BOARD OF VISITORS
ACADEMIC AND STUDENT AFFAIRS

Report on Student Housing

CURRENT OCCUPANCY

As of February 22, 2019, 2346 students are assigned to main campus residence halls, Lancer Park, Longwood Landings, and Longwood Village.

Category		Continuing Students	New First Time Freshman	New Transfer Students	Readmitted Students	Exchange Students	TOTAL RESIDENTS
Spring 2019 (2-22-19)	MC	1169	11	13	3	2	1198
	APTS	1121	0	14	10	3	1148
	TOTAL	**2290**	**11**	**27**	**13**	**5**	**2346**
Spring 2018 (2-22-18)	MC	1328	8	22	5	2	1365
	APTS	1106	0	13	6	1	1126
	TOTAL	**2434**	**8**	**35**	**11**	**3**	**2491**
Spring 2017 (2-22-17)	MC	1307	14	19	5	6	1351
	APTS	1199	0	23	10	2	1234
	TOTAL	**2506**	**14**	**42**	**15**	**8**	**2585**

STUDENT DISTRIBUTION:	**Spring 2019**	**Spring 2018**	**Spring 2017**
On-Campus Residents	1198	1365	1351
Longwood Landings	357	347	360
Lancer Park	597	572	638
Longwood Village	194	207	236
TOTAL	**2346**	**2491**	**2585**

CLASS DISTRIBUTION:	**Spring 2019**	**Spring 2018**	**Spring 2017**
Freshman	708	762	688
Sophomore	689	641	707
Junior	485	550	659
Senior	459	535	523
Exchange	5	3	8
TOTAL	**2346**	**2491**	**2585**

GENDER DISTRIBUTION:	**Spring 2019**	**Spring 2018**	**Spring 2017**
Females	1553	1661	1743
% Female	66.2%	66.7%	67.4%
Males	793	830	842
% Males	33.8%	33.3%	32.6%
TOTAL	**2346**	**2491**	**2585**

Summary:

- Currently, 2346 students are assigned to Longwood managed housing for spring 2019. The decrease from spring 2018 is due to somewhat smaller freshman and transfer classes. However, the occupancy percentage is 80%. During spring 2018, the occupancy percentage was 78%. Even though fewer students are housed in spring 2019 compared to spring 2018, the occupancy percentage is higher due to the decrease in housing spaces available due to the Frazer renovations.
- With sufficient space available, Longwood Village C bedroom will be single occupancy for 2019-2020. The overall standard occupancy for 2019-2020 will be 2822. This will decrease the standard occupancy by 104 bed spaces compared to this year.
- The Longwood-managed continuing student registration process, where students indicate whether they will live off-campus next year, will be concluded in late March.

Campus Security Operations

Funding

- Since 2012, Longwood campus security operations have seen **budget increases each year**, with more than $1.3 million in additional funding allocated.
- The **operational budget has seen an 83% increase since 2012**, an average annual increase of more than 10%.
- The Longwood REF has supplemented annual campus safety funding over the last four years by **more than $200,000**, secured a new police vehicle, and additional cameras and blue phones.

Staffing

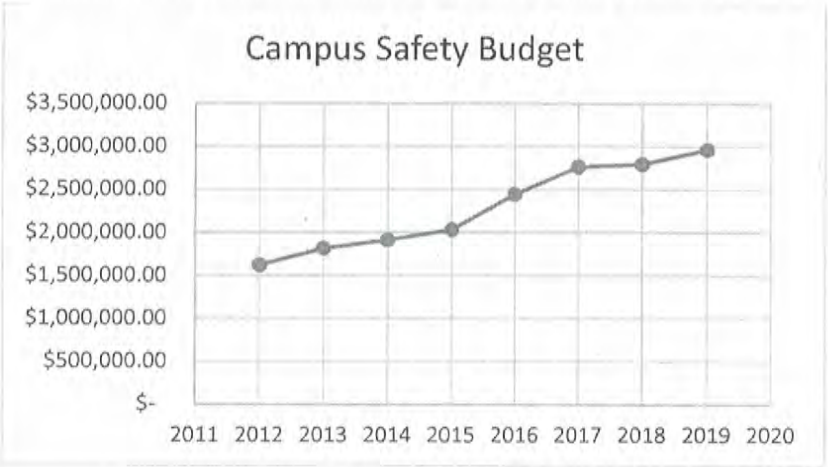
- Over the last ten years, LUPD has added **five new full-time officers**, to a total now of 19. That's **more than double the U.S. average** of 8 police officers for the same population.
- The number of **full-time officers per student has increased**. There is now one officer for every 273 students on campus, a 24% increase since 2015.

Physical Improvements

- LUPD operates **more than 300 security cameras**. In 2013, there were 0.
- LUPD has installed **more than 50 blue phones** on Longwood property. In 2013, there were 0.
- In the last five years, Longwood has spent **more than $331,000 on lighting improvements** to areas on campus, including High Street, Spruce Street, and several parking areas.
- In the last ten years, Longwood has added to campus: **emergency notification system with siren; additional counseling staff; increased card access to campus buildings**
- New construction over next two years will add **70 cameras and 3 blue light phones**
- Police are in the process of installing **3 additional blue phones at Longwood Village** to total 4, along with **21 security cameras**.

Operations

- LUPD offers **more than 20 programs**, including Code Red training and Self-Defense classes.
- LUPD has adopted **community policing practices**, focused on building connections with the community and utilizing pro-active, student-focused crime prevention strategies.



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Longwood University Foundation Board Report

Board of Visitors Meeting
March 23, 2019

- In FY2019 (ending 6/30/19), the Foundation will send $5 million in scholarships, program support, and annual gifts to Longwood University. $2.5 million of this is from endowed scholarships and programs. Another $2.5 is from annual and unrestricted gifts raised by Advancement in FY2018, along with account balances that had not been used in prior years. This does not include another $5 million in Real Estate cash the Foundation held for the Upchurch Student Center.

- The transition of check-writing from LUF to LU is completed. Today, LU departments and programs can view both University and Foundation money in LU's Banner accounting system. This move facilitates University budgeting and accountability and frees the Foundation to focus on maximizing tuition assistance for students.

- The Foundation Board met in February in the Soza Ballroom of the Upchurch University Center. We welcomed two new members, Greg Fawcett and Troy Littles, and continue to recruit energized individuals who want to make a difference for the students of Longwood University. Unfortunately, our very capable Vice President and President-Elect, Drew Hudson, resigned for personal reasons. He remains unflappably committed to Longwood and on our "short list" of people to include for guidance and as a resource on important initiatives.

- Working closely with Dean of Students, Larry Robertson and the Office of Institutional Advancement, the Board established a student emergency fund entitled "Longwood Cares – an Emergency Fund for Students". Following the example of other institutions, the fund will be made available to Dean Robertson and the school's Care Team involved with addressing student emergencies. Until now, financial requests have been funded with personal contributions made by faculty and staff. This fund is a way to directly help students, but appeals to donors, especially young grads, in that small gifts can make an immediate big difference.

- Working closely with the Office of Alumni and Career Services and the Hotel Weyanoke, the Board has created a special way to recognize alumni couples who met while in school and will be visiting the campus on Alumni Weekend. We are sponsoring "Longwood Love Stories" as a way to reconnect with alumni and incent them to visit the campus.

- Everyone on campus is invited to cocktails at the Catbird on the Saturday of Alumni Weekend, where 10% of drink proceeds will go to kick-off the new student emergency fund. This event is one more way to get alums to connect with the school, and, hopefully, become or continue as financial supporters.

- Spider reported a positive return of nearly 5% in January on securities traded in open markets, which is a significant portion (89%) of LUF total cash assets under management. This is welcome news following the negative fourth quarter of 2018, especially the disastrous December. The return helped to recover much of the value lost in the fourth quarter. Preliminarily, Spider was breakeven or slightly negative for the year 2018 due to year-to-date gains being wiped out, mostly in December.

- Special focus within the Foundation includes:
    - Finding more money for tuition assistance, with a special emphasis on attracting talented freshmen;
    - Educating Board members about the importance of scholarships in mitigating declining public support for higher education, and the impact of tuition assistance in providing students with the opportunity to attend and perform at Longwood University;
    - Implementing discipline and creativity in cash, investment, and financial management; and
    - Streamlining and automating operations.

Board of Visitors Meeting March 2019
Longwood University Real Estate Foundation

Curry and Frazer Residence Halls Renovations

The renovation of Frazer Residence Hall is progressing nicely. Weather conditions have made the site muddy and challenging, but it has not held up progress. The site regularly has over 100 workers there daily. The building is 95 percent enclosed with all precast panels in place and window installation in progress. The mechanical, electrical, and plumbing rough-in work is nearly complete and drywall installation has started. The project is currently within budget and on schedule.

Curry Hall will continue to be occupied during the 2018-19 academic year, and then will be vacated for renovations in May 2019. The renovated Frazer Hall will re-open for student occupancy in August 2019, and the total project will be completed in August 2020.

2018 Bond Financing

The REF completed the 2018 bond transaction. This allowed for the refinancing of the 2015 series bonds which represents Lancer Park, Longwood Village, Midtown Landings, Sharp Hall, and Register Hall.

- The par amount of the 2018 bonds is $128,425,000
- True interest cost is 4.76%
- Average life of the bonds is 24.42 years
- Final maturity is 1/1/55

This deal allowed REF to reduce interest costs by 100 basis points, reduced market and derivative risk, exposed Longwood and REF to the public market, and provided funds for working capital.

Property Acquisitions

REF acquired 605 Chambers Street to provide for parking expansion opportunities in the future.

Alumni Board Report

In November, The Office of Alumni and Career Services promoted the first ever Educators Appreciation Week on social media. Hundreds of educators engaged with the content across Facebook, Instagram, Twitter, and Linkedin. Alumni sent in photos, shared memories, and provided Longwood with updates on where they're living and teaching.

The week culminated with the "We Teach to Enlighten Summit" held on Saturday, November 17th. Fifty alumni educators registered, hosted roundtable discussions on various topics and participated in a panel similar to the one during the reunion in May where the panelists discussed how Longwood is trying to solve Virginia's teacher shortage.

Alumni Board members participated in the Angel Tree outreach project in November.
Gifts were purchased and donated to children in need who are currently being served by the InfantToddler Connection (ITC) of the Heartland.

The Alumni Awards dinner was held on March 15th. Information about each award recipient will be in the next Longwood Alumni Magazine publication. The Board met on Saturday morning. Speakers included President Reveley, SGA President Josh Darst, and Katherine Bulifant from the Institutional Advancement office. Our outreach project for this meeting was the Elwood Cabinet.

The Ring Ceremony was held in the Rotunda at 12:30 on Saturday, March 16th. A luncheon followed for juniors and seniors receiving rings and their families. There has been an increase in ring sales over the last year.

The Board is particularly excited about two signature on-campus alumni celebrations that are being planned for May and June.

The first is the "Senior Toast" on Friday, May 10. The vision is for new graduates to be welcomed into the alumni community through a new ceremony and celebration, led by Longwood alumni, that we believe will soon become another cherished tradition.

Registration for Alumni Weekend is slated to go live over the next couple of weeks. Alumni of all ages and class years are invited to attend this event, which will be held during the weekend of May 31st. The vision is to provide the opportunity for Longwood alumni to return to campus to connect with former classmates, the campus and town. The celebratory environment will be reminiscent of the last two years, including reunions of various shapes and sizes for affinity groups and class years/decades.

There will be regional after-work networking events coming up in Richmond and DC in March and April. The Richmond event will be on Friday, March 22nd, at the Circuit Bar Arcade in Scott's Addition.

Tammy Jones, President- Alumni Association

President W. Taylor Reveley IV & Board of Visitors—

The Student Government Association is excited about our many accomplishments so far this semester and for projects that we have coming up.

Our Town Hall series has been well attended, covering topics such as Campus Safety, Title IX and Sexual Misconduct, and Mental Health. I want to thank the University Administration for their willingness to work with students following the campus safety issues that occurred this semester. It was challenging for the panel that contributed but it was important to do so, for that I am appreciative.

The Greek community has begun to make a push for recruitment to occur in the fall for freshmen, (will update this statement when we see the resolution come to SGA, it is expected before the BOV meeting).

After founding Elwood's Cabinet, we were able to make this a registered student organization. This will help with the sustainability of this important project.

We are working on an initiative to provide free or low cost feminine hygiene products on campus.

We are also going to be setting up a compensation structure for executive members of SGA. This is being done for equity and inclusion of students who do not have the means to make the time commitment to SGA Executive Board due to work and other factors. (Will update to provide more accurate details prior to BOV).

We are looking forward to creating a strategic needs assessment for an intercultural center here on campus.

Josh Darst

President

Student Government Association

Report from the Faculty Representative to the Board of Visitors

I asked faculty to send stories about what they are doing, or what they have done to help our students succeed that goes beyond what is normally captured in "teaching, scholarship, and service." I was looking for acts of kindness, both large and small. Below you will find an edited sampling of the stories I received that represent the special aspects of Longwood that I have observed for decades.

The story is related to a LIFE STEM student who took a class with a faculty member. Along that semester, the student asked if she could do independent research with the faculty member the following semester and so, after a couple of meetings, they agreed on the topic, the logistics, etc. So far, this encounter appeared common to all faculty. However, here it is the human aspect of it. She is a Hispanic person who said that she did not want to forget her Spanish language and that she did not have anyone around to practice with. She asked if the faculty member would feel comfortable conducting all of the research with her in Spanish. Finances and time would not allow her to enroll in an upper level Spanish class or to engage in Spanish club to accomplish her goal. She is a first generation student who is the older of 2 siblings and her mother was sick. She had not travelled back to her country for many years. The student had lot to contend with, besides trying to be successful in her studies at school. The faculty member felt it was an honor to be able to do this and hopes this simple activity added a little bit of happiness to the student's life.

Another faculty member regularly meets with graduate students to assist them with their writing via WebEx. Because the graduate students usually have day jobs and families, meeting times are later in the evening. The 10:00-10:30 appointment has been one of his most popular times. He has gotten to know some of the students well this way, hearing about their work and their families as they work their way through their writing issues.

One faculty member has been revising her grading policy to allow students to turn work in late and/or resubmit assignments for full credit. She has been surprised that students do not take advantage of this flexibility and in nearly all cases do all of the work assigned. Many students who are experiencing external stressors or adversity are most likely to need these types of grading policies (e.g. they shut down when they get overwhelmed and don't submit work). Providing students with flexible due dates and opportunities to resubmit key assignments for full credit modeled what she was teaching about sharing power with students and acknowledging the uneven playing field that many students are experiencing. Last week she got the email below that really confirmed her observations that these practices are having a marked impact on student success. And contrary to popular opinion, they are teaching students to learn from their mistakes and take responsibility for their actions.

"I graduated from Longwood in 2014. I wanted to reach out and say thank you for your understanding while I was your student. I worked so hard over the 4 years I was there to get the highest GPA I could. Weeks before graduation, I finished my teacher work sample too quickly and got a B which significantly lowered my GPA. I would no longer graduate with honors because I lost focus so close to the end. I remember how upset I was when I realized what a

night at the bar with friends had cost me. You allowed me to resubmit it where I received an A and graduated Summa Cum Laude! I thank you all the time for allowing me to reach my goal and graduate with that honor. Without your understanding, I would still carry that disappointment and regret today. I worked so hard and nearly messed it all up right at the end. I decided it was time to actually reach out and thank you! Thank you for allowing me to keep my pride and that little line of text on my diploma that I wanted so much! It hangs in my home and I think of your kindness every time I see it. Thank you!!"

A faculty member had a student in a physics class. The student is a physics/dual-degree engineering majors. Although it was his first semester of college, he had earned an associate's degree through the community college through his high school. During the first few days of the semester, he seemed overwhelmed. He had recently found out that he could not complete the physics degree in just two years with having the associate's degree even though that was implied through his high school advising. She was also worried about his math skills as he seemed to struggle a bit during class. She reached out to him to see if she could help in some way. After some discussions with him, she found out that he was a first generation student and his parents were immigrants to this country. The only person in his family that is a US citizen is his younger sister. In the current political climate, this was weighting on his mind during his first week of college. Although his parents were supportive of him, they just did not have the knowledge to help him navigate some of the issues that arise in college. Since the first week of classes last fall, she has become an unofficial mentor to this student. She has helped him with items related to work study, financial aid, advising, studying for classes, connecting with campus resources, and even connected him to other students on campus that may have similar background (with the help of Alix Fink and the Honors College). He now feels very comfortable going to her for anything. He often studies in the conference room in the department and will ask her physics questions he is struggling with for class. I think he realized last semester, that the Longwood faculty want him to succeed and are willing to go above and beyond to see that happen. He actually feels so comfortable with the faculty that he also approaches other physics faculty and asks them questions. I'm not sure that he would have had such a successful first semester if they hadn't connected.

Report from the Staff Advisory Committee

The Staff Advisory Committee is in the process of planning spring semester events including the ice cream train. The committee is reworking the office recognition process which will roll out this semester.

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LONGWOOD UNIVERSITY

LOOKING TO OUR THIRD CENTURY
Strategic Plan 2014-2018

Our Mission: *Longwood University is an institution of higher learning dedicated to the development of citizen leaders who are prepared to make positive contributions to the common good of society. Building upon its strong foundation in the liberal arts and sciences, the University provides an environment in which exceptional teaching fosters student learning, scholarship, and achievement. As the only four-year public institution in south central Virginia, Longwood University serves as a catalyst for regional prosperity and advancement.*

Our Opportunity:

A Model for American Higher Education – few institutions in the country have Longwood's potential to make great progress; we have kinetic energy without the entrenched views prevalent at many institutions

Our Key Principles:

Academic Enterprise at the Heart – as one of the hundred oldest U.S. colleges and universities and Virginia's third oldest public university, we prize faculty engagement with students, our residential character, research and scholarship, and the role of a broader learning community beyond the classroom in the preparation of citizen leaders

Transforming Lives – we are at our best when helping to transform lives, by helping our students to truly realize their potential and by helping keep higher education affordable

Camaraderie – we enjoy a distinctive camaraderie, enriched by our many traditions and attention to diversity; a camaraderie that gives us a distinctive advantage when working through challenges and challenging times

Our Priorities:

Retention & Graduation – it is a moral imperative, and likewise catalytic from the standpoint of revenue and the spirit of the University; academic rigor is fundamentally part of the solution, as is affordability

Renewing General Education – we can build a powerful curriculum, building on the liberal arts and sciences for citizen leaders, our unique assets such as Hull Springs, the LCVA, and nearby Moton, and our technology

National Marketing – institution-wide endeavor and marketing collaboration will make one of the fifty oldest NCAA Division I schools as well-known as it should be

Foot Traffic by Alumni and Friends – philanthropy and public support for the University hinge on visits to campus and in-person engagement, since those who see our beautiful campus love Longwood

Prosperity of One of America's Oldest Two-College Communities – Farmville, Prince Edward, the surrounding region, H-SC, and Longwood stand together where the Civil War ended and Civil Rights began; we will thrive together

Strengthening the University Community – faculty and staff compensation must rise substantially; opportunities for professional development must increase; diversity must be fostered; all of which will enhance retention and hiring

Organization, Structuring, and Governance – we must give continually fresh attention to how Longwood is structured and to our policies, practices, data methodologies, and stewardship of resources

Measuring Progress:

Each part of the University will determine how best to assess progress against these priorities in its own area; here are metrics Longwood will measure and monitor as barometers that will reflect our institution-wide progress:

- Student Progress to Graduation
- Consensus on General Education, Implementation, and Assessment
- Alumni Annual Giving Rate
- Overall Attendance at University Events (Performances, Games, Exhibits, Conferences, Lectures, etc.)
- Total Population of the Local Community
- Compensation for Faculty and Staff
- Composite Financial Index (CFI)

LONGWOOD UNIVERSITY

1839-2014

LOOKING TO OUR THIRD CENTURY
Strategic Plan 2014-2018

– Dashboard of Principal Metrics –

Retention & Graduation -- It is a moral imperative, and likewise catalytic from the standpoint of revenue and the spirit of the University; academic rigor is fundamentally part of the solution, as is affordability

Principal Metric:
Student Progress to Graduation. Note: figures are those reported as of Aug. 15 each year

Undergraduate	Fall 2011	Fall 2012	Fall 2013	Fall 2014	Fall 2015	Fall 2016	Fall 2017	Fall 2018
Applications Prior Year	*4075*	*4167*	*4290*	*4576*	*5248*	*5847*	*6615*	*7026*
Freshmen	1055	1007	1091	1102	1053	951	1070	1053
Sophomores	760	840	809	854	872	799	728	770
Juniors	710	687	774	745	798	782	718	655
Seniors	704	668	635	734	711	740	742	669
5th year +	214	224	259	223	257	233	220	217
Transfers and Part-time	744	885	891	907	971	913	994	764

National Marketing -- Institution-wide endeavor and marketing collaboration will make one of the fifty oldest NCAA Division I schools as well known as it should be.

Principal Metric:
Alumni Annual Giving Participation

	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018
Alumni of Record	30,360	30,024	30,868	27,197*	27,197*	27,894	28,691	29,522
Alumni Donors	3,465	3,293	3,133	2,575*	2,976*	3,126	2,890	2,813
% Rate	11.41%	10.97%	10.15%	9.47%	10.94%	11.2%	10.07%	9.53%

**Beginning in FY14, per standard national practice, only undergraduate alumni are included in this category*

Foot Traffic by Alumni and Friends -- Philanthropy and public support for the University hinge on visits to campus and in-person engagement, since those who see our beautiful campus love Longwood.

Principal Metric:
Overall Attendance at University Events (M&W Basketball, LCVA, Conferences, Events, B&B Nights)

FY2011	FY2012	FY2013	FY2014	FY2015	FY2016	FY 2017	FY 2018
39,099	35,654	39,354	44,584	51,729	71,662	124,844*	138,126

**This number does not include foot traffic brought to campus by the Vice Presidential Debate*

Prosperity of One of America's Oldest Two-College Communities -- Farmville, Prince Edward, the surrounding region, H-SC, and Longwood stand together where the Civil War ended and Civil Rights began; we will thrive together.

Principal Metric:
Total Population of Buckingham, Charlotte, Cumberland, and Prince Edward Counties (by registered voters)

July 2011	July 2012	July 2013	July 2014	July 2015	July 2016	July 2017	July 2018
39,184	39,258	39,168	38,925	37,626	38,078	38,009	38,280

**As of September 1, 2018*

Strengthening the University Community – Faculty and staff compensation must rise substantially; opportunities for professional development must increase; diversity must be fostered; all of which will enhance retention and hiring.

Principal Metric:
Average Compensation for Faculty and Staff

	FY2011	FY2012	FY2013	FY2014	FY2015	FY2016	FY2017	FY2018
Classified Staff	$37,068	$38,975	$39,549	$40,969	$42,201	$42,572	$42,416	$43,517
AP Staff	$57,577	$58,673	$60,458	$62,433	$63,851	$65,084	$67,196	$66,792
Professor	$77,300	$77,300	$77,200	$80,000	$80,100	$82,057	$83,437	$85,710
Associate Professor	$63,000	$61,400	$64,300	$65,800	$67,100	$69,146	$69,921	$71,555
Assistant Professor	$53,800	$55,100	$57,100	$59,600	$59,200	$62,622	$65,056	$65,821
Instructor	$56,400	$57,200	$60,000	$55,700	$58,400	$65,634	$59,068	$60,625
All Faculty	$62,625	$62,750	$64,650	$65,275	$66,200	$69,472	$70,833	$72,318

Organization, Structuring, and Governance – We must give continually fresh attention to how Longwood is structured and to our policies, practices, data methodologies, and stewardship of resources.

Principal Metric:
Composite Financial Index (CFI)

FY2011	FY2012	FY2013	FY2014	FY2015	FY2016	FY2017	FY2018
4.19	-1.14	3.98	3.55	2.57	N/A*	N/A*	N/A*

**Beginning with FY2016, the Commonwealth's APA includes the notional full value of the VRS obligation to Longwood employees as a liability on the University's balance sheet, making CFI comparisons inconsistent.*

The Strategic Priority of Renewing General Education will be gauged as a matter of process until the appropriate juncture of implementation.

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SCHEV Summary of 2019 General Assembly Legislation on Higher Education

Bills that passed the 2019 General Assembly.

Boards of Visitors Tuition-Setting and Management Decisions

- HB 2173 (Miyares)/SB 1118 (Petersen) Public institutions of higher education; tuition and fee increases; public comment. Requires the governing board of each public institution of higher education to permit public comment on a proposed tuition increase at a meeting, as that term is defined in section 2.2-3701, of the governing board. Each governing board shall establish policies for such public comment, which may include reasonable time limitations.
- HB 2336 (Landes) Public institutions of higher education; executive officers; salaries. Requires the governing board of each public institution of higher education to report by September 1 on each year to the Chairmen of the House Committees on Appropriations and Education and the Senate Committees on Finance and Education and Health the salary by position of any executive officer of such institution that exceeds for the previous fiscal year the salary limit for the chief executive officer for such institution set forth in Part 4 of the general appropriation.
- HB 2337 (Landes) Governing boards of public institutions of higher education; tuition and mandatory fee rates. Requires the governing board of each public institution of higher education to provide and discuss certain information relating to the rate of undergraduate tuition and mandatory fees at meetings preceding the meeting at which it sets such rate, including the factors that it expects will influence such rate and a projected range of the increase in such rate. The bill requires the State Council of Higher Education to submit to the Governor and the Chairmen of the House Committee on Appropriations, the House Committee on Education, the Senate Committee on Education and Health, and the Senate Committee on Finance an annual report that contains an assessment of such information.
- HB 2620 (Miyares)/SB 1234 (DeSteph). Governing boards of public institutions of higher education; educational programs. Requires educational programs for the governing boards of public institutions of higher education to include presentations relating to Board members' primary duty to the citizens of the Commonwealth and on student debt trends.
- SB 1068 (Obenshain) Members of boards of visitors; employment waiting period. Prohibits a baccalaureate public institution of higher education from employing an individual appointed by the Governor to the board of visitors of such institution within two years of the expiration of such member's term. The prohibition does not apply to presidents.

Restructuring and Institutional Performance

- HB 2653 (Cox)/SB 1628 (Dunnavant) Public institutions of higher education; institutional partnership performance agreements; Innovative Internship Fund and Pilot Program. Permits any public institution of higher education to propose in conjunction with the six-year plan process, and the General Assembly to adopt by reference in the general appropriation act, an institutional partnership

performance agreement that advances the objectives of the Virginia Higher Education Opportunity Act of 2011 by aligning the strategies, activities, and investments of the institution, the Commonwealth, and any identified partners concerning (i) college access, affordability, cost predictability, and employment pathways for undergraduate Virginia students and (ii) strategic talent development and other high-priority economic initiatives of the Commonwealth. The bill contains provisions relating to mandatory and permissive contents of, the approval process for, and the legal effect of any such agreement.

Tech Talent Pipeline and Research

- HB 2490 (Rush)/SB 1617 (Ruff) Tech Talent Investment Program. Creates a grant program to assist qualified public institutions of higher education, defined in the bill, in reaching, by 2039, a goal of increasing, in the aggregate, the number of bachelor's and master's degrees awarded in computer science, computer engineering, and closely related fields by at least 25,000 degrees. To be eligible for an annual grant, a qualified institution is required to enter into a memorandum of understanding setting forth specific criteria for eligible degrees, eligible expenses, and degree production goals. The bill requires qualified institutions that are grant recipients to report annually on progress towards meeting such goals and that grants issued pursuant to the program are subject to appropriation.

Note that the following bills, related to consolidating various research programs under a new entity, did not pass, but will be the subject of further discussions among the various stakeholders.

HB 2550 (Jones) Research and development in the Commonwealth. Creates the Commonwealth of Virginia Research Consortium Authority (the Consortium) to oversee and support research and commercialization in the Commonwealth. The Consortium will be advised by an Investment Advisory Committee and a Research and Technology Advisory Committee. Existing grant, loan, and investment funds currently administered by the Innovation and Entrepreneurship Investment Authority and the Virginia Research Investment Committee would be consolidated under the Consortium, and the Consortium would be responsible for the Commonwealth Research and Technology Strategic Roadmap. The Consortium would also be responsible for allocating research-related funds to the Virginia Biosciences Health Research Consortium and the Commonwealth Center for Advanced Manufacturing. The bill repeals the existing Virginia Research Investment Committee.

SB 1651 (Howell) Research and development in the Commonwealth. Creates the Partnership for Innovation and Entrepreneurship Authority (the Partnership) to oversee and support research and commercialization in the Commonwealth. The Partnership will be advised by an Investment Advisory Committee, an Entrepreneurship Advisory Committee, and a Research Advisory Committee. Existing grant, loan, and investment funds currently administered by the Innovation and Entrepreneurship Investment Authority and the Virginia Research Investment Committee would be consolidated under the Partnership. The bill repeals the existing Virginia Research Investment Committee.

	Item	Description	Notes
1.	Innovative Internship Fund and Program (HB 2653/SB 1628)	The program is designed to "expand paid or credit-bearing student internship and other work-based learning opportunities in collaboration with Virginia employers." It includes both institutional grants and a statewide initiative.	SCHEV is designated as administrator of the fund. $500,000 is included in FY 2020 for the fund.
2.	Financial aid study and report (Item 141)	In consultation with others, SCHEV shall review financial aid funding models and awarding practices.	Report and recommendations due November 1, 2019.
3.	Graduate outcomes survey (Item 143)	SCHEV received $750,000 in one-time funding for a survey of graduates of public institutions of higher education.	This is a SCHEV priority initiative.
4.	Education summit (Item 143)	SCHEV received $75,000 to conduct an education summit for legislators to include policy experts and educational leaders.	No date is specified, but previous "education summits" have occurred in September and October.
5.	Grow Your Own Teacher scholarship program (Item 141)	The program will provide scholarships to low-income high school graduates who are committed to attend a baccalaureate institution of higher education in the Commonwealth and to subsequently teach in high-need public schools in the school divisions in which they graduated from high school.	SCHEV, in collaboration with VDOE, shall administer the program. $240,000 is included in FY 2020 for the program.
6.	Higher education finance plan (Item 143)	SCHEV is directed to "develop a statewide higher education finance plan" and provide "strategies to higher education outcomes."	This assignment is consistent with existing work with Lumina Foundation to align long-term finance planning with The Virginia Plan for Higher Education.

	Item	Description	Notes
7.	Tuition and fee transparency and predictability plan (Item 143)	SCHEV is directed to develop instructions for institutions to use in submitting plans.	The instructions will be included in the six-year plan process, which will take place this year.
8.	Performance pilot plan ((HB 2490/SB 1617)	As part of the six-year plan process, institutions are authorized to submit "one innovative proposal, with clearly defined performance measures, including any request for necessary authority or support from the Commonwealth, for a performance pilot."	As a "designated reviewer," SCHEV director will be involved in assessing the proposed plans. Also, while not stated in the legislation, presumably SCHEV would be the entity that monitors the agreements and reports on their progress.
9.	Tech Talent Investment Fund (HB 2490/SB 1617)	The purpose of the program is to "support the efforts of qualified institutions to increase by fiscal year 2039 the number of new eligible degrees by at least 25,000 more degrees..."	The SCHEV director is one of the "designated reviewers" who will establish memoranda of understanding with institutions to advance the purpose of the program.
10.	Tuition moderation fund (Item 253.50)	Allocations in the fund ($52,459,000) shall be granted to public colleges and universities in fiscal year 2020 so long as they maintain tuition and mandatory Educational and General (E & G) fee charges for in-state undergraduate students to fiscal year 2019 levels. Another $5 million is designated specifically for the VCCS.	By July 2019, SCHEV shall "certify" which institutions have met the conditions of the fund.
11.	Public comment (HB 2337)	Language directs institutions to provide an opportunity for the public to comment to the governing board on proposed tuition increases.	By August 1 of each year, SCHEV shall provide a report on the public comment and on any deviation in the

	Item	Description	Notes
			tuition increase from the range projected by the institution.
12.	Board of visitors' orientation (HB 2620/SB 1234)	As part of its orientation for new board members, SCHEV shall include information on student debt and on a board member's "primary duty to the citizens of the Commonwealth."	The orientation takes place in October.
13.	Grants for foster youth (HB 2350)	Legislation expands the program to include baccalaureate-level institutions. It previously applied only to the VCCS.	The State Board for Community Colleges and SCHEV shall develop regulations regarding the program.
14.	Certification of private institutions (SB 1461)	Legislative changes to the section of Code dealing with certification of private institutions.	SCHEV may need to modify its regulations to account for this change.
15.	Financial aid award letters (SB 1593)	Legislation requires public and private institutions of higher education to "meet the requirements and best practices established by the Council in its Financial Aid Award Letters Policies and Guidance."	SCHEV will have to monitor institutional financial aid award letters to ensure that they meet the requirements.
16.	Virginia Center for School and Campus Safety (SB 1591)	Legislation directs the Virginia Center for School and Campus Safety to develop guidelines for the sharing of information regarding a student whose behavior may pose a threat to the safety of a school, institution or community.	A representative of SCHEV shall serve on a work group.

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President Trump vows to issue executive order barring research funds to colleges that don't support free speech

Submitted by Scott Jaschik on March 4, 2019 - 3:00am

President Trump vowed Saturday to "soon" issue an executive order that would deny federal research funds to colleges and universities that do not support free speech.

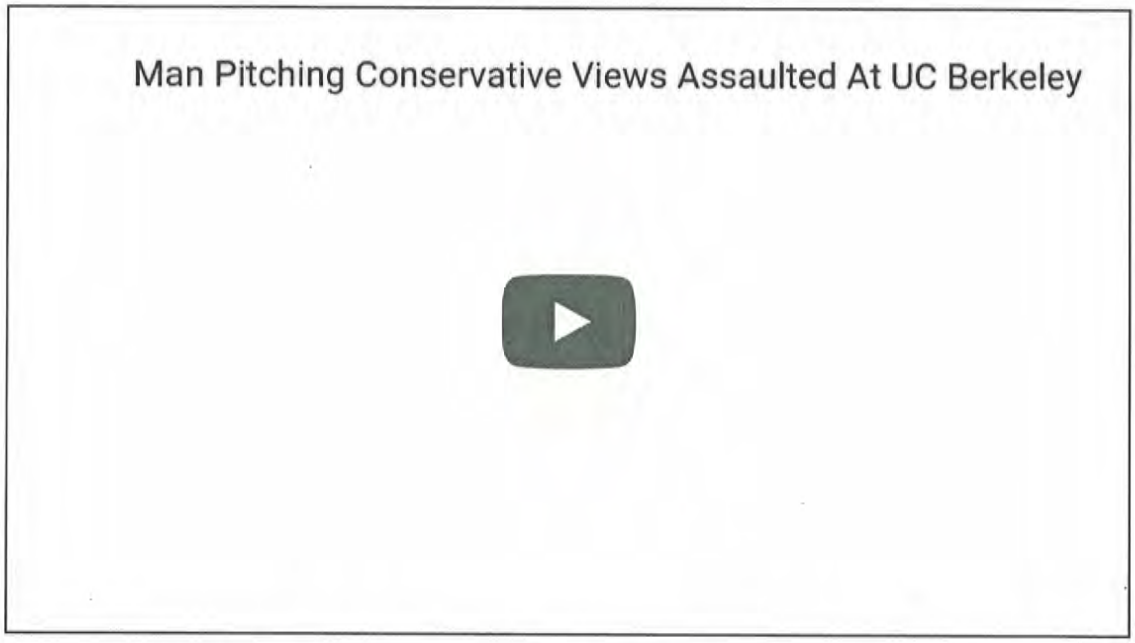
"If they want our dollars and we give them by the billions, they've got to allow people to speak," said Trump in a speech at the Conservative Political Action Conference.

He did not describe how the executive order would work, or who would judge whether a college or university was not protecting free speech.

During his speech, President Trump brought on stage and praised Hayden Williams, who was punched last week when he was at the University of California, Berkeley, seeking support for the president and conservative causes and criticizing Jussie Smollett, the actor who is facing charges of false reporting to the police in a hate crime he claimed to have experienced.

Of Williams, President Trump said that he should sue Berkeley "and maybe sue the state." To loud applause, Trump said, "He took a hard punch in the face for all of us. We can never allow that to happen." And he added that after Williams sues Berkeley, "he's going to be a very wealthy man." The crowd at the meeting chanted "USA" as Trump made these statements.

Video has widely circulated showing Williams being punched.



Trump did not note that Berkeley arrested a man [1], Zachary Greenberg, for assaulting Williams. Neither Williams nor Greenberg are students at Berkeley. The university had permitted Williams to be on campus expressing his views.

Late Saturday [2], Berkeley released a new summary of what had happened, reiterating that the university had in this incident not wavered in its commitment to free speech or its willingness to take action in response to the attack on Williams. The statement said that events at the university have been "willfully distorted and inaccurately reported."

This is not the first time President Trump has used an incident at Berkeley to suggest that federal research dollars should be cut off over alleged denial of free speech rights.

In 2017, violent protesters (believed by university officials to be from off campus) set fires and damaged property [3] at the university just before a scheduled appearance by Milo Yiannopoulos. President Trump tweeted:

Donald J. Trump

What he didn't note at that time was that Berkeley officials had allowed Yiannopoulos to speak, calling off the event only amid the violence. Berkeley had defended his right to appear on campus (and he has appeared since), citing principles of free speech even as some on campus said he should be kept away because of views many find offensive.

Terry Hartle, senior vice president for government and public affairs at the American Council on Education, in an interview shortly after President Trump's Saturday speech, called the proposed executive order "a solution in search of a problem." He said that is because "free speech and academic freedom are core values of research universities."

While "controversies do arise," Hartle said that the norm is for universities to err on the side of promoting free speech. He asked how some federal agency in the future would try to enforce the executive order by determining whether a college had done enough to promote free speech. He predicted that an executive order would lead people to try to create free speech incidents just to stir up controversy.

And Hartle said that federal law gives religious institutions broad discretion about campus activities. "Would religious institutions be required to have speakers whose views were antithetical to the college?" Hartle asked. "Would Yeshiva University be required to host a Holocaust denier?"

Hartle also noted the lack of consistency of the Trump administration about free speech.

"As always in the current environment, irony does come into play. This is an administration that stifles the views of its own research scientists if they are counter to the political views of the administration, such as on climate change. And the president vigorously attacks people like Colin Kaepernick who exercise their free speech rights."

Peter McPherson, president of the Association of Public and Land-grant Universities, said via email, "Public research universities have a First Amendment constitutional obligation to protect free speech. It is an obligation they take very seriously and work hard to protect. Our campuses serve as important forums for the debate of diverse ideas. An executive order is unnecessary, as public research universities are already bound by the First Amendment, which they deeply respect and honor. It is core to their academic mission."

The Trump Administration Record

Before he was president, Trump called for the National Endowment for the Arts to stop supporting, and for museums to stop displaying [5] art he considers to be "gross, degenerate stuff." And while he has been president, his staff has taken actions -- such as blocking critics from the Trump Twitter feed -- that have led to the administration being sued over First Amendment concerns [6].

Trump's first attorney general, Jeff Sessions, gave several speeches denouncing the squelching of speech on college campuses. But Sessions was silent about (and declined to answer questions on) [7] squelching that was done at the behest of Republican politicians, such as when the University of Kansas took down an artwork featuring the American flag after GOP leaders in the state demanded that it come down.

The Trump administration's officials talk regularly about Berkeley. The administration has been silent as Republican legislators in Tennessee have for years tried to kill a student-organized "Sex Week" at the University of Tennessee at Knoxville [8] -- an event that does not use state funds.

Views of Groups That Focus on Free Expression

Among organizations that promote free expression on campus, the response to President Trump's Saturday speech was tepid.

The Foundation for Individual Rights in Education released a statement [9] that said in part, "While we are glad that this important national issue has the president's attention, we do not currently have any more information on the details of the executive order. We are looking forward to learning more about this initiative in the coming days."

Jonathan Friedman, project director for campus free speech at PEN America, said via email, "We need to see the text. On the surface the government reaffirming the importance of free speech on campus is appropriate and essential, particularly at a time of serious threats to open discourse. In practice, new and proposed measures ostensibly intended to protect speech can yield unintended negative consequences for speech, which we've documented in our work. While we at PEN America reserve judgment until a draft of the order is released, we believe that any government action on this issue should be approached in a thoughtful, nonpartisan manner, upholding the universal principles of free speech and academic freedom."

Debra Mashek, executive director of Heterodox Academy, said via email that "we need diversity and dialogue, not decrees."

Added Mashek, "Heterodox Academy encourages individual colleges and universities to advance common-sense policies and practices that promote teaching, learning and discovery. Higher ed would not benefit from a blunt, top-down, partisan decree that politicizes the academy's core values of open inquiry and academic freedom. Governments cannot legislate campus cultures. In order to create classrooms and campuses that welcome diverse people with diverse viewpoints and that equip learners with the habits of heart and mind to engage that diversity in open inquiry and constructive disagreement, colleges and universities must harness their own values, histories and capacities."

Could Solomon Amendment Be a Model?

Many in higher education questioned how the executive order might work. Two proponents of the measure, however, say that the Solomon Amendment provides a model.

In an article [10] in *National Affairs* last year, Frederick M. Hess and Grant Addison, both of the American Enterprise Institute, called for federal funds to be cut off to American colleges that do not support free expression on campus. They said that the precedent for this could be the Solomon Amendment, the 1996 law that barred federal funds from going to colleges and universities that did not permit military recruiting or Reserve Officer Training Corps programs on campus. The law came at a time when some colleges were barring the military from campus, citing its policies (since lifted) of discriminating against gay people. The U.S. Supreme Court in 2006 upheld the constitutionality of the amendment [11], which was challenged by law schools.

While there was no dispute that some colleges barred the military, in the case of free expression, some institutions (such as Berkeley) denounced by President Trump can point to evidence that they in fact support free expression.

"New federal guidance in this area has a chance to make free inquiry and free speech relevant to the broader scientific research community in a fashion that it has not been previously," says the article. "The slumbering, silent middle on campus may awaken when accomplished researchers bringing in millions in 'indirect' costs suddenly recognize that the ideological crusades of their colleagues may imperil their laboratories and research projects. Campus leaders who have found it easy to virtue signal by indulging students and faculty demanding constraints on speech will now have a fairer fight on their hands, and they will need to be worried about their biochemistry and engineering faculty departing for institutions eligible for federal funds."

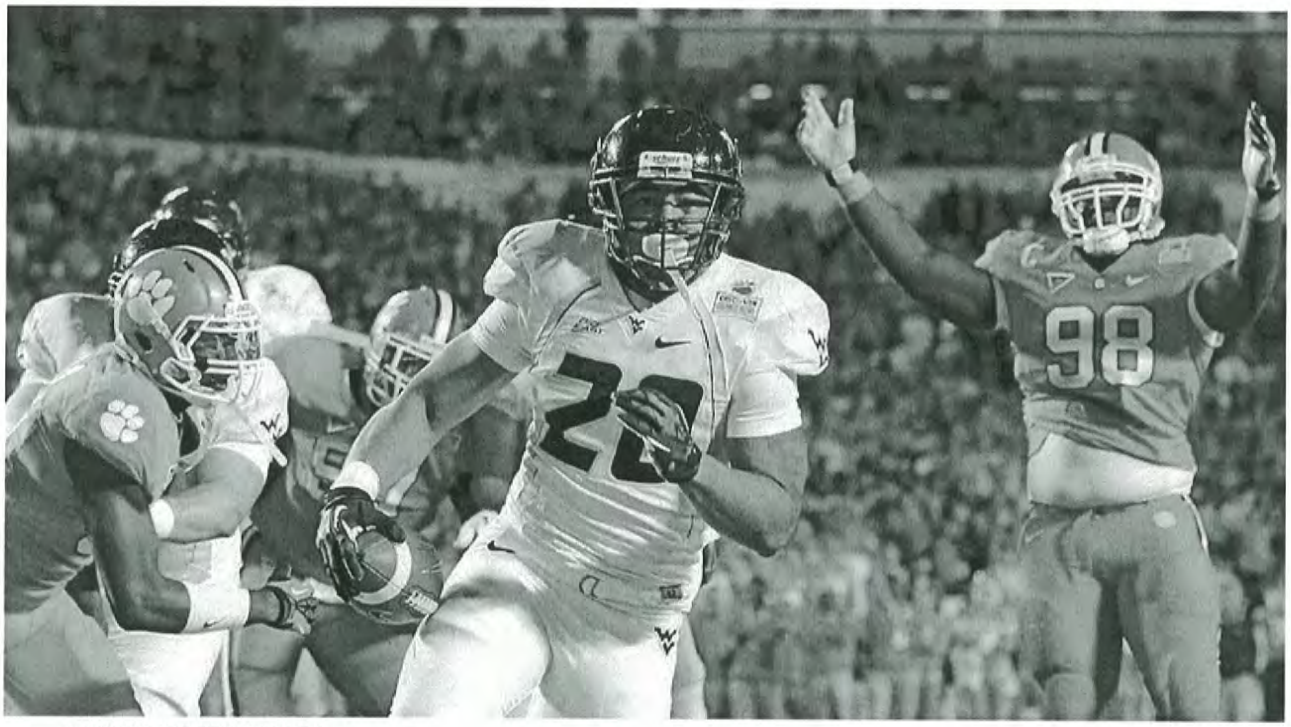
Source URL: https://www.insidehighered.com/news/2019/03/04/president-trump-vows-issue-executive-order-barring-research-funds-colleges-dont

Links

[1] https://news.berkeley.edu/2019/03/01/suspect-named-in-sproul-plaza-assault/
[2] https://news.berkeley.edu/2019/03/02/statement-reaffirming-campuss-commitment-to-free-speech/
[3] https://www.insidehighered.com/news/2017/02/02/violent-protests-visiting-mob-lead-berkeley-cancel-speech-milo-yiannopoulos
[4] https://twitter.com/realDonaldTrump/status/827112633224544256?ref_src=twsrc%5Etfw
[5] https://www.nydailynews.com/archives/news/no-funds-obscene-art-trump-sez-article-1.853405
[6] https://knightcolumbia.org/content/knight-institute-v-trump-lawsuit-challenging-president-trumps-blocking-critics-twitter
[7] https://www.insidehighered.com/news/2018/07/25/attorney-general-again-denounces-campuses-free-expression-what-about-kansas
[8] https://www.insidehighered.com/news/2019/02/22/moves-kill-ut-knoxvilles-sex-week-met-questions
[9] https://www.thefire.org/statement-on-president-donald-trumps-campus-free-speech-announcement-at-cpac/
[10] https://www.nationalaffairs.com/publications/detail/restoring-free-inquiry-on-campus
[11] https://www.scotusblog.com/2006/03/court-upholds-solomon-amendment/

COLLEGE FOOTBALL

Why the NCAA Lost Its Latest Landmark Case in the Battle Over What Schools Can Offer Athletes



J. MERIC/GETTY IMAGES

QUICKLY

- U.S. District Judge Claudia Wilken has declared that the NCAA and its 11 major conferences are violating antitrust law by capping the value of athletic scholarships.

By **MICHAEL MCCANN** March 08, 2019

In a 104-page judicial ruling poised to reshape big-time college sports, U.S. District Judge Claudia Wilken has declared that the NCAA and its 11 major conferences are violating antitrust law by capping the value of athletic scholarships. Friday's ruling follows a 10-day bench trial that took place last September and featured former West Virginia running back Shawne Alston and former Cal center Justine Hartman leading a class action on behalf of former men's and women's college players.

Judge Wilken has effectively ordered the NCAA to revise its grant-in-aid rules so that they both permit member schools to compete more fully and enable conferences to establish their own policies for scholarships. Accordingly, schools that already compete for recruits in myriad ways—spending many millions of dollars to fund top coaches' salaries, constructing new stadiums, building state-of-the-art training facilities—will be able to compete in one additional way: by offering athletic scholarships of higher value.

In reaching her conclusion, Judge Wilken highlighted the "great disparity" between the NCAA's "extraordinary revenue" generated by DI basketball and FBS football and "the modest benefits" that college athletes obtain for playing sports.

Should Judge Wilken's ruling be upheld on appeal, this new framework will mark a sharp departure from how recruiting has worked for years. Grant-in-aid rules currently prohibit universities from offering athletic scholarships that are worth more than tuition, fees, room, board, course-related books and other expenses up to the value of the full cost of attendance. Pursuant to Judge Wilken's order, recruits will soon be able to receive athletic scholarship offers that exceed a "full ride" to college. To the extent schools elect to offer more than a full ride, the excess amount can reflect additional compensation for "non-cash education-related benefits and academic awards."

To that end, Judge Wilken has permanently restrained the NCAA from agreeing to fix or limit education benefits related to "computers, science equipment, musical instruments and other tangible items not included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies." This list is neither exhaustive nor, as Judge Wilken stresses, permanent: it can be amended with court approval. Judge Wilken also permits the NCAA to define "related to education" though any such definition must be in accordance with her antitrust analysis.

In addition, the NCAA will be barred from limiting "post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; tutoring; expenses related to studying abroad that are not included in the cost of attendance calculation; and paid post-eligibility internships." However, the NCAA can restrict academic or graduation awards and related incentives that are paid in cash or a cash-equivalent.

FOUR IMPORTANT CAVEATS ABOUT THE VICTORY FOR THE PLAYERS

While groundbreaking and disruptive, Judge Wilken's ruling does not compel any immediate change, and its eventual effects might prove less impactful than some wish. To that end, there are at least four caveats to consider.

First, Judge Wilken has given the NCAA 90 days to comply with her order. Excluding weekends and holidays, 90 days would run the calendar to July 16, 2019. However, this date could be pushed back—potentially for months or even years—if the NCAA appeals, which it most certainly will, as the 90 days will be stayed (postponed). The delay is for pragmatic reasons: to ensure that the NCAA and its members can review the order and determine how to best comply. The delay also means the NCAA can continue to enforce current grant-in-aid rules through at least the current recruiting season.

Second, Judge Wilken has not authorized a "free market" for athletic scholarships. Instead, she envisions a more dynamic, but nonetheless restrained, market where athletic scholarship amounts must remain, as Judge Wilken and other judges have put it, tethered to academics (a point explored in an accompanying SI legal story on the ruling's impact). Judge Wilken's ruling also indicates that conferences will enjoy discretion in determining appropriate restrictions on scholarship values. This suggests that while major conferences might permit their member schools to spend well above the grant-in-aid, other leagues could gravitate towards less generous limitations.

Third, while Judge Wilken's order will enable the approximately 350 colleges that make up NCAA Division I to offer recruits more than a full ride, none will be compelled to do so. This is a crucial point for schools and their compliance offices. Judge Wilken's order is directed toward how schools conspire with one another, not how each school reaches its individual decision. To that point, while the ruling prevents colleges from continuing to collude through NCAA grant-in-aid rules, each college, on its own, could land in the same place by deciding to not offer a scholarship that exceeds the grant-in-aid. Stated differently, it's not the grant-in-aid amount that is illegal, but that competing schools and conferences join hands through the NCAA in agreeing to follow it. Considering that only about 20 D-I schools report a profit on athletics and most athletic scholarships are partial rather than full, many if not most colleges will likely decline to offer athletic scholarships that exceed the current levels.

Fourth, the NCAA and its conferences will appeal Judge Wilken's order to the U.S. Court of Appeals for the Ninth Circuit. This is the same appellate court that upheld Judge Wilken's order in Ed O'Bannon's case against the NCAA but modified the accompanying remedy. I break down the appeal prospects in an accompanying story on this ruling.

THE KEY ANTITRUST ISSUE: SCHOOLS AGREEING TO CAP ATHLETIC SCHOLARSHIPS IS ANTICOMPETITIVE AND UNLAWFUL

The central reason for Judge Wilken's decision in the case (formally titled *In Re: NCAA Grant-in-Aid Cap Antitrust Litigation*) is her determination that NCAA grant-in-aid rules constitute an unreasonable restraint on trade. The case turned on Judge Wilken's application of Section 1 of the Sherman Act. Generally speaking, Section 1 forbids competing businesses from conspiring to restrain competition in ways that cause more economic harm than good. While colleges might not seem like competing businesses given their educational missions, they are very much economic competitors. They compete over students, athletes, professors, administrators, staff, media attention, tuition dollars, donations, grants and many other finite resources.

Here, Judge Wilken agreed with the players' attorneys, who include Jeffrey Kessler and David Greenspan from Winston and Strawn and Steve Berman from Hagens, Berman, Sobol, Shapiro. She reasoned that grant-in-aid rules amount to illegal price-fixing. The relevant competitors—the NCAA and its member schools and conferences—conspired to fix the maximum dollar amount allowable under a grant-in-aid. On their own, NCAA member schools can't disregard grant-in-aid rules. These rules are mandatory. Should a school breach them, the school would accept the risk of expulsion from the NCAA—an untenable position for virtually every major university.

This means that even if schools wish to offer a coveted recruit more than the grant-in-aid, they can't within the boundaries of NCAA rules. As a result, they and their rivals can only offer the same basic package of tuition, fees, room, board, course-related books and other expenses up to the value of the full cost of attendance.

By explicitly preventing competition, then, NCAA rules run afoul of antitrust law.

HOW COMPETITION INCREASES COMPENSATION

The antitrust dynamic described above can be illustrated using one of this year's best incoming players: Nolan Smith, a defensive end at IMG Academy in Bradenton, Fla. Over the last year, Smith was ranked as one of the top three recruits in the class of 2019 by every major outlet. Five elite college football programs—Alabama, Clemson, Georgia, Clemson and Tennessee—all aggressively recruited him. During the early signing period in December, Smith officially signed with Georgia, and he will play for the Bulldogs on a full scholarship this fall.

This description of Smith might not seem problematic. In fact, it seems ordinary for a recruit of Smith's caliber. Yet it nonetheless contains an antitrust problem. Smith was denied the full benefits of the competition for his services. If Smith were a coach or a professor, the multiple schools competing for him could have offered him more money as an inducement to select their school. That doesn't mean the school would pay Smith a salary. NCAA rules forbid "paying" college athletes as employees, but a similar "compensatory" outcome could be achieved through a scholarship offer that reflects the market competition for Smith. If Alabama offered $100,000 per year in a scholarship, Clemson could offer $150,000 and then Tennessee could top them both at $200,000 per year—and so on.

You might doubt that schools would enter into bidding wars for elite recruits, but those same schools routinely engage in de facto bidding wars to impress recruits enough to sign. Examples of this trend are readily available in the competition for elite coaches who excel at attracting recruits to their programs. There is a reason Nick Saban reportedly earned $11.7 million last season as Alabama's coach. He wins games and lands the top recruits, who want to play for him. Meanwhile, *USA Today*'s NCAA salary database shows that more than 20 college football *assistant* coaches earn at least $1 million a year.

Or consider facilities. National champion Clemson recently opened a new $55 million football facility. Among other amenities designed to appeal to college-age athletes, the facility contains a laser tag room, a bowling alley, a movie theater and a lounge to play video games. Georgia, for its part, has made available a $30.2 million indoor practice facility and is eyeing additional facility enhancements for its football team.

There is nothing illegal about schools paying coaches millions of dollars or spending millions of dollars to enhance facilities. Yet those transactions played exactly into the plaintiffs' legal arguments: Schools may claim to lose money on sports, and they may claim to cherish a clear

demarcation between professional and amateur sports, but they keep finding ways to spend enormous amounts of money on everything around the players.

It's also not illogical for schools to compete over elite recruits. These recruits help their teams win games, which translates into improved TV ratings, increased gate receipts and higher merchandise sales. To illustrate, take a look at Adam Zagoria's recent empirical findings on "The Zion Effect", which refers to effect of Duke freshman sensation Zion Williamson's impact on Duke men's basketball ticket sales and prices. Williamson is one of the most marketable college athletes in recent memory. His recent knee injury caused by a defective Nike sneaker became a national controversy with potential legal implications. Yet the most Williamson can legally receive from Duke is capped at the grant-in-aid.

A winning team is valuable to a university's admissions office, which often aims to recruit top high school students in part by highlighting the college's successful—and entertaining—athletics program. Likewise, a winning team can also help a university's foundation office convince alumni to donate to their alma mater. As I explored in a column last year on No. 16-seed UMBC's upset of No. 1-seed Virginia in the NCAA tournament, colleges that obtain national exposure through sports success can experience massive admissions and fundraising gains. This was famously seen in 1984 at Boston College, which attracted many more applications from high school students and thus became more selective in the aftermath of the football team's stunning victory over defending national champion Miami, a phenomenon known as "The Flutie Effect."

While universities regard elite recruits as potential students, these students are assets to a university in ways that other students are not.

THE LIMITATIONS OF THE NCAA'S DEFENSES

The plaintiffs had the advantage of precedent. In 2014, Judge Wilken ruled in favor of former UCLA star Ed O'Bannon in his antitrust lawsuit against the NCAA over its use of players' names, images and likenesses. O'Bannon successfully argued that the NCAA and its members had illegally applied amateurism rules to misappropriate players' names, images and likenesses without those players' consent or compensation. The NCAA then unlawfully licensed these properties for inclusion in video games, classic broadcasts, player jerseys and other products. At the time, Judge Wilken signaled clear displeasure with NCAA member institutions joining together to restrain competition in ways that adversely impacted players. While players' identity

rights and scholarships are different topics, that same displeasure was apparent in Judge Wilken's order in the Grant-in-Aid Cap ruling.

The NCAA was also hampered by an inability to convince Judge Wilken that grant-in-aid rules promote competition or that the grant-in-aid cap is a sensible boundary between amateurism and pro sports. The NCAA argued that athletic scholarship restrictions enhance college sports. For instance, the NCAA claimed these restrictions attracted fans to college sports. Its expert witnesses asserted these fans would become less interested in college sports if the players were essentially pro athletes, and those witnesses cited survey data to corroborate that point.

The NCAA also maintained that competition restrictions help colleges integrate academics and athletics in that they purportedly help students "retain a focus on academics." This integration is also designed, NCAA attorneys argued, to prevent measures that would "further distinguish" student-athletes "from their peers and create a wedge between student-athletes and the broader school community and also among different student-athletes."

In response, the players' attorneys asserted that the NCAA lacked sufficient empirical evidence to support these assertions. Further, sports economist Daniel Rascher of the University of San Francisco offered testimony that debunked some of the NCAA's arguable fearmongering. He noted that as college athletes have been able to receive more financial benefits post *–O'Bannon*—including annual stipends of roughly $3,000 to $6,000 to reflect the full cost of attendance; unlimited snacks and meals; and ability to borrow against future earnings to purchase loss-of-value insurance—college sports revenues have increased. In other words, athletes receiving more hasn't led to diminished fan interest or consumer investment in college sports. Just the opposite, revenues continue to climb, which suggests that fans and consumers will not be "turned off" by Judge Wilken's ruling.

Indeed, Judge Wilken decisively endorsed this reasoning in her opinion. "Restricting non-cash education-related benefits and academic awards that can be provided on top of a grant-in-aid has not," the judge writes, "been proven to be necessary to preserving consumer demand" in D-I basketball and FBS football. Just as in the O'Bannon case, Judge Wilken was unconvinced that amateurism is a necessary means for college sports to protect education or that it is needed for college sports to preserve a marketable identity.

NEXT STEPS AND IMPLICATIONS

Please see my accompanying SI articles on how the grant-in-aid ruling will impact college sports and where the litigation could next turn. As discussed in those articles, this ruling holds key implications for conference alignment, Title IX, tax law and immigration law.

Michael McCann is SI's legal analyst. He is also Associate Dean of the University of New Hampshire School of Law and editor and co-author of The Oxford Handbook of American Sports Law *and* Court Justice: The Inside Story of My Battle Against the NCAA

American Council on Education®
One Dupont Circle NW
Washington, DC 20036
(202) 939-9300
acenet.edu

January 30, 2019

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

Re: **Docket ID ED-2018-OCR-0064-0001**

Dear Secretary DeVos:

On behalf of the higher education associations listed below, I write to provide comments in response to the Department's November 29, 2018, notice of proposed rulemaking ("NPRM" or "proposed rule") amending regulations implementing Title IX of the Education Amendments of 1972 ("Title IX"), Docket ID ED-2018-OCR-0064.

INTRODUCTION

Colleges and universities have a clear, unambiguous responsibility under Title IX to respond to allegations of sexual harassment, including sexual assault.[1] Equally important to their compliance obligations, higher education institutions want to do the right thing. Colleges and universities are committed to upholding civil rights and to creating and maintaining campus environments that are safe, supportive, and responsive for all students so that they can benefit from the widest possible array of educational opportunities.[2]

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[1] Our use of the term "sexual harassment" should be read to encompass both sexual harassment and sexual assault. Throughout the document, we specifically reference "sexual assault" when making points or raising concerns specific to those cases.

[2] Our comments presume the NPRM is intended to address primarily sexual harassment, and specifically sexual assault, involving students because sexual harassment in the student context has been a significant focus of colleges, universities, and policymakers in recent years. The NPRM's justifications and reasoning focus mainly on sexual harassment in the context of students, as well. For example, the NPRM's "Purpose of this regulatory action" section makes no reference to employees and cites specifically "the rights of ... ***students*** to access education free from sex discrimination" (emphasis added). As we discuss below, we believe the NPRM's provisions should be limited to matters involving student-respondents. Applying NPRM processes to employee-respondents will prove

In recent years, institutions have continued to make important strides in addressing sexual assault on campus, and they have invested significant resources in their commitment to this goal. Expanded and innovative sexual assault awareness and prevention programming is one important example. Educational courses and training are the most critical component of prevention, ideally starting during the K-12 years and continuing in college, with consent and bystander intervention education being core elements of such initiatives.[3] Improved disciplinary processes and enhanced training for campus staff and community members are other examples of ways that institutions are addressing this issue.

Unfortunately, by their very nature, sexual assault cases can be extremely difficult to resolve. They often involve differing accounts about what happened; few, if any, witnesses; little or no physical evidence; conduct and recollections impaired by alcohol use; and, perhaps, a significant time lapse between the event and the filing of a report. For these and other reasons, law enforcement authorities can and often do decline to pursue these cases through the criminal justice system. Title IX, as well as campus disciplinary codes, requires institutions to act. This means that federal regulations that set forth a framework for institutions and all affected parties are critically important.

The overarching goal of our comments is to (1) note where we believe the proposed rule would help institutions better support survivors,[4] have processes that are fair and equitable to both parties, and understand the responsibilities Title IX imposes on institutions; and (2) identify and describe where changes are needed to help achieve these objectives. Our comments align with what we have said since the Obama administration issued its Dear Colleague Letter in 2011 and are consistent with the goals of the NPRM.

Most importantly, we ask that the final rule reflect this fundamental premise: Colleges and universities are educational institutions, not arms of or alternatives

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unworkable and be at odds with employer obligations under Title VII of the Civil Rights Act of 1964, state laws, and sound human resource policies.

[3] We urge the Department to dedicate resources to helping support institutions with these preventative and educational efforts as a way to make significant progress on these issues in the long term.

[4] Our use of the terms "survivor" (rather than "victim" or "accuser") and "accused" is not intended to suggest any particular characterization of the veracity of claims brought by those who report allegations of sexual misconduct. Where appropriate, we also use the terms "complainant" and "respondent."

to the criminal justice system. They should not be expected to mimic civil court systems with trial-like forums that enable one person to seek a quasi-judicial judgment against another individual. Attempts to graft formal legal procedures onto internal college and university disciplinary systems conflict with a longstanding body of case law that distinguishes college disciplinary processes from judicial systems.

Federal courts have repeatedly questioned the assumption that colleges should act as judicial bodies. As the court observed in *Gomes v. University of Maine System,* "A university is not a court of law, and it is neither practical nor desirable it be one."[5]

The presumption underlying the NPRM that every institution can and should provide a court-like forum for one individual to press a case against another one also is problematic and antithetical to the educational environment. Campus disciplinary hearings are a means of institutionally reviewing the conduct of a student in light of institutional expectations, and taking appropriate action within the context of the educational setting. It is not the duty of a victimized student or that student's attorney to prove that a fellow student violated campus rules, or even to prove any part of the issues in controversy, including credibility. It is the institution's responsibility. The Department should respect and preserve the ability of colleges and universities to sensibly review and discipline conduct by their students.[6]

There is no easy or quick solution to the very serious problem of sexual harassment, on campuses or elsewhere in our society. Colleges and universities

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[5] 365 F.Supp.2d 6, 16 (D. Me. 2005). *See also, Schaer v. Brandeis Univ.*, 735 N.E.2nd 373 (Mass. 2000)(in private college disciplinary hearing for sexual assault, "[a] university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts"); *Fellheimer v. Middlebury College*, 869 F.Supp. 238, 243 (D. Vt. 1994) (rejecting plaintiff's claim that "the College promised to provide students with procedural protections equivalent to those required under Federal and State constitutions" and noting that "[s]ince the College lacks full judicial authority, such as the power to subpoena or place witnesses under oath, a student's due process rights cannot be coextensive with or identical to the rights afforded in a civil or criminal legal proceeding.").

[6] Certainly, the Department should expect that all campus community members have a clearly identified and accessible means of filing a grievance against an institution when someone perceives that any aspect of the institution's response to a sexual harassment allegation, including its disciplinary process, negatively impacts one's Title IX rights. However, these Title IX grievance procedures should not be confused with, or supplant, campus disciplinary processes. By using the term "grievance" to describe a required student versus student court-like hearing, the NPRM perpetuates that confusion.

share the Department's goal of having campus disciplinary processes that are clearly understood, based on objective evaluation of relevant facts, consistently applied, and fair to both parties. We hope these regulations will clarify federal expectations of institutions regarding their Title IX responsibilities. However, meaningful and effective federal policies require that institutions maintain the ability to handle sexual harassment cases carefully, effectively, compassionately, and equitably in the context in which these cases arise, and using reasoned judgment. The fair and equitable resolution of sexual harassment cases is rarely accomplished through a one-size-fits-all, factory-like process. Institutions require and should be granted the flexibility to treat different cases differently, adjusting their approaches as needed to address the distinct circumstances of individual cases, so long as principles of accuracy, equity, and fairness are upheld.

The government should recognize when schools are acting in good faith to comply with Title IX. The Department of Education and higher education institutions must continue to work together on preventing campus sexual harassment, including sexual assault. And institutions seek a clear regulatory framework that sets out their responsibilities under Title IX and allows them to fairly, effectively, and compassionately investigate and resolve allegations of sexual harassment on their campuses. When institutions fail to live up to their obligations under Title IX, and clearly err, they should be held accountable. But when institutions act in good faith, after a careful and deliberative process, they should not be second-guessed by the Department.

In some ways, we believe that these proposed regulations will help institutions more effectively address sexual harassment. In other important respects, they are a step in the wrong direction. There are also several areas in the proposed regulations where the Department's intention is confusing or internally inconsistent and clarification is essential before the regulations are finalized.

The three sections below detail where we believe the proposed rules are helpful, where we have major concerns, and where clarification is necessary.

Federal policy initiatives, especially under Title IX, have an important impact on campuses. But Title IX is not the only source of law, guidance, and philosophy driving the efforts by higher education institutions: A wide array of other federal

and state[7] laws, judicial precedent, policies and commitments, and institutional values shape the nature and extent of our responses. Federal policy needs to give institutions enough flexibility to ensure that all legal and other obligations—no matter their source—are properly addressed when resolving sexual harassment allegations.

Provisions of the NPRM That Will Help Institutions Address Sexual Harassment

Several provisions in the NPRM would advance college and university efforts to support the survivor, enhance fairness for both parties, and clarify federal expectations of institutions. Some of these provisions would accomplish more than one of these goals.

1. The NPRM would provide survivors more flexibility to determine how they wish to proceed—for example, through formal Title IX grievance procedures, supportive measures, or informal resolution, including mediation. The proposed rule clarifies that supportive measures can be provided even if the survivor decides not to file a formal Title IX complaint. While many, if not most, institutions are already providing support under these circumstances, the clarification is welcome and helpful. The NPRM also makes clear that mediation as well as other forms of alternative resolution, which were prohibited in certain circumstances under prior guidance, may be used, provided both parties make an informed and voluntary decision to pursue these options, and doing so is appropriate for the particular case at hand.

2. The NPRM also clarifies that an institution may immediately remove a respondent from campus if it determines an immediate threat to health or safety exists. It is critical that institutions have the ability to take immediate action when individuals pose a serious risk to members of the campus

[7] In several places, our comments raise concerns about the proposed rule's interaction with existing state laws addressing sexual harassment and assault, and the potential for confusion or conflicts between these differing legal obligations. Similar concerns may also be present in the case of tribal laws on sexual harassment and assault occurring on tribal lands. When crafting a final rule, we urge the Department to pay careful attention to the unique and important legal issues and obligations affecting tribal colleges and the application of tribal criminal and civil laws.

community. Institutional obligations in this regard go well beyond the requirements of Title IX.

3. The proposed regulations eliminate the arbitrary and inflexible "60-day rule" from prior guidance and replace it with a requirement that institutions complete the grievance process within "a reasonably prompt timeframe." Institutions should resolve Title IX allegations promptly, but not at the expense of a thorough and equitable process. Evidence that could be determinative should not be excluded from consideration simply because it became available outside an arbitrary timeframe. In addition, eliminating the "60-day" rule will provide institutions additional flexibility to work more cooperatively with law enforcement agencies that may be conducting a parallel criminal investigation.

   We strongly support the removal of the "60-day" rule, but caution that the highly detailed and legalistic requirements envisioned by the NPRM, as detailed elsewhere in these comments, may undermine the desire for a prompt resolution. Just as we should not favor speed over a complete and thorough determination, neither should we create a process-heavy system that prevents cases from being resolved in a reasonable amount of time. In short, we are concerned that the procedures set forth in the NPRM may unreasonably delay the resolution of these cases.

4. The NPRM requires an objective evaluation of evidence. This underscores what should always be clear: there can be no "thumb on the scale" in favor of one party or the other. We support language in the NPRM that presumptions about credibility may not be based on one's status as a complainant, respondent, or witness.

5. The proposed rule also requires institutions to provide both parties with reasonable time to prepare for any interview or disciplinary hearing. Most institutions already do this as a matter of course, but it is important to have the point clarified. Providing a reasonable amount of time to prepare in advance of an interview or hearing is critical to ensuring a fair process for both parties. No respondent facing a disciplinary hearing that could have serious consequences should be subjected to a hasty investigation or

resolution, and complainants also should be afforded sufficient time to prepare themselves for important steps in the process.

6. The NPRM explicitly allows for an appeal of a decision by either party, if appeals are permitted. Such a provision is consistent with Clery Act regulations on the same topic. An opportunity to appeal should be provided to both complainants and respondents and we appreciate the Department's decision to leave institutions the flexibility to determine whether appeals will be offered.

7. The "actual knowledge" language makes clear the circumstances under which Title IX requires institutions to take action. We believe this is helpful. Clarity about when an institution is required to act by Title IX is important. However, institutions will also continue to act upon sexual harassment outside of or beyond the regulation's specific requirements. The regulations should be equally clear that they do not prohibit or inhibit such institutional response.

8. Finally, understanding what the Department will consider to be sexual harassment for purposes of Title IX is helpful. Recognizing that many institutions consider, define, and discipline sexual harassment more broadly, our acceptance of the Department including a definition in the proposed rule is predicated on a final rule that assures institutions have clear and unambiguous authority to address sexual harassment that violates their own codes of conduct even if it falls outside the Title IX regulatory definition.

Provisions of the NPRM That Undermine Institutions' Efforts to Address Sexual Harassment

The proposed rule contains a number of provisions that raise serious concerns because they would undermine our ability to address sexual harassment on campus and to ensure prompt, equitable, and fundamentally fair resolutions of such allegations.

We focus in this section on the issues of greatest concern to our members. We also ask the Department to carefully consider the comments submitted by

individual colleges and universities and higher education associations, which will provide valuable perspectives on these and other issues not addressed in our letter.

A number of our specific concerns, such as the requirement for a live hearing with cross-examination or the mandate giving both parties the absolute right to inspect "all evidence . . . directly related" to the allegations, vividly illustrate our overarching concern that the NPRM imposes highly legalistic, court-like processes that conflict with the fundamental educational missions of our institutions.

We repeat: Colleges and universities are not law enforcement agencies or courts. Unfortunately, the NPRM consistently relies on formal legal procedures and concepts, and imports courtroom terminology and procedures, to impose an approach that all schools—large and small, public and private—must follow, even if these procedures, concepts, and terms are wildly inappropriate and infeasible in an educational setting. The proposed rule assumes that institutions are a reasonable substitute for our criminal and civil legal system. They are not. As the Department considers our specific concerns about the NPRM discussed below, we urge it to correct this overarching and fundamentally flawed premise.

A legalistic, prescriptive "one-size-fits-all" judicial-like process will not work well on a college campus. Moreover, the imposition of such legalistic standards in the Title IX context is certain to have unintended and negative consequences for other campus disciplinary proceedings. Students may ask, quite reasonably, why a race discrimination case is not subject to the same court-like disciplinary procedures as a Title IX sexual harassment case. Or why a sexual assault involving two students that occurred in privately owned, off-campus housing is subject to a different set of procedures than a sexual assault that occurred in an on-campus residence hall.

Imposing a legalistic process will increase significantly the amount of time that will be required to conduct a Title IX investigation and make a determination of responsibility. Based on the process outlined by the NPRM, resolutions of sexual harassment and particularly campus sexual assault could easily take months and carry over from one semester or academic year to the next, leaving uncertainty and wariness for the parties and perhaps for the campus community. Indeed, because most college students are in two- or four-year programs, a significant number of parties or witnesses may graduate or leave before the investigation

and determination are complete, denying the parties the benefit of a fair and timely resolution of the complaint and in some cases leaving behind the ills that Title IX is meant to resolve. In short, while we oppose arbitrary 60-day deadlines, unreasonably protracted processes in response to a sexual assault allegation are in no one's interest.[8]

As an alternative to the highly prescriptive process set forth in the NPRM, we encourage the Department to consider adopting a more flexible framework within which institutions could develop policies and procedures that are adapted to the specific needs of their campus communities. For example, the Department's regulations that address student disciplinary proceedings in cases of sexual assault and certain other offenses under the Clery Act require proceedings that are "prompt, fair and impartial" and establish certain procedural safeguards related to notice, timeframe, and conduct of proceedings. (*See* 34 CFR 668.46(k).) We believe adopting the Clery Act framework or another similar set of expectations for Title IX complaints would provide appropriate flexibility to institutions while making clear to institutions and students alike that the Department takes seriously its obligations to enforce civil rights protections on campus.

1. <u>The NPRM inappropriately legalizes campus disciplinary proceedings on sexual harassment by requiring a "live hearing" with direct cross-examination by the parties' advisors.</u>

   The strongest example of how the NPRM legalizes campus disciplinary hearings on sexual harassment is the requirement for a "live hearing" with direct cross-examination by the parties' advisors. Such an approach–which will subject students to highly contentious, hostile, emotionally draining direct cross-examination–has obvious drawbacks.

   Under the NPRM, when a student lacks an advisor, the institution must provide one who is "aligned" with that party. If one student hires an

[8] Given the timeframes specified in the NPRM of at least 10 days for the parties' response to "directly related" evidence "obtained as part of the investigation," then at least another 10 days for an investigative report to be provided to the parties pre-hearing for their review and response, and the NPRM's detailed requirements for a written determination at the conclusion of a live hearing, the Department is virtually assuring that institutions will take longer to resolve these matters than had been the case previously. Applying the NPRM process requirements, no resolution will be likely until at least 30 additional days after the completion of any investigation.

aggressive litigator for this purpose, schools will be under great pressure to ensure that the other individual's "advisor" is comparable in experience and training. Rather than campus officials advising students in a disciplinary proceeding, a courtroom-like "trial" atmosphere will develop, with both students represented by counsel, potentially provided at the institution's expense, who appear before campus decision makers, who are not likely to be attorneys. As a result, an institution's in-house or outside counsel will also have to become immersed in the matter, and likely be present at the "trial" to provide advice on behalf of the institution to ensure that all required processes are properly followed.

We foresee the rapid emergence and expansion of a cottage industry of advisors who will bring an adversarial, legal orientation to campus disciplinary hearings. Because the NPRM requires the exclusion of any statement by a party or witness who declines to answer questions,[9] we expect extraordinarily aggressive posturing and questioning by attorneys or other advisors (including emotionally invested parents) in an attempt to intimidate the survivor, the accused, or witnesses. This dynamic increases the risk that cross-examination will re-traumatize those survivors who are willing to pursue a formal complaint and may actually discourage some survivors from reporting these incidents in the first place. It would also likely cause witnesses–regardless of whether their testimony might be interpreted as supporting the complainant or the respondent–to refuse to participate in the hearing.

In addition, the NPRM expects campus officials overseeing disciplinary hearings to assume the role of a skilled trial judge and to make nuanced decisions about what questions are permitted during cross-examination and what evidence will be admitted. It also requires decision makers to provide an on-the-spot explanation for any decision to exclude a question or evidence–something not even judges are required to do in a court of law. To hold college administrators in student conduct proceedings to a standard that is higher than that required of judges in courts of law is nonsensical. College officials who conduct campus disciplinary hearings are

[9] Obviously, colleges and universities do not have the power to force or "subpoena" witnesses to participate in their hearings. We cannot think of another example of a decision-making process in which information cannot be considered unless the source of it submits to live cross-examination, yet the decision maker has no practical ability to require that person to participate in the process.

unlikely to have, and should not be expected to have, a legal or judicial background that would enable them to make evidentiary determinations such as whether the questions comply with the complex requirements of rape shield laws outlined in the proposed rule. All of this will force some institutions to hire, at significant expense, retired judges and experienced attorneys to preside over the required hearings, and this cost will be particularly burdensome for smaller, less resourced institutions.

There are ways to provide a thorough and fair process for determining the facts of a matter and a means for the parties to test the credibility of the other party and any witnesses that do not involve a "live hearing" with cross-examination. For example, many institutions currently utilize procedures whereby neutral, experienced investigators interview the parties and witnesses, pose questions that are suggested by the parties (providing an effective substitute for direct cross-examination), and make detailed factual findings for consideration by other individuals who serve as decision makers. Other institutions allow parties to submit questions and follow up questions directly to the decision maker, who then poses relevant questions to the witness.[10]

We believe that approaches like these provide reasonable ways to accomplish the goals that the Department seeks and would, in many cases, result in better, more accurate credibility determinations. This is particularly true for the teenagers and young adults who will be parties to and witnesses in these highly emotionally charged and stressful cases and who need time to process questions and formulate their responses–time that a live hearing with cross-examination would not provide.

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[10] In reviewing campus student proceedings, federal courts have recently underscored that cross-examination is not required to achieve fairness. *See, e.g., Xiaolu Peter Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 465 (S.D.N.Y. 2015) (concluding that under Title IX "any claim of unfairness due to a requirement that questions be asked through the panel Chair fails as a matter of law. Courts have found that similar policies are procedurally adequate."). *See also Doe v. Belmont Univ.*, 334 F. Supp. 3d 877, 893 (M.D. Tenn. 2018) (finding that cross-examination was not required at private universities and noting that opportunity for parties to review and respond to an investigative report, written statements, and other evidence provided adequate means for respondent to challenge veracity of complainant's claims); *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242 (D. Mass. 2018) (finding that even at a public institution, to which Constitutional due process principles apply, cross-examination is not "essential to due process in the context of school discipline hearings"); *Doe v. W. New England Univ.*, 228 F. Supp. 3d 154, 184 (D. Mass. 2017) (finding that cross-examination was not required and proceedings were not unfair when respondent "was present at the hearing with his counsel and was permitted to direct questions to" members of the decision-making panel).

The Department concedes that the use of written questions is a reasonable and sufficient alternative for testing the credibility of witnesses: the NPRM explicitly permits this approach in the elementary and secondary school context. In addition to college freshman who have yet to turn 18 years old, there are a significant number of high school-aged students who enroll in colleges and universities through dual enrollment programs. At some community colleges, high school students may make up to 20-30 percent of the total enrolled student body. Given that some students enrolled in college may be the same age or younger than many high school students, we see no reason why the Department should not permit colleges and universities to use an approach similar to the one it outlines for the K-12 setting.

Moreover, there are foreseeable circumstances in which a requirement of a live hearing with cross-examination would violate procedural fairness for respondents. Attorneys will often advise respondent clients not to testify or subject themselves to cross-examination for fear that their statements may be admitted in a future criminal or civil proceeding. Since the decision maker would be prohibited from considering any statements of the respondent who, for important reasons, is not willing to have their testimony cross-examined, the respondent is essentially being silenced. If the complainant testifies, is cross-examined, and is credible, the decision maker will likely be all but required to make a finding of responsibility against the respondent. Such an approach seems contrary to the respondent's interest in a fair process. This is one of the reasons why alternative models that do not include live cross-examination, which are already successfully employed by many institutions, are often a better approach and actually can be significantly more procedurally fair to respondents.

To be clear, we strongly support resolution procedures that are clearly understood, transparent, fair, and even-handed to both parties. However, we seek requirements that do not have the clear disadvantages of a "live hearing" with cross-examination in a judicial-like forum.

RECOMMENDATION: The Department should remove the mandate for a "live hearing" and should not require that a resolution process include direct cross-examination by the parties' advisors. The Department should provide flexibility to institutions to choose a live hearing or to use other non-hearing models that permit each party to test the credibility of the other party and witnesses. Second, as an alternative to mandatory cross-examination, the final rule should permit institutions to use a process whereby parties submit questions, follow up questions, and responses in writing to the decision-maker.

2. <u>The NPRM's requirement that institutions give both parties the absolute right to inspect "any evidence . . . directly related" to the allegations will cause more harm than good.</u>

   The provision giving both parties the absolute right to inspect "any evidence . . . directly related" to the allegations would further legalize the proceedings and, as drafted, exceed what even the judicial system demands. Such a broad standard–calling for the sharing of "any" evidence–can lead to confusion, acrimony, and further litigation.

   For example, the requirement to provide "any evidence . . . directly related" would appear to include confidential and sensitive information, such as medical information. As written, the proposed rule does not grant institutions the authority to redact portions of documents necessary to protect confidential information, such as tangential but sensitive medical information that was collected and not used, from disclosure. The Department's attempt to control the downloading or copying of information (discussed below) suggests that the Department realizes that sensitive information should be protected.

   The NPRM requires institutions to give the parties and their advisors the evidence subject to inspection and review "in an electronic format, such as a file sharing platform," that restricts downloading or copying. It is not practical, reasonable, or desirable for the Department to dictate the precise way that institutions make evidence available to the parties and their advisors. There are likely to be significant costs that the Department has not considered associated with electronic file platforms and, most

importantly, we are unaware of methods that would preclude copying as a practical matter. Indeed, anyone with an iPhone can easily photograph a document or record a document displayed on a file-sharing platform, even if the platform itself restricts copying. Moreover, new technologies may be developed that would help in managing these challenges, which the proposed rule could inadvertently preclude. We understand the Department's desire to help provide this information to both parties and their advisors, but we urge the Department to avoid specifying the means by which this is to be accomplished.

RECOMMENDATION: Both parties should have access to information that is directly related to the allegations at issue, but we believe that appropriate limitations should be imposed. Institutions should have the authority to redact confidential and other sensitive information, such as medical or counseling records. Under existing law, the Department's regulations implementing the Clery Act require an institution in cases of sexual assault allegations to provide both parties with "timely and equal access . . . to any information that will be used during informal and formal disciplinary meetings and hearings." (34 CFR 668.46 (k)(3)(i) (B)(3)). We think this provides an appropriate framework to ensure that both parties have an opportunity to inspect, review, and respond to the relevant evidence, and we recommend that the Department adopt the same standard under Title IX. We also ask the Department to provide institutions with flexibility to determine the precise information sharing method they will use.

3. <u>The NPRM's use of the phrase "due process" is inappropriate and likely to cause confusion.</u>

The campus disciplinary process for sexual harassment is further legalized by the use of the words "due process" in more than 30 places in the NPRM. "Due process" is most commonly associated with protections provided by law enforcement and the judicial system for criminal defendants where an accused individual's life or liberty is at risk. Indeed, Black's Law Dictionary defines "due process" in the context of criminal law: "Embodied in the due process concept are *the basic rights of a defendant in criminal proceedings and the requisites for a fair trial*"[11] (emphasis added). While public

[11] "Due Process of Law," Black's Law Dictionary, Sixth Ed. (p. 500).

institutions are required to provide certain due process protections under the Fourteenth amendment to the U.S. Constitution, the type and amount of process required of colleges in these situations is far less than the process due in a criminal trial.[12] Campus disciplinary hearings are neither "criminal proceedings," nor "trials."

Words matter. We believe that the repeated use of the phrase "due process" encourages a faulty perception that Title IX requires that federal criminal trial-like constitutional due process protections must be provided on all campuses, public and private, for all Title IX sexual harassment proceedings, and is likely to lead to substantially more civil litigation.

RECOMMENDATION: We strongly support a process that is fair to both respondents and complainants, that is carefully designed to be even-handed and that does not disadvantage either party. However, we ask the Department to replace the phrase "due process" with a phrase like "fair process" that better captures the evenhandedness and equitable treatment that the Department and institutions both seek.

If the Department insists upon using the phrase "due process," we ask that the final rule clarify that this use is not signaling an expectation that all recipients, both public and private, will be required to observe judicial protections given to criminal defendants, or that private institutions will be subject to the constitutional due process requirements that apply to student discipline cases at public colleges and universities. The Department should also explicitly state that the "due process" protections it interprets Title IX as requiring are limited to those specified in the regulations.

4. <u>The NPRM appears to force an institution to "dismiss" a complaint that falls outside of Title IX, even if that conduct would violate campus codes of conduct. The NPRM also appears to prevent an institution from taking disciplinary action without a formal Title IX complaint, even if the alleged conduct would violate Title IX and campus codes of conduct.</u>

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[12] *E.g.*, <u>*Marshall v. Indiana Univ.*</u>, 170 F. Supp. 3d 1201, 1209 (S.D. Ind. 2016) ("[A] disciplinary hearing in an educational setting is neither a criminal or quasi-criminal hearing. . . . As such, the rights afforded to criminal defendants in a criminal trial do not apply.").

In order to maintain a safe and welcoming campus environment, colleges and universities must have clear and unambiguous authority to investigate and resolve sexual harassment, sexual assault, and other sexual misconduct allegations even if the conduct as alleged does not fall within the NPRM's definition of sexual harassment, or even if the complainant is unwilling to file a formal complaint. While institutions have this authority at present, it is unclear from the NPRM whether they will have this authority in the future.

Under the proposed rule, where the conduct alleged by the complainant would not meet the Title IX definition of sexual harassment, even if proved, or did not occur within the institution's program or activity, the institution "*must dismiss* the formal complaint with regard to that conduct" (emphasis added) (p. 61498). This language implies that an institution is prohibited from moving forward under its own campus disciplinary procedures to address a violation of its own code of conduct for sexual misconduct if that conduct falls outside the boundaries of the proposed rule's definition. We believe this is a serious mistake.

The NPRM's preamble actually provides an alternative view, stating that an institution "remains free to respond to conduct that does not meet the Title IX definition of sexual harassment or that did not occur within the recipient's program or activity . . . but such decisions are left to the recipient's discretion . . . ." (p. 61475). The preamble also notes, "nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding" for situations involving a report of "sexual harassment that occurs outside the recipient's education program or activity (or as to conduct that harms a person located outside the United States, such as a student participating in a study abroad program)" (p. 61468).

There are situations where allegations of sexual misconduct occur that violate campus values and codes of conduct but fall outside the boundaries of Title IX as defined in the NPRM. For example, consider a situation where an institution receives a report of a sexual assault involving two students that occurs in an off-campus house owned by a fraternity that is not recognized or sponsored by the institution. While the location of the

assault may place it outside of an institution's "program or activity," the alleged conduct may well be a serious violation of the institution's student code of conduct that the school is compelled to address in order to maintain a safe campus environment.

Likewise, the NPRM could be read to mean that a sexual assault that occurs on a school-sponsored study abroad program would not be covered by Title IX because it occurred to "a person outside the United States." This may be conduct an institution wants to prohibit through its conduct code in order to ensure the safety of its students while participating in a school-sponsored activity. We believe that when sexual misconduct violates campus community standards or codes of conduct, institutions must continue to have the right to pursue these matters in the manner institutions deem appropriate, including by instituting disciplinary procedures, regardless of whether the incident falls within the scope of Title IX.

Furthermore, under the proposed rule, a formal written, signed complaint is needed in order for the institution to initiate the NPRM's grievance procedures. Because a survivor may be unwilling to file a complaint, there may be circumstances where the institution is aware of conduct that, if it occurred as alleged, would fall within the scope of Title IX, but where the institution would be unable to initiate a Title IX grievance procedure. Obviously, in the case of a single report, the NPRM's multiple-reports requirement would not be met. While the institution may not be able to proceed with a Title IX grievance procedure in this circumstance, it should be permitted to investigate and discipline under the institution's code of conduct. The institution should also be permitted to take appropriate actions in response—for example, by increasing monitoring, supervision, or security, or providing training, education, or counseling.

RECOMMENDATION: We strongly recommend the Department drop the "must dismiss" language from the text of the rule and include language in the final rule that explicitly affirms the right of schools to address misconduct that falls outside the scope of Title IX. We believe the view expressed in the preamble is correct and is of such overwhelming

significance that it should be incorporated explicitly in the text of the final rule.

We also recommend that the Department make explicit in the final rule that an institution is permitted under Title IX to take actions to protect the campus community in response to reports of sexual harassment, even if no formal complaint is made that triggers the NPRM's formal grievance procedures.

5. <u>The proposed rule will effectively result in a single federally mandated evidentiary standard of proof across all campus disciplinary hearings.</u>

We are deeply concerned that, for many institutions, the NPRM will have the effect of establishing the evidentiary standard of proof used in all campus disciplinary hearings. The NPRM purports to offer institutions a choice: they may use either "preponderance of evidence" or "clear and convincing evidence" as the standard of proof in Title IX formal grievance proceedings. However, under the proposed rule, an institution that selects the preponderance of evidence standard must adopt it in all other campus proceedings that carry the same disciplinary penalty. Moreover, it must use the same standard for Title IX complaints involving students as it uses for Title IX complaints involving employees.

Practically, this means that collective bargaining agreements, institutional governance decisions, as well as state-law-regulated and non-Title IX disciplinary policies and procedures will need to conform to this Title IX regulatory mandate if the institution elects to use the preponderance of evidence standard for student-on-student sexual harassment cases, but currently uses clear and convincing for even a small number of other matters. Given the impracticality of such a global change across myriad campus matters, constituencies, and processes, the NPRM will force many schools to use the clear and convincing evidence standard for Title IX cases, making this a *de facto* federally prescribed standard.[13] This heavy-handed federal regulatory solution is inconsistent with the administration's promise

[13] This NPRM as a practical matter will preclude some campuses from using the preponderance of evidence standard for Title IX cases (even if they are already using that standard for all student conduct matters) and will force many schools to use the clear and convincing evidence standard for Title IX cases.

to reduce the amount of one-size-fits-all federal regulation imposed from Washington, DC.

Moreover, we believe this rule exceeds the Department's statutory authority because, as a practical effect, it would dictate the standard of proof used in non-Title IX disciplinary proceedings, such as academic dishonesty proceedings, where the Title IX statute provides no such authority.

RECOMMENDATION: The Department should not micromanage campus disciplinary proceedings, nor should it mandate a one-size-fits-all federal standard. Institutions should have the flexibility to choose between the preponderance of evidence and clear and convincing standards in Title IX grievance proceedings regardless of the standard used in other cases. The requirement to synchronize the standard with other types of institutional disciplinary proceedings should be dropped.

6. <u>The procedures outlined in the NPRM should be focused on sexual harassment allegations involving student-respondents. They should not apply to sexual harassment allegations involving employee-respondents</u>.

Directed question three indicates that the Department is considering whether the final regulations should apply to allegations of sexual harassment involving employees. The Department asks for comments about whether any parts of the rule would prove "unworkable" in the context of sexual harassment by employees and whether there are any "unique circumstances" that apply to processes involving employees that the Department should consider.

While institutions clearly have responsibilities under Title IX to address sexual harassment involving employees, applying the NPRM's grievance procedures in the employee-respondent context is both unwise and unworkable. It would require an unnecessary, costly, complex, time-consuming, and wholesale redesign of campus human resources functions.[14] For non-unionized, at-will employees, these requirements

[14] The Department should proceed cautiously when considering regulatory changes that would affect the personnel of colleges and universities. Congress was concerned about the potential for overreach when it created

would require a massive re-evaluation of how such cases have been handled, successfully, for decades, and would impose undue regulatory burdens on higher education institutions that are not imposed on any other employers. For unionized employees, disciplinary processes are often written into existing collective bargaining agreements, which may explicitly stipulate that they cannot be re-bargained for a specific period of time. At many institutions, there are multiple bargaining units, each with their own agreements. Any changes to collective bargaining agreements will also be subject to National Labor Relations Act and state labor law requirements, making the process for changing those agreements slow and arduous.

In addition, for both unionized and non-unionized faculty, disciplinary proceedings are conducted in a manner that aligns with faculty handbooks that have been developed (and often negotiated) through shared governance and in accordance with principles of academic freedom and tenure. In these cases, campus administrators have limited ability to implement unilateral changes, and attempts to do so can be expected to undermine other important institutional undertakings where administrator-faculty cooperation and respect are crucial, and may lead to legal action. Certainly, these processes cannot be changed solely at the will of an institution's administration or in a limited period of time.

There are many other laws in addition to Title IX that address sexual harassment involving employees–most notably Title VII of the Civil Rights Act of 1964 but also numerous state and local laws. The overlapping but different requirements imposed by the proposed rule, Title VII[15], and state and local anti-discrimination laws would cause confusion and create

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the Department in 1979 and included in the General Education Provisions Act a clear prohibition that the Department may not exercise any "direction, supervision, or control over the . . . administration, or personnel of any educational institution . . . ."

[15] In order to meet the second prong of the NPRM's definition of sexual harassment, conduct would need to be "severe, pervasive ***and*** objectively offensive" while under Title VII, conduct that is "severe ***or*** pervasive" is actionable (emphasis added). The proposed Title IX regulation's definition of "harassment" does not recognize the distinction between a hostile environment and harassing conduct that may create or lead to a hostile environment. Specifically, Title VII requires employers to address sexual harassment, defined as unwelcome conduct that is based on sex, ***before*** that conduct creates a hostile environment for an employer's employees. If an employer fails to cure harassment before the harassment creates a hostile environment, the employer has violated Title VII and is liable to the employee for the unlawful hostile environment. Yet the proposed regulations currently provide that institutions "must dismiss" allegations that do not meet the new Title IX definition of harassment. The Department should make clear that the NPRM's grievance procedures do not apply in the employment context.

conflicting and unworkable obligations for institutions that are committed to complying with all applicable laws. This could easily create a legal free-for-all as courts step in to sort out the ambiguities that will ensue. The Department has not identified any problem with allowing existing laws and regulations, particularly Title VII, to guide institutional attention to faculty and staff conduct. Further, in recognition of the difference in an educational institution's relationship with its employees and its students, the NPRM makes clear that nothing precludes higher education employers from placing non-student employees on administrative leave during an investigation.

We note that much of the public discussion about ensuring fair processes for respondents, and indeed the Department's own preamble, focuses on concerns about student-respondents and whether they are at a unique disadvantage in campus disciplinary proceedings. The Department has failed to identify the problem it is seeking to remedy by extending the NPRM's grievance procedures to faculty and staff.

RECOMMENDATION: As we stated above, institutions clearly have responsibilities under Title IX to address sexual harassment involving employees. However, we urge the Department to clarify that the NPRM's grievance procedures would apply solely to cases involving alleged sexual harassment by student-respondents and would not apply to alleged sexual harassment by employee-respondents.

7. <u>The NPRM requires that the formal "notice of allegations" explicitly state that the respondent is "presumed not responsible."</u>

As in other cases of campus discipline (for example allegations of underage drinking by students or plagiarism) respondents are presumed not responsible unless and until a thorough and fair disciplinary process determines them responsible for violations of the institution's policy. While some campuses already provide statements similar to that included in the NPRM in the specific charge notices they give to an accused student, other colleges would be uncomfortable with including a federally mandated statement in the institution's notice indicating a "presumption" in favor of one party. We believe that if the Department seeks to impose the inclusion

of a federally mandated statement along these lines, a more neutral articulation is appropriate.

RECOMMENDATION: We recommend that the Department remove this requirement. If the Department believes a federal mandate is necessary, we ask that each institution be allowed to choose the wording that communicates that outcomes are not prejudged and parties will be treated equally and fairly. For example, "this notice of allegations does not imply any judgment about responsibility or lack of responsibility on behalf of either party" would, we believe, be less likely to sow uncertainty for survivors or to cause confusion than the statement that the Department has proposed.

8. <u>The proposed rule would significantly increase regulatory burden, redirecting time and resources away from efforts to support students.</u>

The thicket of requirements in the NPRM will significantly increase the number and complexity of regulations and the associated costs imposed on colleges and universities. We have identified more than 50 separately identifiable administrative requirements contained in the NPRM, which we have attached as Appendix 1. Even by the standards of the Department of Education's often-detailed approach to regulation, this represents an extensive and labor-intensive set of prerequisites. As the Department itself notes in the preamble, the previous Title IX guidance was criticized in part because it "removed reasonable options for how schools should structure their grievance processes to accommodate each school's unique pedagogical mission, resources, and educational community." We agree with this view. Unfortunately, we believe that the highly prescriptive nature of the NPRM may inadvertently raise even greater concerns than the previous guidance.

Federal regulatory mandates will increase the costs of addressing sexual harassment on campus. For example, banning the "single investigator" model would force some institutions to hire additional personnel. As noted earlier, providing advisors aligned with each party to a formal proceeding—many of whom will be attorneys in private practice—will be costly. Allowing attorneys to cross-examine participants is likely to force institutions to hire

other attorneys or professional mediators to chair the proceeding to ensure that it is handled appropriately. The possibility that the NPRM's formal Title IX grievance procedures will affect the processes and procedures used in other campus disciplinary cases is guaranteed to increase institutions' administrative costs, forcing institutions to divert resources from financial aid and academic programs.

No matter how hard colleges try to follow the rules, institutions can expect legal action from complainants and respondents alike to address uncertainties that surround evidentiary rulings, cross-examination-related decisions, the adequacy of advisors, jurisdictional issues, and the definition of "a program or activity." This too will increase college and university operating costs.

To the extent that the NPRM does this, the impact will be greatest at small, thinly staffed, less-resourced institutions like community colleges, small private liberal arts colleges, and faith-based institutions. There are 581 colleges with fewer than 500 students in the United States and, of that number, 382 institutions have fewer than 250 students. Most colleges and universities do not have a general counsel on staff.[16] These schools will have little choice but to hire additional staff, attorneys, or consultants to meet federal mandates. And, sadly, externally imposed increases in the cost of doing business are almost always passed on to the final consumers. In the case of higher education, of course, that means students and their families.

We respectfully disagree with the cost estimates that accompany the NPRM. The Department estimates that the NPRM will result in a net cost savings over 10 years because the number of Title IX investigations will decrease. We are deeply concerned that this drop could reflect the unwillingness of survivors to file a formal complaint and proceed under the NPRM's formal Title IX grievance procedures. Even assuming the number of investigations does fall, the complex and costly procedures mandated by the proposed rule means that the costs of those cases that are investigated and proceed through the formal resolution process will substantially

[16] Based on our estimates, of approximately 4,500 degree-granting colleges and universities, only 1,000 have a dedicated general counsel on campus.

increase. Indeed, we expect Title IX compliance costs to skyrocket. The primary factors driving the increase will be the costs of administering live hearings with cross-examination by advisors, as discussed above, and the increase in litigation against institutions by survivors or the accused (or both) challenging the institution's provision of services and management of the processes pursuant to these regulations.

None of this is to suggest that institutions should not devote the resources necessary to combat the scourge of sexual harassment and sexual assault. But neither should we expect that the imposition of complex and extensive regulatory requirements will not affect the cost of running colleges and universities and the price that students pay to enroll.

RECOMMENDATION: We ask that the Department actively seek ways to give institutions flexibility to achieve the federal policy goals without detailing the precise means to do so. This will enable institutions to seek effective, responsible, and cost-efficient ways to proceed that will address sexual harassment and ensure fair processes for both complainants and respondents.

NPRM Provisions that Require Clarification

1. The proposed rule requires that when an institution receives multiple reports of sexual harassment by the same individual, but none of the reporting individuals are willing to file a formal complaint, the institution's Title IX Coordinator must nonetheless file a formal complaint to initiate the Title IX grievance process, even if none of the reporting individuals are willing to serve as witnesses.

   We support the goal of this provision, which is to ensure that institutions take action when there is evidence of a serial offender on campus. However, a blanket requirement that the Title IX Coordinator initiate a formal complaint in the absence of individuals willing to participate in the

NPRM's formal grievance process (including cross-examination) will cause far more harm than good.

The ability of the institution to hold an individual responsible in this scenario is undermined dramatically because the most directly impacted witnesses will be unavailable for cross-examination. The proposed regulation makes clear that if a witness is unwilling to submit to cross-examination, their statement cannot be used in determining responsibility. Further, the NPRM's detailed formal complaint requirements will nearly certainly require the institution to identify the survivors, even if they wished to remain anonymous, when the institution initiates the NPRM's formal Title IX grievance process. Institutions will want to advise students of the potential risk that the institution may not be able to respect a wish for confidentiality, which in turn may have a chilling effect on reports of sexual harassment.

In the absence of such witnesses, an institution risks, almost by default, a determination of "not responsible" for a respondent who has been the subject of multiple reports of misconduct, which may embolden the individual. And at many institutions, a final determination of "not responsible" may negatively impact the institution's ability to use information about prior misconduct in a subsequent misconduct hearing. We recommend that the institution retain the flexibility to determine whether to pursue a campus disciplinary proceeding against an individual who has been the subject of multiple reports of sexual harassment. Again, we reiterate our strong conviction that institutions must have the authority to pursue sexual harassment cases under their own codes of conduct in cases where the NPRM's Title IX grievance process is not triggered.

2. We encourage the Department to recognize and clarify the extent to which the proposed regulations are intended to supersede and preempt state law, particularly in states that have enacted (or that may enact) campus sexual assault laws.[17] For example, the language in the draft rule that appears to direct institutions to "dismiss" sexual harassment allegations

[17] As of last fall, 20 states had state laws addressing campus sexual assault: Arkansas, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Louisiana, Minnesota, New Jersey, New York, North Carolina, North Dakota, Rhode Island, South Carolina, Texas, Virginia, Washington, and Wisconsin.

that fall outside the definition of Title IX is almost surely to be in conflict with state laws requiring institutions to address sexual assault more broadly than is required by the NPRM.

We believe that the Department should tread very lightly and precisely if it is intending to preempt states' laws in this area, particularly where there is a risk of the regulations being read to preempt laws that have been developed by a state in response to the specific needs and campus settings of its colleges and universities and their students. Furthermore, such a result would be inconsistent with the administration's commitment to reduce burdensome federal regulations and to avoid unnecessary interference in matters of state law. Moreover, to the extent that federal regulations conflict or are inconsistent with state law, institutions will require significant time and effort to navigate those legal complexities– both at the outset, as the federal regulations become effective, and in the moment during the course of an investigation. We encourage the Department to clarify the extent to which the Title IX regulations preempt state law in this area in order to minimize such administrative burden and the likelihood of confusion to institutions, students, and states.

3. The proposed regulations state that when investigating a formal complaint, institutions must "[n]ot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence." While we understand the Department's desire to allow the parties to gather and present relevant evidence, many institutions implement "no contact" orders, which restrict the ability of the parties to discuss the matter with each other, as a supportive measure. We ask the Department to clarify that "no contact" orders are permissible in so far as they are necessary to comply with supportive measures and/or to prohibit the parties from engaging in any retaliatory conduct. Retaliatory conduct against a complainant or a respondent can, itself, violate Title IX. Institutions must maintain the right and the authority to prohibit such retaliation, and respond swiftly and appropriately if it occurs.

4. The Department should provide more clarity about the meaning of the phrase "in a program or activity" and whether, by using this phrase, the Department intends to create any distinction between the scope of the

proposed rule and the Title IX statutory language.[18] Without further clarification, this provision will quickly be the subject of innumerable complaints to OCR and legal challenges. Any number of hypothetical cases illustrate the likely confusion: privately owned student housing across the street from campus; "satellite" fraternities located off campus; fraternities not officially recognized by the institution; or two students participating in an off-campus program run by a private vendor or another university. (For example, in the case of students who are participating in a program run by another university, which school conducts the Title IX investigation?) The rapid-response task force that we recommend in number six below might provide one way to address the sort of highly specific and technical questions that will arise.

5. It will take a significant amount of time and resources for colleges and universities to implement the new policies and procedures envisioned by the NPRM. The Higher Education Act's Master Calendar gives institutions at least eight months to prepare for the adoption of new federal requirements and ensures that new regulations take effect at the start of a new school year. While the Master Calendar does not apply to this NPRM, we ask that the Department provide campuses a comparable amount of time to design and implement the many new policies and procedures envisioned under the NPRM and to conduct the extensive retraining that will be required. We also ask that the NPRM effective date coincide with the start of the academic year in the fall (e.g., a final rule issued sometime in 2019 might be effective July 1, 2020, in advance of the academic year in fall 2020).

6. In addition, we strongly encourage the Department to ensure that questions regarding the implementation of the final rule can be answered quickly and authoritatively by Department officials. This is important because complex regulations are never self-executing. Questions will always arise and clarification will be required. We recommend that the Department create a rapid-response Title IX regulations task force to facilitate campus implementation of the new requirements by providing a

[18] The Title IX statute states that no person shall, on the basis of sex, be excluded "***from participation in***, be ***denied the benefits of***, or be ***subjected to discrimination under*** any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added).

centralized point of contact for questions and clarifications, and publicizing the questions it receives and the answers it provides.

CONCLUSION

We appreciate the opportunity to participate in a formal notice and comment regulatory process that ensures the Department considers comments from a variety of stakeholders about the impact and unintended consequences of the provisions in the NPRM. Colleges and universities remain committed to addressing sexual harassment and sexual assault on their campuses and to complying with all federal and state laws, including Title IX. We strongly urge the Department to modify the NPRM to address the serious concerns we have raised so that colleges and universities can support survivors, ensure fair processes for both parties, and have greater clarity about their obligations under the law.

Sincerely,

Ted Mitchell
President

On behalf of:

ACPA-College Student Educators International
American Association of Colleges for Teacher Education
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of Hispanics in Higher Education
American Association of State Colleges and Universities
American College Health Association
American Council on Education
American Dental Education Association

American Indian Higher Education Consortium
APPA, Leadership in Educational Facilities
Asociación de Colegios y Universidades Privadas de Puerto Rico
Associated Colleges of the South
Association for Biblical Higher Education
Association of American Colleges and Universities
Association of American Medical Colleges
Association of American Universities
Association of Catholic Colleges and Universities
Association of Chiropractic Colleges
Association of Colleges and Universities of The Church of Jesus Christ of Latter-day Saints
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Independent California Colleges and Universities
Association of Independent Colleges and Universities in New Jersey
Association of Independent Colleges and Universities of Pennsylvania
Association of Independent Colleges and Universities of Rhode Island
Association of Independent Kentucky Colleges & Universities
Association of Jesuit Colleges and Universities
Association of Presbyterian Colleges and Universities
Association of Public and Land-grant Universities
Association of Research Libraries
Association of Vermont Independent Colleges
College and University Professional Association for Human Resources
Commission on Independent Colleges and Universities
Conference for Mercy Higher Education
Consortium of Universities of the Washington Metropolitan Area
Council for Advancement and Support of Education
Council for Christian Colleges & Universities
Council for Higher Education Accreditation
Council of Graduate Schools
Council of Independent Colleges
EDUCAUSE
Georgia Independent College Association

Hispanic Association of Colleges and Universities
Independent Colleges and Universities of Texas, Inc.
Independent Colleges of Indiana
Independent Colleges of Washington
Iowa Association of Independent Colleges and Universities
Kansas Independent College Association
Maryland Independent College & University Association
Michigan Independent Colleges & Universities
Minnesota Private College Council
NASPA - Student Affairs Administrators in Higher Education
National Association for Equal Opportunity in Higher Education
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Collegiate Athletic Association
North Carolina Independent Colleges and Universities
South Carolina Independent Colleges and Universities
Tennessee Independent Colleges and Universities Association
Transnational Association of Christian Colleges and Schools
Wisconsin Association of Independent Colleges and Universities

APPENDIX 1

Requirements that would exist if the proposed rule is finalized without further changes[19]

Before it learns of any sexual harassment, the institution must:

1. Prominently display its Title IX non-discrimination policy on its website (if any) and in each handbook or catalog that it makes available all student, employees, applicants for admission, unions, and professional organizations.

Once the institution has actual knowledge of an allegation of sexual harassment/assault, it must:

2. Offer and provide the survivor with supportive measures. The Title IX Coordinator must coordinate the implementation of supportive measures.
3. **Follow the procedures outlined in section 106.45 for a formal complaint process (investigation, gathering evidence, live hearing with cross-examination, etc.).**
4. **If there are multiple complaints about the same individual, the Title IX coordinator must file a formal complaint.**
5. **While offering/providing supportive measures, inform the claimant <u>in writing</u> about the right to file a formal complaint now or later.**
6. **Before removing a student from campus for safety reasons, undertake a risk analysis and provide the respondent the opportunity to challenge it.**

The institution's formal grievance procedures must:

7. Require an objective evaluation of all relevant evidence, including inculpatory and exculpatory evidence.
8. **Require that anyone designated as the Title IX Coordinator, investigator, or decision maker not have a conflict of interest or a bias.**
9. Train personnel on the definition of sexual harassment and how to conduct an investigation and grievance process including hearings that protect safety, ensure due process, and promote accountability.
10. **Include a presumption that respondent is not responsible in the notice to the accused.**
11. Include reasonably prompt timeframes for the conclusion of the grievance process.
12. Describe the range of sanctions and remedies that the institution may implement.
13. Describe the standard of evidence to be used.
14. **Set one evidentiary standard to be used in Title IX cases, either "preponderance of evidence" or "clear and convincing." However, if an institution chooses "preponderance of evidence," it must apply that standard to "conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction."**
15. Include procedures and bases for claimant and respondent to appeal, if appeal is an option.

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[19] Note: Some of these regulations were included in the 2001, 2011, and 2014 Title IX guidance. Many institutions already comply with these regulations, although they did not previously have the force of law. Bolded proposed regulations would be new under the Title IX NPRM.

16. Describe the range of supportive measures available to claimant and respondent.

Upon receipt of formal complaint, the institution must provide written "notice of allegations" to the parties that includes:

17. Notice of the recipient's grievance procedures.
18. Notice of the allegations, including the "who, what, where, and when."
19. Details sufficient and with sufficient time to prepare a response before any initial interview.
20. The specific section of code of conduct violated.
21. The conduct allegedly constituting sexual harassment.
22. **A statement that the respondent is deemed not responsible and that a determination will be made at conclusion of process.**
23. **Notice informing the parties that they may inspect and review evidence.**
24. **Notice of any code of conduct provisions that prohibit claimant or respondent from providing false statements or information during a grievance process.**
25. Notice requirement is ongoing–must be updated if new allegations arise.

Upon receipt of a formal complaint, the institution's formal grievance procedures must be consistent with the following requirements:

26. Ensure, when investigating the allegations, the burden of gathering evidence rests on the institution and not the parties.
27. **Prohibit the use of a "single investigator" model.**
28. Provide equal opportunity for parties to present witnesses and evidence.
29. **Prohibit any restriction on the ability of parties to discuss or gather evidence.**
30. Provide an opportunity for parties to have others present, including being accompanied by advisors of their choice in any meeting or proceeding.
31. Provide party written notice of date, time, location, participants of all hearings, investigative interviews, with sufficient time for party to prepare.
32. **Provide a live hearing.**
33. **Permit parties to cross-examine one another and witnesses through an advisor.**
34. **Provide an advisor for a student who does not have one for cross-examination.**
35. **Provide separate rooms with technology if requested.**
36. **Exclude statements from a party or witness who refused to sit for cross-examination.**
37. **Provide equal opportunity for parties to inspect and review "any evidence" obtained as part of the investigation that is "directly related" including evidence upon which that the institution does not intend to rely.**
38. **Send each party all the evidence in electronic format and give them 10 days to respond before finalizing the investigative report.**
39. **Create an investigative report that fairly summarizes all the evidence and provide a copy to parties at least 10 days prior to a hearing.**

At the conclusion of the hearing, the decision maker must issue an extensive written report regarding responsibility, which must include:

40. Section of code of conduct violated.

41. Description of all procedural steps taken from the receipt of the complaint through the determination including any notifications to the parties, interviews, site visits, methods to gather evidence, and hearings held.
42. Findings of fact supporting the determination.
43. Conclusions regarding the application of the policy to the facts.
44. A statement of and rational for the results to each allegation, including a determination of responsibility, any sanction on respondent, and remedies provided to the claimant.
45. The procedures and bases for complainant to appeal, if offered.
46. **Provide this written statement simultaneously to both parties.**

If appeals are allowed, the institution must:

47. Notify the other party in writing when an appeal is filed.
48. **Ensure a new decision maker who was not the investigator or decision maker in the previous hearing.**
49. **Ensure the appeal decision maker complies with the no conflict or bias rule.**
50. Give both parties an equal opportunity to submit a written statement in support or in challenging the outcome.
51. Issue a written decision describing the result of the appeal and the rationale.
52. **Provide the written decision simultaneously to both parties.**

If informal resolution process is used, the institution must:

53. **Provide written notice to both parties that discloses allegations, provides requirements of the informal process, whether the process is binding, and any consequences from participating, including that records could be maintained or shared.**
54. Obtain the parties' voluntary written consent to the informal process.

Institution must maintain records for three years and make available to claimant and respondent:

55. **Investigation of sexual harassment and any determination, any sanctions, any remedies.**
56. **Any appeal and the result.**
57. **Informal resolution.**
58. **All materials used to train coordinators investigators and decision makers.**