Dear Department of Education. I am writing to submit the attached (PDF) written comment by FIRE for the public hearing on Title IX conducted from June 7 through 11.
Thank you for your attention to our perspective.
Respectfully submitted,
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Comment of the Foundation for Individual Rights in Education for the Department of Education’s June 7 to June 11 Public Hearing on Title IX

Submitted on June 11, 2021

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Introduction

The Foundation for Individual Rights in Education (FIRE; thefire.org) is a nonpartisan, nonprofit organization dedicated to defending student and faculty rights on America’s college campuses. These rights include freedom of speech, freedom of assembly, due process, academic freedom, legal equality, and freedom of conscience.

The Department’s 2020 Title IX regulations significantly improve upon previous departmental policy and guidance in a number of important ways, and FIRE urges the Department to leave the regulations intact. If the Department decides otherwise, any changes should be modest and must maintain the campus free speech and due process protections currently included.

FIRE has consistently argued that everyone on campus benefits from fundamentally fair proceedings. The current rules take the rights of both complainants and respondents seriously and make important strides toward ensuring that complaints of sexual misconduct will be neither ignored nor prejudged. The regulations go a long way toward ensuring meaningful due process protections on campuses—to the ultimate benefit of both complainants and respondents alike. They should not be weakened or eliminated.

I. The Department must take the rights of accusers and accused students seriously. The current regulations are fair to all.

   A. Legal scholars and leading media outlets characterized the regulations as a serious effort to address campus misconduct fairly, rejecting hyperbolic criticism

Any fair-minded examination of Title IX’s implementation over the last decade would find numerous examples of institutions either inadequately addressing the needs of
complainants or running roughshod over the rights of the accused. Neither reaction to a complaint is acceptable or lawful. It is of utmost importance that federal policy ensures that all students can trust that their cases will be handled by their institutions with the seriousness they deserve, regardless of which side of an allegation they are on.

When the Title IX regulations were issued, some critics decried them as a callous attack on complainants. For example, Catherine Lhamon, former Assistant Secretary of Civil Rights and President Biden’s nominee to resume that mantle, declared on Twitter that former Secretary Betsy DeVos “presides over taking us back to the bad old days, that predate my birth, when it was permissible to rape and sexually harass students with impunity. Today’s students deserve better, including fair protections consistent with law[.]” The National Women’s Law Center tweeted similar sentiments: “Title IX rules will return us to a time when schools could sweep rape, assault and harassment under the rug without any consequences.”

Yet many legal scholars and leading media outlets rejected these exaggerated critiques. Evaluating the regulations and the reactions of critics, Harvard Law School Professor Jeannie Suk Gersen wrote in *The New Yorker*:

> It was unclear, however, precisely what aspects of the regulations were so extreme and alarming. Uncharacteristically for the Trump Administration, the Education Department, in crafting the regulations, engaged with a large range of public comments and concerns—from schools, advocates for survivors, and advocates of due process—and the regulations reflect that engagement. They are not exactly as I would wish, but they clarify the rights of both victims and the accused in a way that is likely to lead to improvements in basic fairness. The suggestion that even the most controversial provisions of the regulations allow rape with impunity speaks to a disturbingly large gap between reality and rhetoric on the topic—one that is particularly important to address, so students do not get the false sense that they should not bother to report assaults.

When the regulations were pending, Lara Bazelon, a professor of law at the University of San Francisco School of Law and director of the law school’s Criminal Juvenile Justice and Racial Justice Clinical Programs, also expressed support for the regulations, writing:

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1 Catherine Lhamon (@CatherineLhamon), Twitter (May 5, 2020, 8:48 PM), https://twitter.com/CatherineLhamon/status/1257834691366772737.


I'm a feminist and a Democrat, and as a lawyer I have seen the troubling racial
dynamics at play under the current Title IX system and the lack of due process for
the accused. Ms. DeVos’s proposals take important steps to fix these problems.⁴

Major media outlets also concluded that the regulations were a serious and salutary effort
and largely rejected the notion that the regulations posed a serious threat to the rights of
complainants. Some leading outlets praised the regulations for their even-handedness.
Writing about the regulations when initially proposed, The Washington Post’s editorial
board declared:

Some of the criticism, to our mind, has been overheated. Ms. DeVos is right
that there are problems with the current system, and her department’s
proposal contains some sensible changes that would bring needed balance to
how disciplinary proceedings are conducted.

[...]

Changes aimed at ensuring fairness to students accused of misconduct — a
presumption of fairness, written notice of allegations, equal opportunity to
review all evidence collected, right to an appeal — make sense.⁵

The editorial board of the Los Angeles Times concluded:

When Education Secretary Betsy DeVos decided to revisit the rules governing
sexual assault accusations at colleges, some victims' advocates feared she
would make it too difficult to hold assailants responsible. But the rules
released this week make reasonable changes for the most part, curbing some
of the excesses of the previous system.⁶

In a separate editorial this year, the Los Angeles Times explained, “The changes engineered
by DeVos need minor adjustment but not an overhaul and certainly not a swing back to the
rules adopted by the Obama administration.”⁷

⁴ Lara Bazelon, I'm a Democrat and a Feminist. And I Support Betsy DeVos’s Title IX Reforms., N.Y. TIMES (Dec.
⁵ Editorial, What Betsy DeVos’s new Title IX changes get right — and wrong, WASH. POST (Dec. 14, 2018),
https://www.washingtonpost.com/opinions/what-betsy-devoss-new-title-ix-changes-get-right--and-
wrong/2018/12/14/a8d485e2-feca-11e8-ad40-cdfdd0e0dd6a_story.html.
⁶ Editorial, Betsy DeVos hits the reset button on campus sexual harassment rules, L.A. TIMES (May 8, 2020),
⁷ Editorial, Campus sex assault rules need a tweaking not an overhaul, L.A. TIMES (Mar. 22, 2021),
https://www.latimes.com/opinion/story/2021-03-22/editorial-campus-sex-assault-rules-need-a-tweaking-
ot-an-overhaul.
B. The regulations provide fair procedures for all parties in a disciplinary proceeding

At the heart of the regulations are provisions that require institutions to provide fair procedures when adjudicating sexual misconduct cases.

While it is tempting to think about procedural protections only through the lens of their benefit to accused students, they also play a vital role in protecting the interests of complainants. After all, it is by thoroughly evaluating accusations that findings of responsibility gain legitimacy. It is also important to keep in mind that complainants suffer when procedural protections are inadequate. This point is powerfully illustrated by a case in Kentucky, where courts remanded a case for new proceedings several times and thereby forced the complainant to revisit her alleged rape over and over again, all because the University of Kentucky repeatedly violated the rights of the accused student. 8 A complainant needs a credible process, too.

To guarantee both due process and a proceeding's credibility, the regulations require longstanding and uncontroversial hallmarks of fair adjudication: detailed notice; 9 a presumption of innocence; 10 the right to review the evidence in the institution's possession (unless that evidence is privileged), whether or not the institution intends to use that evidence in the proceeding; 11 a live hearing; 12 and the ability, through an advisor, to cross-examine the other party and any witnesses. 13 Moreover, to help prevent the use of training materials that may improperly bias investigators and adjudicators against a complainant or respondent, the regulations require the publication of all materials used to train such personnel on an institution's website. 14

Reasonable observers have concluded that the regulations are even-handed precisely because they are helpful to everyone.

C. The preamble to the regulations unambiguously set forth that they equally apply to all individuals

Analysis of the regulations affirms that they are carefully crafted to protect the rights of all parties and extend necessary protections to everyone involved in or affected by the campus

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8 Doe v. Univ. of Ky., 2016 U.S. Dist. LEXIS 117606, *8 (E.D. Ky. Aug. 31, 2016), modified on other grounds, 2018 U.S. Dist. LEXIS 135633 (E.D. Ky. Aug. 10, 2018) (concluding “the University bungled the disciplinary hearings so badly, so inexcusably, that it necessitated three appeals and reversals in an attempt to remedy the due process deficiencies,” and that this had “profoundly affected Plaintiff’s ability to obtain an education at the University of Kentucky.”).
9 See 34 C.F.R. § 106.45(b)(2).
10 See 34 C.F.R. § 106.45(b)(1)(iv).
11 See 34 C.F.R. § 106.45(b)(5)(vi).
12 See 34 C.F.R. § 106.45(b)(6)(i).
13 Id.
14 See 34 C.F.R. § 106.45(b)(10)(i)(D).
disciplinary process. The regulations’ preamble unambiguously emphasizes that the regulations apply equally across all sexual orientations; gender, racial, and ethnic identities; and all other personal characteristics:

For consistency, throughout this preamble we use the acronym “LGBTQ” while recognizing that other terminology may be used or preferred by certain groups or individuals, and our use of “LGBTQ” should be understood to include lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, and other sexual orientation or gender identity communities. We use the phrase “persons of color” to refer to individuals whose race or ethnicity is not white or Caucasian. We emphasize that every person, regardless of demographic or personal characteristics or identity, is entitled to the same protections against sexual harassment under these final regulations, and that every individual should be treated with equal dignity and respect.15

The regulations meaningfully protect the interests of all parties.

D. The regulations protect a complainant’s education, well-being, and autonomy

When Title IX was enacted, it was not intended to create a shadow justice system. The statute’s overarching purpose is to ensure that sex-based discrimination does not prevent students from attaining an education. However, over the years, the focus of many institutions’ Title IX efforts often became less about what an institution could do to help a complainant continue his or her education and more about meting out punishment to those deemed by institutions to be offenders.

Refocusing institutions’ attention on addressing a complainant’s ability to stay in school, the regulations mandate:

The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures [. . .], consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.16

Regardless of any pending disciplinary process, the current regulations immediately put an institution to work on behalf of a complainant’s personal well-being and continued access to education.

16 34 C.F.R. § 106.44(a).
The supportive measures available to a complainant, whether ongoing counseling or classroom and housing accommodations, are determined by an institution’s reasonable evaluation of that student’s best interests and not on whether his or her complaint can be sufficiently proven to justify punishing the alleged assailant. This is a victory for complainants because under this framework, in a close case where there is not enough evidence to justify punishing the alleged assailant, an institution must still make efforts to ensure a complainant has equal access to his or her education. This is also a victory because it preserves the ability of institutions to take disciplinary action where warranted while reemphasizing the availability of remedies when the complainant prefers an informal mediation over a formal disciplinary process.

Because victims are often, for a variety of reasons, reluctant to come forward when they believe that formal punishment will result, another important way the regulations expand complainants’ choices as to how an allegation of misconduct is handled by an institution is by allowing that institution to offer additional informal resolution processes, like mediation and other alternative dispute resolution processes, that focus on restorative justice. At the same time, an institution may never force a complainant into informal resolution. By granting students autonomy to decide how to proceed, the regulations restore Title IX’s focus to ensuring equal educational access.

The regulations also give complainants greater control over their privacy. For example, rather than requiring all employees to be mandatory reporters, which can make victims reluctant to share their stories with faculty members or others who they would otherwise trust to keep things confidential, the regulations allow universities to “decide which of their employees must, may, or must only with a student’s consent, report sexual harassment to the recipient’s Title IX Coordinator (a report to whom always triggers the recipient’s response obligations, no matter who makes the report).” The regulations satisfy two significant but distinct interests. They support an institution’s interest in eliminating all misconduct from its programs by allowing it to select staff who must report any and all misconduct brought to their attention. At the same time, by allowing an institution to designate staff who will only proceed with an official report with the complainant’s consent, the regulations serve a complainant’s interest in controlling the development of a sensitive process.

The regulations also protect a complainant’s privacy by mandating that an institution cannot “access, consider, disclose, or otherwise use” a party’s medical records without that party’s voluntary, written consent. Under this provision, medical records that would ordinarily be deemed relevant are only allowed if the party provides the records themselves or consents to their use in the proceeding.

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17 See 34 C.F.R. § 106.45(b)(9).
19 34 C.F.R. § 106.45(b)(5)(i).
As in other matters, the regulations seek to harmonize various interests. At the same time the regulations protect privacy, they also enhance transparency. All parties—including complainants—benefit from provisions in the regulations that forbid schools from issuing gag orders on the parties that would prevent them from discussing their cases publicly or otherwise retaliating against them.

II. The Department's policies must conform with the United States Constitution and relevant judicial authority. The current regulations do so, even directly incorporating language from Supreme Court precedent.

Insofar as the Department’s policies will bind public institutions of higher education, they must comply with the United States Constitution and judicial authority.

A. The regulations mirror binding precedent related to Title IX’s jurisdiction

In *Davis v. Monroe County Board of Education*, the Supreme Court of the United States addressed the jurisdictional limits of Title IX:

The language of Title IX itself—particularly when viewed in conjunction with the requirement that the recipient have notice of Title IX’s prohibitions to be liable for damages—also cabins the range of misconduct that the statute proscribes. *The statute’s plain language confines the scope of prohibited conduct based on the recipient’s degree of control over the harasser and the environment in which the harassment occurs*. If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference “subject[s]” its students to harassment [. . .] harassment must take place in a context subject to the school district’s control [. . .] *These factors combine to limit a recipient’s damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs*. Only then can the recipient be said to “expose” its students to harassment or “cause” them to undergo it “under” the recipient’s programs.

Following the Court’s ruling is not optional and the Department is bound to abide by these jurisdictional limitations.

B. The regulations comply with established law protecting constitutional rights of freedom of expression

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20 See 34 C.F.R. § 106.45(b)(3).
21 See 34 C.F.R. § 106.71.
There is no doubt that First Amendment interests are implicated when expression on public college campuses is regulated. As the Supreme Court has declared, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” 23 The Court has also rejected the idea that, “because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’” 24 Further, these protections apply even to highly offensive speech on campus: “[T]he mere dissemination of ideas — no matter how offensive to good taste — on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” 25

Federal agencies must comply with precedents established by the Supreme Court of the United States that interpret constitutional rights, including the First Amendment. 26 This is true even if the agency believes the court rulings are in error or set bad policy. Indeed, were the Department to amend the Title IX regulations in a manner that required the violation of First Amendment rights, such a rule would receive no deference and would be subject to invalidation by a court. 27

Significantly, the definition of sexual harassment required by the current Title IX regulations is taken directly from the Supreme Court of the United States decision in Davis, 28 and thus, complies with the First Amendment. Many courts use the Davis standard to evaluate the constitutionality of campus policies. 29 Departing from it would be unconstitutional.

27 See, e.g., Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1438 (1985) (holding that rules “fundamentally at odds with the First Amendment . . . can no longer be permitted to stand”); see also Edward J. Debartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575–76 (1988) (observing that courts will “not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it”).
29 See, e.g., McCauley v. Univ. of the V.I., 618 F.3d 232 (3d Cir. 2010) (upholding district court’s invalidation of university harassment policy on First Amendment grounds); DeJohn v. Temple Univ., 537 F.3d 301, 319 (3d Cir. 2008) (striking down sexual harassment policy reasoning that because the policy failed to require that speech in question “objectively” create a hostile environment, it provided “no shelter for core protected speech”); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional). (Note that Dambrot was issued before Davis, but relied upon similar elements.)
Given the long-recognized institutional significance and legal necessity of First Amendment protections for students and faculty, the Department of Education’s Office for Civil Rights (OCR) stated in 2003:

OCR has consistently maintained that schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech. OCR’s regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment. . . . OCR interprets its regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles. 30

The Department of Education must stick with the Davis standard to comply with the First Amendment.

C. The regulations reflect established law protecting the constitutional right to due process

The Department must protect not only the constitutional free speech rights in the current Title IX regulations, but constitutional due process rights as well. While there is no doubt that universities are both morally and legally obligated to respond to known instances of sexual assault in a manner reasonably calculated to prevent its recurrence, public universities are also bound by the Constitution to provide meaningful due process to accused students. 31

Since the April 4, 2011 “Dear Colleague” letter was issued, there have been more than 700 lawsuits filed challenging how institutions conduct their Title IX proceedings, 32 producing at least 200 rulings (and likely even more settlements) favorable to the rights of the accused. 33

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31 See, e.g., Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961); Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56, 69 (1st Cir. 2019) (“In this respect, we agree with a position taken by the Foundation for Individual Rights in Education, as amicus in support of the appellant—that due process in the university disciplinary setting requires ‘some opportunity for real-time cross-examination, even if only through a hearing panel.’”).
33 See KC Johnson, The Biggest Enemy of Campus Due Process from the Obama Years Is Back, NATIONAL REVIEW (June 1, 2021), https://www.nationalreview.com/2021/06/the-biggest-enemy-of-campus-due-process-from-the-obama-years-is-back (“While courts typically defer to colleges and universities in academic-discipline cases, there have been 200 decisions favorable to students accused under Title IX since the Obama administration’s policy change. Federal appeals courts covering 29 states from Vermont to Alaska...”)
The United States Courts of Appeals for the First, Third, and Sixth Circuits have all guaranteed students the right to some form of cross-examination. Indeed, in the case of Doe v. Baum, the Sixth Circuit declared that, in the context of campus sexual misconduct adjudications, cross-examination is a requirement of due process. Explaining its reasoning, the court observed:

Without the back-and-forth of adversarial questioning, the accused cannot probe the witness’s story to test her memory, intelligence, or potential ulterior motives. Nor can the fact-finder observe the witness’s demeanor under that questioning. For that reason, written statements cannot substitute for cross-examination.

The opinion in Baum is clear with respect to its requirement that accused students be afforded the right to cross-examine adverse witnesses and their accusers, but it also establishes that accused students have the right to an actual, live hearing. Judicial authorities expect campuses to maintain procedures necessary for fair proceedings. The federal government’s regulations must respect this and related rulings.

While the law is still developing with respect to the precise contours of what specific due process protections are constitutionally required in campus disciplinary proceedings, it is clear that the Constitution and the rule of law demand that these proceedings are fundamentally fair. Fundamental fairness is simply not possible without robust meaningful safeguards like those provided by regulations. An explicit presumption of innocence, detailed notice of the allegations, access to all evidence in the institution’s possession unless that evidence is privileged, a live hearing with meaningful cross examination conducted by an advocate, and active representation by an advocate (who may be an attorney) are time-tested tools for producing more reliable, accurate, and fair results.

have issued rulings making it easier for wrongly accused students to sue their universities for gender discrimination.”.

34 See Doe v. Univ. of Scis., 961 F.3d 203, 214 (3d Cir. 2020) (“In short, notions of fairness in Pennsylvania law include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her.”); Haidak, 933 F.3d at 69 (“In this respect, we agree with a position taken by the Foundation for Individual Rights in Education, as amicus in support of the appellant -- that due process in the university disciplinary setting requires ‘some opportunity for real-time cross-examination, even if only through a hearing panel.’”); Doe v. Baum, 903 F.3d 575, 578 (6th Cir. 2018) (“[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”).

35 See Baum, 903 F.3d at 578.

36 Id. at 582 (internal citations omitted).

37 Id. at 583 (“Doe asks for an opportunity for a hearing with live cross-examination. Due process requires as much.”). See also Univ. of Scis., 961 F.3d at 214.
Though the Department of Education may require institutions to give students more robust protections than the courts have demanded, it cannot instruct institutions to provide students less.

**Conclusion**

Fairly addressing sexual misconduct on college campuses is both a moral and legal responsibility. Unfortunately, too many critics of the current Title IX regulations assert that procedural protections must be abandoned to avoid chilling complainers from coming forward with their complaints. FIRE does not agree that procedural protections put victims at risk. Nor did the late Justice Ruth Bader Ginsburg.

During a February 2017 conversation with National Constitution Center President and CEO Jeffrey Rosen, Justice Ginsburg stressed the importance of restoring due process to campus proceedings. When discussing the #MeToo movement, Rosen asked the Justice, “What about due process for the accused?” Justice Ginsburg responded:

> Well, that must not be ignored and it goes beyond sexual harassment. The person who is accused has a right to defend herself or himself. And we certainly should not lose sight of that, recognizing that these are complaints that should be heard. So, there’s been criticism of some college codes of conduct for not giving the accused person a fair opportunity to be heard, and that’s one of the basic tenets of our system, as you know. Everyone deserves a fair hearing.

Rosen followed up, asking:

**Rosen:** Are some of those criticisms of the college codes valid?

**Ginsburg:** Do I think they are? Yes.

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38 See, e.g., *Title IX Rule Puts Students at Greater Risk of Sexual Harassment and Assault*, CTR. FOR AM. PROGRESS, (“By [...] changing grievance procedures, schools will likely investigate fewer incidents of sexual harassment [...] which will have a chilling effect on reporting of sexual harassment […]”); *Civil and Human Rights Community Joint Comment on Title IX NPRM*, LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS (Jan. 30, 2019), https://civilrights.org/resource/civil-and-human-rights-community-joint-comment-on-title-ix-nprm/ (“The proposed rules require post-secondary institutions to conduct a ‘live-hearing’ in which parties and witnesses must submit to cross-examination by the other party’s ‘advisor of choice’ […] [cross-examination] would understandably discourage many students-parties and witnesses- from participating in a Title IX grievance process, chilling those who have experienced or witnessed harassment from coming forward.”).

Rosen: I think people are hungry for your thoughts about how to balance the values of due process against the need for increased gender equality.

Ginsburg: It's not one or the other. It's both. We have a system of justice where people who are accused get due process, so it's just applying to this field what we have applied generally.

Justice Ginsburg was right, and her point remains clear and persuasive: due process for the accused and justice for victims must never be considered mutually exclusive. The regulations, as they stand now, reflect this truth. They comply with the intent of Title IX, the requirements of the Constitution, and the case law interpreting those requirements.

For all of the preceding reasons, the Department should leave the Title IX regulations intact. However, if it is determined to revise them, it should heed the advice of the Los Angeles Times and make only “minor adjustments,” and none that in any way compromises the right of all students to speak their minds freely and to have their claims considered in fundamentally fair proceedings.

Respectfully submitted,

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