WRITTEN COMMENT of **FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION**

for the EO 12866 Meeting on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

October 16, 2018

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending students' and faculty members' individual rights on America's college and university campuses. FIRE is grateful for the opportunity to provide feedback on the Department of Education's draft regulations concerning Title IX. We hope FIRE's suggestions and input are helpful.

The draft regulations are a dramatic improvement over the current system of subregulatory guidance in a number of important ways. First, although it may go without saying, the shift from subregulatory guidance to proposed regulations makes feedback from a wide range of stakeholders possible. This procedural step was itself of critical importance, and FIRE thanks the Department of Education for taking this approach.

The draft regulations would improve the climate for all students from both a free speech and a due process standpoint. As Secretary DeVos said when she announced in September 2017 that the Department of Education would promulgate new Title IX regulations, "[n]o one benefits from a system that does not have the public's trust — not survivors, not accused students, not institutions and not the public."[1] In her speech, Secretary DeVos argued, "Every survivor of sexual misconduct must be taken seriously. Every student accused of sexual misconduct must know that guilt is not predetermined. These are non-negotiable principles."[2] The proposed regulations are a dramatic step towards honoring those principles.

On the free speech side, the regulations correctly identify the harm done to free speech on campus by the use of overly broad definitions of sexual harassment. Proposed section 106.44(e)(1), defining sexual harassment in accordance with Supreme Court standards, would relieve universities of the fear that the broader definition ("any unwelcome conduct of a sexual nature") used by OCR in earlier subregulatory guidance must be incorporated into

[1] Secretary DeVos Prepared Remarks on Title IX Enforcement, September 7, 2017, https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement.
[2] *Id.*

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university policy to avoid a Title IX investigation. This important draft regulation would finally correct the profound damage to university policies caused by colleges' attempts to follow OCR's incorrect, and often incoherent, subregulatory guidance on this issue.

Another important positive feature of the proposed regulations is the recognition, in section 106.45(a), that a recipient's treatment of either a complainant *or* a respondent may constitute discrimination on the basis of sex. Section 106.45(b) of the proposed regulations effectuates this recognition by requiring meaningful due process protections for accused students, such as consideration of both inculpatory and exculpatory evidence and a prohibition on training materials that "rely on sex stereotypes" — a problem that FIRE has repeatedly observed in campus judiciaries.[3] The fact that 106.45(b)(7) would require universities to make those training materials available to both complainants and respondents gives additional, much-needed teeth to this prohibition, since transparency is a serious problem in this area. Currently, the only way to access such materials is through time-consuming and often costly open-records requests.

The proposed regulations also recognize a number of other, much-needed procedural protections, such as the right of an accused student to detailed notice of the allegations (§106.45(b)(2)); the right to access all evidence gathered in the investigation (§106.45(b)(3)); and the right to cross-examination (§106.45(b)(3)). Additionally, the rescission of the preponderance mandate gives institutions the flexibility to use a higher, clear-and-convincing standard of evidence when they conclude that is warranted by the seriousness of the offense(s) charged.[4]

As Secretary DeVos recognized, these due process protections will improve the integrity of the process in ways that benefit both respondents and complainants.

There are several areas, however, in which FIRE believes the proposed regulations could better ensure that accused students receive a fair process.

First, and most notably, the proposed regulations — while requiring students who receive a hearing to have the opportunity for live cross-examination — still allow schools to use an

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[3] At one time, for example, Stanford University trained adjudicators in sexual misconduct cases using materials instructing them to be "very, very cautious in accepting a man's claim that he has been wrongly accused of abuse or violence," claiming that "[t]he great majority of allegations of abuse—though not all—are substantially accurate," and that "an abuser almost never 'seems like the type.'" *See* Stanford University, Dean's Administrative Review Process Training Materials, 2010-2011, *available at* https://www.thefire.org/deans-administrative-review-process-training-materials-2010-2011. For additional examples, *see* KC Johnson & Stuart Taylor, "The Title IX Training Travesty," *The Weekly Standard*, Nov. 10, 2017, *available at* https://www.weeklystandard.com/kc-johnson-and-stuart-taylor-jr/the-title-ix-training-travesty.

[4] This is particularly significant in light of the fact that at least one court has explicitly suggested that the preponderance standard may be constitutionally inadequate in certain types of cases. *See* Lee v. Univ. of New Mexico, No. 1:17-cv-01230 (D.N.M. Sept. 20, 2018) (holding that "preponderance of the evidence is not the proper standard for disciplinary investigations such as the one that led to Lee's expulsion, given the significant consequences of having a permanent notation such as the one UNM placed on Lee's transcript.")

investigative model under which a student accused of one of society's most serious offenses may be found responsible with no hearing at all. FIRE believes the investigative model is unavoidably inadequate to this task for a number of reasons, the most significant of which is the inability of both parties to engage in the type of live cross-examination that the U.S. Supreme Court has referred to as "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970).

Recently, a number of state and federal courts — most notably, the U.S. Court of Appeals for the Sixth Circuit — have held that cross-examination is essential to due process in cases turning on credibility (as so many campus sexual misconduct cases do, given the frequent lack of third-party witnesses or physical evidence). In *Doe v. Baum*, for example, the Sixth Circuit held that in a case that turned on competing witness narratives, "the university must allow for some form of *live* questioning *in front of* the fact-finder."[5] (Emphasis in original). The court held that this was critical to due process because:

> Without the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives. Nor can the fact-finder observe the witness's demeanor under that questioning. For that reason, written statements cannot substitute for cross-examination.[6]

Other courts to consider this question have reached similar results.[7] If, as those courts and FIRE believe, there are some situations in which a live hearing is necessitated by concerns for both law and justice, the investigative model can simply never be sufficient.

FIRE is pleased that the proposed regulations guarantee both complainants and respondents the right to an advisor, including an attorney. While we strongly believe that *active* advisor participation is of critical importance in protecting the rights of both complainants and respondents, we also understand that *mandating* active advisor participation may be beyond the scope of OCR's authority. To ensure that institutions do not misinterpret OCR's regulations as *prohibiting* active advisor participation, however, we believe it would be better if §106.45(b)(3)(iv) was rephrased simply to state that "nothing in the proposed regulation prohibits a recipient from establishing restrictions regarding the extent to which the advisor may participate in the proceedings." This phrasing makes clear that while the regulations do not require institutions to allow advisors to actively participate, they do not themselves authorize institutions to restrict advisor participation. Alternatively, the regulations could simply remain silent on the question of advisor participation. (§106.45(b)(3)(iv)). FIRE will continue to advocate that Congress and state legislatures provide students with the right to be represented by counsel who can actively participate in campus suspension and expulsion

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[5]Doe v. Baum, 2018 U.S. App. LEXIS 25404, *14 (6th Cir. Sept. 7, 2018).
[6]I*d.* at *13.
[7]*See, e.g.*, Lee v. Univ. of N.M., No. 1:17-cv-01230 (D.N.M. Sept. 20, 2018); Doe v. Pa. St. Univ., 2018 U.S. Dist. LEXIS 141423 (M.D. Pa. Aug. 21, 2018); Doe v. Univ. of Mich., 2018 U.S. Dist. LEXIS 112438 (E.D. Mich. July 6, 2018); Doe v. Regents of the Univ. of Cal., No. B283229 (Cal. Ct. App. Oct. 9, 2018).

hearings. In the meantime, we are continuing to urge all institutions of higher education to provide that critical right.

The Department could also clarify that however a university defines consent, the burden of proof must remain on the institution, not on the alleged victim or on the accused. Those alleged to be victims of sexual assault should not be made to effectively act as the "prosecutor" in their own cases — that should be the institution's responsibility. Likewise, FIRE has seen too many institutions effectively shift the burden of proof away from themselves and onto accused students by requiring evidence of "affirmative consent" in order to disprove allegations of sexual misconduct. To offset this unjust burden-shifting, the regulations could provide that in order to meet its due process obligations, a school must — before it may take a punitive action against an accused student — prove every element of any alleged offense. This could be added to the other procedural protections afforded by §106.45(b)(3).

Lastly, FIRE applauds the emphasis on utilizing "supportive measures." (§106.44(e)(4)). The section defines the term as "non-disciplinary individualized services offered as appropriate to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed." The section continues:

> Paragraph (e)(4) goes on to explain that such measures are designed to preserve access to the recipient's education program or activity, protect the safety of all parties and the recipient's educational environment, and deter sexual harassment; that supportive measure must be non-punitive, time-limited, and narrowly tailored to support continued access to an education program or activity without unreasonably burdening the other party; and that supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

Often, advocates have made the critical point that the purpose of Title IX is to ensure continued access to educational opportunities. While law enforcement and courts are better suited to ensure that justice is served, educational institutions must use the tools available to them to keep educational environments free from discrimination. By encouraging institutions to prioritize providing supportive measures that are not dependent on the outcome of campus proceedings, the proposed regulations focus on steps that institutions can take to help affected students beyond campus judicial proceedings. FIRE commends the proposed regulations for clarifying that supportive measures must be non-punitive and not unreasonably burdensome on the other party. One important way this language might be improved is by removing the requirement that all supportive measures be "time-limited." FIRE sees no reason why institutions should have to cut short counseling services or many other non-punitive support measures.

Thank you for the opportunity to share FIRE's input regarding the proposed regulations. Our recommendations are intended to assist the Department of Education in ensuring that

institutional responses to sexual misconduct claims pursuant to Title IX are both effective and respect the due process rights of accused students. Thank you for the important progress you have already made towards this goal and for your attention to our concerns.

Respectfully submitted,

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