Attached is a PDF of my comments.
Thank you,
Norma Fox
June 9, 2021

Suzanne Goldberg
Deputy Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Title IX Public Hearing Written Comment

Dear Ms. Goldberg:

I am writing to comment on the existing 2020 Title IX Rules and to express my overall support for the 2020 Rules as promulgated in last August.

My own loved one was subjected to a pre-2020 university Title IX proceeding that alleged Sexual Assault. While I understand the need to take sexual harassment seriously and fully support efforts to make sure complainants are respected and supported, I cannot stress enough what a Kafkaesque, heartbreaking experience the Title IX process was with respect to my loved one, the respondent. The 2020 Rules would have given my loved one the opportunity to defend himself adequately, the result may very well have been different, and the ultimate federal lawsuit to address the egregious due process deficiencies may have been avoided, not to mention the still ongoing mental health issues that were precipitated by the process. My comments address the following issues:

- Presumption of Innocence, “Trauma informed” investigatory and decision making
- Live Hearings, Cross-Examination, and Advisor Participation
- Impact of the 2020 Regulations on Disabled Students

1) PRESUMPTION OF INNOCENCE AND “TRAUMA INFORMED” INVESTIGATIONS AND DECISION MAKING: § 106.45 (b)(1)(ii): This part of the 2020 regulation, which “includes a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process” should remain one of the most important parts of the process.

a. My loved one was forced to prove he obtained consent. It should be the burden of the recipient to prove wrongdoing, as it is in the 2020 Rules.

b. “Believe the victim” and “trauma-informed” policies have resulted in a presumption of guilt by assuming that inconsistent behaviors are evidence of trauma. In Doe v. University of Mississippi, Civil Action 3:16-CV-63-DPJ-FKB, p. 20 (D. S.D. Miss., N.D. July 24, 2018), the court found that the school’s training materials created a presumption of guilt. This undermined the ability of the accused to mount any sort of defense. My loved one’s investigative report
had no factual basis for a finding of responsibility other than the investigator’s “experience and intuition”, stemming from training that made those unscientific assumptions.

c. To combat this bias, I support § 106.45 (b)(7)(D), which states that “a recipient must create, make available to the complainant and respondent, and maintain for a period of 3 years, records of...(D) all materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment”.

d. I also support § 106.45 (b)(1)(iii) that states: “any materials used to train ... may not rely on sex stereotypes and must promote impartial investigations...” To clarify, I believe that “trauma-informed” policies should be restricted to interviews. Once they creep their way into investigation and adjudication, they create presumptions of guilt that result in the exclusion of otherwise relevant evidence.

2) **LIVE HEARINGS, CROSS-EXAMINATION, AND ADVISOR PARTICIPATION:**

§ 106.45 (b)(6)(i): “For institutions of higher education, the recipient’s grievance procedure must provide for a live hearing...Such cross-examination at a hearing must be conducted by the party’s advisor of choice”.

a. My loved one’s school only used the hearing process after an initial finding of responsibility, and only after we requested one. I believe we should have had one BEFORE any finding, because credibility of witnesses was an issue, and suspension or expulsion was a potential sanction.

b. **Live hearings with cross-examination by an advisor is the single most important improvement in Title IX processes in the 2020 Rules.** Live hearings benefit decision makers, respondents and complainants as it is the best and perhaps only opportunity to effectively present evidence, expose inconsistencies, point out investigative errors, oversights or biases and have it on record.

c. I support the requirement that an advisor of choice do the cross-examination. However, I DO NOT support a school limiting the participation of said advisor, except to protect both parties from overly aggressive and inappropriate questioning. No 18-to-21-year-old naïve student should be expected to mount a defense alone, particularly when faced with the prospect of arguing against an experienced university lawyer. My loved one was overwhelmed and traumatized, and this severely hampered his ability to defend himself. In short, he did not know what he was doing, and none of his support people were allowed to advise him during the hearing.

d. **I support requiring that advisors receive some type of training before any hearing.**

e. Many victims’ advocates say that a live hearing with cross-examination can retraumatize the complainant. I will say that respondents are also likewise traumatized, especially innocent respondents. However, the 2020 Rules actually constrain the process by having questions pre-approved and allowing advisor’s participation otherwise be restricted. In addition, allowing parties to be in separate locations, provided they and decision makers can see and hear each respond to their questions, all together serve to limit an advisor’s irrelevant,
aggressive, or offensive questioning. These limitations may improve the
effectiveness of questioning and reduce the likelihood the parties will be
traumatized by being questioned.

f. **The 2020 Rule’s cross-examination mandate is consistent with preexisting case law** in several jurisdictions in which courts have held schools must facilitate some form of cross-examination when the credibility of parties is at issue (See Doe v. Baum (Univ of Mich.) 903 F. 3d 575, 578 (6th Cir. 2018); Powell v. Montana State Univ., No. 2:17-cv-15 SEH, Docket 134, p. 21 (MT Dec. 21, 2018)), and it is particularly essential in the Title IX sexual misconduct context because credibility usually is the predominant — if not the only — issue in these typically two-party disputes.

g. **Ineffectiveness of Written Questions:** prior to the 2020 Rules, many schools allowed a party’s questions to be asked only by a decision maker and only if posed in advance in a written format. Under that practice, my loved one encountered a situation where the submitted questions were not asked and then follow-up questions were not allowed. According to one court, such a process inhibits a respondent’s ability to defend themselves. (See Doe v. U. of Notre Dame 2017 U.S. Dist. LEXIS 69645, p. 25 (ND Ind. 5/8/2017), using orig. court-filed version) Live cross-examination by an advisor would have helped my loved one immensely by pointing out inconsistencies and investigator bias.

h. **“Single Investigator” models should remain prohibited** due to the likelihood of confirmation bias and the impossibility of cross-examination. This is supported by John Doe v. University of Michigan, et al., Case No. 18-1177, p. 7 (E.D. Mich. July 6, 2018).

i. OCR should consider encouraging smaller schools and school systems to join together in consortiums to share resources, as the hearing models can be particularly complicated for them to implement due to lack of trained personnel and funds. I suggest some mechanism be established such that small schools can apply for grants to cover these costs.

3) **IMPACT OF 2020 REGULATIONS ON DISABLED STUDENTS 106.44 (c)**

This subsection addresses students with disabilities: the Rules “may not be construed to modify any rights under the Individuals with Disabilities Education Act.” There are two aspects to the relationship between Title IX and disability issues:

a. **Students with Autism Spectrum Disorder, Non-Verbal Learning Disorder or language-based learning disabilities are highly vulnerable to a Title IX accusation.** They often lack appropriate social skills, do not understand nonliteral language, and are terrified of persons with authority, quick to apologize for fear of “getting in trouble,” and desperately want to “fit in.” These characteristics create a higher risk that disabled students will be easily manipulated or their intentions will be misunderstood. In fact, there is some evidence that disabled students have been disciplined at a higher rate than others. (see https://www.insidehighered.com/views/2018/02/08/colleges-should-understand-special-issues-related-autism-and-title-ix-opinion)
b. **Students with disabilities are not always able to understand the Title IX process or how to defend themselves, and often are unaware they are entitled to accommodations.** Unfortunately, most of the available literature and school policies focus on complainant disabilities while entirely ignoring the needs of disabled respondents. Though the Obama administration’s 2014 “Questions and Answers on Title IX and Sexual Violence” discussed the disability rights of complainants in the context of Title IX, it never even mentioned respondents who may be disabled and the additional difficulties they encounter in defending themselves.

a. **Though the 2020 Rules do address these issues, they still do not adequately consider the significant issues faced by respondents with disabilities.** Protections for accused disabled students should extend to any disciplinary proceeding which could result in the temporary or permanent removal of disabled students’ access to education. Every notice of a complaint and student conduct code policy should discuss a respondent’s rights to disability accommodations. Though every school policy includes a “statement of protection” addressing the rights of students with disabilities, many respondents with disabilities are not informed or aware that those rights were available to them in the context of a Title IX disciplinary proceeding.

b. **For the disabled student, understanding the Title IX process often requires more than the communication of words; respondents with communication disabilities that are not readily visible are especially vulnerable and have suffered significantly as a result.** Schools may have little or no effective communication between their Title IX and disability offices. Disabled students are therefore often not recognized by Title IX officials.

c. **Disabled students — and any other group of disadvantaged or marginalized students — desperately need robust due process protections—to avoid tragic miscarriages of justice.**

4) **FINAL COMMENTS:**

a. **I believe that OCR should prohibit investigations of a sexual nature to be done outside of the Title IX framework, meaning that schools should not be allowed to have two processes, one for on campus misconduct that includes due process protections, and a different one for off campus misconduct that does not.** Reliability of result should be the goal—and processes that do not include robust due process end up being wholly unreliable. In addition, this creates potential liability for schools that have two such processes. (See Doe v. Rensselaer Polytechnic Inst., No. 1:20-CV-1185, 2020 WL 6118492, at *7 (N.D.N.Y. Oct. 16, 2020))
b. Most Title IX allegations involve regretted drunken hook-ups, as was the case with my loved one. As a result, I believe it would be more appropriate to address these non-criminal allegations with education and discussion, rather than the immediate commencement of an adversarial process. The availability of mediation should remain required.

c. It is very important that schools provide academic and campus life support to both accusers and respondents, even when there is no formal complaint. This will go a long way toward insuring equal opportunity to access education—the reason for Title IX regulations. Schools frequently are confused about how to support respondents, in particular. OCR should provide guidance.

d. No one should have to sue their school for justice or to undo wrongful findings of responsibility.

Thank you for the opportunity to submit comments.

Norma Fox

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