

From: Kristina W. Supler
Sent: Thu, 10 Jun 2021 21:54:19 +0000
To: T9PublicHearing
Cc: Kyle O'Dowd
Subject: Written Comment: Title IX Public Hearing - NACDL's Comment in Support of Preserving Due Process in Title IX Proceedings
Attachments: NACDL Comment for Title IX Regulations 6.9.21.pdf

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To Whom It May Concern:

Attached please find a statement from the National Association of Criminal Defense Lawyers regarding Title IX.

Sincerely,
Kristina Supler on behalf of NACDL

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June 9, 2021

Via Email – T9PublicHearing@ed.gov

Miguel A. Cardona
Secretary of Education
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

**Re: Written Comment: Title IX Public Hearing -
National Association of Criminal Defense Lawyers' Comment in Support of
Preserving Due Process in Title IX Proceedings**

Dear Secretary Cardona:

The National Association of Criminal Defense Lawyers (“NACDL”) submits this comment to inform the Office for Civil Rights’ (“OCR”) review of the 2020 amendments to the Title IX regulations. NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Our membership is comprised of private criminal defense attorneys, public defenders, law professors, and judges, among others. In carrying out its mission, NACDL advocates for policies that promote procedural fairness and due process for the accused.

In January 2019, NACDL submitted remarks for consideration by OCR during the formal comment period. NACDL was pleased to see that 2020 amendments codified important procedural protections for which NACDL advocated. These protections include the following:

- A requirement that educational institutions afford accused students a presumption of non-responsibility (§106.45(b)(i)(iv));
- A requirement that educational institutions issue proper written notice containing sufficient detail of the claims to a respondent (§106.45(b)(2)(i));
- The ability for schools to extend the timeframe of Title IX investigations when there is concurrent law enforcement activity (§106.45(b)(1)(v));
- A requirement that educational institutions permit complainants and respondents the opportunity to inspect and review all evidence (§106.45(b)(3)(viii)); and
- A requirement that educational institutions hold live hearings with cross-examination conducted by advisors (§106.45(b)(6)(i)).



Given the high stakes for all parties involved in Title IX proceedings, the importance of a live hearing with cross-examination by an advisor cannot be overstated. These procedural measures help safeguard the integrity of Title IX proceedings. As the Sixth Circuit Court of Appeals explained in *Doe v. Baum [University of Michigan]*, “not only does cross-examination allow the accused to identify inconsistencies in the other side’s story, but it also gives the fact-finder an opportunity to assess a witness’s demeanor and determine who can be trusted.” 903 F.3d 575, 581 (6th Cir. 2018). When the 2020 amendments were contemplated, critics of cross-examination expressed concern that cross-examination would deter complainants from filing Title IX reports and potentially subject complainants to harassment. Evidence to date does not support such fears.

Additionally, members of the public previously expressed concern about the feasibility of schools implementing the due process protections established by the 2020 amendments. Given that colleges and universities have already revised their internal Title IX policies to include important safeguards, OCR should not revise the regulations in a manner that removes or weakens these procedures. The advances in due process that have been incorporated into campus Title IX policies across the country must remain in place.

There is one key area where OCR should reconsider the 2020 amendments – the inability to use a statement by a respondent who does not submit to cross-examination, set forth in §106.45(b)(6)(i). As a general matter, NACDL agrees with the provision of the regulations only permitting statements that have been tested for credibility to be considered by the decision-maker. However, when the statement is that of the respondent, the restriction compromises a respondent’s Fifth Amendment protection against self-incrimination. There are a multitude of circumstances in which a respondent facing a criminal investigation may wish to provide a limited statement (or denial) for consideration by a decision-maker without submitting to cross-examination. For example, a respondent who wishes to share information with an investigator about one key fact in dispute, but who does not wish to subject himself to extensive questioning at a campus hearing. Blanket preclusion of the respondent’s statement places a respondent in the precarious position of having to weigh the benefits of participation in the Title IX process with the risks of submitting to questioning during a criminal investigation in which the individual has a constitutional right to silence.

In closing, NACDL urges OCR to preserve the due process protections created by the 2020 amendments. Due process benefits all parties involved in the Title IX proceedings.

Respectfully submitted,

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Chris Adams