Association for the Study of Higher Education (ASHE) Response to The Department of Education's May 2020 regulations on Title IX of the Higher Education Act of 1972 (Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance)

34 CFR § 106 et. seq. (2020)

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I. Executive Summary

On May 6th, 2020, the U.S. Department of Education released new regulations[2] regarding changes to the way Title IX of the Education Amendments of 1972 is applied to redress for sexual harassment in educational contexts.[3] The following is an overview of the issues pertinent to the May 2020 regulations, along with response to the Rule by the Association for the Study of Higher Education (hereafter, referred to as ASHE).

ASHE is a scholarly professional association, incorporated as a 501(c)3 non-profit organization with over 2,000 members. These members represent full and part-time faculty and administrators serving in public, private, and for-profit institutions of higher education, graduate students, and policy makers serving in state, regional and federal roles. Numerous members of ASHE conduct research on varied aspects of violence prevention, campus safety, law, policy, and procedure pertaining to Title IX and sexual

[1] The authors gratefully acknowledge the helpful feedback of Stephanie Aguilar-Smith, Michael Brick, Jason Guilbeau, Chris Linder, D-L Stewart, and Jeffrey Sun.
[2] Although referred to as the "Final Rule" on the document itself and some press releases, such naming is inaccurate because such rulings are never actually final when they can and typically are overturned by the subsequent administration. We have chosen to refer to it this way to avoid the impression that these regulations are unalterable.
[3] A summary of the changes in the May 2020 regulations issued by Secretary DeVos is in Appendix A.

harassment more broadly, and many have direct expertise in implementation of federal regulations on the hundreds of different college and university campuses in the United States where they serve. Advancing the safety, well-being, and bodily integrity of all students and employees in higher education is a fundamental purpose of any association pertaining to higher education and is a driving ethos of ASHE as well.

In the following document, ASHE names areas of concern related to the issuance of the May 2020 regulations, as well as areas where the May 2020 regulations enhance opportunities for redress of sexual harassment, including sexual and domestic violence and stalking on campus. As the new presidential administration revisits the May 2020 regulations, ASHE advances several recommendations, informed by research, for continued improved practice in the effort to end such harassment on all campuses in the United States.

Upon review of the May 2020 regulations, ASHE has determined that it offers minor improvements in the following areas:

1) expanding the definition of sexual harassment to include sexual violence, dating violence, domestic violence, and stalking;

2) requiring institutions to use a consistent standard of evidence to address such harassment, regardless of the identity of the perpetrator (faculty, staff, or student);

3) allowing confidential resources as well as mandated reporters; and

4) directing that the cross-examination of witnesses, deemed allowable within a campus adjudication hearing, to be conducted by the student's advisor, rather than the student themselves.

Conversely, ASHE affirms that five aspects of the May 2020 regulations serve to roll back the considerable progress made in previous iterations of guidance from the Department of Education regarding the use of Title IX to address campus sexual harassment. These critiques include:

1) the requirement that a perpetrator's conduct must be "severe, pervasive, *and* objectively offensive" to be considered sufficient for institutional action;

2) that this requirement stems from a (mistaken) sense that academic freedom has been curtailed for faculty wishing to speak freely about topics related to sexual harassment and sexual violence in classroom settings;

3) that colleges are now permitted to avoid investigating sexually harassing conduct when it happens outside the United States (such as in college-sponsored study abroad programs);

4) the unevidenced notion that due process is specious or absent in college grievance procedures, and thus disadvantages respondent (accused) students; and

5) the requirement that colleges must hold live, synchronous adjudication hearings, and must allow both complainant and respondent to cross-examine one another using their advisors

II. Introduction

Researchers recognize that several variables relate to the incidence of sexual violence on college campuses, including alcohol (Abbey,1991; Howard et al., 2008), collegiate environments that foster and enable hegemonic masculinity as normative (Hong, 2017; Marine, 2018), and a culture that disregards the experiences of survivors, inhibiting reporting and effective accountability measures (Armstrong et al., 2006). Additionally, significant evidence shows that research on sexual harassment and sexual violence on campus over-focuses on samples of students that are white, cisgender, and heterosexual (Harris et al., 2020; Linder et al., 2020). Remedies to address campus sexual violence have also over-relied on criminal justice approaches, even as the occurrence of sexual violence in an educational environment is undoubtedly also a violation of students' civil rights (Swan, 2015).

Title IX of the Education Amendments of 1972 is frequently called up as a remedy for sexual harassment on campus, including peer-to-peer sexual violence and violence perpetrated by faculty and staff against students (Peterson & Ortiz, 2015). This use of Title IX to address sexual harassment in higher education has a long and complex history.[4] While Title IX is a federal statute established in Congress (Buchanan, 2012), the executive branch has played an outsized role in how it is applied to counter college and university sexual violence. This became apparent once again when on September 22, 2017, Secretary DeVos, on behalf of the Office for Civil Rights of the U.S. Department of Education (ED), officially rescinded the 2011 Dear Colleague Letter released during the Obama administration (United States Department of Education, 2017a).

This 2017 statement also served as the notice of proposed rulemaking (NPRM), indicating the ED would engage in the process to draft and implement new regulations in an effort to address criticism that the previous regulations had not followed proper legal procedures. In the interim of new regulations, the ED provided a question-and-answer (Q&A) document to help educational institutions determine how they would

[4] See Appendix B for that discussion.

adhere to Title IX policy (Hefling & Emma, 2017). The United States Department of Education Office for Civil Rights (2017) announced that the Q&A document would serve as interim guidance. The most contentious issues in these changes related to the use of mediation in sexual misconduct cases and the higher standard of proof, which changed from a “preponderance of evidence” to “clear and convincing” evidence.

On November 29, 2018, the U.S. Department of Education released proposed regulations under Title IX on the Federal Register (Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 2018). The ED indicated they had spent over a year gathering information from various stakeholders including students, Title IX Coordinators, advocates, and other constituencies, although a complete list was not made available. The publication of these proposed regulations to the Federal Register then began a 60-day public comment period.

The process, as defined by the Administrative Procedures Act, requires that all comments received by the ED are read and seriously considered. The public comment period ended on January 30, 2019. Some individuals experienced technical issues when submitting comments, the ED reopened comment submissions for 24 hours on February 15, 2019 (DeVos, 2019).

The ED received 124,000 comments during the entire comment period. Several survivor advocacy groups such as Know Your IX and Hands Off IX supported and encouraged campus groups to submit comments (Know Your IX, n.d.). Additionally, a “crowd-researched” project titled the *Big Comments Catalog Project* (Cantalupo et al., n.d.) sought to catalog each of the comments in response to the NPRM, and the concern that while the ED is required to seriously consider each comment, it does not need to make their own catalog of the comments public.

On March 25, 2020, the National Women’s Law Center joined by 200 organizations submitted a letter to Secretary DeVos. The letter urged the ED to delay the announcement of the Title IX regulations due to the COVID-19 pandemic. Their concern was two-fold. First, educational institutions were focused on transitioning online and

confronting various emergency issues due to the pandemic. Second, the ED should be focused on support for students during the pandemic.

Nonetheless, on May 6, 2020, Secretary DeVos officially announced the new Title IX rules and regulations amid criticisms about their release during the COVID-19 pandemic (North, 2020). Institutions had until August 14, 2020 to ensure they were in compliance with these regulations. The process by which institutions of higher education drafted and implemented their policies informed by the new Title IX regulations varied. However, all institutions were mandated to adjust their policies and announced them to their stakeholders by the deadline of August 14, 2020.

Sexual harassment[5], including rape, forced sexual touching, stalking, and dating violence, are significant impediments to human flourishing on college campuses. Despite more than four decades of sustained and energetic work on campuses by survivor activists, prevention educators, and researchers, sexual violence on college campuses continues unabated, deeply impacting the lives of student survivors and campus communities alike (Harris & Linder, 2017). Evidence for the prevalence of sexual violence on college campuses is alarming: 25.5% of undergraduate women and 7.9% of undergraduate men experienced "nonconsensual sexual contact by physical force or inability to consent since entering the school" (Cantor et al., 2019, p. 19). Among graduate students, 10% of women and 1.9% of men reported victimization; 18.7% of trans*, nonbinary or genderqueer, questioning, and those of unlisted gender identities experienced victimization (Cantor, et al., 2019). Bisexual, gay, lesbian and queer-identified students report exceptionally high percentages of victimization, at 26.4% (Edwards, et al., 2015). Relatively few college student survivors (20%) report their victimization to the police (Sinozich & Langton, 2014).

[5] Throughout this statement, the authors use the terms 'sexual harassment' (the term of choice in the Title IX statute, and throughout the May 2020 regulations) and 'sexual violence' (the term more commonly used by higher education researchers) interchangeably.

III. ASHE Response to the Release of the May 2020 Regulations

Characterizing the new regulations as "strengthening Title IX protections for survivors of sexual misconduct, and [restoring] due process in campus proceedings to ensure all students can pursue an education free from sex discrimination," DeVos indicated several putative improvements (United States Department of Education, 2020a). For example, the ED's official statement heralded that this would be the first time that sexual harassment, including sexual assault, dating violence, domestic violence, and stalking, constituted unlawful discrimination on the basis of sex. The department also stated that the new regulations "[come] after years of wide-ranging research, careful deliberation, and critical input from survivors, advocates, falsely accused students, school administrators, Title IX coordinators, and the American people, including over 124,000 public comments" (United States Department of Education, 2020a).

The May 2020 regulations declared eleven different areas of reform within the existing guidelines set forth by the Obama administration.[6] As an association of researchers and educators dedicated to improving higher education, ASHE affirms that the safety of students, faculty, and staff in our communities is absolutely paramount to all other considerations. Additionally, acknowledging that sexual violence is a crime perpetrated against students by other students, faculty, and staff, and that significant trauma results from this behavior, researchers have argued for centering survivors and survivor concerns in the work of remedying sexual violence (Harris & Linder, 2017; Hurtado, 2020; Marine, 2018). We are thus compelled to respond to the May 2020 issuance of the May 2020 regulations. We want to specifically highlight the ways in which the May 2020 regulations represent a reversal from earlier practices outlined in the OCR's previous Title IX Guidance that served to advance safety, to empower survivors, and to provide effective and transparent commitment to prevent sexual harassment on college campuses. As described below, thousands of researchers, advocates, and activists expressed deep concern with the ED's stances; more than 124,000 comments—most of

[6] For a complete summary of the changes associated with the May 2020 regulations, refer to Appendix A.

them critical—offered during the open comment period for the Notice of Proposed Rulemaking, evidence this concern (Cantalupo et al., n.d.).

Four aspects of the May 2020 regulations merit commendation:

1) The expansion of the definition of sexual harassment to include sexual violence, dating violence, domestic violence, and stalking, provides greater latitude for those experiencing a wide variety of behaviors to seek redress.
2) The May 2020 regulations' allowance that institutions may designate resources who can be confidential, and thus, are not required to report to college officials regarding students' confidential reports.
3) The consistent use of one standard of evidence—regardless of the identity of the perpetrator (faculty/staff or student)—provides transparency to survivors, which may enhance a sense of control throughout the process.
4) Initially, DeVos hinted that students should have the right to cross examine one another during campus hearings (Harris, 2018), however, the May 2020 regulations name instead that advisors should be the ones to conduct cross-examination.

The following five specific critiques delineate the weaknesses in the May 2020 regulations process and findings, which in many cases run counter to evidence-based practices. In addition to the substantive concerns with the document, ASHE notes the hasty and poorly communicated expectations underlying implementation of the May 2020 regulations. Each critique will be explored below in more specific detail, and with context provided drawn from relevant research.

First, the May 2020 regulations require that sexual harassment must be "severe, pervasive, and objectively offensive," (United States Department of Education, 2020a) to be considered worthy of redress. This standard assumes an objective reality that feminist researchers have long challenged and that instantiates the notion that everyone similarly experiences such severity and pervasiveness (Moran, 2003; Shoenfelt et al., 2002). The requirement that a perpetrator's conduct must be severe, pervasive, *and* objectively offensive rather than the more expansive definition in Title VII precedent of

severe *or* pervasive *or* objectively offensive, means that significant harm may be caused before rising to this level, causing trauma to the targeted person long before a remedy may be enacted. Evidence for the significant, long lasting, and life-interruptive effects of trauma experienced by those enduring sexual harassment on college campuses (Artime, et al., 2019; Conley & Griffith, 2016; Oliver, 2016) requires intervention earlier than the May 2020 regulations acknowledge. Further, evidence suggests that few, if any, student survivors believe their assault rises to the level worthy of redress (Foster & Fullagar, 2018; Mellgren, et al., 2018). The May 2020 regulations' reiteration of the more restrictive severity standard will thus inarguably have a chilling effect on those considering reporting.

Second, the May 2020 regulations' use of the more restrictive and narrow definition of behaviors that constitute harassment is based in the belief that the previous, more expansive definition created a "chilly climate" for those wishing to speak freely in accordance with academic freedom. This perspective sidesteps data suggesting that both unanticipated and planned subjection to imagery, language, or discussion of sexual trauma often substantially negatively impacts those who have a life history of experiencing sexual trauma (Krans, et al., 2010; Sanson, et al., 2019). Some organizations' objections to thoughtful interventions designed to create sensitive classroom environments, such as the use of trigger warnings, was coupled with the erroneous belief that faculty are compelled to self-censor course content in order to protect so-called fragile students from being offended (Kruth, 2014; National Coalition Against Censorship, 2019). In this way, the thinking that informed the May 2020 regulations creates a putative danger to academic freedom (Corlett & Brillon, 2020; Earle & Cava, 1997). Unfortunately, this belief was echoed by the American Association of University Professors in their policy statement on the *History, Uses, and Abuses of Title IX* (Lieberwitz, et al. 2016). Scholars have argued persuasively that this fear is grossly overblown; in fact, those who speak out against sexual violence on campus and who report harassment in the context of the classroom are typically far more silenced than faculty teaching about rape in their classrooms (Gould, 1999; Matejkovic & Redle, 2006).

Thirdly, the May 2020 regulations posit that institutions are only responsible for addressing harassment within educational programs when such conduct occurs in the United States. This means that students experiencing sexual harassment in a U.S. institution's educational program in another country, such as those harassed during a study abroad program, are ineligible to bring the complaint to their college's grievance process. Evidence related to the after-effects of those who experience study-abroad-related assault suggests that it is a deeply traumatic experience, particularly as students struggle to recover without the familiarity of surroundings, family, and friends (Flack et al., 2015; Kimble et al., 2013). The exclusion of U.S. institutions' educational activities happening outside the United States means that the many U.S. colleges with branch campuses in other nations can choose to avoid addressing sexual harassment as well, leaving students with few options beyond unfamiliar criminal justice systems (Anderson, 2020b). While colleges can make different decisions regarding their adjudication options for students abroad, they are not compelled to do so legally, a situation that leaves far too much discretion to college leaders and the institution's general counsel.

Fourth, ASHE is deeply concerned with the process undertaken by DeVos, and the troubling discourses shaping her decision to invoke the NPRM process. On several occasions, DeVos characterized campus grievance processes as highly suspect and lacking in due process protections, expressing concern that respondents (mostly young men) facing campus harassment allegations were targeted unfairly (Harris, 2018; Strauss, 2020). She declared, providing only anecdotal evidence, that accused students were deprived of due process, and had been rendered victimized by campus systems (United States Department of Education, 2017). Her comments were reportedly heavily informed by, and connected back to, correspondence with men's rights groups (Barthelemy, 2020; Dooley, et al., 2017). While campus grievance processes are admittedly quite stressful for all parties involved, evidence to suggest that campus grievance processes are weaponized and stacked in favor of complainants is nonexistent (Buzuvis, 2017; Richards, 2019). Kidder (2020) has argued that providing institutions with the option to apply the standard of clear and convincing evidence, rather than the preponderance of evidence standard, would result in more false

negative findings (i.e., a student commits sexual harassment but is found not responsible).

The lack of due process rhetoric advanced by DeVos is related to the fifth concern of ASHE. DeVos' unsubstantiated concern about due process protections—despite the overwhelming input offered during the public comment period to the contrary— led her to use the May 2020 regulations to reinforce the requirement that colleges mandate parties to engage in live hearings and that all parties must agree to be cross-examined by the other party's designated advisor. DeVos's approach represents a particular kind of mistaken argument—a baseline assumption— that sidesteps historical context. Crenshaw described the concept of baselines as the underlying understanding of an issue (Schnall, 2020). If sexual violence is viewed as a form of inequity and that certain populations are being oppressed through this form of violence, then Title IX is meant to address these inequities. However, if the baseline understanding informing a policy is that a fair and equal society already exists, then Title IX is viewed as favoring complainants, which serves as the basis of due process concerns. These concerns lack evidence and ignore the more radical intentions and history of Title IX.

In addition to these five specific concerns with the May 2020 regulations, ASHE objects to the ED's hasty and unsupported mandate for implementation, announced in early May 2020 and required to be fully in place by August 2020. The extensive challenges with meeting this timeline just two months into the outbreak of the COVID-19 pandemic reflected the poorly conceived execution of the process. It also suggests blatant disregard on the part of DeVos for personnel of colleges and universities to quickly pivot to an entirely different grievance process and other requirements.

VI. Future Directions for Research, Policy, and Practice

While far from a panacea for ending sexual harassment on college campuses —as evidenced by continuing high rates of students who perpetrate and who survive it — Title IX has created a meaningful pathway for holding institutions accountable for addressing the harms such harassment causes (Edwards, 2015). The federal government has an important, if partial, role to play in creating violence-free colleges,

and the history of Title IX's use for this purpose suggests that the standpoint of the President and, in many instances, Secretary of Education indelibly shapes the progress or regression that ensues.

Regressive and baseless assumptions issued by Secretary DeVos with support of President Trump about the so-called failures of college grievance processes, including the mistaken belief that due process is not already assured in the structure of such systems, have failed our communities. These assumptions have prompted the creation of a set of regulations that reduce the likelihood that student survivors will come forward to report the violence they have experienced, thereby resulting in less safe campuses (Bedera, 2020; North, 2020). ASHE encourages the rescindment of the May 2020 regulations and a return advancement of Title IX and other remedies for campus sexual violence that are based in evidence and that reflect the current state of research in the field. To bolster the evidence based on which this work can proceed, ASHE recommends several areas for further research, as well as clarifying key roles in policy and practice.

Future Directions for Research

As noted previously, most research conducted on sexual violence and harassment in higher education to date draws data and inferences from problematically homogeneous student samples: white, cisgender, heterosexual women (Harris et al., 2020; Linder et al., 2020). We echo the concerns of Harris (2020) that research that engages in "race evasiveness" (p. 3)— that avoids fully engaging with questions about survivor identity, especially the impact of racialized marginality on survivors' agency and healing— must be actively challenged and changed. Inattention to the experiences of lesbian, gay, bisexual, and transgender campus survivors also typifies the research to date, which also must be addressed (Marine & Nicolazzo, 2017a). Additionally, a commitment to better serving populations with different specific needs, such as international students and students with disabilities, is warranted (Sun, et al., 2013).

In terms of future research related to the use of Title IX to address campus harassment, additional studies on the role of shared governance (as well as shared responsibility

and accountability) in the process will be key. Researchers need to determine how shared governance works (or does not work) in terms of implementing these policies and how faculty can (and arguably must) play a role in ensuring that institutions are enlisting intentional practices (AAUP, 2019; Hurtado, 2020) in addressing this problem. Recently, researchers have critiqued institutions' over-reliance and concern with compliance with Title IX, rather than addressing the roots of the problem of sexual harassment and violence in higher education (Hurtado, 2020; Marine & Nicolazzo, 2017b). A return to a focus on the ways that power operates between and among those who experience sexual violence and those who perpetrate it, as well as between and among institutional stakeholders, is essential to truly address the problem (Harris & Linder, 2017; Linder, 2018).

Research should be continued that seeks to better understand the experiences of students who engage in Title IX grievance processes, how they perceive these processes to function, and the outcomes and effects of these processes. Research documenting the experience of campus survivors of sexual violence and dating violence has improved and increased over the last two decades, and we have learned a great deal about the nature and extent of harms student survivors have endured (e.g., Ahrens et al., 2010; Clark & Pino, 2016; Coulter et al., 2017; Harris, 2020; Holland & Cortina, 2017; Nguyen et al., 2010; Tillapaugh, 2017; Walsh et al., 2010). Sexual violence activists have made a compelling case for shaping policies and procedures with survivors at the center, since they are the most directly impacted by policies (McMahon et al., 2019; Weaver, 2015). To date, no published studies document the experiences of students with campus grievance processes, and thus, in most cases these processes remain uninformed by evidence about survivor experience.

Researchers committed to improving campus safety are also well-advised to systematically examine the experiences of campus officials, especially Title IX Coordinators. These professionals are charged with implementing Title IX-related legislation in a particularly volatile political environment. As described in the appendix on the history of Title IX as a remedy for campus sexual harassment, each successive action taken by the federal government, through the Department of Education, their

Office of Civil Rights, and the Executive Branch—among many other players— creates new requirements, regulations, and the shifting sands of procedure and practice. All carry heavy responsibility for ensuring their institutions comply, and yet little is understood about their roles and responsibilities or their experiences of adapting to these changes. Studies suggest the work is challenging and may contribute to early burnout and departure from the field (Taylor, 2005; Wiersma-Moseley & DiLoreto, 2018). Much remains to be understood about this key role and the complexities of performing it compassionately. The role of grievance process advisor—and the skillset, training, and deployment of support for students in the process—also is not well understood and would benefit from additional research.

Finally, the promising potential for alternative approaches to traditional college judicial processes, allowed in the May 2020 regulations, has been documented in a number of demonstration projects. The recommendation is poorly constructed, owing to the mingling of mediation (a highly fraught concept) with more responsible options for students, such as restorative justice. Promising demonstration projects related to this include the RESTORE program at the University of Arizona, the Transformative Justice Initiative at Brown University, and the Center for Restorative Justice at the University of San Diego (Guo, 2019; Karp & Sacks, 2014; Koss et al., 2003; Koss et al., 2014). Scoglio and colleagues (2020) have indicated that survivors' conceptions of factors that advance healing and provide justice extends well beyond traditional carceral models. In a period in history marked by growing awareness of the white supremacist foundations of the criminal "justice" and carceral state (Alexander, 2020), alternatives that center womanist, feminist, and anti-racist theories and practices are crucially important to imagine and study (Kim, 2018; Spencer, et al., 2018).

Future Directions for Policy and Practice

Policy matters and it can and must be used as a tool for addressing sexual harassment on campus (Iverson & Issadore, 2018). In addition to identifying areas for necessary further research, ASHE affirms the need for researchers, scholars, and administrators to remain fully engaged with the process of public policy development around the use of

Title IX as a means of redress for sexual harassment. Working alongside campus advocates, activists, legal experts, and advocacy organizations, ASHE members can bring crucial insights from scholarly work on the previous questions, as well as their own perspectives as survivors, student advocates, and grievance process advisors, to the work of shaping future iterations of the May 2020 regulations. Importantly, ASHE members should also remain vigilant regarding the implementation of Title IX at the institutional level, and ensure that students' rights, interests, and concerns are addressed in these processes. Faculty across the globe have engaged in meaningful anti-harassment activism and from their work many lessons for effective advocacy can be drawn (Marine & Lewis, 2020). Advocacy and use of the individual and collective power we bring to the table matters. During the recent comment period, the absence of institutional and association voices on the issues at stake in Title IX was glaringly evident. Although more than 124,000 comments from individuals and advocacy organizations were entered during the open comment for the Notice of Proposed Rule Making (Cantalupo et al., n.d), most institutions and associations of higher education did not provide comment. We urge more and deeper participation in the next round of comments and encourage ASHE members to advocate for their institutions to participate. Practicing institutional courage (Freyd, 2018) in this way will require thoughtful coordination of voices and ideas, but we are confident that college and university involvement will further improve the impact of Title IX as a remedy for sexual harassment and violence affecting students in higher education.

The May 2020 regulations specify many ways in which colleges are called on to provide support: the role of Title IX coordinators, reporting processes, and the grievance process and notification of students involved. However, it is for all intents and purposes a modest baseline for the ways that such processes, supports, and communications systems should operate. Colleges and their leaders are free and encouraged to exceed the requirements of the May 2020 regulations and do more for students to make their policies even more streamlined and transparent. Most importantly, college leaders should make support resources and prevention programming efforts *more* abundant than the May 2020 regulations require. Integrating an ethos of trauma-informed care (McCauley & Casler, 2015)—and weaving trauma-informed practices throughout the

institution's response mechanisms and education programs— is essential. We must continue to do better to safeguard students and their safety, to ensure fair, compassionate, and trauma-informed processes, and to make the primacy of bodily integrity the driving ethos of our campus communities. Anything less is an abdication of our responsibility.

VII. Conclusion

In summary, ASHE has made several critiques of the May 2020 Title IX regulations. We believe these regulations are not in the best interest of survivors and thus not in the best interest of effectively responding to, and ending, sexual harassment on campuses. The May 2020 regulations' specifications were not sufficiently grounded in research and evidence; instead they were developed based on anecdotal reports of the "failure" of due process in institutional grievance processes. As they stand, these rules limit which instances of sexual harassment and violence are the responsibility of the institution making it more difficult for survivors to receive the justice they deserve. Additionally, the announcement and required implementation of these rules during the COVID-19 pandemic posed several challenges for institutions. These challenges included limited time while institutions were making decisions related to the pandemic, limited resources and financial support due to losses caused by the pandemic, and the low feasibility of engaging meaningful processes of shared governance over the summer prior to implementation. Ultimately, the application of Title IX to reducing sexual harassment is essential, but insufficient. Culture change to address the structural manifestations of sexism, racism, genderism, heterosexism, and other forms of inequity that undergird all forms of violence is urgently needed, and research remains crucial to this effort (Hong, 2017; Klein, et al, 2020; Linder, 2018). Given the extensive concerns with the May 2020 regulations described in this document, ASHE members must remain vigilant and engaged in research and public policy development focused on the most essential goal: Ending sexual harassment in higher education.

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Appendix A: Summary of the Title IX May 2020 Regulations

The following changes pertain to higher education policies and procedures to address sexual harassment, summarized as follows (United States Department of Education, 2020b):

Reporting:

- Colleges will be permitted to require mandatory reporting from all college officials, or to designate some college officials as confidential resources, with whom a student can confer about an incident without triggering an automatic report to the Title IX officer. Definition of relevant forms of harassment:
- The definition of sexual harassment was expanded to include three specific kinds of violations: (1) Any instance of quid pro quo harassment by a school's employee; (2) any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; and (3) any instance of sexual assault (as defined in the Clery Act), including dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

Responsibility to respond:

- Colleges are responsible for responding to any incident happening on-campus or off-campus within the scope of any educational program or activity within the United States. Educational programs and activities include “locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house)” (United States Department of Education, 2020b, p. 2)
- Colleges must improve the accessibility of contacting and reporting to the Title IX Coordinator, not only for students and staff but also for prospective students, employees, parents, and all unions. Any person may make a report and reporting

can be made using any medium (phone, email, writing, in person) and at any time of day/time of the academic year.

- When a report is made, institutions must respond promptly and initiate a process swiftly. Supportive measures for survivors (referred to throughout the document as “complainants”) must be offered, and the institution must follow a process of investigation and adjudication that complies with the mandates of the May 2020 regulations.
- While affirming the complainant should generally have the right to decide if an investigation should ensue, the Title IX Coordinator may decide to pursue an investigation even against the wishes of the reporting complainant if deemed “not clearly unreasonable” to do so (United States Department of Education, 2020b, p.4). If the complaint does not meet the definition of harassment, or occurred outside the United States, the college must dismiss the complaint “for the purposes of Title IX” but may pursue adjudication of the complaint in other ways it deems appropriate (e.g. within its own code of conduct).
- The May 2020 regulations declare that a person who experienced sexual assault, or a third party, may file a report (but limits the role of parents in reporting); the report must be filed while the complainant is participating in or attempting to participate in an educational program, and must be signed by the complainant. The Title IX Coordinator, who must also sign the complaint, cannot be considered a complainant, and must be deemed “free of conflicts and bias.”
- Supportive measures, defined as “individualized services reasonably available that are nonpunitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment” must be provided to both parties by the institution. The May 2020 regulations pledge “not to second guess a school’s disciplinary decisions” but requires them to provide the previously described “supportive measures.”

Requirements related to grievance processes:

- Colleges, as with K-12 schools, must conduct their grievance process in a manner that ensures the following: that complainants are treated equitably by providing

remedies upon a finding of responsibility and treat respondents equitably by following their stated procedures closely. Remedies for a finding of responsibility must be designed to maintain the complainant's equitable access to education; remedies "need not avoid burdening the respondent" (United States Department of Education, 2020b, p.4). Additionally, Title IX coordinators are required to be free from conflicts of interest.

- Training of Title IX coordinators must include attention to the definitions stated in the May 2020 regulations; the scope of the school's education program or activity; how to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable; and, how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- Decision-makers in adjudication roles must receive training on technology used in the hearing process, on other "issues of relevance," (United States Department of Education, 2020b, p. 5) and on the rape shield law protections provided to complainants.
- Decision makers must assume that respondents are not responsible for the alleged conduct until the conclusion of the process when a decision of responsibility may be made; all materials used to train decision makers must be posted for public inspection, or make them available upon request.
- Processes must be conducted in reasonably prompt time frames, including periods allotted for appeal or extension of the process.
- Institutions may use either the clear and convincing evidence standard, or the preponderance of evidence standard, but must state their choice and use the same standard regardless of the identity of the parties involved (e.g., whether the case involved students student case, or a faculty/staff on student case).
- Appeal processes must be clearly described, along with supportive measures for both complainants and respondents.
- Legally recognized privileges must be honored in the process, and institutions are prohibited from seeking information protected by those privileges, unless the person holding such person has waived the process.

- Any provisions, rules, or practices aside from these required stipulations must apply equally to complainants and respondents.

Responsibilities related to investigations:

- Allegations made in a formal report must be provided in writing to both complainants and respondents.
- The burden of gathering evidence and providing proof falls on the institution. Equal opportunity “for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence” (United States Department of Education, 2020b, p.6) must be assured. Schools must not restrict all parties’ abilities to discuss allegations or gather evidence; gag orders are prohibited.
- Both parties may secure an advisor of their choice, who may be (but is not required to be) an attorney.
- All meetings, interviews, or hearings must be announced in writing to all parties; all parties must be given at least ten days to review and respond to the evidence. This includes the summative report (provided by the institution) made of all information obtained through the investigation.
- Schools must dismiss allegations not meeting the May 2020 regulations’ definitions of harassment; this does not preclude schools from using their own, non-Title-IX related conduct procedures, to address the behavior.
- Allegations may also be dismissed if: 1) the complainant withdraws from the process, 2) the respondent leaves the institution, or 3) “if specific circumstances prevent the school from gathering sufficient evidence to reach a determination” (United States Department of Education, 2020b, p. 6).
- Schools must notify all parties in the event of a dismissal of a case, and the reasons for it. Schools may consolidate formal complaints when the allegations arise from the same facts.
- Schools may not access a party’s medical, psychological, or other treatment records without the party’s voluntary, written permission.

Requirements related to Hearings:

- Postsecondary institutions are required to include a live hearing in their grievance process, in which each party's advisor is permitted to orally ask the other party and any witnesses all relevant questions and follow-up questions in person.
- The complainant(s) and respondent (s) may not personally ask questions of one another during the live hearing.
- At the request of either party, the entire live hearing (including cross-examination) can occur with the parties located in separate rooms using technology to communicate; institutions can conduct live hearings with parties in different locations, using technology, as needed.
- Only relevant cross-examination and other questions may be asked of a party or witness (as deemed by the officials overseeing the process).
- If either party does not have an advisor, the institution must provide, without fee or charge to that party, an advisor of the school's choice, such as an attorney to conduct cross examination on behalf of that party.
- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) "must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions" (United States Department of Education, 2020b, p.7).
- Schools must create a recording, or transcript, of any live hearing.

Rape Shield Protections:

- Complainants shall be protected from deeming irrelevant questions and evidence about a complainant's prior sexual behavior, unless such questions or evidence are included to "prove that someone other than the respondent committed the alleged misconduct or offered to prove consent" (Department of Education, 2020b, p.7).

Requirements for Standard of Evidence and Written Determinations:

- Each institution must state whether the standard of evidence to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard; the same standard must be used in all complaints of harassment, regardless of identity of the respondent.
- Adjudication officials must issue a written determination regarding responsibility with findings of fact, conclusions about whether the event occurred, the rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant; this written notice must be sent to all parties simultaneously, along with information about the process for an appeal.

Appeals notification:

- The May 2020 regulations state that a school must offer both parties an appeal from either a finding of responsibility or dismissal of a complaint on the following grounds: procedural irregularity; new evidence; evidence that Title IX personnel had a conflict of interest or bias. In all cases this information must represent information that would have an impact on the outcome.
- A school may offer an appeal equally to both parties on additional bases.

Options for Informal Resolution Processes:

- The May 2020 regulations allow institutions to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, by a well-trained facilitator, as long as both parties provide informed and voluntary consent.
- No person, whether a complainant or respondent, must be asked to provide a waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment.
- Institutions may not require parties to participate in an informal resolution process without their consent; institutions may not offer an informal resolution process unless a formal complaint is filed.

- All parties involved in a resolution of a complaint, prior to agreeing to a resolution, have the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.
- Schools must only use their formal grievance process to address employee-on-student harassment; schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Retaliation:

- The May 2020 regulations prohibit retaliation against any party: "Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation," (United States Department of Education, 2020b, p. 8).
- The identities of all complainants, witnesses, and respondents involved in a grievance case must be kept confidential (except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding).
- Prompt and equitable grievance procedures should be used for those who wish to report retaliation.
- "The exercise of rights protected under the First Amendment does not constitute retaliation," (United States Department of Education, 2020b, p. 8).
- Individuals making a materially false statement in the course of a Title IX grievance proceeding should be disciplined and this should not be considered 'retaliation.' Additionally, "A determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement," (United States Department of Education, 2020b, p. 9)

Appendix B: History of Title IX as a Remedy for Sexual Violence in Higher Education: An Overview

Title IX was used as a remedy for all forms of sex-based discrimination in education from its inception in 1972. Its use as a remedy for campus sexual violation has unfolded gradually across three decades, beginning with Congress passing the 1987 Civil Rights Restoration Act. This act affirmed that educational institutions were responsible for effective redress of any Title IX violation; once notified of a violation, failure to remedy would jeopardize an institution's federal educational funding (Graham, 1998). The legislation, primarily designed in response to Title IX violations related to equity in women's athletics, served to strengthen a plaintiff's ability to hold institutions accountable for the lack of redress.

While Title IX was frequently invoked to address equal access of opportunity on the playing field, and in internship and academic opportunities, the potential of using Title IX as a remedy for campus sexual violence was first discussed in 1991 by Terry Nicole Steinberg in the *Journal of College and University Law*. Drawn from her perspective as a survivor of campus rape, Steinberg effectively argued that rape must be considered an extreme form of sexual harassment, using case law precedent in which Title VII (a statue prohibiting sex-based discrimination in the workplace) was used to establish rape as a form of employment discrimination in *Lipsett V. University of Puerto Rico* (in the U.S. District Court of Puerto Rico). In this case, the plaintiff was subjected to repeated and increasingly severe forms of sexual harassment during her training as a medical resident; she was thus considered both an employee of the university and a student, and attorneys representing her thus invoked the use of Title IX. Commenting on this ruling, Steinberg noted that the court found that:

> In a Title IX case, an educational institution is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees if an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show he or she took appropriate steps to halt it. (Steinberg, 1991, p. 57)

These precedents hastened the use of Title IX as the federal law that underpinned educational institutions' obligation to address sexual harassment, when directed at students (Silbaugh, 2015).

During the Clinton Administration in 1997, the federal government established the role of Title IX in addressing the problem and the regulation of sexual harassment in educational institutions and established the Office of Civil Rights (OCR) under the Department of Education as the primary oversight body to address violations in compliance. The OCR released its first-ever statement on the nature of colleges' (and schools') obligation to respond to sexual harassment, and in turn, to protect the rights of students to equitably access educational programs (United States Department of Education Office for Civil Rights, 1997). Gradually, through this federal intervention, Title IX underpinned educational institutions' obligation to address sexual harassment, an obligation which henceforth was tested in several key lawsuits. (Silbaugh, 2015). In 1999, two landmark lawsuits[7]—*Gebser v. Lago Independent School District* in 1998, and *Davis v. Monroe County Board of Education* set precedent for institutional liability related to investigating and prevention of sexual harassment, particularly when a person of authority in a school knows of the violence and demonstrates "deliberate indifference" to both the violence and the effect it had on the students in question (Solocinski, 2000, p. 148). These cases revealed that left to their own devices, educational institutions would likely not respond to reported sexual harassment promptly and effectively without further specific guidance than given in the OCR statement. In 2001, the federal government (then under the administration of George W. Bush) posted a notice in the Federal Register requesting comments on proposed revisions; eleven comments representing 15 different organizations were entered in the register (Monroe, 2006). The Department of Education revised the policy guidance regarding schools and colleges' responsibility for addressing campus sexual violence (United States Department of Education Office for Civil Rights, 2001). Reflecting the fallout from *Gebser* and *Davis*, the guidance was clear for the first time: educational institutions that fail to meet the

[7] These cases critically differentiated between regulatory compliance (i.e., the ED may scold and discipline Title IV aid-recipient colleges) versus individual legal liability (i.e., a student harmed may sue and collect damages). The latter is significantly more difficult and has very onerous standards.

basic standards for investigation and redress[8] spelled out by the Department of Education risked losing federal funding. It is now understood to be weak in both intent and impact: It continued to be unclear about students' rights to appeal and lacked any specificity around appropriate timelines and procedures for redress; retaliation against a reporting student was also not expressly prohibited (Walker, 2010). In short, while telegraphing institutional responsibility, the 2001 guidelines failed to clarify the federal remedy for harassment occurring in educational spaces, effectively allowing it to continue unchecked.

A landmark case in 2002, in which plaintiff Tiffany Williams sued the University of Georgia (and won) for failing to act when notified of a rape she endured at the hands of star athlete Tony Cole, effectively served to break the secrecy culture around Division I athletic departments protection of athletes. It also shifted the burden for responding promptly, and adjudicating campus sexual violence effectively, and thus protecting students' civil rights in the process (Walker, 2010).

For the subsequent five years, schools and colleges began slowly to attend to the guidance, and the OCR began investigating reported violations with more regularity (Klusas, 2003). In 2006, renewed interest in the use of Title IX to address sexual violence in educational settings—likely a result of these investigations and the urgency regarding clarification of institutional responsibility to respond— resulted in the release of a memo further clarifying the roles and responsibilities of educational institution officials (Monroe, 2006). This, the first in a series of "Dear Colleague Letters" (DCLs) issued by the OCR, placed schools on clear notice. In the opening to the memo, Assistant Secretary for Civil Rights Stephanie Monroe stated:

> I am committed to the vigorous enforcement of Title IX and to ensuring equal opportunities in education for all students. In furtherance of that commitment, OCR plans to conduct compliance reviews related to sexual harassment in

[8] Basic standards refer to prompt response to complaints, confidential treatment of complaints, thorough and impartial investigation, and provision of equivalent resources for both complainant and respondent. It also includes attention to due process throughout.

> schools. OCR remains willing to support you in your voluntary efforts to comply with Title IX. (Monroe, 2006, para. 5)

Notably, in the 2006 DCL, Monroe resisted commenters' feedback imploring them to expand the definition of Title-IX-adjudicable harassment to include harassment based on sex-based stereotyping. The memo failed to create distinct definitions of harassment (from those used in the previously mentioned case law) for Title IX-related cases, owing to schools "special relationship to students" (Monroe, 2006, para. 2). Commenters expressed concern that protecting the identity of the complainant prevented due process for respondents and urged a more transparent approach. In 2008, the OCR issued a pamphlet entitled *Sexual Harassment: It's not Academic.* This pamphlet clarified the OCR's perspective that while some sexual harassment is criminal in nature, and thus may be reported to and investigated by law enforcement, the institution's responsibility to thoroughly investigate and respond to harassment remains. The pamphlet also noted that harassment directed at gay or lesbian students is equally the responsibility of schools, while affirming that Title IX "...does not address discrimination or other issues related to sexual orientation" (U.S. Department of Education Office for Civil Rights, 2008). The OCR's compliance reviews, as well as investigations of colleges and universities where students and others reported policy violations increased from 9 in 2009 to 102 in 2014, and in clear violation of its stated practice of limiting investigations to a six-month period, the average length of an OCR investigation, was 478 days (New, 2015).

The three decades of application of Title IX to remedy sexual harassment on college campuses varied widely and was often in part dependent on the priority accorded to it by whomever was President during each period (Tani, 2016). Arguably, the visibility of Title IX as a remedy for campus-based sexual harassment reached its apex during the Obama Administration. During this eight-year period, OCR issued three Dear Colleague Letters. Informed heavily by mounting evidence that the incidence of sexual harassment on college campuses was relatively unchanged in the previous three decades, OCR officials worked to address the remaining lack of clarity in college procedures (Wilson, 2017). The April 4, 2011 DCL (Ali, 2011) specifically clarified and

expanded the role of institutional leaders to respond to sexual harassment happening on or off college and university campuses (as opposed to previous such memoranda, which focused equally on K-12 schools). The letter required colleges and universities to apply the "preponderance of evidence" standard to judicial processes, as compared with the "clear and convincing"[9] standard in place in many college judicial processes. The DCL required that colleges appoint, train, and thus empower a specific Title IX coordinator to oversee processes and practices related to adjudication.

The 2011 DCL significantly changed the landscape of college and university adjudication, as colleges and universities scrambled to meet the requirements of the letter and to reform previously idiosyncratic and inequitable practices. The letter was opposed by groups such as the Foundation for Independent Rights in Education (FIRE), who described it as a significant federal overreach and claimed that it would create chilly conditions for academic freedom on campus (Greeley, 2012). Taking the commitment to ending campus sexual harassment further, the Obama administration convened a White House Task Force to Protect Students from Sexual Assault. In 2014, the Obama Administration launched the "It's On Us" Campaign, a set of initiatives designed to prevent campus sexual harassment as well as reinforce the need to respond to it (Somanader, 2014). The administration's final commentary regarding campus sexual violence was the release of the 2016 Dear Colleague Letter, which clarified the application of Title IX to the protection, support, safety, and flourishing of transgender students in educational institutions (Llhamon & Gupta, 2016). At the end of 2019, 502 investigations of colleges and universities for Title IX violations related to sexual harassment and violence on college campuses have been conducted; 197 have been resolved, while 305 remain open (*The Chronicle of Higher Education*, 2020).

In summary, the use of Title IX as a remedy for campus sexual harassment, moving steadily forward since the late 1980s, resulted in gradual and modest improvement in several arenas. Federal policy grounded in evidence, clearer and more comprehensive

[9] These phrases are used to differentiate two different thresholds of evidence. Preponderance of evidence refers to being more likely than not that it happened; clear and convincing, a higher standard of evidence, means little or no doubt that it happened.

definitions of what constitutes harm, and clarity of recommended procedural standards for schools, colleges, and universities are among these improvements. Researchers and activists in the movement to end sexual harassment on college campuses hailed these improvements particularly for students of all genders, particularly cisgender women and trans students (Cantalupo, 2012; Harris, 2019; Tani, 2016; Wooten & Mitchell, 2015). This of course depends on being properly and faithfully enacted by colleges and universities, increasing transparency, and promoting safer and more equitable environments. Others have argued against over-reliance on Title IX as a form of remedy (Harris & Linder, 2017; Yung, 2015). The election of Donald J. Trump in 2016 imposed a swift halt to this progress (Bedera, 2020; New, 2016). Without sufficient evidence substantiating the decision, Trump's Secretary of Education Betsy DeVos moved to rescind the 2011 and 2016 DCLs, inciting what many saw as a needless national referendum on the issue (Joyce, 2015).