



DREW FINDLING
President

January 25, 2019

Betsy DeVos
Secretary of Education
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

**Re: Docket No. ED-2018-OCR-0064
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving
Federal Financial Assistance, Federal Register Vol 83, No. 230, p.61462**

Dear Secretary DeVos:

The National Association of Criminal Defense Lawyer's ("NACDL") Title IX Committee urges the Department of Education to adopt the proposed regulations relating to the implementation of Title IX of the Education Amendments of 1972. NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Our membership is comprised of private criminal defense attorneys, public defenders, law professors and judges, among others. As part of its vision and mission, NACDL advocates for and supports policies that promote procedural fairness and due process for the accused.

NACDL's Title IX Committee commends the Department of Education for utilizing formal rulemaking procedures that allow stakeholders to evaluate and respond to the proposed regulations. Public notice and comment are important steps in the rulemaking process that help to foster confidence in the Department of Education's Title IX directives.

Our comments focus on the portions of the proposed regulations that most directly relate to issues of due process and the intersection between campus misconduct proceedings and the criminal justice system. While campus sexual misconduct hearings are not criminal cases, they are, nonetheless, proceedings with significant and far-reaching consequences. Thus, fundamental fairness to all involved parties is essential, as it will ultimately create greater respect for campus investigations and adjudications.

A. Grievance Procedures

1. Section 106.45(b)(1)(iv) – Presumption of non-responsibility

This proposed section requires that an educational institution establish a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility has been made at the conclusion of the grievance process. The presumption of innocence is the most fundamental principle of the American criminal justice system. We applaud this proposed section.

2. Section 106.45(b)(1)(v) – Expanding the timeframe for campus proceedings due to a concurrent law enforcement investigation

This proposed section encourages prompt resolution of grievance proceedings and requires the educational institution to designate reasonably prompt timeframes for the grievance process but allows for timeframes to be extended for good cause shown, which expressly includes “concurrent law enforcement activity.” We support this provision that allows for educational institutions to slow the pace of Title IX proceedings when there is a related criminal investigation. Too often, respondents have not participated in campus sexual misconduct proceedings due to a parallel criminal investigation, or at a minimum, out of concern that a parallel investigation would ensue and any statements made in the campus proceeding would be used in a criminal prosecution. Students should not face a dilemma in which they must choose between participating in campus proceedings and foregoing their Fifth Amendment right to silence in the criminal justice system. The right against self-incrimination is a constitutional right that must be safeguarded. To this end, we encourage the Department of Education to formalize a directive stating that Title IX hearing panel members cannot draw a negative inference from a respondent’s choice not to submit to an interview.

3. Section 106.45(b)(2) – Notice

This proposed regulation requires an educational institution, upon receipt of a complaint, to provide written notice to the accused student. The notice must include sufficient details, including the identities of the persons involved (if known), the specific alleged conduct in issue, and the date and location of the alleged incident. Proper notice regarding the scope of the allegations will aid students in participating in campus proceedings in a more meaningful way, including proper preparation of a defense.

4. Section 106.45(b)(3)(vii) – Live hearing and cross-examination

This proposed section requires educational institutions to hold a “live hearing” and to allow the parties’ advisors to cross-examine the other party and witnesses. Cross-examination helps uncover truth. In *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018), the court explained that “not only does cross-examination allow the accused to identify inconsistencies in the other side’s story, but it also gives the fact-finder an opportunity to assess a witness’s demeanor and determine who can be trusted. . . if a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process.” Facts that have been overlooked or misstated can be more fully evaluated through cross-examination, which ultimately sheds light on a witness’s credibility.

The regulation recognizes that if a party does not have an advisor, the educational institution must provide that party with an advisor aligned with the party to conduct the cross-examination. While we commend the Department of Education’s directive that schools must provide advisors to students, this provision requires clarification. Providing a student with an advisor does not necessarily ensure adequate assistance. An advisor can only be as effective as his or her training and experience with Title IX proceedings. Thus, we urge the Department of Education to set minimum standards for training to serve as an advisor. Also, we encourage schools to provide students with lists of trained advisors so that students can select not only an advisor with whom they feel comfortable, but an advisor capable of providing meaningful assistance. Cross-examination is of little value if not done correctly.

5. Section 106.45(b)(3)(viii) – Equal opportunity to inspect and review evidence

This proposed section requires that educational institutions permit complainants and respondents an equal opportunity to inspect and review evidence obtained as a part of the investigation that is “directly related to the allegations” raised in the complaint, regardless of whether the evidence will be relied upon in the adjudication. We welcome this section, as too many schools presently limit parties’ access to evidence or characterize evidence as “irrelevant.” First, open and unfettered access to evidence will increase the reliability of Title IX adjudications, which may, in turn, foster confidence in Title IX enforcement as a means of making students safer in educational environments. Second, because the facts and circumstances of every Title IX complaint are different, a respondent should be afforded an opportunity to determine whether evidence is relevant and useful to his or her defense.

B. Response to Directed Question 6 – Standard of Evidence

In this question, you sought comment on “(1) whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and if so then what standard is most appropriate; and (2) if schools retain the option to select the standard they wish to apply, whether it is appropriate to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed.”

We believe that all educational institutions should use the clear and convincing standard of proof for Title IX adjudications. A higher burden of proof for Title IX cases is warranted given the serious and far-reaching collateral consequences associated with an administrative finding of sexual misconduct. In *Doe v. Brandeis*, 177 F. Supp. 3d 561, 601-602 (D. Mass. 2016), the district court explained the scope of the harm caused by a finding of sexual misconduct in a campus Title IX proceeding:

A finding of responsibility for sexual misconduct can also have significant consequences off-campus. Post-graduate educational and employment opportunities may require disclosure of disciplinary actions taken by a student's former educational institution . . . Finally, a . . . student who is found responsible for sexual misconduct will likely face substantial social and personal repercussions. It is true that the consequences of a university sanction are not as severe as the consequences of a criminal conviction. Nevertheless, they bear some similarities, particularly in terms of reputational injury. Certainly stigmatization as a sex offender can be a harsh consequence for an individual who has not been convicted of any crime, and who was not afforded the procedural protections of criminal proceedings.

Given the lifelong ramifications of a Title IX finding of responsibility, a higher burden of proof is appropriate. Academic institutions should implement the clear and convincing evidentiary standard.

C. Clarifying Amendment Regarding Constitutional Protections

We value the clarifying amendment set forth in Section 106.6(d), which contains a reminder that an educational institution’s Title IX obligations should not require an institution to restrict or infringe upon the constitutional rights of students and others subject to Title IX. This section expressly notes that when

enforcing Title IX, an educational institution should not “deprive an individual of rights that would otherwise be protected from governmental action under the Due Process Clauses of the Fifth and Fourteenth Amendments; or restrict any other right guaranteed against governmental action by the U.S. Constitution.”

In closing, we believe that fundamentally fair standards for campus sexual misconduct proceedings benefit all parties involved—not just complainants or respondents. Whether an individual is a complaining party or an accused student, the person should be treated with respect and have an equal opportunity to present his or her case. Procedural protections are consistent with the principles of the United States Constitution.

Thank you for your time and consideration of our comments.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'DF', is written over the typed name 'Drew Findling'.

Drew Findling