Please find the attached public comment from the Office of the Montana Attorney General.
June 11, 2021

Suzanne Goldberg  
Acting Assistant Secretary for Civil Rights  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, DC 20202

Dear Acting Assistant Secretary Goldberg:

On behalf of the Montana Department of Justice, I hereby submit this written comment regarding enforcement of Title IX of the Education Amendments of 1972 (Title IX).

Someone once said that “allegations of sexual harassment and sexual assault are complicated.”¹ That same individual—who has been accused multiple times of sexual misconduct²—persuasively argued that “[victims] deserve to be treated with dignity and respect” and “should be heard” but that “their stories should be subject to appropriate inquiry and scrutiny.”³ A longtime friend and ally of that individual said that her friend was entitled to “due process.”⁴ Those powerful individuals were President Biden and Speaker Nancy Pelosi—and they were absolutely correct: victims and accused students deserve a fair, impartial, and reliable process to adjudicate accusations of sexual harassment and sexual assault in education.

Fortunately, the new Title IX Rule put in place by Secretary of Education Betsy DeVos on August 14, 2020, does exactly that. The Rule established a system that protects the rights of all students and cleaned up the constitutional and regulatory mess made by none other than former Vice President Biden and his current nominee to run the Office for Civil Rights (OCR), Catherine Lhamon. If the Department of Education seeks improvements in Title IX, it should vigorously enforce and implement the August 14, 2020, rule.

It is ironic and unfortunate that President Biden demanded due process for himself yet was responsible—more than any other person in America—for denying that same due process to students across the country. In a 2016 speech at the University of Nevada Las Vegas, then-Vice President Biden mocked the idea that sexual assault allegations might be “complicated,” and told the assembled students that they should “ostracize the abusers” and “make them the pariah on campus.” It was then-Vice President Biden who was put in charge of the Obama Administration’s disastrous Title IX policies. He spearheaded the infamous 2011 Dear Colleague Letter: Sexual Violence ("2011 DCL"), that wreaked havoc on campuses across the country (The 2011 DCL was expanded upon by a 2014 Questions and Answers on Title IX and Sexual Violence). The regime installed by Vice President Biden was a Kafkaesque disciplinary disaster that resulted in hundreds of successful lawsuits against schools and widespread criticism from across the ideological spectrum. One columnist noted that if President Biden’s was judged under the Title IX standards he championed for accused students, he would be guilty of sexual misconduct. And one

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5 See CHRONICLE OF HIGHER EDUCATION, Apr. 24, 2019, https://www.chronicle.com/article/joe-biden-was-a-change-agent-on-title-ix-but-his-presidential-campaign-may-shine-a-harder-light-on-him/ ("Advocates say the sweeping Title IX changes that have transformed higher education would not have happened without Biden’s support.").


of the more tragic ironies is that the 2011 DCL resulted in a disproportionate number of expulsions and scholarship losses for Black male students.\textsuperscript{9}

The 2011 DCL compelled schools to adopt the lowest standard of proof for proving sexual harassment and sexual assault claims—preponderance of the evidence—and pressured schools to find accused students responsible for sexual misconduct even where there was significant doubt about culpability.\textsuperscript{10}

Both OCR and the White House pressured schools to employ a “single investigator” model that gives one person appointed by the school’s Title IX coordinator authority not just to investigate alleged misconduct, but to determine guilt and innocence.\textsuperscript{11} Schools housed these investigators/adjudicators in their Title IX offices, which had strong incentives to ensure the school stayed compliant with the

\textsuperscript{9} RealClearEducation, Jan. 21, 2019, https://www.realcleareducation.com/articles/2019/01/21/black_men_title_nine_and_the_disparate_impact_of_discipline_policies_110308.html.

\textsuperscript{10} OCR found numerous institutions in violation of Title IX for failing to adopt the preponderance of the evidence standard in its investigations of sexual harassment, even though the notion that the preponderance of the evidence standard is the only standard that might be applied under Title IX was set forth in the 2011 Dear Colleague Letter and not in the Title IX statute, current regulations, or other guidance. E.g., U.S. Dep’t. of Education, Office for Civil Rights, Letter of Findings to Harvard Law School 7, Dec. 10, 2014, https://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf (“[I]n order for a recipient’s grievance procedures to be consistent with the Title IX evidentiary standard, the recipient must use a preponderance of the evidence standard for investigating allegations of sexual harassment, including sexual assault/violence.”); see also Blair A. Baker, When Campus Sexual Misconduct Policies Violate Due Process Rights, 26 CORNELL J. L. & PUB. POL’Y 533, 542 (2016) (The 2011 DCL “forced universities to change their former policies drastically, with regards to their specific procedures as well as the standard of proof, out of fear that the Department of Education will pursue their school for a violation of Title IX.”).

\textsuperscript{11} See Doe v. Univ. of Scis., 961 F.3d 203, 213 (3d Cir. 2020) (describing the pressure universities faced as a result of the Dear Colleague Letter). In the “single investigator” model, there is no hearing. One person conducts interviews with each party and witness, and then makes the determination whether the accused is responsible. No one knows what the investigator hears or sees in the interviews except the people in the room at the time. This makes the investigator all powerful. Neither accuser nor accused can guess what additional evidence to offer, or what different interpretations of the evidence to propose, because they are completely in the dark about what the investigator is learning and are helpless to fend off the investigator’s structural and personal biases as they get cooked into the evidence-gathering.
DCLs to avoid losing federal funding. Many Title IX offices assumed every role in the process, acting as prosecutor, judge, jury, and appeals board.

A laundry list of due process violations—reminiscent of Star Chamber—stacked the deck against accused students: schools failed to give students the complaint against them, or notice of the factual basis of charges, the evidence gathered, or the identities of witnesses; schools fail to provide hearings or to allow the accused student’s lawyer to attend or speak at hearings; schools barred the accused from putting questions to the accuser or witnesses, even through intermediaries; schools denied parties the right to see the investigative report or get copies for their lawyers for preparing an appeal; schools allowed appeals only on very narrow grounds such as new evidence or procedural error, providing no meaningful check on the initial decisionmaker. A study by the Foundation for Individual Rights in Education found that 73% of the top universities in America did not guarantee the presumption of innocence in campus proceedings.12

OCR created an expansive definition of sexual harassment that included “verbal conduct” (i.e., speech) such as “making sexual comments, jokes or gestures,” “spreading sexual rumors,” and “creating e-mails or Web sites of a sexual nature.”13 The environment became so precarious that Harvard Law School professor Jeannie Suk Gersen wrote in 2014 that law school faculty were increasingly reluctant to teach rape law for fear of offending or upsetting their students.14 When the University of Montana incorporated the Supreme Court’s definition of sexual harassment (discriminatory conduct “that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and


13 Id.

opportunities”) into its sexual harassment policy, OCR objected, insisting in 2013 that the university establish policies to “encourage students to report sexual harassment early, before such conduct becomes severe or pervasive, so that it can take steps to prevent the harassment from creating a hostile environment.” The broad definition of sexual harassment was a so-called “national blueprint” for schools and led OCR to regulate conduct that was not covered under Title IX.

The only individual who bears remotely similar culpability to President Biden for the Obama Administration’s Title IX fiasco is Catherine Lhamon, who led OCR from 2013 to 2017. Lhamon’s OCR didn’t merely put its thumb on the scale of justice. It became a biased institution under Ms. Lhamon’s leadership. Investigations were not simply an inquiry into a given complaint, but instead a fishing expedition into every aspect of a school’s adjudication process and general climate, and a review of all cases going back years. And “[b]y 2016, according to BuzzFeed, the average investigation had been open for 963 days, up from an average in 2010 of 289 days.”

Former and current OCR investigators told the media “the perceived message from Washington was that once an investigation into a school was opened, the...

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19 Jacob Gersen and Jeannie Suk, The Sex Bureaucracy, 104 CALIF. L. REV. 881, 902-03 (2016) (Asserting that the Obama OCR’s guidance required schools to regulate student conduct “that [was] not creating a hostile environment and therefore is not sexual harassment and therefore not sex discrimination” and concluding that OCR’s guidance overstep[ped] OCR’s jurisdictional authority).
21 Id.
investigators in the field offices were not meant to be objective fact finders. Their job was to find schools in violation of Title IX.\textsuperscript{22}

By 2014, OCR had stopped using the terms complainant/alleged victim and alleged perpetrator and replaced them with victim/survivor and perpetrator. OCR then began keeping a public list of the schools at which it was investigating possible Title IX violations, putting schools under a cloud of suspicion.

This resulted in a Title IX system that quite literally resembled Kafka’s \textit{The Trial}.\textsuperscript{23} Here are just a few examples of the unfair and unamerican system created by President Biden and Catherine Lhamon:

- An athlete of color at Colorado State University-Pueblo was accused of sexually assaulting a female trainer, but not by her. Despite the trainer saying that she had not been raped, University officials pointed out that according to Title IX, they got to decide the accused student’s fate and the student was found guilty and expelled.\textsuperscript{24}

- At USC, a student-athlete was kicked out of school for abusing his girlfriend—despite the fact his girlfriend never reported any abuse and vehemently denied any abuse ever took place—after a neighbor saw the couple playfully roughhousing in the front yard.\textsuperscript{25}

- A Howard University law professor was punished, following a 16-month investigation, because an exam question he wrote involving a bikini wax was deemed to have created an unsafe environment after a student “allegedly

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} See, e.g., COMMENTARY MAGAZINE, June 2017, https://www.commentarymagazine.com/articles/kc-johnson/kafka-u/.


believed the question’s premise somehow required her to reveal to the class whether she’d had a Brazilian wax.”

- A judge rebuked Brandeis University for denying fundamental due process rights to a student who was found guilty of sexual misconduct for a variety of non-violent offenses: most notably, because he had awakened his then-boyfriend with nonconsensual kisses.

- Northwestern University Professor Laura Kipnis (herself a liberal feminist) faced a Title IX complaint and investigation simply for writing an essay about sex on campus and criticizing sexual harassment policies (the complaint alleged she created a “chilling environment” for reporting sexual harassment or assaults).

- Carleton College suspended a student for drunken sex and then expelled the student as soon as he appealed the suspension, with the Dean writing to him that “the fact you continue to assert that it was okay to engage in sexual activity with a person in [Jane Doe’s] condition is deeply troubling.”

- A University of Tennessee student was investigated for sexual harassment because he wrote his instructor’s name wrong.

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• Resident Advisors at University of Massachusetts-Amherst told students that making jokes about Harambe, the dead gorilla and internet meme, could constitute a violation of Title IX.31

Despite his personal plea for due process, President Biden has steadfastly maintained his support for the 2011 DCL.32 And when Secretary DeVos began to fulfill her promise to clean up the mess and restore fairness and due process to Title IX, Former Vice President Biden called supporters of reform “cultural neanderthals” and compared them to neo-Nazis.33 Ms. Lhamon claimed that Secretary DeVos’s new Title IX Rules are “taking us back to the bad old days, when it was permissible to rape and sexually harass students with impunity.” And Speaker Pelosi remarked that “with wanton disregard, [the Trump] Administration ha[d] cruelly codified their utter contempt for survivor justice by making schools unwelcoming and less safe.”34

But the list of Neanderthals is long and ideologically diverse. In fact, the Title IX system created by then-Vice President Biden and Catherine Llamon may be the only policy area where I agree with the following individuals or organizations:

• Four feminist law professors at Harvard wrote that the Biden/Lhamon Title IX system “put pressure on [schools] to stack the system so as to favor alleged victims over those they accuse and that “procedures for enforcing [definitions of sexual harassment] are frequently so unfair as to be truly shocking.”35

32 See, e.g., The Biden Plan To End Violence Against Women, JOEBIDEN.COM, https://joebiden.com/yawa/, (“The Biden Administration will restore the Title IX guidance for colleges, including the 2011 Dear Colleague Letter, which outlined for schools how to fairly conduct Title IX proceedings.”).
35 Elizabeth Bartholet et al., Fairness For All Students Under Title IX, Aug. 21, 2017, https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf?sequence=1&isAllowed=y.
• More than two dozen other Harvard Law School professors wrote a letter in 2014 objecting to the school’s Title IX process as unfair.36

• A group of 16 law professors from the University of Pennsylvania argued “we believe that OCR’s approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness.”37

• Janet Halley, a self-described feminist and professor at Harvard Law School told Congress that “the rate of complaints and sanctions against male (including transitioning to male) students of color is unreasonably high.”38

• The past President of the American Civil Liberties Union remarked in 2015 that “OCR’s distorted concept of sexual harassment actually does more harm than good to gender justice, not to mention to free speech.”39

• The American College of Trial Lawyers issued a report concluding that OCR had imperiled due process and free speech.40


• Terry Hartle, a senior vice president at the American Council on Education, called OCR “a Court of Star Chamber, with arbitrary rulings, no rights for those under investigation and a secret process.”

• Former Obama Administration Homeland Security Secretary and President of the University of California Janet Napolitano wrote that OCR’s guidance documents “left [campuses] with significant uncertainty and confusion about how to appropriately comply after they were implemented” and specifically noted that the “2011 Dear Colleague Letter generated significant compliance questions for campuses.”

• Former Obama Administration Homeland Security Secretary and President of the University of California Janet Napolitano wrote that OCR’s guidance documents “left [campuses] with significant uncertainty and confusion about how to appropriately comply after they were implemented” and specifically noted that the “2011 Dear Colleague Letter generated significant compliance questions for campuses.”

• Supreme Court Justice Ruth Bader Ginsberg recognized that due process was being denied to accused students.

• The American Bar Association’s Task Force on College Due Process Rights and Victim Protections criticized the 2011 DCL model.

• The American Association of University Professors called on OCR to narrow its definition of sexual harassment in order “to adequately protect academic freedom.”


43 Ruth Bader Ginsburg Opens Up About #MeToo, Voting Rights, and Millennials, The Atlantic, Feb. 15, 2018, https://www.theatlantic.com/politics/archive/2018/02/ruth-bader-ginsburg-opens-up-about-metoo-voting-rights-and-millenials/553409/, (“Ginsburg: 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: Are some of those criticisms of the college codes valid? Ginsburg: Do I think they are? Yes. 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.”).

The due-process deficiencies in the 2011 DCL led to over 600 lawsuits by accused students against their academic institutions. These lawsuits, more often than not, resulted in victories for accused students across the country in state and federal court, including key wins at the appellate level. See, e.g., Doe v. Oberlin Coll., 963 F.3d 580, 581 (6th Cir. 2020); Doe v. Univ. of the Scis., 961 F.3d 203, 205 (3d Cir. 2020); Doe v. Purdue Univ., 928 F.3d 652, 656 (7th Cir. 2019); Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 60 (1st Cir. 2019); Doe v. Miami Univ., 882 F.3d 579 (6th Cir. 2018); Doe v. Baum, 903 F.3d 575 (6th Cir. 2018); Doe v. Univ. of Cincinnati, 872 F.3d 393 (6th Cir. 2017); Doe v. Claremont McKenna Coll., 25 Cal. App. 5th 1055, 1070 (2018); Doe v. Regents of Univ. of Cal., 28 Cal. App. 5th 44, 61 (2018).

It was because of the mess made by President Biden and Catherine Lhamon that Secretary DeVos pledged to overhaul the Title IX system and engage in formal rulemaking to ensure due process, reliability, and accountability in campus misconduct proceedings. After thoroughly considering over 124,000 public comments, the Department issued its Title IX Regulations, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (“Final Rule”), to better align the Title IX regulations with the text and purpose of Title IX, the U.S. Constitution, Supreme Court precedent and other case law, and to address the practical challenges facing students, employees, and schools with respect to sexual harassment allegations. For the first time in history, regulations regarding sexual harassment under Title IX were codified into law.

45 See Milestone: 600+ Title IX/Due Process Lawsuits in Behalf of Accused Students, TITLE IX FOR ALL, Apr. 1, 2020, https://www.titleixforall.com/milestone-600-title-ix-due-process-lawsuits-in-behalf-of-accused-students; see also Diane Heckman, The Assembly Line of Title IX Mishandling Cases Concerning Sexual Violence on College Campuses, 336 WEST’S EDUC. L. REP. 619, 631 (2016) (stating that since 2014 “there has been an influx of lawsuits contending post-secondary schools have violated Title IX due to their failure to properly handle sexual assault claims. What is unusual is that both sexes are bringing such Title IX mishandling cases due to lack of or failure to follow proper process and due process from each party’s perspective. A staggering number of cases involve incidents of alcohol or drug usage or intoxication triggering the issue of the negating a voluntary consent between the participants.”) (internal citations omitted).

The Final Rule set forth clear legal obligations that require recipients to: promptly respond to individuals who are alleged to be victims of sexual harassment by offering supportive measures; follow a fair grievance process to resolve sexual harassment allegations when a complainant requests an investigation or a Title IX Coordinator decides on the recipient’s behalf that an investigation is necessary; and provide remedies to victims of sexual harassment. The Final Rule guarantees victims and accused students strong, clear procedural rights in a predictable, transparent process designed to reach reliable outcomes. It also ensures that schools do not violate First Amendment rights when complying with Title IX. Finally, contrary to statements made by President Biden and Ms. Lhamon—who would obviously rather avoid discussing their past mistakes—the Final Rule actually offers important new protections and benefits for victims of sexual harassment and sexual assault.47

Due process is nothing to sniff at. Yet, perhaps unsurprisingly, Vice President Biden and Catherine Lhamon put the interests of fringe activists over students, schools, and core American values. In stark contrast, the DeVos Title IX rules now require schools to respond promptly and supportively to allegations of sexual harassment while also providing due process to both alleged victims and alleged perpetrators. As Justice Ginsburg said, “It’s not one or the other. It’s both.”

Sincerely,

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Austin Knudsen
ATTORNEY GENERAL

47 See U.S. Dep't of Educ. YouTube Channel, OCR Webinar on New Title IX Protections Against Sexual Assault (July 7, 2020), https://www.youtube.com/watch?v=i-BCnhUsJ4s