From: Dinmore, Brianna
Sent: Fri, 11 Jun 2021 19:06:28 +0000
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing - Ensuring Fair and Reliable Campus Disciplinary Proceedings In Cases Involving Alleged Sexual Misconduct
Attachments: 2021-06-11 Hamill Dakessian OCR Comment.pdf

Good Afternoon,

Attached please find Patricia Hamill and Lorie Dakessian's written comments regarding ensuring fair and reliable campus disciplinary proceedings in cases involving alleged sexual misconduct.

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COMMENT

TO: **Office for Civil Rights (OCR), U.S. Department of Education**

FROM: **Patricia M. Hamill, Esquire**
Lorie K. Dakessian, Esquire
Conrad O'Brien P.C.[1]

DATE: **June 11, 2021**

RE: **Written Comment: Title IX Public Hearing (Ensuring Fair and Reliable Campus Disciplinary Proceedings In Cases Involving Alleged Sexual Misconduct)**

I. INTRODUCTION

We appreciate the opportunity to submit this comment in connection with OCR's efforts to improve enforcement of Title IX of the Education Amendments of 1972 and ensure a fair and reliable process in campus disciplinary proceedings involving alleged sexual misconduct.

We bring a unique perspective to these issues, and a deep understanding of the challenges faced by all the interested parties. We are partners at the Philadelphia law firm Conrad O'Brien, P.C., and lead the firm's nationwide Title IX, Due Process and Campus Discipline practice. Over the past eight years, we have represented hundreds of students and academic professionals, mostly men, who have been accused of various levels of sexual misconduct.[2] It is a fundamental principle of American jurisprudence that all persons are entitled to a fair hearing. Our task as attorneys is to advocate for fair, objective, and reliable Title IX proceedings, and we see that as a nonpartisan issue.

Before addressing the question of fair process, we want to acknowledge that many of the campus procedures that were put in place after guidance issued by OCR in 2011, and before the

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[1] Patricia Hamill and Lorie Dakessian are partners at the Philadelphia law firm Conrad O'Brien, P.C., and lead the firm's nationwide Title IX, Due Process and Campus Discipline practice. They represent college students and academic professionals in disciplinary proceedings and related litigation. They are frequent speakers on Title IX litigation and related issues to audiences including Title IX coordinators, advocacy groups, and attorneys. Patricia is also a commercial litigator who represents clients in white-collar and internal investigations, and is a member of the firm's three-person Executive Committee.

[2] We have represented complaining students as well, but the bulk of our work is on behalf of responding students and faculty. Regardless of the party we represent, we believe fair and equitable processes benefit everyone, not one "side" or the other.

adoption of amended Title IX regulations in 2020, were an effort to correct for decades of sexual assault claims not being taken seriously or, worse, being completely ignored. We want to be perfectly clear. Sexual assault on and related to college campuses is a serious problem. We are heartened whenever women (and, though less commonly, men) come forward and speak up, when their concerns are taken seriously and properly investigated, and when they are given the support they need both during and after a disciplinary process, regardless of the outcome.

However, current disciplinary processes should not be marred by the sins of the past, however oppressive and heinous those sins may have been. The corrective to inadequate responses to sexual assault, whether past or present, is not to presume that accused people are guilty, deprive them of the ability to defend themselves, and punish them without a full consideration of the facts from both parties' perspectives. We are concerned by the national polarization on these topics, and by the apparent assumption by many that measures to give accused people – usually men – a fair hearing are a strike against justice for women. Title IX prohibits gender discrimination, and the effort to correct discrimination against one gender does not justify discrimination against others. What is often missing from the public discourse is an understanding that misconduct occurs on a spectrum, and often there are plausible competing narratives and no independent witnesses or corroborating evidence. Many cases involve encounters between young people who are sexually inexperienced, are engaged in the casual hook-up culture prevalent on campuses, or both. They may have misread or misinterpreted each other's feelings or intent. Often both parties have consumed alcohol or drugs, further diminishing their ability to make clear decisions, communicate effectively, or remember what happened. In addressing contested cases – whether they involve sexual or any other form of serious misconduct – our nation's fundamental values require fairness to both parties, a thorough and impartial investigation, and a fair hearing before impartial decisionmakers.[3]

In the words of one judge, commenting on college disciplinary procedures that "appear[] to have substantially impaired, if not eliminated, an accused student's right to a fair and impartial process," "it is not enough simply to say that such changes are appropriate because victims of sexual assault have not always achieved justice in the past. Whether someone is a 'victim' is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. Each case must be decided on its own merits, according to its own facts. If a college

[3] As the American Civil Liberties Union has observed: "Conventional wisdom all too often pits the interests in due process and equal rights against each other, as though all steps to remedy campus sexual violence will lead to deprivations of fair process for the respondent, and robust fair process protections will necessarily disadvantage or deter complainants. There are, however, important ways in which the goals of due process and equality are shared. Both principles seek to ensure that no student—complainant or respondent—is unjustifiably deprived of access to an education. Moreover, both parties (as well as the schools themselves) benefit from disciplinary procedures that are fair, prompt, equitable, and reliable." *ACLU Comment*, https://www.aclu.org/letter/aclu-comments-title-ix-proposed-rule.

student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision. Put simply, a fair determination of the facts requires a fair process, not tilted to favor a particular outcome, and a fair and neutral fact-finder, not predisposed to reach a particular conclusion." *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016).

Providing a fair process and impartial decisionmakers will make each individual disciplinary proceeding and outcome more reliable, and will benefit complainants, respondents, schools, and their officials. At the same time, our focus should not simply be on addressing situations after-the-fact: as a nation, we should consider other steps to address the conditions and attitudes that lead to contested sexual assault complaints, including excessive use of alcohol and drugs, and to provide more effective education on consensual sexual conduct.[4]

We present our comments as follows. First, we give some historical background – how did we get where we are today, and how and why is the federal government involved? (Pages 4-7). As discussed below, starting in 2011, U.S. Department of Education guidance and other federal government initiatives changed the way sexual assault is adjudicated on school campuses. Concerns have grown, however, that procedures that were developed to address sexual assault allegations were not effective for people who report sexual assault, were eroding fundamental protections for people who are accused, and were undermining the legitimacy of campus disciplinary proceedings and outcomes. These concerns have been voiced in public and scholarly commentary, by universities and colleges, in an increasing number of opinions from federal and state courts, and in several state legislatures.

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[4] We share the concern that many women have been subjected to inappropriate conduct. However, the claim that one in five women is sexually assaulted in college, a claim that has been foundational to advocacy efforts, disciplinary processes, and government policy decisions, has been seriously challenged, and is based not on scientific studies but on anonymous surveys with imprecise wording and without controls to ensure they cover a representative sampling. *E.g.*, https://www.washingtonpost.com/news/fact-checker/wp/2014/12/17/one-in-five-women-in-college-sexually-assaulted-an-update/?utm_term=.7f211e30541e; https://www.washingtonexaminer.com/no-1-in-5-women-have-not-been-raped-on-college-campuses; http://www.slate.com/articles/double_x/doublex/2015/09/aau_campus_sexual_assault_survey_why_such_surveys_don_t_paint_an_accurate.html. Advocates for reported victims also often suggest false accusations of sexual assault are rare. This too has been disputed, has been undermined by high profile cases, and does not appear to take into account the wide spectrum of situations in which complaints can arise. But the mission of this agency should not be sidetracked by surveys and statistics, whether reliable or not. Even one assault is too many. Our point here is about ensuring a fair process. Regardless of the accuracy of surveys, the decision in any particular case should be based on the facts of that case, objectively and fairly assessed.

Second, we discuss the Department of Education's response to those concerns, culminating in the Title IX regulations it adopted in 2020. (Pages 7-14). Overall, we see the 2020 regulations as a crucial effort to align Title IX regulatory requirements with basic principles of justice, with court precedent requiring fair procedures for people accused of serious misconduct, and with Title IX's proscription of *all* gender discrimination. We also welcome the provisions giving schools and parties more flexibility to pursue informal, non-punitive resolutions. At the same time, legitimate concerns have been raised about some of the provisions, including the definitions and conditions that give rise to schools' duty to respond. We discuss provisions of the 2020 regulations that should be preserved and provisions that should be modified or clarified. In the former category are key procedural protections which, under our nation's system of law, are required for fair and reliable determinations, including notice, impartial decisionmakers, thorough and fair investigations where both exculpatory and inculpatory evidence is gathered and considered, a meaningful opportunity to be heard (including the opportunity for the parties to present their positions and confront testimony against them in a live hearing before decisionmakers), a presumption that the respondent is not responsible unless the applicable standard of proof is met, and decisions based on the facts of the particular case.

II. HISTORICAL BACKGROUND

Title IX of the Education Amendments of 1972 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[5] As interpreted by federal courts, gender discrimination under Title IX includes sexual assault and sexual harassment.

Starting in 2011, the federal government began to take aggressive steps to combat what it viewed as an epidemic of sexual assault on college campuses, focusing on countering discrimination against women. On April 4, 2011, OCR issued a "significant guidance document" known as the 2011 "Dear Colleague letter," stating that "about 1 in 5 women are victims of completed or attempted sexual assault while in college" and setting forth steps schools should take to end sexual harassment and violence.[6] Among other things, the letter defined sexual harassment broadly as "unwelcome conduct of a sexual nature," conflating cases based on conduct with cases based on speech;[7] stated that "mediation is not appropriate even on a

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[5] 20 U.S.C. § 1681(a).

[6] *Letter from Russlynn Ali, Ass't Sec'y for Civil Rights, U.S. Dep't of Educ., OCR*, at 2 (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[7] *Id.* at 3.

voluntary basis" in cases involving alleged sexual assault;[8] directed schools to ensure "steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant";[9] directed schools to take interim steps to protect complainants and "minimize the burden on the complainant";[10] "strongly discourage[d]" schools from allowing cross-examination of parties; [11] and urged schools to focus on victim advocacy.[12] The letter also stated that schools "must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred)," and must not use the "clear and convincing standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred.)."[13]

Although the letter was framed as "guidance" and did not go through the procedures required for formal, binding regulations, much of its language – including the standard of proof provision – was mandatory. And the letter specifically warned that "[w]hen a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation."[14]

In 2014, OCR released additional guidance in which it reiterated many of the directives set forth in the 2011 Dear Colleague Letter, including the injunction to "ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant."[15] The same year, a White House Task Force was created, co-chaired by the Office of the Vice President and the White House Council on Women and Girls, with a mission "to tell sexual assault survivors that they are not alone" and "help schools live up to their obligation to protect students from sexual violence."[16] The Task Force's first report

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[8] *Id.* at 8.

[9] *Id.* at 12.

[10] *Id.* at 15-16.

[11] *Id.* at 12.

[12] *Id.* at 19 n.46.

[13] *Id.* at 11.

[14] *Id.* at 16.

[15] *Questions and Answers on Title IX and Sexual Violence*, https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[16] *Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault*, p.2, https://www.justice.gov/ovw/page/file/905942/download.

opened with the claim that "[o]ne in five women is sexually assaulted in college," stated that the federal government was ramping up Title IX enforcement efforts, and stressed again that schools found in violation of Title IX risked losing federal funding.[17] Among other things, the Task Force supported the use of a single investigator model, which generally involved one school official serving as investigator, prosecutor, and decisionmaker and severely limited the respondent's ability to challenge the complainant's account.[18] The Task Force also encouraged colleges and universities to provide "trauma-informed" training for their officials, stating that "when survivors are treated with care and wisdom, they start trusting the system, and the strength of their accounts can better hold offenders accountable."[19] The report stated that the Justice Department, through its Center for Campus Public Safety and its Office on Violence Against Women, was developing trauma-informed training programs.[20] Ultimately, the Department of Justice funded a "Start by Believing" campaign that sought to train investigators to investigate cases from an initial presumption of guilt and write reports that successfully support the prosecution of sexual assault cases.

On May 1, 2014, as part of its aggressive enforcement, OCR published a list of 55 higher education institutions nationwide that were under investigation for possible Title IX violations.[21] According to the Chronicle of Higher Education, that number eventually grew to over 500.[22]

In response to the federal government's directives and enforcement activities, schools adopted special policies for disciplinary proceedings involving alleged sexual misconduct. The policies were administered by designated officials and included investigatory and decision-making processes, evidentiary standards, and appeal processes based on OCR's actual and perceived requirements. In many instances, the policies and processes were very different from those used to resolve other campus disciplinary matters, including matters involving allegations of serious non-sexual misconduct. Many schools went even further than OCR's specific

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[17] *Id.* at 2, 17.

[18] *Id.* at 3, 14.

[19] *Id.* at 3.

[20] *Id.*

[21] *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations* (May 1, 2014), https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations.

[22] *Title IX, Tracking Sexual Assault Allegations,* Chronicle of Higher Education, https://projects.chronicle.com/titleix/.

directives, essentially eliminating due process protections for respondents – the great majority of whom are male – in proceedings involving alleged sexual misconduct. Trauma-informed and "#BelieveWomen" approaches have been applied in ways that lead school officials (and the community at large) to presume that an alleged assault occurred or that a complainant's account of an incident must be true. Students and academic professionals have been suspended, expelled, or pushed out of their positions without meaningful notice or opportunity to be heard, and have been left with records that permanently brand them as sexual offenders, devastate them personally, and severely impact their educational and career opportunities. In this age of social media and the internet, the mere mention of a sexual misconduct accusation can have the same negative and ongoing effects as a finding of responsibility, even if the accused is exonerated.

Since 2011, some 700 students have filed lawsuits asserting that their schools disciplined them for alleged sexual misconduct without providing a fair process or following the schools' own procedures. In scores of written opinions – including over 20 appellate decisions – federal and state courts have raised concerns about the lack of meaningful procedural protections in campus Title IX proceedings, and have held that schools must, at the very least, provide full and fair notice, a full and fair opportunity to defend, and impartial decisionmakers.[23]

III. THE DEPARTMENT'S EFFORTS TO ALIGN REGULATORY REQUIREMENTS WITH PRINCIPLES OF JUSTICE, JUDICIAL PRECEDENT, AND TITLE IX'S PROSCRIPTION OF ALL GENDER DISCRIMINATION

Starting in 2017, the Department of Education began to modify its position on Title IX enforcement in response to the developing case law and escalating concerns that individual Title IX complaints were not being justly resolved. In September 2017, the Department withdrew the 2011 Dear Colleague Letter and the 2014 Questions and Answers on Title IX Sexual Violence, and released a new interim Q&A on Campus Sexual Misconduct to guide schools on how to

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[23] For a sample of publications expressing concerns about the erosion of procedural protections and citing relevant court opinions, see K.C. Johnson and Samantha Harris, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf (citing cases decided through late 2019);
Foundation for Individual Rights in Education (FIRE), *Mountain of evidence shows the Department of Education's prior approach to campus sexual assault was "widely criticized" and "failing"* (Nov. 15, 2018), https://www.thefire.org/mountain-of-evidence-shows-the-department-of-educations-prior-approach-to-campus-sexual-assault-was-widely-criticized-and-failing/; *see also Comments of Eric Rosenberg, Cynthia Garrett, Kimberly Lau, and KC Johnson on proposed Title IX regulations* (Jan. 8, 2019), https://www.regulations.gov/document?D=ED-2018-OCR-0064-6244 (discussing case law foundations for many provisions that were ultimately included in the 2020 regulations). In an appendix below, we include summaries of a few significant representative cases, including cases decided after the publications cited here.

investigate and adjudicate allegations. In November 2018, the Department issued a Notice of Proposed Rulemaking with proposed amended Title IX regulations.[24] Over 100,000 comments were filed by legislators, colleges, students, attorneys, and other organizations and citizens.[25]

In May 2020, the Department adopted new regulations.[26] Broadly speaking, the 2020 regulations include three categories: first, definitions and conditions that activate a school's obligations under Title IX; second, provisions giving schools more flexibility to take constructive, non-punitive steps to resolve specific concerns and prevent inappropriate behavior while still ensuring that both parties can pursue their education; and third, procedural provisions for formal Title IX proceedings. We address each of these categories below.[27]

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[24] *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

[25] We joined 40 practicing lawyers and professors to submit detailed comments on the proposed regulations. *Comments of Concerned Lawyers and Educators in Support of Fundamental Fairness for All Parties in Title IX Grievance Proceedings* (Jan. 28, 2019), https://conradobrien.com/uploads/attachments/cjrjac2cb0cmt01iw4vzo4aev-comments-of-concerned-lawyers-and-educators-in-support-of-fundamental-fairness-for-all-parties-in-title-ix-grievance-proceedings-1-28-2019.pdf. We also submitted individual comments, setting forth scenarios drawn from cases involving accused students to illustrate why procedural reforms were so badly needed. *Comments of Patricia M. Hamill* (Jan. 28, 2019), https://conradobrien.com/uploads/attachments/cjrjaco9u0cmszciwf8gq9jfj-comment-of-p-hamill-on-proposed-title-ix-regulations-1-28-2019.pdf. Other commenters submitted personal stories reinforcing this point. Some involved students who were found responsible after a blatantly unfair proceeding. In others, the accused student was exonerated, but still suffered significant and lasting damage due to the mere fact of the accusation or how the proceedings were handled.

[26] *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, published in the Federal Register on May 19, 2020 (85 FR 30026).

[27] We have also joined a comment submitted by K.C. Johnson, Kimberly Lau, Eric Rosenberg, and many other attorneys and educators, which we refer to here as the *Johnson 2021 comment*, https://kcjohnson.files.wordpress.com/2021/06/20210604-comment-on-proposed-title-ix-rulemaking-1.pdf.

A. Definitions and Conditions[28]

In setting forth the definitions and conditions that give rise to a school's duty to respond under Title IX, the Department's apparent intent was to restrict formal Title IX proceedings to cases of alleged misconduct that interfere with a complainant's participation in an educational program or activity, consistent with the language of Title IX and with court decisions. But even stakeholders who welcomed the Department's efforts to balance protection of alleged victims with due process protections have expressed concerns that the Department has gone too far in loosening schools' duty to respond. Moreover, in response to the 2020 regulations, some schools have developed a two-track system, providing the legally mandated procedural protections in some cases involving alleged sexual misconduct but not in others, even where the potential consequences of a finding of responsibility are comparable. That is unfair, confusing, and unworkable. Any proceeding that could result in a respondent's being deprived of access to a school's educational programs or activities should provide the critical procedural protections set forth in Section III.C below.[29]

B. Provisions for Informal Resolution

We strongly support the regulatory provision giving complainants who report conduct covered by Title IX a meaningful choice between a formal Title IX process or an alternative dispute resolution, and the corresponding requirement that schools provide supportive, non-punitive individualized services designed to restore or preserve parties' access to the school's education programs and activities, whether or not formal proceedings are pursued.[30] The Department's expressed goal was not to limit protections for complainants, but to give them "greater choice and control," acknowledging that college students are adults and different resolution processes may be appropriate for different individuals and different situations.[31]

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[28] *See* the definitions of sexual harassment and sexual assault (34 CFR §106.30), the "deliberate indifference" standard (§ 106.44(a)); and the standards for what constitutes conduct within a school's "education program or activity" (§ 106.44(a)).

[29] *See also Johnson 2021 comment*, raising this point. While we are not proposing any particular solution to these concerns in this submission, we note suggestions made by Harvard professors Gersen, Gertner, and Halley, https://perma.cc/3F9K-PZSB; the ACLU, https://www.aclu.org/letter/aclu-comments-title-ix-proposed-rule; and Concerned Lawyers and Educators, https://conradobrien.com/uploads/attachments/cjrjac2cb0cmt01iw4vzo4aev-comments-of-concerned-lawyers-and-educators-in-support-of-fundamental-fairness-for-all-parties-in-title-ix-grievance-proceedings-1-28-2019.pdf.

[30] Section 106.30, 106.45(b)(9).

[31] 85 FR 30089.

Informal, non-punitive resolution processes are equally, if not more, appropriate when a complainant reports conduct that is not covered by Title IX, for example, conduct that is unwelcome but not necessarily severe or pervasive and does not constitute assault.[32]

We have recently been involved in a number of cases that were promptly and satisfactorily resolved without a formal investigation or hearing: both parties' viewpoints were considered, the complainant's concerns were addressed through remedial, non-punitive measures, and both parties' access to their education was preserved. Examples of remedial, non-punitive measures can include alcohol counseling and agreements to abstain from alcohol; giving a complainant priority with respect to class or dorm selection; agreement by a respondent to come on campus only for classes; agreements not to communicate with or about each other; and education on consent. With an informal resolution, both parties can avoid the stress and uncertainty of a formal proceeding as well as the stigma and distress a formal decision can cause for either or both parties.

C. Procedural Provisions

Here we address procedural protections in the 2020 regulations that should be preserved and two key areas where the regulations should be modified or clarified.

1. Procedural Protections that Should Be Preserved

Overall, we support the procedural protections in the 2020 regulations. As we have emphasized, these protections are consistent with basic principles of justice and with rulings by many courts. Most of them would be freely accepted in any other context, and many have not been the subject of specific objections (with notable exceptions such as the live hearing, cross-examination, and presumption of non-responsibility provisions, which we address below). While some have raised general concerns about the potential cost and complexity of these provisions, they are necessary for fair proceedings and can be avoided if schools and parties voluntarily pursue less formal resolutions. In addition, the disproportionate negative impact of sexual

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[32] Even commenters who oppose other aspects of the regulations have welcomed the provisions giving schools more power to pursue informal resolutions, including restorative justice or mediation. To quote just one of a number of similar comments: "Students and institutions alike desire the power to settle these disputes in a productive manner rather than being arbitrarily forced into a one-size-fits-all solution." *Association of Governing Boards of Universities and Colleges*, https://www.regulations.gov/document?D=ED-2018-OCR-0064-7550.

misconduct policies and proceedings on men of color has been well documented, and makes due process and other legal rights all the more important.[33]

In particular, as required by the 2020 regulations:

a) Schools should offer supportive measures – "non-disciplinary, non-punitive individualized services . . . designed to restore or preserve equal access to the [school's] education program or activity" – to both parties, whether or not a formal complaint is filed.[34]

b) Schools should give both parties timely and adequate notice of the applicable school policy or code provisions and their rights.[35]

c) Schools should give respondents notice of complaints against them, including the factual allegations on which a complaint is based and the relevant provisions of the school's policy or code, before any initial interview and with sufficient time to prepare a response. Parties should also be notified if the school decides to investigate additional or different allegations from those included in the initial notice.[36]

d) Title IX coordinators, investigators, and decisionmakers should not have conflicts of interest, bias for or against complainants or respondents generally, or bias for or against a particular party.[37]

e) Decisionmaker(s) should not be the same person(s) as the Title IX coordinator or the investigator(s).[38]

f) All officials involved in Title IX disciplinary proceedings should be trained on the requirements of Title IX and the school's procedures. They should be trained to conduct impartial proceedings, not to rely on sex stereotypes, and to protect due process for all parties. In particular, while investigators may be appropriately trained

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[33] *See*, for example, Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, Harvard Law Review, https://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement-2/.

[34] Section 106.30.

[35] Section 106.45(b)(2).

[36] Section 106.45(b)(2).

[37] Section 106.45(b)(1)(iii).

[38] Section 106.45(b)(7).

to be sensitive in how they question parties, they should not be trained to presume alleged conduct occurred or to make credibility determinations based on presumptions about complainants or respondents.[39]

g) Schools – not parties – should be responsible for gathering all relevant evidence, both inculpatory and exculpatory, and for evaluating it objectively. Credibility determinations should not be based on a person's status as a complainant, respondent, or witness.[40]

h) Respondents should be given a presumption of non-responsibility.[41] This is simply a corollary to the standard of proof: if the standard is not satisfied the respondent should be found not responsible. An express statement of the presumption is necessary because college officials have commonly been trained to presume a complainant's credibility.

i) A respondent's right to avoid self-incrimination must be protected and no adverse inference should be drawn if the respondent limits their participation or testimony.[42]

j) The parties should have an equal opportunity to present witnesses and evidence and to be accompanied during the proceedings by an advisor of their choice.[43]

k) The parties should be given written notice of all interviews, meetings, and hearings, with sufficient time to prepare.[44]

l) The parties should be given an equal and meaningful opportunity to review, respond to, and present all evidence gathered during the investigation, both inculpatory and exculpatory.[45]

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[39] Section 106.45(b)(1)(iii).
[40] Section 106.45(b)(1)(ii), (5).

[41] Section 106.45(b)(1)(iv).

[42] Section 106.45(b)(6)(i).

[43] Section 106.45(b)(5).

[44] Section 106.45(b)(5).

[45] Section 106.45(b)(5).

m) The investigative report should fairly summarize relevant evidence, both inculpatory and exculpatory, and the parties should be given a meaningful opportunity to review and respond to the report.[46]

n) Decision-makers should issue a comprehensive written determination based on an objective evaluation of the evidence. The determination should identify the relevant policy or code provision(s), describe the investigation, review the evidence, include findings of fact and conclusions as to how the code provisions apply to the facts, state the decision as to each allegation and the rationale for the decision, describe any sanction and the rationale for the sanction, and describe any support measures or remedies provided to the complainant.[47]

o) The parties should receive timely written notice of their appeal rights, and an independent decisionmaker for the appeal.[48]

p) Institutions of higher education should provide a live hearing and allow the parties' advisors to question the other party and witnesses.[49]

The live hearing/cross-examination provisions in the 2020 regulations have provoked particular opposition. However, they are consistent with longstanding legal precedent and critical to a fair determination, ensuring that the parties can test, and decisionmakers can assess, the credibility and reliability of the parties and witnesses.[50] The practice many schools used before the 2020 regulations, where parties could submit written questions, school officials decided what questions to ask, and decisionmakers might never even see the parties in person, was not an adequate substitute. The written question process is artificially constrained and does not allow the questioner to flow with the testimony or effectively address new points as they come up. As the regulations require, questioning should take place in real time, in the presence of both the parties and the decisionmakers.

As for the often-repeated concern that live hearings with cross-examination will deter students from reporting sexual assault, we have seen no evidence that is true.

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[46] Section 106.45(b)(5).

[47] Section 106.45(b)(7).

[48] Section 106.45(b)(8).

[49] Section 106.45(b)(6)(i).

[50] For an overview of case law explaining the essential role of cross-examination in resolving the credibility disputes that are central to most Title IX proceedings, see the *Johnson 2021 comment*.

> Long before the 2020 regulations were adopted, live hearings with cross-examination were required in California, in the Sixth Circuit, and in many states' procedures for public institutions. Schools can, should, and do adopt measures to ensure respectful treatment of parties and witnesses and prevent irrelevant, unfair, or badgering questions, and can also take steps to keep the parties separated. Moreover, as we have said, we firmly believe complainants should be supported and taken seriously, but the goal of a particular disciplinary proceeding should be to determine whether the allegations in that case are true. Any assumption that a particular complainant is a victim of sexual misconduct and should not be questioned or effectively tested is not consistent with basic fairness. Clear options for supportive measures and informal resolutions, with steps to ensure fair procedures and reliable outcomes if a formal grievance procedure takes place and with appropriate education of the school community, should encourage students who encounter sexual harassment or assault to report to and seek support from their schools.

2. Key Areas Where the 2020 Regulations Should Be Modified or Clarified

First, the provision in Section 106.45(b)(6)(i) requiring exclusion of *any* statement by parties that do not submit to cross-examination is not workable and contradicts well-established evidentiary rules. Decisionmakers should be allowed to rely on statements that are not being offered for their truth, including statements that could themselves be part of a sexual harassment claim and statements relevant to issues such as consent and capacity. Decisionmakers should also be allowed to rely on either party's prior admissions or statements against their own interest.[51]

Second, Section 106.45(b)(5)(iii) states that schools must "[n]ot restrict the ability of either party to discuss the allegations under investigation." A provision of this type was a needed corrective against policies that restricted the parties' ability to gather evidence. However, the regulations should also make clear that this provision is subject to Section 106.71, which prohibits retaliation. Schools can and must protect the parties from retaliatory harassment and defamation. It is all too common for respondents who have been vindicated by their schools to then be targeted by smear campaigns, which can follow them even if they transfer or graduate. And it is all too common for schools to do little or nothing in response.[52]

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[51] *See Johnson 2021 comment.*

[52] We are also concerned about students who have been found responsible under current processes that did not provide the basic protections necessary to ensure a fair result, and believe consideration should be given to offering them recourse. At the very least, a process should be available for persons found responsible to have their records expunged after a designated period, and there should be a time frame after which respondents are no longer required to report an adverse disciplinary ruling on an application for admission to another school.

IV. CONCLUSION

The Department must continue to align its approach to Title IX enforcement with basic principles of justice and court rulings requiring fair procedures for individuals accused of serious misconduct. As properly recognized in the 2020 regulations, a school's treatment of either a complainant or a respondent in connection with a sexual harassment complaint may constitute discrimination on the basis of sex. Title IX protects access to education, and students who are accused of sexual harassment or assault are routinely excluded from and denied the benefits of their school's educational programs and activities, whether or not they are found responsible. Moreover, while the erosion of due process protections in campus disciplinary proceedings has so far primarily impacted men, it has led to injustice and insecurity for everyone. This is starkly illustrated by a number of recent cases in which women have been the accused or have been censured after arguing that others should receive a fair process.[53]

We believe *both* complainants and respondents have a right to be heard. *Neither* has a right to be automatically believed. A society dedicated to equal justice under law cannot function if we abandon basic fairness and due process principles in reaction to particular types of cases.

Respectfully submitted,

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[53] See, for example, complaint in *Alyssa Reid v. James Madison University and Department of Education,* No. 5:2021cv00032 (W.D. Va. May 3, 2021).

APPENDIX

To supplement the publications cited in footnote 22, here is a representative sampling of cases affirming that schools are obligated to follow their procedures; clearly notify respondents of the charges against them and the factual basis; conduct a thorough and fair investigation; give respondents a meaningful opportunity to defend themselves (with access to relevant materials and the ability to confront their accusers); ensure decisionmakers and investigators are impartial; meaningfully consider both exculpatory and inculpatory evidence; and give fair and consistent treatment to complainants (usually female) and respondents (usually male).

Federal appellate decisions

Doe v. Regents of the Univ. of Minnesota, No. 19-2552, 2021 WL 2197073 (8th Cir. June 1, 2021): allowed male student to proceed with Title IX claim; plaintiff alleged government and campus pressure to charge males with sexual misconduct coupled with "detailed allegations of investigator bias and dubious investigative procedures in these particular proceedings." The Court rejected an argument that bias in favor of the victims of sexual assault does not establish a reasonable inference of bias against male students; "[s]ex discrimination need not be the only plausible explanation or even the most plausible explanation for a Title IX claim to proceed."

Doe v. Univ. of Arkansas - Fayetteville, 974 F.3d 858 (8th Cir. Sept. 4, 2020): allowed male student to proceed with Title IX claim; plaintiff alleged "[a] decision that is against the substantial weight of the evidence and inconsistent with ordinary practice on sanctions . . . against the backdrop of substantial pressure on the University to demonstrate that it was responsive to female complainants."

Schwake v. Arizona Bd. of Regents, 967 F.3d 940 (9th Cir. July 29, 2020): allowed male student to proceed with Title IX claim based on "background indicia of sex discrimination, namely, the pressure that the University faced concerning its handling of sexual misconduct complaints and gender-based decision-making against men in sexual misconduct disciplinary cases," coupled with allegations concerning irregularities in the disciplinary case against plaintiff, including "an atmosphere of bias," failure to allow an appeal, refusal to permit plaintiff to file a harassment complaint against the complainant, and a one-sided investigation (refusal to give plaintiff written information about allegations, failure to consider his version or evidence, adding new violations without giving him an opportunity to respond, and finding him responsible "without any access to evidence or considering his exculpatory evidence.")

Doe v. Oberlin College, 963 F.3d 580 (6th Cir. June 29, 2020): allowed male plaintiff to proceed with Title IX claim; plaintiff alleged "[c]lear procedural irregularities" (substantial delays in the investigation and in telling plaintiff of the specific allegations against him, failure of hearing panel to comment on contradiction in female complainant's statements, appeals officer's failure

to consider a witness's later submitted statement contradicting complainant's testimony) and an "arguably inexplicable" decision to find plaintiff responsible. "Any number of federal constitutional and statutory provisions reflect the proposition that, in this country, we determine guilt or innocence individually—rather than collectively, based on one's identification with some demographic group. That principle has not always been perfectly realized in our Nation's history, but as judges it is one that we take an oath to enforce."

Doe v. Univ. of the Sciences, 961 F.3d 203 (3d Cir. May 29, 2020): allowed male plaintiff to proceed with Title IX claim; plaintiff alleged pressure from federal government combined with university's discriminatory enforcement of its sexual misconduct policy (including crediting all females and discrediting all males). Also allowed breach of contract claim for failure to provide a fair procedure, based on use of single investigator model and failure to provide a real, live, adversarial hearing with cross-examination.

Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. June 28, 2019): allowed male plaintiff to proceed with due process and Title IX claims; plaintiff alleged the female complainant did not make a formal complaint or submit her own statement, Title IX coordinator did not allow plaintiff to review the investigative report, complainant did not appear before the hearing panel and plaintiff was not allowed to cross-examine her, and plaintiff was not allowed to present witnesses or submit evidence that undermined complainant's credibility

Doe v. Baum, 903 F.3d 575 (6th Cir. Sept. 7, 2018): allowed male student to proceed with due process and Title IX claims because credibility was at issue and plaintiff was not given a hearing or "an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder;" also held plaintiff had plausibly alleged that university officials "discredited all males, including Doe, and credited all females, including Roe, because of gender bias."

Doe v. Miami University, 882 F.3d 579 (6th Cir. 2018): allowed male student to proceed with claims that the university did not consider inconsistencies in complainant's statement, did not apply its own definition of consent, and treated the parties differently, failing to take seriously the male student's allegations that the female student engaged in non-consensual conduct.

Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016): allowed male student to proceed with Title IX claims; plaintiff alleged university "chose to accept an unsupported accusatory version over Plaintiff's, and declined even to explore the testimony of Plaintiff's witnesses," against a backdrop of pressure to crack down on alleged sexual assault.

Other cases

Doe v. Washington & Lee University, No. 6:19-CV-00023, 2021 WL 1520001 (W.D. Va. Apr. 17, 2021): allowed male student to proceed with Title IX claim; plaintiff alleged gendered stereotypes and differing standards for assessing the parties' credibility.

Doe v. New York Univ., No. 1:20-CV-01343-GHW, 2021 WL 1226384 (S.D.N.Y. Mar. 31, 2021): allowed male student to proceed with Title IX claim; plaintiff alleged procedural irregularities, evidentiary weaknesses, refusal to investigate complainant's alleged policy violations, and fact that university was under pressure to refute criticisms circulating in the student body and in the public press that it was turning a blind eye to female students' charges of gender-based misconduct by male students.

Doe v. Rensselaer Polytechnic Institute, No. 1:20-CV-1185, 2020 WL 6118492 (N.D.N.Y. Oct. 16, 2020): enjoined school from conducting disciplinary proceeding against male student; found powerful inference of gender bias based on allegations that school chose not to apply the protections in its 2020 policy to plaintiff's case, proceeded on female's complaint against male but not his countercomplaint against her, applied standards contrary to its own policy definition of consent, and applied inconsistent standards to male and female.

Doe v. American University, No. 19-CV-03097, 2020 WL 5593909 (D.D.C. Sept. 18, 2020): allowed male student to proceed with Title IX claim; plaintiff alleged that investigator made no credibility findings on female complainant, despite her inconsistencies and professed memory impairment, faulted plaintiff for "modest testimonial deviation," and appeared to discount male testimony, and that university had changed from a hearing process to a "survivor-friendly" model with a single investigator.

Doe v. Purdue University, 464 F. Supp. 3d 989 (N.D. Ind. 2020): allowed male student to proceed on due process and equal protection claims; plaintiff alleged defendants withheld evidence they used to find him guilty of violating university policy, treated male and female students differently, and engaged in gender-based stereotyping.

Doe v. Syracuse University, No. 519CV1467TJMATB, 2020 WL 2513691 (N.D.N.Y. May 15, 2020): allowed male student to proceed with Title IX claim; plaintiff alleged flaws in the investigation, assumptions made by investigators, failure to address contradictions in female complainant's story, and refusal to investigate exculpatory evidence.

Noakes v. Syracuse University, 369 F. Supp. 3d 397 (N.D.N.Y. 2019): denied university's motion to dismiss Title IX claims by male African American student who was expelled for alleged sexual assault of a female student and claimed mistaken identity; the complainant did not testify at the hearing, plaintiff was not allowed to cross-examine her or key witnesses, and plaintiff alleged flaws in the investigation, pro-complainant assumptions, and unwillingness to consider evidence of plaintiff's innocence or question complainant's credibility, coupled with facts to show public and university-specific pressure to believe accusers and presume accused students responsible.

Norris v. Univ. of Colorado, 362 F. Supp. 3d 1001 (D. Colo. 2019): denied university's motion to dismiss Title IX and due process claims brought by a male student who was suspended for 18 months for alleged sexual misconduct with a female student; plaintiff alleged the university applied the wrong version of its code, withheld notice of its investigation until after plaintiff was interviewed by police, denied him a hearing and the right to cross-examine his accuser and other witnesses, denied him access to the investigation file, made inconsistent findings, used a "trauma-informed" approach that presumed the truth of complainant's allegations, and assigned officials with conflicts of interest to investigate and decide the case.

Oliver v. University of Texas Southwestern Medical School, No. 3:18-CV-1549-B, 2019 WL 536376 (N.D. Tex. Feb. 11, 2019): denied motion to dismiss Title IX and due process claims filed by a male medical student who was expelled based on an alleged physical assault of his former fiancée; plaintiff alleged the university had first found the complaint against plaintiff to be unfounded but then reopened it based on "new evidence" which it did not share with him; held a hearing without requiring complainant to testify and without allowing cross-examination; and disregarded proof that complainant had doctored the "new evidence."

Doe v. Univ. of Mississippi, 361 F. Supp. 3d 597 (S.D. Miss. 2019): denied motion to dismiss Title IX, due process, and equal protection claims filed by male student suspended for three years for alleged sexual assault of female student; plaintiff alleged that the investigator excluded exculpatory evidence, failed to interview key witnesses, and failed to address medical records that made clear complainant did not think she was raped, that a panel member mocked defenses raised by men accused of sexual assault, that defendants treated plaintiff less favorably than complainant for the same conduct (sexual activity with someone under the influence of alcohol), that the investigative report was flawed and incomplete, that decision makers were trained to assume an assault occurred, that plaintiff was not allowed to cross-examine complainant or witnesses because they did not appear at the hearing, and that the preponderance standard was not sufficient to protect plaintiff's rights.

Doe v. Regents of Univ. of California, 28 Cal. App. 5th 44 (Cal. Ct. App. 2018): held that university violated male student's due process rights by denying him access to critical evidence, the opportunity to adequately cross-examine witnesses, and the opportunity to present evidence in his defense. "When the accused does not receive a fair hearing, neither does the accuser. . . . It is ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy. This case turned on the Committee's determination of the credibility of the witnesses. Credibility cannot be properly decided until the accused is given the opportunity to adequately respond to the accusation. The lack of due process in the hearing here precluded a fair evaluation of the witnesses' credibility. In this respect, neither Jane nor John received a fair hearing."

Doe v. George Washington Univ., 366 F. Supp. 3d 1 (D.D.C. 2018): denied motion to dismiss breach of contract and Title IX claims by male student suspended for one year (after finishing all his course work) for alleged sexual assault of female student; Court noted among other things that "[t]he Appeals Panel was presented with direct contradictions in the evidence and appears to have strained to overlook such contradictions, leaving no trail of reasoning."

Doe v. University of Oregon, No. 6:17-CV-01103-AA, 2018 WL 1474531 (D. Or. Mar. 26, 2018): allowed male student to proceed with claims including allegations that a university decisionmaker explained away inconsistencies and problems with complainant's evidence, ignored evidence favoring plaintiff, did not give him advance copies of evidence, and allowed the complainant to introduce new evidence at the hearing without allowing him to respond.

Doe v. Marymount University, 297 F. Supp. 3d 573 (E.D. Va. Mar. 14, 2018): allowed male student to proceed with claims including allegations that the university did not allow him to interview potential witnesses or gather exculpatory evidence, and did not investigate or consider evidence that contradicted complainant's account, including her inconsistent statements.

Gischel v. University of Cincinnati, 302 F. Supp. 3d 961 (S.D. Ohio Feb. 5, 2018): allowed male student to proceed with claims that the university's investigator was biased against him, the university did not consider evidence that contradicted the complainant's account, and the university denied cross-examination by refusing to ask the complainant questions posed by the respondent.

Doe v. The Trustees of the University of Pennsylvania, 270 F. Supp. 3d 799 (E.D. Pa. Sept. 13, 2017): allowed male student to proceed with claims including allegations that the university failed to conduct a thorough investigation and trained investigators and members of the Hearing Panel to presume that complainants were telling the truth and accused students were responsible.

Doe v. University of Notre Dame, 2017 U.S. Dist. LEXIS 69645 (N.D. Ind. May 8, 2017): in response to university's argument that lawyers were not required because its disciplinary process was educational, not punitive, judge wrote: "This testimony is not credible. Being thrown out of school, not being permitted to graduate and forfeiting a semester's worth of tuition is 'punishment' in any reasonable sense of that term."

Doe v. Brandeis University, 177 F. Supp. 3d 561 (D. Mass. 2016): "Brandeis appears to have substantially impaired, if not eliminated, an accused student's right to a fair and impartial process. … If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision."