**Comments of Concerned Lawyers and Due Process Advocates**[1]
**to the Department of Education's Request for Information Regarding the Prevention and Response to Sexual Violence on Campuses of Educational Institutions**

Request for Information (RFI) by the Office of Postsecondary Education and Office of Elementary and Secondary Education, U.S. Department of Education.

Docket ID ED-2023-OPE-0207

Submitted March 11, 2024

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Our comments address the following questions set forth in the RFI as they pertain to postsecondary educational settings:

(1) What factors and best practices should educational institutions consider when establishing sexual assault prevention and response teams, including for online threats, harassment and intimidation, and other forms of technological abuse?

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(3) What best practices should educational institutions consider for responding to and preventing sexual violence and dating violence on their campuses, including the online environment, and which may take into consideration an institution's educational level, size, and resources?

(4) What factors should be considered as educational institutions develop or implement sex education programs, as appropriate, for students, training initiatives for school staff in sexual violence prevention, and equitably designed and applied discipline models?

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<u>Response to Question 1: Factors and best practices that postsecondary educational institutions should consider when establishing sexual assault prevention and response teams, including for online threats, harassment and intimidation, and other forms of technological abuse.</u>

Response teams can play an important role in ensuring that serious problems are dealt with in a timely manner. At the same time, however, as with any expedited response, there is a risk of a rush to judgment. Institutions should thus take care to balance the remediation of harm

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with ensuring that respondents receive due process and that, in the case of non-physical conduct, they adhere to principles of free expression.

Not all speech that may cause offense constitutes a threat, harassment, or intimidation. Simply because someone alleges that they *feel* harassed or intimidated does not mean that, as a matter of policy, they *were* harassed or intimidated. Principles of free expression should be applied equally lest an institution's free expression policies be subject to a heckler's veto. This principle should hold equally whether the speech is happening on the quad or online.

At the same time, in the age of social media, where "call-out culture" and "cancel culture" run rampant, institutions must also play a role in protecting their students from online harassment. In recent years, this has increasingly become an issue, where students will post accusations of sexual assault on social media, going so far as to name the alleged perpetrators and resulting in the social ostracization of the alleged perpetrator before any allegation has been adjudicated—or in some cases, formally brought to the institution at all. Institutions should create policies and procedures that protect students from such public harassment while being careful not to overly restrict freedom of expression. This will be less difficult in practice than in theory—holding a rally will almost always constitute protected expression, while publicly accusing someone of a serious crime (such as sexual assault) will rarely constitute protected expression. Institutions may find that such issues are best addressed not through a formal disciplinary process but rather through an informal or restorative-justice process where the focus is on education and remediation, not on punishment. Institutions should also consider housing this function in an office other than the Title IX office, so that accused students do not have to feel like they would be bringing a Title IX complaint upon themselves by seeking help.

A recent lawsuit against the University of Maryland illustrates the problem the Department should address. After facing a sexual misconduct allegation, a male student was cleared through the university's Title IX process. But both the complainant and several students involved in victim advocacy refused to accept the outcome. Despite the university's decision, the complainant publicly labeled the male student a "rapist"; co-presidents of the victims' organization similarly identified the (cleared) male student, claiming that "their job" is to let students know "who the predators are on campus." When this public pressure led to his club sports team removing the (cleared) male student, the complainant deemed the outcome a "huge W for me and other survivors."[2]

The student filed complaints with Maryland's Title IX office, alleging harassment. The office responded that there was nothing they could do. So he sued, alleging gender discrimination in violation of Title IX. In a ruling from the bench denying the university's motion to dismiss, Judge Paula Xinis expressed puzzlement at Maryland's argument that publicly (and falsely) calling a male student a rapist could not be gender bias since men can be victims of rape. "When the table is turned and we have other cases in which a woman makes a complaint and then there are allegations of similar disparaging, insulting, humiliating comments," the court noted, "we don't go through this attempt to parse out what part of it is

[2] *Complaint, John Doe v. The University of Maryland, College Park, et al.*, Case No. 8:22-cv-00872, ECF 1 (Aug. 11, 2022).

because the complainant is a woman, the plaintiff is a woman and what part of it is because she is complaining about rape."[3]

Response to Question 3: The best practices that postsecondary educational institutions should consider for responding to and preventing sexual violence and dating violence on their campuses, including the online environment, and which may take into consideration an institution's educational level, size, and resources.

Institutions should take steps to educate students on the specific dangers of alcohol abuse. Most institutions already tell students during orientation that they are at risk if they overconsume alcohol. Such education is extremely important and should be continued, ideally using real-life examples, as at many drunk-driving classes. At the same time, however, there has been far too little education about the difference between being drunk enough to make bad decisions that one will later regret and being so drunk that one is *incapacitated* by alcohol. Many Title IX cases come down to exactly this distinction, because students have not been sufficiently taught about it. Institutions should dedicate a specific orientation session to walking through the factors that will be used to determine if a student has been incapacitated by alcohol, as opposed to having simply been intoxicated. The hope would be that such education would lead to fewer unfounded Title IX complaints being brought, as students learn that one can make valid, if ill-informed, choices while intoxicated without being actually incapacitated.

Response to Question 4: Factors that should be considered as educational institutions develop or implement sex education programs, as appropriate, for students, training initiatives for school staff in sexual violence prevention, and equitably designed and applied discipline models.

*Training Initiatives*

Between 2011 and 2015, the Education Department thrice raised the issue of colleges and universities training both the investigators and the decisionmakers that handled student-on-student sexual misconduct claims:

> (1) The 2011 "Dear Colleague" letter from the Office for Civil Rights (OCR) stated, "In sexual violence cases, the fact-finder and decision-maker also should have adequate training or knowledge regarding sexual violence."[4]
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> (2) OCR's 2014 "Question and Answers" guidance required training in such topics as "the importance of accountability for individuals found to have committed sexual violence" and "the effects of trauma, including neurobiological change."[5]
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> (3) In 2015, regulations implementing §304 of the Violence Against Women Act (VAWA) required that college employees conducting Title IX investigations and

[3] Transcript, motion hearing, *Doe v. Univ. of Maryland*, ECF 70, p. 1 (28 March 2023).
[4] Letter from Russlynn Ali, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., to Colleague (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.
[5] Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

adjudications receive annual training "on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability."[6]

During this period, the Education Department did not require any training specifically addressing the rights of student respondents. Cotemporaneous documents contained only two references to "due process." OCR's 2014 guidance acknowledged that Title IX "must be interpreted consistently with any federally guaranteed due process rights" but cautioned that "[o]f course, a school should ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant."[7] Department commentary to the VAWA regulations disagreed "with the comments that the procedures under § 668.46(k) violate due process rights," claiming that the rule's combination of a generic requirement for fairness and its assurance that "proceedings be conducted by officials who receive training on sexual assault issues and on how to conduct a proceeding that protects the safety of victims and promotes accountability" meant that "these procedures do provide significant protections for all parties."[8]

The period between 2011 and 2020 was an era in which, as one prominent figure in the field recently observed, schools "pushed too many complaints through the full Title IX process that did not warrant it."[9] To the best of our knowledge, no college or university made public their Title IX training or voluntarily provided training material to the parties in individual Title IX cases. But the training that surfaced either in the media or as a result of litigation raised questions of bias. Often complainant-centric, the training seemed primarily designed to provide the adjudicator with a hook to find an accused student responsible for the allegation, or to foster an environment in which campus adjudicators might act to address the societal scourge of campus sexual assault rather than the facts of the particular case.[10]

In particular, the training materials too often had the effect of undermining the preponderance standard by identifying atypical and even highly atypical behaviors that might be consistent with sexual assault in some cases, but not most of the time. In this respect, the training materials regularly failed to *train*: that is, to help panelists distinguish between seemingly identical behavior that might be consistent with trauma or an intent to mislead.

Consider, for example, materials that surfaced in an accused student's lawsuit against the University of Pennsylvania. After his disciplinary proceeding, the student discovered that Penn used training material entitled, "Sexual Misconduct Complaints: 17 Tips for Student Discipline

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[6] "Violence Against Women Reauthorization Act of 2013," Pub. Law 113-4, Sec. 304, https://www.congress.gov/113/plaws/publ4/PLAW-113publ4.htm.
[7] Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
[8] Office of Postsecondary Education, Department of Education, "Violence Against Women Act," Federal Register Vol. 79, no. 202 (20 Oct. 2014), pp. 62771-2, https://www.federalregister.gov/documents/2014/10/20/2014-24284/violence-against-womenact.
[9] Brett Sokolow, "Tip of the Week: Know Your Ratio of Title IX Hearing Outcomes. What Should It Be?," TNG Consulting, 29 Feb. 2024, https://www.jdsupra.com/legalnews/know-your-ratio-of-title-ix-hearing-4955510/.
[10] See, e.g., Emily Yoffe, "The Bad Science Behind Campus Response to Sexual Assault," The Atlantic, Sept. 8, 2017, https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behindcampus-response-to-sexual-assault/539211/; KC Johnson and Stuart Taylor, "The Title IX Training Travesty," Weekly Standard, Nov. 10, 2017, https://www.weeklystandard.com/kc-johnson-and-stuart-taylor-jr/the-title-ix-trainingtravesty.

Adjudicators." This training presented virtually any conduct as consistent with the complainant's truthfulness: "Some complainants may have excellent recall of the details of a sexual assault while others may not . . . Some may be openly expressive, sobbing or showing anger, while others may appear controlled and practically emotionless . . . Many complainants try to avoid the assailant afterwards, although some may initiate contact . . . The fact that a complainant recounts a sexual assault somewhat differently from one retelling to the next may reflect memory processes rather than inattentiveness or deceit." The training provided no guidance on when these behavioral characteristics, including otherwise "counterintuitive" conduct by the complainant, signaled trauma from sexual assault or when they might, instead, signify deceit or simply a mistaken allegation.[11]

Partly in response to such cases, the current Title IX regulations instruct colleges and universities to make "publicly available on [their] website" "[a]ll materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process." According to the Department, this provision was "rooted in due process principles of notice and a meaningful opportunity to be heard and the importance of an impartial process before unbiased officials." The regulations also forbid colleges and universities from using sex stereotypes in training materials.[12]

The current regulations strike the appropriate balance in promoting training that's fair to both sides—and through the publicity requirement, a chance for complainants and respondents alike to proactively raise questions of bias if they detect unfairness. The Department should continue to require that postsecondary institutions adopt and publish their nondiscrimination policy and grievance procedures, train their officials on how to discharge their responsibilities and serve impartially; avoid reliance on sex stereotypes; and make their training materials publicly available. The Department should also take steps to ensure that schools that use outside companies for the adjudication process make public the training that the contractors received.

To the extent that the Department considers requiring more specific instructions for training, it also should: (a) require schools to train in how to meaningfully apply the presumption of innocence; and (b) require schools to train adjudicators in how to evaluate counterintuitive complainant behavior, rather than simply providing them with information that this behavior might be consistent with a finding of responsibility.

*Equitably Designed and Applied Discipline Models*

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[11] *Doe v. Trs. of the Univ. of Pa.*, Case No. 2:16-cv-05088, E.D. Pa., ECF 1, citing "Sexual Misconduct Complaints: 17 Tips for Student Discipline Adjudicators," available at: https://www.legalmomentum.org/resources/guide-university-discipline-panels-sexual-violence. For an example of similar training bias, in an accused student's lawsuit against the University of Mississippi where the complaint included slides of the Title IX training, the court denied the university's motion to dismiss the due process count in part because "there seems to have been an assumption under [the Title IX coordinator's] training materials that an assault occurred. As a result, there is a question whether the panel was trained to ignore some of the alleged deficiencies in the investigation and official report the panel considered." *Doe v. Univ. of Miss*., 361 F. Supp. 3d 597, 610 (S.D. Miss. January 16, 2019).

[12] Office for Civil Rights, Department of Education, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," Federal Register Vol. 85, no. 97 (19 May 2020), p. 30054, https://www.govinfo.gov/content/pkg/FR-2020-05- 19/pdf/2020-10512.pdf.

In an effort to ensure equitable designed and applied disciplinary models, the Department should require colleges and universities to implement the following non-exhaustive list of rights and features in their processes.

1. Requiring that a signed, written complaint is made to the Title IX Office or its designee in order to initiate a disciplinary process but not to institute an informal resolution.

A written complaint is necessary to allow school officials to make preliminary assessments on whether and how to proceed in a disciplinary process.

The written complaint should be made to the Title IX office or a designated official or office. To the extent the Department is concerned that complainants might not understand that they need to file a complaint with the Title IX office, then it should require more training for students and employees, to ensure that complainants know where to go or are directed to the right place if they go to someone else.

The complaint should be signed. The *Purdue* case—where the university allowed the complaint to be written in the accuser's name by a university official—shows the problems with unsigned complaints; the university ultimately was sued due to alleged bias by the office that wrote up the complaint.[13]

A written complaint should not be required, however, for student parties to reach an informal (or alternative) resolution.

2. Requiring that the parties are provided with all directly related information obtained.

The Department should continue to require the university's investigator to provide the parties with directly related information. Under the current Title IX regulations, parties receive "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." 34 C.F.R. § 106.45(b)(5)(vi).

By making all directly related information available to the parties, the parties can then meaningfully participate in relevancy determinations. A definition of relevant also should be provided, and it should follow the definition of Federal Rule of Evidence 401 that "relevant evidence" means evidence having any tendency to make the existence of any fact that is of

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[13] *Doe v. Purdue Univ.*, 928 F.3d 652, 669-670 (7th Cir. 2019) ("It is plausible that Sermersheim and her advisors chose to believe Jane because she is a woman and to disbelieve John because he is a man. The plausibility of that inference is strengthened by a post that CARE put up on its Facebook page during the same month that John was disciplined: an article from The Washington Post titled 'Alcohol isn't the cause of campus sexual assault. Men are.' Construing reasonable inferences in John's favor, this statement, which CARE advertised to the campus community, could be understood to blame men as a class for the problem of campus sexual assault rather than the individuals who commit sexual assault. And it is pertinent here that Bloom, CARE's director, wrote the letter regarding Jane to which Sermersheim apparently gave significant weight.")

consequence in determining the action more probable or less probable than it would be without the evidence.

Determinations of relevance should await the gathering of all the evidence and the parties need access to all underlying evidence in order to have meaningful input into the determination of what is relevant. In the Preamble to the current Title IX regulations, the Department explained the regulatory requirements regarding the gathering of and access to evidence as follows:

> The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it). The parties may then inspect and review the evidence directly related to the allegations. The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the relevant evidence in the investigative report. The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence).[14]

The Department further noted that "the right to inspect all evidence directly related to the allegations is an important procedural right for both parties, in order for a respondent to present a defense and for a complainant to present reasons why the respondent should be found responsible. This approach balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties' equal right to participate in furthering each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence."[15]

Both parties should be able to present their positions on relevance, and they "will not have a robust opportunity to do this if evidence related to the allegations is withheld from the parties by the investigator."[16]

3. <u>Requiring a broad and mutual prohibition on retaliation</u>

The Department should define and prohibit retaliation against anyone who made a complaint or responded to a complaint or against anyone who participated in the investigation or

[14] 85 Fed. Reg. at 30026, 30249.
[15] 85 Fed. Reg. at 30303.
[16] 85 Fed. Reg. at 30304.

hearing. Prohibited retaliation should include peer retaliation. *See also* Response to Question 1, above.

4. Requiring that the presumption of non-responsibility is reflected in supportive measures.

The Department should require that the rights of the complainant and respondent remain balanced, including in the pre-adjudication period. Presently, colleges and universities are required to both presume the respondent innocent and provide non-punitive supportive measures for the complainant. The current regulations seek to make sure that complainants were adequately supported, but not at the cost of punishing respondents before a finding of responsibility after a fair proceeding. The presumption of innocence imposed no cost on colleges and universities.

5. Precluding a two-track system that differentiates between alleged sexual misconduct occurring on campus or a school-sponsored event and conduct occurring off-campus.

The Department should preclude postsecondary institutions from maintaining a two-track investigation and disciplinary process. In two-track processes, alleged sexual misconduct occurring on campus or at a school-sponsored event would be handled under a Title IX process, with the protections mandated by the regulations, while essentially the same misconduct occurring at an off-campus apartment would be handled under a separate process, with few if any of those protections. The Department should eliminate the uncertainty in this area and recognize the reality that off campus sexual misconduct allegations involving students or school employees can and most likely would impact either or both parties' access to the school's educational opportunities. Sexual misconduct, whether in a dorm or an off-campus apartment, can impact a complainant's access to education; false allegations or an erroneous finding of responsibility impair – or completely eliminate – a respondent's access. Unfair or unreliable procedures harm both parties.

Many universities choose to maintain an administratively and financially burdensome "two-track" approach, which reflects their unwillingness to provide fair Title IX procedures absent regulatory or judicial mandates. One court, confronting such an approach, expressed puzzlement that the university "decided that it would be best to maintain two parallel procedures solely to ensure that at least some respondents would not have access to new rules designed to provide due process protections such as the right to cross-examination that have long been considered essential in other contexts… Such disregard for the inevitable administrative headaches of a multi-procedure approach certainly qualifies as evidence of an irregular adjudicative process," while "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."[17]

6. Requiring universities to offer informal resolution in matters involving student respondents when both parties want it.

Colleges and universities should offer an informal resolution process to parties who wish to avail themselves of it. This process should be available with or without a formal complaint.

[17] *Doe v. Rensselaer Polytechnic Institute*, 2020 WL 6118492 (N.D.N.Y. Oct. 16, 2020).

The informal resolution option maximizes the autonomy given to the complainant while also allowing colleges and universities to focus on what they do best – educating, counseling, and mentoring students – rather than attempting high-stakes adjudications of alleged criminal conduct.

7. Requiring universities to balance privacy rights with preventing retaliation and ensuring a fair grievance process.

The Department should require colleges and universities to take reasonable steps to protect the privacy of the parties without restricting their ability to obtain and present evidence, including by speaking to witnesses; consulting an advisor, family member, confidential resource; preparing for a hearing; or otherwise defending their interests.

8. Requiring that parties who decide to produce privileged medical documents must produce the entire document and not select portions.

If a party submits a medical record, then the party should be required to submit the entire document. For example, a complainant should not be allowed to produce a page or two of a SANE report and then refuse permission for the respondent or the university decisionmaker to see the remainder of the report on grounds of privilege. At the very least, the other party must be able to see the entire document to engage in discussions of whether the material the party does not want to produce is relevant.

9. Requiring universities to permit parties to present expert witnesses.

Parties should be permitted to present expert witnesses in the investigation and/or adjudicatory process. For example, university investigators and decisionmakers cannot be presumed to have expertise in issues such as toxicology or interpreting SANE reports. The problem with depriving parties of the right to present expert witnesses in a university disciplinary process is illustrated in the following cases.

In *Doe v. George Washington University*, the court concluded that the accused student was likely to succeed on the merits of his breach of contract claim in part because the university's appeals board improperly disregarded a toxicology expert's report from the respondent ("[T]he expert's opinion might have affected the panel's evaluation of [the complainant's] testimony. The expert opined that had Ms. Roe consumed the amount of alcohol to which she testified she may have experienced 'substantial motor impairment, total memory loss,' and other extremely serious symptoms.")[18]

In *Doe v. Ohio State Universit*y, the court concluded that the accused student had plausibly alleged a due process violation after the university denied him the opportunity to present a toxicologist's expert report showing that the accuser, who claimed incapacitation, would not have been incapable of consent based on the amount of alcohol she allegedly drank. The court noted that "the value of allowing live expert-witness testimony here is also

[18] *Doe v. George Washington Univ.*, 305 F. Supp. 3d 126, 132-133 (D.D.C. April 25, 2018). The court nonetheless denied the motion for a preliminary injunction on grounds that the student had not identified irreparable harm.

substantial," since the expert's "opinion went right to the heart of the case: whether Jane Roe was to be believed and whether she was too intoxicated to consent. Alcohol metabolism and the extent of impairment of human judgment and memory are not matters within the knowledge of lay persons. And the disciplinary board held Doe responsible for sexual misconduct because it found Jane Roe was significantly impaired by alcohol and could not consent. The risk of an erroneous result here was substantial given the key evidence [the expert] would have provided."[19]

And in a case at UC-Santa Barbara, an accused student (identified in court filings as John Doe) challenged a finding of responsibility based partly on a claim that the complainant's memories were unreliable because she had improperly combined alcohol with the prescription drug Viibryd on the night in question. As a California appellate court described the situation in setting aside the university's finding, the UCSB Title IX grievance "Committee's rulings during the hearing placed John in a catch-22; he learned the name of the medication Jane was taking too late to allow him to obtain an expert opinion, but the Committee precluded John from offering evidence of the side effects of Viibryd without an expert."[20]

10. Ensuring a recorded, live hearing with cross-examination by a party's advisor.

The Department should continue to require that colleges and universities provide a live hearing before a hearing officer or hearing panel, which, along with the parties and their advisors (who may be attorneys), hears from the complainant, respondent, and any witnesses.

Courts stressing the need for a live hearing, whether or not direct questioning by parties or their advisors is required, include (but are not limited to): The First Circuit: "[W]e agree with a position taken by the Foundation for Individual Rights in Education, as amicus in support of the appellant -- that due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'"[21] The Third Circuit: Notions of fairness "include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her."[22] The Fifth Circuit: "[W]e agree with the position taken by the First Circuit 'that due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'"[23] The Seventh Circuit: Procedural fairness requires "a hearing [to] be a real one, not a sham or pretense."[24] The Eighth Circuit: "[A] university 'must facilitate some form of cross-examination in order to satisfy due process' . . . [and q]uestioning by the panel could be insufficient in a given case."[25]

Each party's advisor should continue to be able to cross-examine the other party as well as any witnesses. The importance of cross-examination cannot be underestimated. More than

[19] *Doe v. Ohio State Univ.*, 311 F. Supp. 3d 881, 895 (S.D. Ohio April 24, 2018).
[20] *Doe v. Regents of University of California*, 2018 WL 4871163 (Cal. App. 2d Dist. October 9, 2018).
[21] *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019).
[22] *Doe v. Univ. of the Scis.*, 961 F.3d 203, 214 (3d Cir. 2020).
[23] *Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. 2020).
[24] *Doe v. Purdue Univ.*, 928 F.3d 652, 663, (7th Cir. 2019).
[25] *Doe v. Univ. of Ark. - Fayetteville*, 974 F.3d 858, 868 (8th Cir. 2020).

fifty years ago, the U.S. Supreme Court celebrated the value of requiring "the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth.'"[26] In addition, in virtually every case involving alleged sexual misconduct, credibility is both in dispute and relevant. Further, whether or not a case hinges on credibility should be decided after all the information is gathered, tested, and evaluated – it should not be prejudged. Credibility – of both parties – is virtually always an issue, even when there are purported admissions on the record. As the *Doe v. Baum* court explained, cross-examination at a live hearing is required if a school "has to choose between competing narratives to resolve a case."[27]

11. Precluding reliance on statements made by party who does not respond to questions related to their credibility.

If a party does not respond to questions related to their credibility, then the Department should preclude the decisionmaker from relying on any statement of that party that supports that party's position. The Department also should instruct that a decisionmaker must not draw an inference about whether sex-based harassment occurred based *solely* on a party's or witness's refusal to respond to questions related to their credibility.

12. Requiring a written decision that identifies the allegations, describes the procedural steps taken, findings of fact supporting the determination, conclusions regarding the application of the school policy to the facts, and the rationale.

The Department should continue to require colleges and universities to supply the parties with a written determination that (a) identifies the allegations potentially constituting sexual harassment; (b) a description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held; (c) findings of fact supporting the determination; (d) conclusions regarding the application of the university's code of conduct to the facts; and (e) a statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility. Requiring these details in the written determination allows for an important safeguard that facilitates review of whether a school has followed its procedures as well as the equity, thoroughness, and adequacy of the process. These requirements lead to a responsibility determination that is based on identified charges, specific factual findings, and specific conclusions correlating the facts to the charges.

13. Requiring universities to provide parties with several broad appeal grounds challenge the written determination.

The Department should continue to require universities to at least allow parties to appeal the written determination based on an irregularity that affected the outcome of the matter, new material that could affect the outcome of the matter, and a bias/conflict of interest that affected the outcome of the matter. In addition, the Department should require universities to allow the following additional grounds to appeal: the weight of the evidence; a clearly erroneous and/or arbitrary result; and the disproportionality of the sanction.

[26] *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).
[27] *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018).