June 11, 2021

Susan B. Goldberg
Acting Assistant Secretary, Office for Civil Rights
U.S. Department of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Written testimony of Carrie Lukas, Independent Women's Forum, and Jennifer C. Braceras, Independent Women's Law Center, on enforcing Title IX of the Education Amendments of 1972 consistent with Due Process

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On March 11, 2021, President Biden directed a comprehensive review of regulations implementing Title IX of the Education Amendments of 1972. As part of this process, the Department of Education (the "Department") is reviewing the most recently promulgated rule, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 FR 30026 (2020) (the "2020 Rule").

The 2020 Rule requires schools to comply with basic constitutional norms regarding due process, including (among other things): timely and specific notice of allegations, live hearings, and the right to cross-examination.

Because the 2020 Rule provides processes that are *required* by the 14th Amendment's Due Process Clause, the Department may not suspend or rescind the Rule's procedural protections, at least with respect to public universities.

Independent Women's Forum and Independent Women's Law Center

Independent Women's Law Center (IWLC) is a project of Independent Women's Forum (IWF), a non-profit, non-partisan 501(c)(3) organization founded by women to foster education and debate on legal, social, and economic policy issues. IWLC supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for equal opportunity, individual liberty, and respect for the American constitutional order.

IWLC and IWF believe that women, whether accusers or accused, benefit from a fair and unbiased process for adjudicating claims of sex discrimination on campus and urge the federal

government to consider fully the consequences of a Title IX regulatory regime unmoored from the text of the statute and from black letter constitutional principles.

Introduction

As an initial matter, IWF and IWLC submit that the process undertaken by the Department does not comply with the notice and comment requirements under the Administrative Procedure Act, 5 U.S.C. §552, for the establishment, amendment, or repeal of Title IX regulations.

The so-called "announcement of public hearing" upon which this testimony is solicited is based on no statutory authority and lacks a description of any rules or policies being considered. This process has no basis in law, does not provide the public with an appropriate basis on which to provide adequate feedback, and should be understood as a press event, not a public hearing in any formal sense. It, therefore, cannot serve as the basis for notice and comment rulemaking required to change the 2020 Rules.

The Department's egregious lack of clarity raises significant questions as to the Department's willingness to monitor educational institutions to ensure they comply with constitutional norms of due process for individuals accused of sexual misconduct.

Background

Educational institutions today face many legal risks when it comes to alleged sexual misconduct between students or committed by professors and staff. A school that is on notice of sexual misconduct and takes insufficient action to address it faces not only the threat of private lawsuits, but also the loss of millions of dollars in federal funding—not to mention reputational damage and the burden of federal investigations. Educational institutions, therefore, have a strong incentive to limit risk by over-monitoring and over-responding to sexual misconduct allegations.[1]

Prior to the promulgation of the 2020 Rule, many educational institutions sought to limit their risk by establishing over-corrective policies that hindered the search for truth and violated basic constitutional norms regarding fairness and due process. Indeed, court after court has issued rulings favorable to students who were held responsible for misconduct under such policies. *See, e.g.*, *Doe v. Univ. of Scis.*, 961 F.3d 203, 215 (3d Cir. 2020); *Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019); *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399–402 (6th Cir. 2017); *see also Lee v. Univ. of New Mexico,* 449 F. Supp. 3d 1071, 1127 (D.N.M. 2020); *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 131–34 (Cal. Ct. App. 2019); *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44, 61 (Cal. Ct. App. 2018); *Doe v. Univ. of S. Cal.*, 241 Cal. Rptr. 3d 146, 163 (Cal. Ct. App. 2018); *Doe v. Claremont McKenna Coll.*, 236 Cal. Rptr. 3d 655, 666 (Cal. Ct. App. 2018); *Doe v. Univ. of Michigan*, 325 F. Supp. 3d 821, 828 (E.D. Mich. 2018), *vacated on other grounds*, *Doe v. Bd. of Regents of Univ. of Mich.*, 2019 WL 3501814 (6th Cir. 2019); *Doe v. Univ. of Miss.*, 3:16-CV-63-DPJFKB, 2018 WL 3570229, at *11 (S.D. Miss. July 24, 2018); *Doe v. Pa. State Univ.*, 336 F. Supp. 3d 441, 450 (M.D. Pa. 2018); *Doe v. Alger*, 228 F. Supp. 3d 713, 730 (W.D. Va. 2016); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 603 (D. Mass. 2016). The 2020 Rule codified this judicial precedent, clarifying for schools their obligations to address sexual misconduct in a manner consistent with fairness and due process.

Due Process

A meaningful opportunity to be heard within a meaningful timeframe is a fundamental requirement of due process. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Because a finding of sexual misconduct can bring with it a permanent and life-altering stigma that irreparably harms a

1 Tovia Smith, *Some Accused of Sexual Assault on Campus Say System Works Against Them*, NPR (Sept. 3, 2014, 3:31 AM), https://www.npr.org/2014/09/03/345312997/some-accused-of-campus-assault-say-the-system-works-against-them (university administrator admits that pressure from OCR created a rush to judgment on individual allegations, and made administrators "jittery.")

student's educational, professional, and social prospects, accused students at public universities are constitutionally entitled to robust procedural protections. *See Purdue Univ.*, 928 F.3d at 663; *Univ. of Cincinnati*, 872 F.3d at 400; *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988).

At a bare minimum, this includes timely notice of the charges, evidence against the accused, and an opportunity for the accused to present his or her side of the story. *Univ. of Cincinnati*, 872 F.3d. at 399-400 (quotation marks omitted); *see also Brandeis Univ.*, 177 F. Supp. 3d at 573, 603-06 (D. Mass. 2016) (finding a lack of basic fairness where the university did not provide specific notice of charges, allow cross-examination, or allow the examination of evidence, used the same individual as investigator and adjudicator, limited appeal rights, and used a "preponderance of the evidence" standard).

Timely Notice

Federal courts have held that, in providing notice, basic fairness requires schools to inform the accused of the specific charges against him or her and must provide the accused access to its evidence of guilt. *Purdue Univ.*, 928 F.3d at 663 (citing *Goss v. Lopez*, 419 U.S. 565, 580 (1975)); *see also Doe v. Miami Univ.*, 882 F.3d 579, 603 (6th Cir. 2018); *Brandeis Univ.*, 177 F. Supp. 3d at 603-06.

Prior to the adoption of the 2020 Rule, the Department was silent as to the need for written notice. Indeed, in the wake of the 2011 Dear Colleague Letter, many schools *rescinded* their policies previously providing notice to the accused. *See Brandeis Univ.*, 177 F. Supp. 3d at 570, 572 (citing *Rethink Harvard's Sexual Harassment Policy*, Boston Globe (Oct. 15, 2014)). This made it almost impossible for some students to defend themselves against allegations of sexual misconduct.

An accused student at Brandeis University, for example, received a sanction and a permanent entry on his educational record that he committed "serious sexual transgressions," based on an accusation that he had "numerous inappropriate, nonconsensual sexual interactions" with his boyfriend over the course of their two-year relationship. *Brandeis Univ.*, 177 F. Supp. 3d at 603-04. Given the vague and non-specific nature of the allegations and the student's long-term relationship with his accuser, the student was unable to mount an effective defense. Incredibly, the accused student was never given access to the investigator's report, despite every administrator and faculty member adjudicating his case using the report to determine his guilt. *Id.* at 606.

By requiring reasonably prompt time frames and written notice of allegations upon receiving a complaint, the 2020 Rule sought to codify federal court precedent and thereby prevent injustices, such as the one at Brandeis, from happening again. Any changes to this Rule or any new Department policies must maintain these basic protections. Without clear notice of what is being alleged and sufficient time to respond, accused persons lack any meaningful opportunity to be heard.

Live Hearings

In addition to providing timely notice of the specific allegations, any proposed replacement to the 2020 Rule must maintain live hearings. "[T]o be fair in the due process sense," a hearing in this context must afford the accused "the opportunity to respond, explain, and defend." *Univ. of R.I.*, 837 F.2d at 13. And in a case that turns on witness credibility, a live hearing is the only way to provide such an opportunity.

In the secondary school context, the Supreme Court has held that even a temporary suspension requires that the disciplined student receive "an opportunity to present his side of the story" at "some kind of hearing." *Goss*, 419 U.S. at 579, 581. Applying these principles at the post-secondary level, federal courts have consistently concluded that before expelling a student for sexual misconduct,

a public university must hold a hearing and that the hearing must be "a real one, not a sham or pretense." *Purdue Univ.*, 928 F.3d at 663.

And when "the credibility of an alleged victim is at issue"—as it often is in these cases—"the university must provide a way for the adjudicative body to evaluate the victim's credibility and to assess the demeanor of both the accused and his accuser." *Miami Univ.*, 882 F.3d at 600 (quotation marks omitted). When the entire dispute turns on a witness's credibility and demeanor, there is simply no way for an accused person effectively to defend him- or herself without an opportunity to listen to and respond to the witness's testimony in person.[2]

Cross-Examination

The Supreme Court has referred to cross-examination as "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970). In sexual misconduct cases, which frequently involve competing "he-said-she-said" narratives, failure to allow cross-examination "raises profound concerns." *Brandeis Univ.*, 177 F. Supp. 3d at 605; *see also Baum*, 903 F.3d at 582 ("[w]ithout the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives"); *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (a university student was entitled to cross-examine accuser in a sexual assault case because the case turned on the accuser's credibility); *Univ. of Cincinnati*, 872 F.3d at 401–02 (same); *Neal v. Colo. State Univ.-Pueblo*, 2017 WL 633045 (D. Colo. 2017) (same).

Without live cross-examination, the requirement that the accused party have a meaningful opportunity to tell his or her side of the story is lost. Accordingly, any replacement to the 2020 Rule must maintain cross examination, at least where credibility is at issue.[3]

Conclusion

The Department of Education, if and when it engages in notice and comment to alter Title IX sexual harassment and misconduct regulations and guidelines, must maintain or improve upon the procedural protections in the 2020 Rule. Anything less is not only unfair but, as applied to public universities, also patently unconstitutional.

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Independent Women's Forum is dedicated to developing and advancing policies that aren't just well intended, but actually enhance people's freedom, choices, and opportunities.

Independent Women's Law Center advocates for equal opportunity, individual liberty, and respect for the American constitutional order.

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2 The 2020 Rule protects against potentially traumatizing experiences by allowing for accuser and accused to be placed in separate rooms, with a allowing participants to see and hear each other. Protections similar to this may be used to maintain the (constitutionally required) benefits of a live hearing, without inflicting undue stress.

3 By allowing for cross-examination to be conducted in separate rooms, and forbidding personal confrontation between parties, the 2020 Rule strikes an "appropriate balance between avoiding retraumatizing procedures, and ensuring both parties have the right to question each other in a manner that captures the real-time, adversarial benefits of cross-examination to a truth-seeking process." 85 Fed. Reg. at 30328. In maintaining cross-examination, the Department may choose to employ these or similar protections, but the heart of the mechanism must remain intact to satisfy the constitutional minimum of fairness.