To: President Eli Capilouto, University Senate Council

From: Joint Working Group on Sexual Assault and Sexual Harassment Policies (Co-Chairs: Martha Alexander, Jennifer Bird-Pollan; Members: Srimati Basu, Jeffrey Bosken, Noah Daniel, Jennifer Fransen, Claire-Marie Hall, Davy Jones, Michelle Kuiper, TK Logan, Tapas Parikh, Claire Renzetti, Sue Roberts)

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The Joint Working Group on Sexual Assault and Sexual Harassment Policies was formed in January 2019 in anticipation of the promulgation of new Department of Education Title IX Regulations ("Regulations") regarding the University of Kentucky's obligations under Title IX. We met regularly for the remainder of the 2018-2019 school year, reviewing a variety of topics related to draft Regulations proposed by the Department of Education, the University's existing Title IX policy (found in Administrative Regulation 6:2[1]) and other issues that arose during the work of an earlier Ad Hoc Working Group on Sexual Assault Policies. During these meetings, we worked to prepare ourselves to respond quickly to the forthcoming Regulations. While the Working Group continued meeting during the beginning of the 2019-2020 school year, the final regulations from the Regulations[2] were not released until 6 May 2020. Despite the fact that this release came right at the end of the school year, the Working Group began meeting more regularly in order to prepare a response to the Regulations.

The current Title IX policy implemented by the University of Kentucky is found in Administrative Regulation 6:2. Under the current policy, in matters in which there is formal investigation, the Investigator prepares a report for the Title IX Coordinator. The Title IX Coordinator provides the report to the parties with an opportunity for the parties to provide additional information. After reviewing the Investigative Report and any additional information provided by the parties, the Title IX Coordinator makes a probable cause determination. If the Title IX Coordinator finds no probable cause, the matter is closed. If the Title IX Coordinator finds there is probable cause, the respondent has an opportunity to accept a resolution and waive their right to a hearing and appeal. Should the respondent choose to not accept the resolution, the matter moves to a hearing. AR 6:2 currently provides a robust pre-hearing procedure allowing most decisions about introduction of evidence to be made prior to a hearing. At the hearing, cross-examination is conducted indirectly by the hearing officer. A finding of responsibility requires a unanimous decision by the hearing panel, which is comprised of three members, drawn from a pool of faculty and staff employees. The current standard of proof for AR 6:2 hearings is preponderance of the evidence and only findings of responsibility may be appealed under the current rules. These rules have been in effect since the enactment of the current version of AR 6:2 in June 2018.

The Regulations cover many areas and require a variety of actions on the part of universities. As described above, the University of Kentucky's current policy provides a robust process for resolving allegations under AR 6:2. As a result, the University is largely in compliance with the Regulations.

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[1] The University's Policy on Discrimination and Harassment (Administrative Regulation 6:1) currently covers the aspects of Title IX related to sex-based discrimination and less severe forms of sexual harassment. The Department of Education Regulations' definition of Sexual Harassment is broader than what is currently prohibited by AR 6:2 and will pull some of the behavior currently prohibited by AR 6:1 into AR 6:2.

[2] The Department of Education Regulations are codified at 34 CFR §Part 106.

However, there are some changes the University will have to make to fully comply with the Regulations. The changes the University is required to make to the current policy include altering definitions of some behavior[3], reconceiving the process for filing formal complaints[4], amending some investigatory and adjudicatory practices[5], and changing the appellate rights of the parties[6]. The majority of the required changes will be found in the definitions section of AR 6:2, the addition of sections providing for notice of investigation[7], dismissal of charges[8], and cross-examination procedures[9].

The remainder of this memo focuses on the areas where the Regulations leave decisions to the discretion of the University. There are five areas where the University must make a decision under the Regulations: first the University must decide whether it wishes to prohibit behavior outside of the definition of Sexual Harassment; second, the University must decide the jurisdictional limits of its sexual harassment policy; third, the University must decide whether to include a prohibition against sexual exploitation in the updated policy; fourth, the University must decide whether to offer restorative justice and/or mediation under the updated policy; and fifth, the University must decide which standard of proof to use in the updated policy.

Each of these areas, with corresponding recommendations, is discussed below.

1. Prohibited Behavior

The Regulations state the University must have a policy that prohibits and sanctions behavior that falls within the definition of Sexual Harassment under Title IX. The Regulations also provide that if behavior does not meet the definitional and jurisdictions requirements of that definition, the Title IX Coordinator must dismiss the allegations under Title IX. However, the Regulations are also clear that universities have the authority to prohibit behavior beyond that explicitly addressed in the Regulations. Keeping our policy broader than is required by the Regulations will allow the University to address allegations of sexual misconduct that would have to be dismissed under the definition of Sexual Harassment provided by the Regulations. In other words, keeping all policies related to sexual misconduct under AR 6:2, as is currently the case, allows the University to prohibit and sanction behavior under this same policy, even in cases where the official Title IX allegation would have to be dismissed. **The Working Group recommends that the University continue to include**

[3] The Regulations provide the following definitions that the University must incorporate into its policy: (1) Advisor, (2) Complainant, (3) Dating Violence, (4) Domestic Violence, (5) Formal Complaint, (6) Respondent, (7) Retaliation, (8) Sexual Assault, (9) Sexual Harassment, (10) Sexual Misconduct, (11) Supportive Measures, and (12) Title IX Coordinator. *See* 34 CFR §Part 106.

[4] The definition of Formal Complaint and the grievance procedure sets forth requirements for a formal complaint that are not part of the version of AR 6:2 in effect currently. *See* 34 CFR §106.30 and 106.45.

[5] The Regulations set forth basic requirements for a grievance procedure in 34 CFR §106.45. The 2018 revision of AR 6:2 is largely compliant with the requirements.

[6] The Regulations make clear that both parties have a right to appeal the outcome of a hearing or of a dismissal. 34 CFR §106.45(b)(8).

[7] The Regulations require a notice of allegations that is more formal than provided in the 2018 revision of AR 6:2. 34 CFR §106.45(b)(2).

[8] The Regulations require that some allegations be dismissed by the Title IX Coordinator in certain circumstances. 34 CFR §106.45(b)(3).

[9] The Regulations require the University to provide direct cross-examination of both witness and parties by the parties' advisor of choice. 34 CFR §106.45(b)(6).

under AR 6:2 behavior that is prohibited under University policy, but that is outside of the scope of the Regulations.

2. Jurisdictional Limits

The Regulations require only that the University's policy cover actions that occur in an educational program or activity[10], which "includes locations, events, or circumstances over which the [University] exercised substantial control over both the respondent and the context in which the harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." 34 CFR §§106.44. Further, the Regulations specifically state that the grievance procedures only apply to individuals physically located in the United States. 34 CFR §106.8.

However, the Regulations permit the University to have a policy that extends beyond those jurisdictional limitations. In other words, the University of Kentucky may continue to elect to have AR 6:2 apply to alleged sexual harassment or sexual misconduct violations that occur outside of the United States on a education abroad program, or occur in a student apartment off-campus, as is currently the case under the University's policy. Specifically, the current policy addresses actions that occur on campus property or during a University sponsored activity, but also addresses any action that occurs outside of those scenarios if "the conduct has continuing adverse effects on or creates a hostile environment for students, employees, or third parties while on property owned, leased, or controlled by the University, or in any University employment or education program or activity" (University of Kentucky, AR 6:2, III.C.). The Working Group believes that this jurisdictional reach should be maintained in the amended AR. This broader jurisdictional authority will allow the University to protect the interests of its community members, regardless of where the alleged prohibited activity occurred. **The Working Group recommends that the University of Kentucky's policy should continue the jurisdictional reach in the current AR 6:2.**

3. Prohibition Against Sexual Exploitation

The Regulations do not include "sexual exploitation" in the definition of Sexual Harassment. As discussed above, universities have the discretion to include other prohibited behavior under their sexual misconduct policies, even if that results in the university's policy reaching further than is required under the Regulations. In addition, to Sexual Assault, Stalking, Dating Violence and Domestic Violence, all of which are recognized as Sexual Harassment by the Regulations, the University's current version of AR 6:2 includes "sexual exploitation" in the list of prohibited actions. The definition of "sexual exploitation" under the current AR 6:2 is "taking non-consensual or abusive sexual advantage of another, and includes situations in which the conduct does not fall within the definitions of Sexual Harassment or Sexual Assault."[11] **The Working Group recommends that sexual**

[10] Education program or education activity is typically interpreted to mean a program or activity that is related to the University's mission, e.g. a biology class or a literature club.

[11] See, University of Kentucky Administrative Regulation 6:2, Part IV.T. ""Sexual exploitation" means taking non-consensual or abusive sexual advantage of another, and includes situations in which the conduct does not fall within the definitions of Sexual Harassment or Sexual Assault. Examples of sexual exploitation include, but are not limited to the following: • Causing the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give affirmative consent to sexual activity; • Allowing third parties to observe private sexual activity from a hidden location (e.g., a closet) or through electronic means (e.g., via Skype or live streaming of images); • Engaging in voyeurism (e.g., watching

exploitation should remain prohibited conduct, identified and sanctioned under AR 6:2. We believe the safety of our community members will be better protected if sexual exploitation is explicitly addressed and prohibited under the University of Kentucky's Sexual Assault and Sexual Harassment policy.

4. Alternative Dispute Resolution Strategies

Restorative justice and mediation are alternative dispute resolution strategies that may be used by a university as part of a holistic response to sexual assault and sexual harassment. These procedures are inappropriate for determinations of responsibility and the Regulations only permit their use in situations in which the parties desire a less formal outcome with no disciplinary action. The Regulations do not require universities to offer any alternative dispute resolution strategies as part of their sexual misconduct policies.

Our Working Group has considered a variety of options that fall into these categories. We support offering alternative dispute resolution methods, such as restorative justice, on our campus. Our research indicates that restorative justice and other alternative dispute resolution is highly effective in assisting individuals who have experienced sexual misconduct heal while having a sense that justice was served. We also believe that the particulars of implementing any method of alternative dispute resolution must be investigated in much more detail before we begin using restorative justice or any other alternative dispute resolution method. In addition, we believe the individual responsible for leading any such process on our campus must be well trained in the area. Implementing any model of alternative dispute resolution will mean a substantial investment in training employees to conduct the alternative dispute resolutions or in hiring new employees or consultants. The details of what form any alternative dispute resolution process will take requires careful investigation and thoughtful design that is outside the scope of this Working Group. **The Working Group recommends the University prioritize development of an alternative dispute resolution process and commission additional research into an alternative dispute resolution process that best fits the needs of the University.**

5. Standard of Proof

The Regulations require that all proceedings that make a determination of responsibility for Sexual Harassment, as that term is defined by the Regulations, must use the same standard of proof. The available standards universities can choose are either "preponderance of the evidence" or "clear and convincing evidence." Preponderance of the evidence is generally accepted to mean that the fact-finder believes with slightly more than 50% certainty that the alleged conduct occurred. Clear and convincing evidence is a much higher standard and is generally accepted to mean that the fact-finder believes with about 70-80% certainty that the alleged conduct occurred. The University of

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private sexual activity without the consent of the participants or viewing another person's intimate parts (including genitalia, groin, breasts, or buttocks) in a place where that person would have a reasonable expectation of privacy); • Recording or photographing private sexual activity and/or a person's intimate parts (including genitalia, groin, breasts, or buttocks) without consent; • Disseminating or posting images of private sexual activity and/or a person's intimate parts (including genitalia, groin, breasts, or buttocks) without consent; • Prostituting another person; and • Knowingly exposing another person to a sexually transmitted infection or virus without the other's knowledge."

Kentucky AR 6:2 currently uses the "preponderance of the evidence" standard for all allegations that fall within AR 6:2, regardless of the violation alleged or whether either the respondent or complainant is a student, a staff employee, or a faculty employee.

This new Department of Education requirement that *all* proceedings that make a determination of responsibility for an allegation of Sexual Harassment under Title IX must use the same standard of proof potentially raises a new problem for us at the University of Kentucky. Under current University policy, if a faculty or staff employee is found responsible for sexual misconduct under AR 6:2, and the University seeks to impose a sanction, that employee is entitled to additional procedural protections before the sanction is imposed. For each of these subsequent proceedings, the threshold determination the University must make is whether the subsequent process makes a determination of responsibility for sexual harassment independent of the proceedings under AR 6:2. If so, then all processes must use the same standard of proof.

Under the University's current policies and procedures, if the Sexual Misconduct Hearing Panel finds a faculty employee responsible as a result of an AR 6:2 hearing and finds that termination would be an appropriate sanction, that faculty employee would be entitled to additional hearings before being terminated. Governing Regulation X.B.1.f.2 states that faculty termination proceedings that occur before the University Hearing Panel on Privilege and Tenure must use a clear and convincing evidence standard of proof. Further, the final step before termination of a tenured faculty employee is a hearing before the Board of Trustees. That final hearing is held under terms entirely determined by the Board itself and could be different in different circumstances. More specifically, for these purposes, the Board of Trustees could use any standard of proof it deems appropriate for a hearing before it.

The problem then arises as follows: while a faculty employee who faced charges under AR 6:2 for a violation of the University of Kentucky's Title IX policy would be subject to the preponderance of the evidence standard of proof in the AR 6:2 hearing, were that faculty employee found responsible, and were the University to seek to terminate that faculty employee, the subsequent hearings would apply a different standard of proof, thereby violating the current Department of Education requirement that all such hearings that make a finding of responsibility for a violation of a Title IX offense for all people use the same standard of proof. If the GR X proceedings make a determination of responsibility that is separate from the determination made under AR 6:2, our current model will have to be amended to comply with the Department of Education requirements.

The Working Group has identified five possible alternatives for moving forward, but a majority of the Working Group recommends consideration of only the first two, labelled as A and B. The remaining three, labelled as C, D, and E, were discussed at length by the Working Group, but ultimately a majority of the Working Group did not recommend consideration of those options. Given the importance of this issue, the Working Group recommends seeking campus community input on this matter. Each alternative will be identified and briefly discussed below. The Working Group recommends that the University pursue either Option A or Option B of the options listed below.

A. **Amend GR X's Standard of Proof for Faculty Termination Proceedings that Stem from Responsible Findings Under AR 6:2.**

If the University decides to keep the standard of proof as preponderance of the evidence for all AR 6:2 hearings, then the standard of proof for subsequent hearings for faculty found responsible under the AR 6:2 hearing must also use the preponderance of evidence standard of proof. Hearings pursuant to GR X by the University Hearing Panel on Privilege and Tenure and, pursuant to KRS 164.230, in front of the Board of Trustees that follow on a faculty employee being found responsible in an AR 6:2 hearing could also be held subject to the preponderance of the evidence standard of proof. While this would lower the standard of proof in faculty termination proceedings from its current standard, this change in the standard of proof could be limited to situations in which the reason the University seeks termination stems from a finding of responsibility in an AR 6:2 hearing. Further, because the purview of AR 6:2 would be broader than the requirements of the Regulations, this change to the standard of proof for subsequent hearings could be further limited so that it *only* applies to situations where the University seeks termination of a faculty employee for a violation of Title IX. In other words, faculty found in violation of an element of AR 6:2 that is not required under Title IX would be entitled to the current clear and convincing standard of proof in subsequent proceedings. Adopting this limited policy would not require any change to any other faculty termination proceedings, as long as those proceedings did not stem from an alleged violation of Title IX.

The Working Group has some concerns regarding lowering the standard of proof in any faculty termination proceeding below the standard recommended by the American Association of University Professors ("the AAUP"). However, these concerns may be mitigated by requiring that the AR 6:2 hearing panel in such cases be comprised only of tenured faculty employees, who are vetted through the University Senate Council. Such a requirement would offer the faculty governance and oversight that is important in matters related to faculty appointment and tenure. The advantages of this option would be that all AR 6:2 hearings would keep the same standard of proof. However, one disadvantage would be that hearings pursuant to GR X for alleged violations of AR 6:2 before the University Hearing Panel on Privilege and Tenure and the Board of Trustees would have different standards of proof than other faculty termination hearings. It is important to note that it has been several decades since there has been a faculty termination hearing in front of the University Hearing Panel on Privilege and Tenure or the Board of Trustees. **The majority of the Working Group recommends considering this option.**

B. Amend AR 6:2 To Have Two Separate Standards Depending on the Sanctions.

This option seeks to distinguish among cases depending on the proposed sanction associated with the charge. If the University sought expulsion of a student or termination of an employee[12], the standard of proof required for a finding of responsibility would be clear and convincing evidence. If the University sought any other sanction, the standard of proof would be preponderance of the evidence. This would allow the faculty termination proceedings to continue to use the current higher standard of proof, since any sexual assault proceeding that resulted in the highest possible sanction would use the same standard of proof. This option also ensures that the most severe

[12] Expulsion of a student and termination of an employee are the most severe possible sanctions for students and employees.

sanctions are reserved for those cases where the University feels most confident about the likelihood of the respondent's responsibility.

Some members of the Working Group have concerns about this option, as it would require members of the AR 6:2 Hearing Panel to have a more nuanced understanding of the distinctions in place in the different charges and sanctions. This option also raises concerns that a Respondent who may be found responsible under the preponderance of the evidence standard would not be found responsible if the University sought a sanction that required clear and convincing evidence. This may be an acceptable result, but the University will have to carefully consider which sanction it seeks. Further, because a respondent who repeatedly violated the AR 6:2 rules might be subject to a more severe sanction than would normally be appropriate for the alleged activity, having such a distinction might also require the University to reveal information about the history of the respondent's behavior during the responsibility determination phase of the hearing were the University to seek the most severe sanction in such a case, which is typically not desirable and may result in bias towards the respondent. Overall, this option may result in the fewest changes to the current policies. **The majority of the Working Group recommends considering this option.**

C. **Change the AR 6:2 Standard of Proof to Clear and Convincing Evidence.**

If all hearings under AR 6:2 were held with a clear and convincing evidence standard of proof, to match the standard used in the faculty termination proceedings, then all hearings would use the same standard. However, the Working Group does not see this as a viable alternative. We are concerned that raising the standard of proof under AR 6:2 would cause an unacceptable chilling effect on reporting of cases of sexual assault and sexual harassment. Further, many of these cases have no third-party witnesses or evidence other than the testimony of the two parties involved. Requiring this high threshold of proof runs the risk of significantly reducing the number of reports of prohibited behavior, reducing the findings of responsibility under AR 6:2, and would likely result in many responsible parties being found not responsible. As a result, **the Working Group does not recommend adopting this option**.

D. Change the Faculty Termination Standard of Proof to Preponderance of the Evidence.

If the faculty termination proceedings in front of the University Hearing Panel on Privilege and Tenure and in front of the Board of Trustees were held with the preponderance of the evidence standard, then all hearings would use the same standard, as required by the Department of Education. However, the clear and convincing evidence standard in place under the GR for the University Hearing Panel has existed for decades and complies with AAUP guidance about best practices for faculty termination proceedings. Further, changing the standard of proof to this new, much lower standard in all faculty termination proceedings would offer significantly less protection to faculty and would go well beyond what is required by the Regulations. Therefore, **the Working Group does not recommend adopting this option.**

E. Alter GR X so that Faculty Found Responsible Under AR 6:2 Move Straight to a Termination Hearing Before the Board of Trustees.

This option would streamline the faculty termination process by eliminating the GR X process available to faculty whom the University seeks to terminate in cases where the termination stems from a finding of responsibility under AR 6:2. Under this model, a finding of responsibility by an AR

6:2 Hearing Panel would lead immediately to a faculty employee having a termination hearing before the Board of Trustees. At that hearing, the Board of Trustees would have to use the preponderance of the evidence standard of proof, in order to comply with "consistency" provisions of the Regulations. Requiring the Board to use the preponderance of the evidence standard is permissible under state law, as KRS 164.230 does not prescribe a standard of proof. This option limits the number of hearings a complainant would have to participate in prior to the ultimate conclusion of their complaint. This option could also include a requirement that the AR 6:2 Hearing Panel be comprised entirely of tenured faculty employees from a list vetted by the Senate Council in a case where the University is seeking termination of a faculty employee. Requiring such a hearing panel composition would offer some faculty governance and faculty oversight that is important in matters related to faculty appointment and tenure. While this option simplifies the process, the Working Group believes this streamlined process eliminates too many of the faculty governance and oversight protections that are currently in place and are recommended by the AAUP. **The Working Group does not recommend adoption of this option.**

6. Conclusions and Next Steps

Because much of the current version of AR 6:2 already complies with the Regulations, the University is in a good position to create a policy that complies with the Regulations, protects the safety and well-being of all members of our community, and ensures justice in all University proceedings. While the Working Group believes that our unanimous recommendations regarding sections 1-4 above can be easily implemented by the University, we strongly encourage the University to seek community feedback. In particular, community feedback may be especially valuable in resolving the questions raised in section 5 of this memo regarding the appropriate standard of proof for hearings. The issues raised here are quite complex, but perhaps this memo could be circulated to help inform discussion. The Working Group suggests that the University consult the University Senate, the Staff Senate, the Student Government Association, the Graduate Student Congress, and other interested campus groups in order to solicit feedback from their respective constituencies.

We thank President Capilouto and the University Senate Council for their trust in our Working Group. We are proud of the collaboration of faculty, staff, and students that has resulted in this report. We offer our services for continued work and conversation on these important questions.