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Comment on Proposed Title IX Rulemaking

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Docket No. ED-2021-OCR-0166-0001, RIN 1870-AA16

Document Number 2022-13734

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Submitted September 11, 2022

My name is Jonathan Taylor. I am the founder of Title IX for All and a former A&M instructor. I submit this comment on behalf of my organization.

Title IX for All was founded to raise awareness of sex-based bias and threats to civil liberties in academic institutions, connect aggrieved students and families with helpful professionals and advocates, and advocate for positive change. Our website is home to the Title IX Lawsuits Database, a comprehensive clearinghouse of lawsuits by respondents to Title IX investigations. Our tally of lawsuits, both active and inactive, now exceed eight hundred. Reviewing and classifying the content and outcomes of these lawsuits is a core part of our work.

The purpose of this submitted comment is not to object to the proposed rule in its entirety, but rather to comment on specific sections. The absence of a comment directed toward a specific section does not necessarily mean we support or oppose such a section.

We have structured our comment in this order:

1. Proposed § 106.2 - Broadened Definition of Hostile Environment Sexual Harassment
2. Proposed § 106.46(f)(1)(i) - Live Hearings
3. Proposed § 106.45(f)(4) – Access to Evidence
4. Proposed § 106.46(f)(1) - Cross-Examination

1. Proposed § 106.2 - Broadened Definition of Hostile Environment Sexual Harassment

As stated in the Title IX NPRM Summary of Major Provisions, the proposed regulations abandon the standard definition set forth by the Supreme Court in *Davis v. Monroe County Board of Education*, which held that schools are liable under Title IX for harassment that is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."

Instead, the proposed rule defines hostile environment harassment for which schools are liable under Title IX as conduct that is "sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated **subjectively and** objectively, it creates a hostile environment, but also that the conduct be based on sex and occur under the recipient's education program or activity."

"Subjectively" is the problematic element here, and the proposed regulations should discard it. Simply put, it is unwise to predicate investigations and discipline upon the stated or assumed subjective feelings of complainants (or school personnel). Inevitably, among at least a small portion of society, feelings of offense and discomfort are influenced by subjective flights of fancy, mental disorders, or prejudice. Subjectivity alone is not compelling evidence in its own right and basing disciplinary outcomes on such a factor would be obviously unfair for respondents in the above cases.

The proposed subjectivity factor can also be unfair for complainants. A school can, for example, find a respondent not responsible because of subjective factors, even when objective factors would point toward a finding of responsibility, especially if they weigh those subjective factors more heavily than objective factors.

Using subjectivity as a factor, a school could also find a respondent not responsible if the victim "does not subjectively perceive the environment to be abusive," which the Supreme Court considered in *Harris v. Forklift Systems, Inc*.

Another problem with the "subjectivity" factor is that it encourages a faith-like approach to crediting a complainant's allegations. While a complainant may in essence argue that a particular form of conduct is *objectively* harmless but *subjectively* harmful, it remains that whether the complainant is truly subjectively harmed would be a determination that would have to be made by unbiased decisionmakers. It would not be a statement taken on faith. The regulations do not appear to have language guarding against this.

In short, broadening the definition of hostile environment harassment to include subjectivity would significantly empower corrupt or biased decision-makers and create unfair outcomes for both complainants and respondents.

2. Proposed § 106.46(f)(1)(i) - Live Hearings

Live hearings are currently required by postsecondary institutions per §106.45(b)(6)(i) of the 2020 regulations. The proposed § 106.46(f)(1)(i), page 694, eliminates live hearings as a requirement, allowing institutions to decide on either a live hearing model or a single investigator model ("Allowing the decisionmaker to ask the parties and witnesses, during individual meetings with the parties **or** at a live hearing…").

Federal circuit courts have determined that live hearings are required as a matter of due process. In *Doe v. University of Cincinnati*, the Sixth Circuit said this about live hearings:

> *The Due Process Clause guarantees fundamental fairness to state university students facing long-term exclusion from the educational process. Here, the University's disciplinary committee necessarily made a credibility determination in finding John Doe responsible for sexually assaulting Jane Roe given the exclusively "he said/she said" nature of the case. Defendants' failure to provide any form of confrontation of the accuser made the proceeding against John Doe fundamentally unfair.*

Court decisions generally follow this principle regarding due process: the greater the deprivation of liberty or property, the greater the process due to determine guilt. This is why, when severe life-altering accusations (sexual assault, dating violence, etc.) are made against a student, with the potential for more severe discipline, more rigorous procedures are required to determine the truth of the matter.

This goes both ways, however. On the other end of the spectrum, when the level of punishment is not severe - such as a written reprimand instead of expulsion for behavior that does not constitute assault or threats - courts have found that procedures like a live hearing are not required. A California appellate court ruled as much in *Knight v. South Orange Community College District*, holding that "We have found no published cases holding that a student is entitled to this level of due process [live hearings] before receiving a written reprimand."

Live hearings enhance the transparency and accountability of the grievance process. They also bolster fact-finding accuracy and reduce bias. As such, they should be required – not merely an option – when students face life-altering accusations. This includes any allegations where a student would be suspended for multiple semesters or expelled. This would obviously include sexual assault allegations.

Under the opposite of a live hearing model – the single investigator model – neither party would hear any words spoken by either party. They would only read what school personnel represent (or misrepresent) that the other party or their witnesses have said. Since live hearings require audio recordings and transcripts, they offer means to hold school personnel accountable for how they (mis)represent the statements of the parties to each other. Under the proposed rule, there is no requirement for audio recordings or a transcript in a single investigator model.

In addition to the potential for school personnel to misrepresent the parties' statements in one-on-one meetings with the adverse party, personnel may also simply decline to provide the adverse party with statements made by the other party or their witnesses that could help their case.

Students simply have the right to see the evidence in play, and they have the right to a process where accountability is a fundamental feature rather than an option chosen by administrators.

They have even more of a right to such a process when facing allegations that could substantially alter the course of their lives for the worse.

While the proposed rule suggests that live hearings would be an option, schools will naturally follow the path of least resistance and forgo live hearings, where they have less accountability, transparency, and more flexibility to allow their biases to play out in their preferred manner. Therefore, the proposed rule is a de facto elimination of live hearings among a likely majority of institutions.

The argument given for forgoing live hearings is simply that it will (speculatively) increase reporting. However, if a complainant will *only* file a complaint if the grievance process has poor quality control and poor accountability, it begs the question of how credible the allegation truly is. A "come one, come all" approach is not necessarily the best.

In addition, if an institution is willing to forgo a series of measures that would improve the integrity of the process simply to increase complaints, it begs the question of whether the institution is truly concerned about finding the truth of the matter, or if it is simply more interested in prioritizing the most convenient process for itself over the needs of its students.

3. Proposed § 106.45(f)(4) – Access to Evidence

It is a fundamental element of a fair procedure – especially when the allegations are potentially life-altering for the accused - that the accused have the right to see the evidence against them. The 2020 regulations, under § 106.45(b)(5)(vi), page 551, required that institutions:

> *(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source,* ***so that each party can meaningfully respond to the evidence prior to conclusion of the investigation****. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.*

Proposed § 106.45(f)(4), page 688, falls far short of this, instead requiring institutions to merely "provide each party with a description of the evidence that is relevant to the allegations of sex." There is no requirement that the description of the evidence even be in writing. Additionally,

substantial opportunity is given to school personnel to reframe, de-contextualize, omit, or misrepresent such evidence. There is no accountability built in to such a process because there is nothing required to be distributed to the parties in writing.

On its face, the proposed rule fails to meet basic requirements of a fair procedure regarding access to evidence. The Department should abandon this proposed change and instead maintain the parties' rights to access to evidence as established under § 106.45(b)(5)(vi) of the 2020 regulations.

4. Proposed § 106.46(f)(1) - Cross-Examination

Proposed § 106.46(f)(1), page 433, allows cross-examination only in cases where schools opt for a live hearing. As has already been discussed, schools are incentivized toward a single adjudicator model and away from live hearings, eliminating cross-examination in practice.

Like live hearings, cross-examination is required by postsecondary institutions per § 106.45(b)(6)(i) of the 2020 regulations where credibility is central or critical to the outcome. The right to cross-examination, as well as the requirements for live hearings and neutral factfinders, was made clear in the following appellate court decisions on both the state and federal level, especially in cases where the decision turned upon a credibility decision.

In *Doe v. University of Cincinnati*, the Sixth Circuit said this about cross-examination:

> *We are sensitive to the competing concerns of this case. "The goal of reducing sexual assault[] and providing appropriate discipline for offenders" is more than "laudable"; it is necessary. Brandeis, 177 F. Supp. 3d at 572. But "[w]hether the elimination of basic procedural protections—and the substantially increased risk that innocent students will be punished—is a fair price to achieve that goal is another question altogether." Id.*
>
> *Here, John Doe's private interest is substantial, and the risk of erroneous deprivation under the procedures UC followed at his ARC hearing is unacceptably high. Allowing defendants to pose questions to witnesses at certain disciplinary hearings may impose an administrative burden on UC. Yet on the facts here, that burden does not justify imposition of severe discipline without any credibility assessment of the accusing student.*

In *Doe v. Baum*, the Sixth Circuit likewise held as follows:

> *If a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.*

State court decisions, including the California Court of Appeal, Second Appellate District, have also held cross-examination as necessary. One such example is *Dixon v. Kegan Allee*:

> *When a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (such as means provided by technology like videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments. USC's disciplinary review process failed to provide these protections and, as a result, denied Doe a fair hearing.*

It is important to note that judicial decisions supporting cross-examination were made regardless of whether the university was public or private. Questions naturally arise whether due process is a right in the context of a private university. Courts have shown, however, that the right to cross-examination exists regardless, whether it is a matter of due process or a matter of basic fairness.

In *Dixon v. Kegan Allee*, ruling against the University of Southern California (a private university), the Court also concluded that, "For practical purposes, common law requirements for a fair disciplinary hearing at a private university mirror the due process protections at public universities." This ruling makes clear that even when certain procedures are not required by due process as a Constitutional right, they are often found in other legal provisions.

Similarly, in *Doe v. University of the Sciences* - a Third Circuit decision regarding a private university – found that such protections are required under basic fairness:

> *Basic fairness in this context does not demand the full panoply of procedural protections available in courts. But it does include the modest procedural protections of a live, meaningful, and adversarial hearing and the chance to test witnesses' credibility through some method of cross-examination.*

Additionally, the Court found that:

> *USciences did not provide Doe a real, live, and adversarial hearing. Nor did USciences permit Doe to cross-examine witnesses—including his accusers, Roe 1 and Roe 2. As we explained above, basic fairness in the context of sexual-assault investigations requires that students accused of sexual assault receive these procedural protections. Thus, Doe states a plausible claim that, at least as it has been implemented here, the single-investigator model violated the fairness that USciences promises students accused of sexual misconduct.*

The proposed rule should abandon the single investigator model and again require live hearings, while guaranteeing the right to cross-examination when credibility determinations are central and necessary to reaching a decision.