

Written Comment: Title IX Public Hearing Regarding
Potential Revisions to 34 C.F.R. §106

We the undersigned are a group of attorneys, academics, and other commentators with a strong interest in fairness for all students in Title IX proceedings. We write to provide comments in advance of OCR's June 7 to 11, 2021 public hearing addressing the current Title IX regulations OCR adopted in May 2020.

We first offer the following three suggestions for improving the regulations by making important clarifications or changes.

First, we believe 34 C.F.R. § 106.45(b)(6)(i) has been misconstrued beyond its intended meaning and would benefit from clarification regarding the consequences of a party or witness's failure to submit to cross-examination. This section provides in relevant part that:

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

We believe this portion of the regulations was designed to address fact patterns such as those seen in 2017 cases at the University of Cincinnati and Miami University.¹ In these cases, a complainant or witnesses supporting the complainant gave a statement to investigators and then declined to testify at a subsequent hearing. In each case, the disciplinary panel nevertheless relied on the statements in imposing a finding of responsibility, which led courts to conclude the process was unfair.

We do not believe that, contrary to what some have argued, this provision was intended to prevent use of evidence of an admission against interest just because a party declines to submit to cross-examination. Such an admission could consist of a confession of responsibility by the respondent or a statement by a complainant that a complaint is unfounded or was filed in bad faith. To eliminate any doubt, we propose adding the following sentence: "*A party's refusal to submit to cross-examination at a hearing does not preclude the decision-maker(s) from relying on a prior statement by that party against his or her own interest.*"

Second, we propose that OCR eliminate the distinction in the current regulations between harassment occurring within the context of a school's education program and activity, which is governed by the Title IX regulations, and harassment purportedly falling outside those confines, which may be subject to a separate and parallel disciplinary process. See 34 C.F.R. §106.45(b)(3)(i). This "dual track" disciplinary system can be confusing to schools and students. It can also lead to disparities in rights for similar disciplinary adjudications, as the same harassing conduct could be subject to different procedures depending on whether it occurred in a school-owned dorm or in a private apartment across the street. And, it potentially exposes schools to litigation risk: at least one court found that a school's establishing

¹ See *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400-06 (6th Cir., 2017); *Nokes v. Miami Univ.*, Case No. 1:17-cv-482, 2017 WL 3674910 at *12-13, 2017 U.S. Dist. LEXIS 136880, *37-39 (S.D. Ohio Aug. 25, 2017).

dual track disciplinary processes can constitute evidence of sex discrimination under Title IX when the school designs the second track to provide fewer protections than OCR's regulations.² We respectfully suggest that schools who wish to receive federal funding should have a single process for harassment offenses that is governed by the regulations, without regard for "education program or activity" distinction.

Third, we believe there needs to be clarification that 34 C.F.R. § 106.45(b)(5)(iii), which states that a school cannot "restrict the ability of either party to discuss the allegations under investigation," is subordinated to 34 C.F.R. § 106.71(a), which provides that retaliation is prohibited. We have noticed a troubling trend on campus where parties to a sexual harassment grievance proceeding have been subjected to retaliatory harassment and defamation campaigns on social media and other public outlets by the other party based on that other party's dissatisfaction with the disciplinary process or result. Schools should be reminded that they have an obligation to prevent both complainants and respondents from suffering such extrajudicial retaliation.

We finally wish to reiterate the importance of the right to a live hearing and cross-examination as codified in the OCR regulations. The right to a live hearing and cross-examination are critical fact-finding tools to facilitate a school's ability to investigate the credibility of the parties and, in turn, the truth of any reported sexual misconduct. 34 C.F.R. § 106.45(b)(6) is consistent with the modern trend in both state and federal judicial decisions across the country, which have recognized the importance of cross-examination in cases that necessitate credibility assessments by a disciplinary panel—as most campus sexual misconduct cases do.³

² See *Doe v. Rensselaer Polytechnic Inst.*, No. 1:20-CV-1185, 2020 WL 6118492, at *7 (N.D.N.Y. Oct. 16, 2020) ("[A] school's conscious and voluntary choice to afford a plaintiff, over his objection, a lesser standard of due process protections when that school has in place a process which affords greater protections, qualifies as an adverse action.").

³ See, e.g., *Doe v. Univ. of Scis.*, 961 F.3d 203, 215 (3d Cir. 2020) ("USciences's contractual promises of 'fair' and 'equitable' treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers."); *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019) ("[D]ue process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.');" *Doe v. Baum [University of Michigan]*, 903 F.3d 575, 581 (6th Cir. 2018); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401 (6th Cir. 2017) ("The ability to cross-examine is most critical when the issue is the credibility of the accuser."); *Lee v. Univ. of New Mexico*, 449 F. Supp. 3d 1071, 1128 (D.N.M. 2020) ("Lee did not receive a 'meaningful opportunity to be heard' because UNM did not allow for any cross-examination in determining credibility, and because UNM's procedures unreasonably hindered Lee's ability to present a meaningful defense."); *Doe v. Univ. of So. Miss.*, No. 2:18-cv-00153-KS-MTP, Docket 35 (S.D. Miss., Sept. 26, 2018) ("Writing a rebuttal after the testimony is complete is not the same as cross examination, which provides the opportunity to assess the person's demeanor when asked certain questions and flesh out inconsistencies in a search for the truth."); *Doe v. Rhodes College*, No. 2:19-cv-02336-JTF-tmp, Docket 33 (W.D. Tenn., June 14, 2019) (cross-examination right for accused students "invokes due process concerns under Title IX"); *Doe v. Univ. of Miss.*, 361 F. Supp. 3d 597, 613 (S.D. Miss. 2019); *Doe v. Univ. of Mich.*, No. 2:18-cv-11776-AJT-EAS, Docket 30, (E.D. Mich. July 6, 2018), *rev'd on other grounds*, 2019 WL 3501814 (6th Cir. Apr. 10, 2019); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 605 (D. Mass. 2016); *Doe v. Univ. of S. Cal. (USC)*, 241 Cal. Rptr. 3d 146, 167 (Cal. Ct. App. 2018) (decision-maker must be able to see witness respond to questions); *Doe v. Claremont McKenna Coll. (CMC)* 25 Cal. App. 5th 1055, 1070 (Cal. Ct. App. 2018).

The rationale for this requirement is twofold:

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. So 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.⁴

In *Doe v. University of Cincinnati*, the Sixth Circuit observed that cross-examination also benefits the decision-makers:

UC assumes cross-examination is of benefit only to Doe. In truth, the opportunity to question a witness and observe her demeanor while being questioned can be just as important to the trier of fact as it is to the accused. "A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not." [] "The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause." Few procedures safeguard accuracy better than adversarial questioning. In the case of competing narratives, cross-examination has always been considered a most effective way to ascertain truth.⁵

In *Doe v. Baum*, the Sixth Circuit reiterated that

due process requires cross-examination in circumstances like these because it is 'the greatest legal engine ever invented' for uncovering the truth. 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. [] So 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.⁶

In a case against Miami University, U.S. District Judge Michael Barrett addressed the school's argument that cross-examination would only matter if the accused student could independently claim the complainant or other inculpatory witnesses would produce answers that would definitely help the accused student's case. The university, the judge observed, missed "the point of cross examination,"

which allows the fact-finder to assess witness demeanor and responses in order to 'assess the credibility of those who disclaim any improper motivations.' If anything, [Miami's] claim that no amount of cross-examination could have changed the minds of the hearing panel members arguably undercuts the fairness of the hearing.⁷

⁴ *Doe v. Baum [University of Michigan]*, 903 F.3d 575, 581 (6th Cir. 2018).

⁵ *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401 (6th Cir. 2017) (citing *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 95 n.5 (1978) (Powell, J. concurring)), *Watkins v. Sowders*, 449 U.S. 341, 349 (1981), and *Maryland v. Craig*, 497 U.S. 836, 846 (1990) ("[C]ross-examination 'ensur[es] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings'").

⁶ *Doe v. Baum [University of Michigan]*, 903 F.3d 575, 581 (6th Cir. 2018).

⁷ *Nokes v. Miami Univ.*, Case No. 1:17-cv-482, 2017 WL 3674910 at *12 n.10, 2017 U.S. Dist. LEXIS 136880, at *39 n.10 (S.D. Ohio Aug. 25, 2017).

We are aware that questioning a complainant about his/her allegations could be re-traumatizing. 34 C.F.R. §106.45(b)(6) goes a long way to ensure this possibility is minimized by allowing advisors and not parties to question an opposing party, as well as by providing that parties may be situated in different locations while still being visible to each other and the decision-makers. Section 106.45(b)(6)(i)-(ii) also protects complainants (but not respondents) from questions or evidence about the complainant's prior sexual behavior or sexual predisposition, mirroring rape shield protections applied in federal courts.

As the Sixth Circuit noted,

A case that “resolve[s] itself into a problem of credibility” cannot itself be resolved without a mutual test of credibility, at least not where the stakes are this high . . . One-sided determinations are not known for their accuracy.⁸

The interests of the respective parties must be weighed, and we believe maintaining the right to a live hearing and cross-examination with the current safeguards in place will achieve a balanced solution.

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⁸ *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 403 (6th Cir. 2017) (citations omitted).

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