Secretary Cardona and Acting Assistant Secretary Goldberg:

On behalf of Kevin Kruger, President, NASPA - Student Affairs Administrators in Higher Education, please accept the attached comments to the Title IX Public Hearings.

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Sincerely,
Allison Tombros Korman

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Read our new report, Ending Campus Sexual Violence: Outcomes from the Culture of Respect Collective Program
June 11, 2021

The Honorable Miguel Cardona
Secretary
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

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

Re: Written Comment for Title IX of the Education Amendments Act of 1972 Public Hearing

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

NASPA is a member-centered association supporting a diverse and passionate network of 15,000 professionals and 1,200 institutions across the globe. We represent a broad range of student affairs professionals who do the bulk of the work related to Title IX compliance within institutions of higher education. As student support professionals, these groups represent student conduct administrators, housing staff, respondent support personnel, survivor advocates, hearing board members, decision-makers, preventionists, and Title IX coordinators. All of these professionals also regularly work with and support the needs of transgender and gender non-conforming students at institutions of higher education.

In the last several months, NASPA has convened a national Sexual Misconduct and Title IX Advisory Group made up of members of the association designed to provide NASPA with direct feedback on the needs and concerns of the profession. On behalf of our members across the United States, we are submitting this written comment in response to the Department of Education’s notice of a virtual public hearing on the Title IX of the Education Amendments Act of 1972 [Title IX] to strongly encourage the Department to revise the current regulations to incorporate more student-centered policies and procedures.

Expand geography of Title IX

The current Title IX regulations restrict what may be investigated under Title IX to incidents that occur on or within an institution’s programs and activities. One of the significant impacts of this change from previous guidance is that it leaves students who study abroad without protections under Title IX. This is especially alarming given that, according to a study of students who studied abroad at one institution, 27.5% reported at least one experience of unwanted touching while abroad, 6% reported an attempted sexual assault (anal, oral or vaginal), and another 4.6% reported rape. This means that a student who is

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1 The advisory group consists of 24 student affairs professionals representing public and private institutions including land grant institutions, community colleges, Historically Black Colleges and Universities (HBCUs), Asian American Native American Pacific Islander - Serving Institutions (AANAPISIs), Hispanic-Serving Institutions (HSIs), and Ivy League institutions.

assaulted in another country by a student peer from their own institution may return to their home institution without protection under Title IX for reporting the assault.

The consequence of limiting the scope of Title IX geography has been, for many institutions, to implement dual policies. Students who experience harm within an institution’s programs and activities will be routed through a Title IX process, while students who experience harm, in some cases directly adjacent to campus, are routed through the student misconduct process. Student affairs professionals who are members of NASPA’s Sexual Misconduct and Title IX Advisory Group have indicated that determining the appropriate process to use, based on geography, is requiring significant staff time. They also indicate that in addition to the number of staff required to conduct parallel systems, having two processes at some campuses is resulting in confusion for students at their time of greatest need.

Finally, while the current regulation includes fraternity and sorority houses to be located within Title IX geography, similar houses that are rented by sports teams and other recognized student organizations are excluded from Title IX geography. In some instances, these houses may be owned by the institution, but are being considered outside of the confines of Title IX geography as it is defined in current regulations. Previously, institutions were advised that if the institution had control over the location or the students involved, Title IX would provide protection for the harmed student; this standard is the one preferred by NASPA as it is the one preferred by professionals responsible for implementing Title IX on campus.

Realign Definitions of Sexual Harassment Under Title VII and Title IX

Student affairs professionals have indicated the significant extent to which the revision of the definition of sexual harassment under Title IX has hindered their ability to comply with Title VII. Sexual harassment definitions should align under civil rights laws equally, citing harassment that is severe or pervasive rather than severe and pervasive, so that those needing their protection have it equally no matter what the situation. Under the current regulation, students who are employees could pursue a Title VII violation based on the definition of sexual harassment there that is more expansive, but not expect a response from the institution under Title IX for the same harm.

Align Title IX protections for LGBT and Gender Non-conforming Students with Supreme Court and Lower Court Decisions

In 2020, the Supreme Court ruled that the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 extends to discrimination based on sexual orientation and gender identity. Subsequent guidance issued by the Department of Education indicating that transgender students’ rights are not covered by Title IX created a conflict for institutions in terms of compliance. Institutions were told that certain civil protections include sexual orientation and gender identity while other civil rights protections such as access to education do not. This conflict is compounded by the fact that in many instances individuals at institutions are both students and employees of the college or university. In addition, prior to the 2020 Supreme Court decision, there were 23 states and three territories in which federal appeals court decisions held that federal law prohibits discrimination based on gender identity as

a form of sex discrimination.\(^4\) In addition, there were six states in which federal appeals court decision holding that federal law prohibits discrimination based on sexual orientation as a form of sex discrimination.\(^5\) Again, this creates a patchwork approach to protections for LGBT and gender non-conforming students that can create confusion for both institutions and students themselves. We highly encourage the Department to ensure that LGBT and gender non-conforming students are granted protections from sex-based harassment under Title IX.

**Keep Less Adversarial Resolution Options and Strengthen the Guardrails Around Their Use**

Many higher education professionals applauded the inclusion of informal resolution practices within the current regulations. There have long been those calling for the ability to utilize restorative justice practices in certain Title IX cases that were prohibited by the previous administration. Unfortunately, the current regulations do not provide enough guardrails around the responsible implementation of informal resolution. There are a variety of informal resolution methods being promoted in Title IX cases as a result, including options like “shuttle diplomacy,” mediation, and arbitration. NASPA and its members feel strongly that alternative dispute resolutions, as a more appropriate term for informal resolution, allows both parties relief from adversarial formal investigative processes as their only option. NASPA strongly encourages the Department to prohibit the use of any alternative dispute resolution process that is not evidence-based and to require formalized training of those implementing it. NASPA would encourage the Department to prohibit the use of shuttle diplomacy, mediated conversations, arbitration, and mediation as possible options for resolution of Title IX cases.

**Ensure Longstanding Protections for Student Survivors\(^6\)**

Since 1997, with the exception of the years of current Title IX rules, the Department of Education, across Democratic and Republican administrations, has consistently outlined educational institutions’ Title IX responsibilities to survivors and the standards by which the Office of Civil Rights (OCR) reviews complaints. This guidance was critical in shining a light on the negative educational outcomes experienced by survivors of sexual harassment; augmenting institutional efforts to support victims; and holding institutions accountable when they failed to comply with Title IX. This guidance also provided student affairs professionals a mandate for the work they were already engaged in to prevent and respond to campus-based sexual harassment. However, much remains to be done to protect students who are sexually harassed. NASPA recommends that, in order to effectuate Title IX’s purpose as a broad remedial statute, the Department reinstate its decades-old view and:

- Explain that sex-based harassment includes sexual harassment, dating violence, domestic violence, and sex-based stalking and harassment based on sexual orientation, gender identity, gender expression, parental status, pregnancy, childbirth, termination of pregnancy, or related conditions;
- Define sexual harassment as unwelcome sexual conduct;
- Require schools to respond to all quid pro quo harassment and any other sex-based harassment that is sufficiently serious to create a hostile environment that interferes with or limits an individual’s ability to participate in or benefit from the recipient’s program or activity;

\(^4\) https://www.1gbtmap.org/equality-maps/federal_court_decisions
\(^5\) Ibid.
\(^6\) In accordance with the guidance from the National Women’s Law Center (NWLC)
- Require institutions to promptly and effectively respond to, take action to eliminate, and prevent the recurrence of sex-based harassment, specifying that:
  - Institutions must address sex-based harassment that may create a hostile environment in their program or activity, regardless of where it occurred;
  - Institutions should respond to harassment that they know or should know about, as well as any sex-based harassment by employees that occurs in the context of the employee’s responsibilities to provide aid, benefits, or services within the institution’s program or activity;
  - To ensure a “prompt” response to sex-based harassment, institutions should be required to provide supportive services and accommodations to the complainant as immediately as possible;
  - Institutions must take reasonable steps when responding to sex-based harassment (rather than just avoiding a response that is “clearly unreasonable,” which is known as the “deliberate indifference” standard);
  - An effective response may include restorative justice, as long as participation is truly voluntary, all parties are able (and aware they are able) to terminate the alternative dispute resolution process at any time, and those facilitating it are adequately trained to do so; and

- Make clear that states and local entities can provide additional protections beyond those in the Department’s Title IX rule.

**Restore Protections for Students who Report Sexual Harassment, Stalking and Dating or Domestic Violence**

**Remove Restrictions on Advisors/Support Persons**

One of the unforeseen consequences of the new regulations at many institutions is a significant decrease in the support provided to students who report harm to their institutions. Many student affairs practitioners have shared with NASPA that their institutions have restricted the ability for survivors to have a confidential advocate or support person in the room with them during the hearing. Some institutions have interpreted the current regulations that require institutions to allow students to have one advisor of choice with them during the hearing to mean that students are restricted to only having one other individual in the room. In many instances this means that reporting parties (and responding parties) are forced to choose between having an advisor that can serve in a legal capacity to cross examine the other party, or an advocate or support person. These additional support persons can be trained advocates or respondent support personnel who have spent considerable time preparing the parties for what to expect during the hearing process and who have accompanied them to meetings throughout the process leading up to the hearing. Forcing either party to choose between having an advisor or a support person is adding undue stress to an already stressful situation. The Department should require that institutions allow students to have both an advisor (often taking the form of legal counsel) and a support person of their choice available during hearing processes.
Require Confidentiality for Advocates
Another deleterious effect of the current regulation is that many institutions have stripped their survivor advocates of confidentiality in order to create equality with respondents. The Department should remind institutions that equity, not equality, is the standard to which they should aspire when providing services to both responding and reporting parties in Title IX cases. Model legislation being passed at the state level supported by the Every Voice Coalition includes the requirement for institutions to provide confidential advocates to survivors on campus. Because they need access to a support person well-versed in the institutional process and whom they can trust, institutions should be required to provide confidential services to survivors.  

Provide All Parties a Process That Is Fair, Prompt, and Equitable

Encourage the Provision of Respondent Support Services
Recent research from NASPA found that most institutions are currently providing support services to respondents involved in Title IX cases. These support personnel are separate from judicial or student misconduct process advisors. There are many examples of institutions with well-developed respondent support programs that assist respondents through the process. The Department should clearly direct institutions that respondent support and survivor support should be housed in different offices and be provided by different personnel to develop the trust of students served and to recognize the different skills and training required for each role. As this may be difficult for smaller institutions, respondent support personnel should not necessarily be full-time in this role and may instead be employees responsible for supporting respondents part-time as additional duties to their current roles on campus.

Restore University's Option to Proceed with Investigations with Compulsory Participation
Many student affairs practitioners report that responding parties, in addition to forcing delays of the process without timeline requirements, are simply refusing to participate in cross examination. This results in the inability to have the hearing since under the current regulations, if either party refuses to participate, neither party's testimony can be heard during a hearing. Respondents are regularly taking advantage of this provision in order to halt the investigative process. Under previous guidance, respondents could refuse to participate in the investigation, but the investigation would proceed without their participation. Additionally, respondents should be prevented from withdrawing from the institution in order to avoid an investigation.

Restore Timelines for Resolutions of Investigations
The current regulations also removed the requirement for a timeline for institutions to resolve Title IX cases. This has left both reporting and responding parties without a sense of when they can expect resolution of their case. This also incentivizes lawyers for respondents to intentionally prolong the process when scheduling interviews or hearings as they can simply delay the case to the point at which one party or the other graduates. While NASPA members vary in their assessment of what constitutes an appropriate timeline for resolution, there is consensus that the Department of Education should provide parameters around the establishment of an official timeline and the expectation that institutions operate within that timeline.

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7 https://www.everyvoicecoalition.org/
Remove the Requirement for Live and Direct Cross Examination

The Department heard many comments during the most recent rulemaking process about the damage that cross examination can do to students and to the Title IX process itself. The American Council on Education has submitted separate comments that speak clearly to the need to avoid having Title IX processes become legalistic or court-like proceedings on campus. The revictimization that cross examinations can cause for survivors is well documented and the stress for responding parties is only beginning to be understood. The requirement for cross examination also pressures both parties to feel the need to have legal counsel present during the hearing process, which causes undue financial pressure on students who are involved in Title IX investigations. The Department should strongly reinstate the prohibition of cross examination as a practice that was outlined in previous guidance.

Ensure Disciplinary Procedures are Responsive to the Diversity of Educational Institutions

Prior to the current rules, the Department long affirmed the uncontroversial notion that school discipline for sexual harassment must be fair to all involved parties. Yet current regulations require adversarial disciplinary procedures for sexual harassment—and sexual harassment alone—that are uniquely hostile to complainants compared to other types of civil harm. Traditionally, student affairs facilitates disciplinary procedures in a way that is both educational and intended to encourage accountability on the part of the student that caused harm. As written, the current regulations impose detailed and burdensome procedural requirements on all educational institutions for addressing sexual harassment, regardless of school type, size, location, and resources.

Because schools vary tremendously in these characteristics and there is no one-size-fits-all model that works for every educational institution and every educational program, the Department should instead outline general requirements for fairness that flow from Title IX's equality mandate, as it did in previous guidance. For example, the Department should require that school’s disciplinary procedures be fair and allow both parties the same procedural rights. The Department should also require that schools use the preponderance of evidence standard in determining responsibility for sexual harassment and other forms of sex-based harassment because that standard is used in civil rights lawsuits and by OCR in its own enforcement actions.

Emphasize Prevention in Title IX

NASPA has heard from members that while the Clery Act and the VAWA Amendments to Clery both address institutional responsibility to provide prevention for students, faculty, and staff, current Title IX regulations fail to mention prevention in a meaningful way, contributing to the perception that enforcement and response outweigh the need for preventing violence from occurring in the first place.

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9 In accordance with the guidance from the National Women's Law Center (NWLC)
10 See, e.g., 2014 Q&A at 26; 2011 DCL at 12; Revised Sexual Harassment Guidance at 22.
11 The DeVos Title IX rule included dating violence, domestic violence, and stalking in its definition of sexual harassment.
Title IX should reinforce the importance of primary, secondary, and tertiary prevention in its regulations as a reminder that the Department will also look to institutions’ prevention efforts when determining their compliance with Title IX. The Department should provide funding or list federal funds available to support prevention work so that institutions do not perceive prevention as an unfunded mandate. The Department could use fines from Clery Act and Title IX violations to support prevention work in higher education in meaningful ways.

We appreciate the opportunity to provide comment on the Title IX regulations and anticipated revisions. NASPA hopes that our association and members, who have significant responsibility for implementing Title IX regulations, can continue to be a resource to you in this work moving forward.

Sincerely,

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