolution To Be Entitled An Act To Advocate For A Suitable Implementation Of Title IX Regulation Changes At North Carolina; State University); Kansas State University, S. Res. 45, 2020-2021 S. (Nov. 19, 2021) (Recommendations Regarding The Implementation Of The Updated Title IX At Kansas State University); American Council on Education, *Letter to Biden and Harris* (Nov. 18, 2020).

⁵ The Committee's recommendations have identified areas of concern in federal policy that are so objectively contrary to ASUM's mission, values, and goals, including jurisdiction, mandatory dismissals, the legal standards derived from *Davis*, the definition of pervasiveness, and the definition of notice.

I. CONFLICTS OF INTEREST

The Department of Education should implement a clear policy and procedure regarding conflict-of-interest checks and implementation.⁶ Privacy is a foundational belief parties hold in ensuring safety, reporting, and participating in the Title IX process. Again, the unique circumstances of the limited professional responsibilities in Montana and at small to mid-sized schools, cannot be underscored. We recognize that federal policies allow bias and conflict of interest as grounds for appeal but raising the issues on appeal does not limit the exposure of personal information prior to its dissemination. The Committee recognizes students at large institutions may not know one another by name but may recognize or have courses together, therefore simply asking members of grievance committees if they “know anybody” is not enough to protect the privacy interests of the parties. Instead, The Department should implement a conflict check based on lifestyle, campus activities, academic activities, and content of complaint. Both the respondent and complainant should be able to review all documentation used in determining whether a conflict exists, prior to dissemination of information.

II. JURISDICTION; “UNIVERSITY ACTIVITY” CATEGORIZATION.

Recognized Greek chapters should be inherently within the university’s jurisdiction no matter the physical location of the chapter facility, location of incident, or lack of home registration with an institution. The Department of Education should bar complaints of sexual misconduct from going through intra and inter Greek council judicial processes. Current federal guidelines have limited the jurisdiction of the Title IX to those of “university protected activity” in which the institution has “substantial control over both the complainant and respondent”.⁷ This prohibits policy extension to violence occurring outside of the United States and non-campus property. Most Greek owned homes are off campus. However, survivors should not have to continue to suffer within Greek life or the hallways of their institution resulting from their University’s denial to investigate simply because a physical house is hundreds of feet from their classroom. In *Framer*, the Court determined that Kansas State University had a relationship with a Greek chapter where an assault took place because the organization was supported by administrative staff at the University and advertised on the University’s website.⁸ Yet, the University of Montana, as well as

⁶ See generally 34 C.F.R. §106.45(b)(iv) (2020); 34 C.F.R. §106.45(6)(i); 34 C.F.R. §106.45(b)(1)(v); 34 C.F.R. §106.45(b)(2)(i)(B).

⁷ 34 C.F.R. at § 106.44(a).

⁸ *Farmer v. Kan. State Univ.*, 918 F.3d 1094 (10th Cir. 2019) (discussing education program or activity, further supported by 2020 regulations, but not included in policies)(Greek life cannot exist without an institution, however and institutions can exist without Greek life, therefore, Greek life is within the purview of University activity)(University advertising Greek life on their website and boasting it is part of the campus community establishes a relation qualifying as university purview under Title IX).

other schools reject that their recognition of Greek life automatically triggers jurisdiction.⁹ In that vein and contrary to the belief of some MUS institutions, Title IX does cover Greek life under the *Framer* standard. We suggest the Department of Education, adopt the understanding of an institutions relationship with Greek members as explained in *Framer* and make explicitly clear relationships that inherently trigger jurisdiction, no matter the physical location. Because of the nature of Greek life and their continued concerning behaviors, intuitions should be strictly responsible for conducting investigations into chapters in which reports arise.¹⁰

However, even if the Department of Education does not choose to adopt an inherent jurisdiction of recognized Greek chapters, the Department of Education should clarify that Greek life is considered a university program or activity. The jurisdictional requirements of Title IX indicates that “University Programs or Activities” is defined to include “any buildings owned or controlled by a student organization that is officially recognized by the University”.¹¹ At our institution, Greek Life maintains direct connection to the University via the Director of Fraternity and Sorority Involvement. As the University officially recognizes this position administratively, it also recognizes the student organizations it serves; i.e. Greek Life.¹² As educational involvement in coursework is itself participation in a University Program, it is our belief that Prohibited Activity impacting a complainant’s ability to learn triggers jurisdiction automatically. This means the policy grants jurisdiction to Prohibited Activity within Greek Life on the grounds of both official recognition and adverse effects on participation in programs.

III. DISMISSALS

This Committee does not endorse or recommend the practice of mandatory dismissals and suggests that mandatory dismissals are removed from the regulations. The Committee fails to see how dismissals are not a “single-investigator” practice prohibited by the current regulations.¹³ We further advocate that discretionary dismissals should be utilized only in extreme circumstances and upon notice and input from both parties. In both circumstances, if dismissals are necessary, we advocate that these dismissals mirror those in the criminal justice system and all carry dismissals “without prejudice”. Students, unless in law school, are not lawyers. Title IX is incredibly complex. Students must balance personal growth, relationships, school, and often times work or internships with their trauma and the trauma the process imposes on the parties. Students, usually as young adults, are not equipped to handle such dense policy and emotions, while still maintaining

⁹ See generally *Framer v. Kan. State Univ.*; Kansas State University, S. Res. 45, 2020-2021 S. (Nov. 19, 2021) (Recommendations Regarding The Implementation Of The Updated Title IX At Kansas State University); Addie Slanger & Helena Dore, *Still Missoula*, Mont. Kiamin (2019).

¹⁰ Jeffrey B. Kingree Ph.D. & Martie P. Thompson Ph.D., *Fraternity Membership and Sexual Aggression: An Examination of Mediators of the Association*, J. of Am. Coll. Health (2013); see also Tayna Asim Cooper, *#SororityToo*, 2020 MICH. ST. L. REV. 355 (2020).

¹¹ 34 C.F.R. at § 106.44(a).

¹² *Id.*

¹³ 34 C.F.R. at § 106.45(b)(ii).

their daily lives, coursework, and health. Dismissing cases without the opportunity for students to be able to reopen their complaints, is contrary to the goals of Title IX and endorses abandoning coursework, an education, to ensure they can maintain their livelihood and safety.

Further, the committee suggests that the policy allow intuitions to hold the conferral of degrees, pending the outcome of investigations and remove mandatory dismissals for respondents and complainants transferring, dropping out, or taking a leave of absence. These recommendations are analogous to requiring students to pay fees and apply for graduation. Simply because a respondent has completed the necessary educational requirements to graduate does not guarantee an individual the right to graduate.

IV. THE “PERVASIVENESS” DEFINITION AND DAVIS STANDARD

The Department of Education should clarify that pervasiveness and the Davis standard should not be interpreted to mean that multiple victims must exist or that multiple instances of harm have occurred to a single student. We do not support the change of the federal definition to include the word ‘and’ instead of ‘or’. Rather, federal policy contradicts itself.¹⁴ The Department should rewrite the standard from ‘and’ to ‘or’ as the 2001 Guidance originally restated the *Davis* standard.¹⁵ If the Department retains the *Davis* standard, we believe that the mere occurrence of IPV and sexual violence to student satisfies each element.

V. TIMELINE

Universities have been accused of intentionally taking their time in complaints of sexual violence.¹⁶ To ensure that our Universities do not resort to this practice, the policy should be clear about the attempted timeline for completion. These timelines should align with best practices but should not exceed five (5) months or one (1) semester. We further suggest that a time limit be set on individual questioning and testimony and hearing length in total. We suggest a more restrictive time limit than the Fed. R. of Civ. Pro. for depositions.¹⁷

VI. CROSS EXAMINATION

Our committee supports the abolishment of live cross examination practices. While we recognize the right to confront an accuser is a cornerstone to our criminal justice system, we do

¹⁴ See 34 C.F.R. pt. 106, 30036 (stating the DOE current policies intended to return to the ‘01 standard, which was “or”) (Preference should be given to read the standard as a disjunctive test).

¹⁵ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661 (1999)(*emphasis added*).

¹⁶ Tara Richards, no. 2, *No Evidence of “Weaponized Title IX” here: An Empirical Assessment of Sexual Misconduct Reporting, Case Processing and Outcomes*, 43 *Law and Human Behavior* 180, 180 —192 (2019).

¹⁷ Fed. R. of Civ. Pro. 30(d)(1) (2021)(limits depositions to seven hours for one day).

not think (1) it must be conducted in administrative hearing, (2) within administrative hearings it must be live, or (3) those who refuse to subject to cross-examination must have their testimony struck from the record.

1. Cross examination does not need to occur in University disciplinary hearings, if students are given other meaningful opportunities to question and challenge the presented allegations and evidence.¹⁸ Under the current regulations, the procedural safeguards in place allow through opportunities for parties to question evidence without the need to submit to cross examination.¹⁹

2. The right to confront an accuser does not require the confrontation to be live, if supported by public policy.²⁰ Here, public policy, data on trauma, and the inability of schools to produce sanctions equivalent to those of the criminal justice system support removal of live confrontation of a complainant.

3. Those who choose not to subject themselves to cross examination should not have their previous statements removed from the record. Without proper rules of evidence, parties which are exposed to abusive questioning, questions which border FERPA or HIPPA disclosures, or questions that are rooted in rape myths, victim blaming, or are protected by rape shield protections, are potential areas in which a party may object to testifying. However, absent rules of evidence, parties are put in a position to expose personal information or compromise parallel criminal matters and should have the right to object.

VII. ADVISORS

The policies relating to advisors should be substantially re-written, require neutral parties to conduct cross-examination, and standardized to be unbiased. Allowing students to select their own “advisors” heightens the likelihood of intimidation, allows unfettered control over the process, and shapes the way in which the complaints are responded to. The Department should remove unfettered control on when and where advisors may be selected. These advisors should be selected from a list of neutrally trained advisors. Further, the Department should explore and implement a requirement for all parties to be given a secondary advisor, to reduce delays, increase accessibility and sharing of knowledge, and reduce the likelihood of conflicts of interest.

¹⁸ See *Plummer v. Univ. of Hous.*, 860 F.3d 767 (5th Cir. 2017).

¹⁹ Generally, students can the statements of other parties, present evidence in response, are given a ten-day reviewable period on all new evidence and are able to provide written appeals that all challenge. Even then, non-live questioning would provide enough due process protections.

²⁰ *United States v. Longstreath*, 45 M.J. 366, 371 (C.A.A.F. 1996)(citing *Maryland v. Craig*, 497 U.S. 836, 857, 111 L. Ed. 2d 666, 110 S. Ct. 3157 (1990)); Carly Parnitzke smith & Jennifer J. Freyd, no. 1, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 *Journal of Traumatic Stress*, 119, 119—124 (2013).

The Committee does not condone allowing the selection of other students, members of the same student group or membership organization, members of the faculty, staff, or student government, or those who belong to the same academic department as the complainant's or respondent's advisor. This includes barring members of Greek Life from serving as advisors to fraternity brothers and sorority sisters, as well as those within the Panhellenic and Interfraternity councils.

IIX. CREATION OF "TAMPERING" VIOLATION

Due to the nature of the complaints, the Department of Education should create a separate Title IX violation for students, faculty, or staff, who dissuade, discourage, offer to handle matters internally, or threaten social implications, organization membership, or prospects relating to their professional capabilities because of participation in a Title IX report, attempted report, or discussion of a potential report.

We appreciate your time, energy, effort, and the opportunity to share our recommendations on Title IX. We will continue to track your progress and voice our concerns and opinions.

Respectfully,

Associated Students of the University of Montana

Committee on Equitable Education

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