U.S. Senate Committee on Health, Education, Labor and Pensions
"Reauthorizing HEA: Addressing Campus Sexual Assault and Ensuring Student Safety and Rights"

Responses by Patricia Hamill, Esquire, Conrad O'Brien P.C., to Senator Alexander's Questions for the Record.[1]

April 18, 2019

I appreciate the opportunity to share my views on questions posed in follow up to the HELP Committee's April 2, 2019 hearing and the written testimony I submitted on March 30, 2019.

I would like to start by stating that I am heartened by the fact that most, if not all, of the Senators and witnesses at the hearing affirmed the need for fair and transparent procedures for resolving Title IX complaints. As I set forth in my written testimony, basic principles such as the need for adequate notice and fair, thorough and impartial investigations and decisions are well established in our nation's jurisprudence. The procedural concerns discussed at the hearing focused on whether fair procedures should include live hearings and direct cross-examination, which I address further in some of my answers below.[2]

Questions from Senator Alexander

1. **In your representation of accused students, how have you seen campus disciplinary proceedings impact their access to education? What negative effects do these proceedings, regardless of outcomes have on the future employment opportunities for these students?**

As this Committee knows, Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). At the hearing, Senators and witnesses emphasized that Title IX protects students' equal access to education, and that sexual harassment or assault can affect a complainant's access to educational programs and activities. I completely agree. And I emphasize that the right to equal access to education means equal access for both complainants and respondents, regardless of gender. Students who are accused of sexual harassment or assault

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[2] My focus here is on colleges and universities and their students.

may be completely excluded from and denied the benefits of their school's educational programs and activities, whether or not they are found responsible.

First, if accused students are found responsible, they may be suspended or expelled from their school and lose the degree they worked and paid for, sometimes very late in their college careers. They may lose scholarships or the ability to participate in military or other programs that have made their educations possible. They likely will be unable to transfer to a comparable school to complete an undergraduate degree. And if they are able to transfer, they may lose credits or have to repeat a term or year.[3] Their reputations, educational prospects, and career or professional prospects may be permanently damaged due to gaps in their education, the stigma of being found responsible for sexual harassment or assault, and, in many cases, permanent notations in their academic records or on their transcripts.[4] It is critical to provide a process fair to both parties before such a consequential decision is made, to minimize the possibility that a student wrongfully accused is found responsible. And it is also critical to provide a path to rehabilitation in cases where an institution's finding of responsibility might have merit. I believe schools should be able to expunge a student's records after a designated period of time, and that there should be a time frame after which respondents are no longer required to report an adverse disciplinary ruling on an application for admission to another school. I note the broad support for "ban the box" laws in the criminal context, which require employers to consider a job candidate's qualifications first, without the stigma of a criminal conviction or arrest record. And the Common Application has removed its question on criminal history – though it continues to include a question on disciplinary history.

Second, an accused student who is ultimately exonerated may also be excluded from and denied the benefits of the school's educational programs and activities. In my experience, this happens frequently due to interim actions schools take while a disciplinary proceeding is pending. The exclusion/denial is obvious if a school suspends or removes a respondent from campus before a final decision is made. The Department's proposed Title IX regulations address this problem, stating that emergency removal is appropriate only if the school "undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal." Proposed 34 C.F.R. § 106.44(c). I

[3] For instance, a student expelled after completing junior year ordinarily cannot simply complete his senior year elsewhere and be awarded a degree from the second institution. Most schools require students to earn a certain number of credits at their institution before awarding a degree. That usually means a student must complete two full years, so a student expelled after his junior year will usually have to repeat that year – assuming he is admitted somewhere else. Also, when a school suspends a student, it typically will not honor courses the student has taken elsewhere during the period of suspension.

[4] Some states and some school policies require notations on transcripts indicating a finding of responsibility for sexual harassment or assault. Some such notations are permanent, particularly in the case of expulsion, and some may be removed after a suspension is served. *See, e.g.,* Va. Code § 23-9.2:15; N.Y. Education Law Art. 129-B.

support those protections, and have proposed in addition that emergency removal be allowed only if it is the least restrictive alternative. Moreover, comparable protections should be in place for other interim actions schools routinely take. "No contact orders," though often appropriate and necessary, should be tailored in such a way that they do not prevent either student from participating in educational programs or activities while the proceeding is pending. The routine practice of putting a "disciplinary hold" on accused students' transcripts or, for students with cases pending at graduation, withholding their degrees, denies accused students the benefits of their education in some of the same ways as a finding of responsibility. For example, a student who cannot get a clean official transcript or whose degree is withheld may, while waiting for the final outcome, lose a job, a scholarship, the ability to participate in a military program, etc., and may be unable to apply for jobs or graduate programs. The damage that occurs while those interim sanctions are in place cannot be undone. Unless a particular student poses an "immediate threat," there is simply no justification for denying him the benefits of his education while his responsibility has yet to be adjudicated.

Third, even apart from the school's official actions, the mere fact of an accusation and a disciplinary proceeding involving alleged sexual harassment or assault can interfere with an accused student's ability to pursue his education. A student who is accused is distressed and is often ostracized. In this age of the internet and social media, the damage to an accused student's educational and career prospects can persist regardless of the outcome of the disciplinary proceeding. While I understand that is not entirely in a school's control, schools can and should mitigate the impact by adopting fair procedures; administering them fairly; avoiding any suggestion that an accusation is credible simply because it was made; educating both employees and students on what a fair process entails; and taking prompt and effective action when harassment or retaliation occurs. The current stigma associated with even a ***wrongful*** allegation of sexual assault is so intense that the vast majority of judges who have handled lawsuits in this area have allowed the accused student to file pleadings as "John Doe."

A number of people who responded to the Department's request for comments on its proposed Title IX regulations shared personal stories illustrating the devastating impact of accusations of sexual harassment or assault, interim sanctions, findings of responsibility, and final sanctions.[5]

[5] See, for example, Comments of Anonymous parent, https://www.regulations.gov/document?D=ED-2018-OCR-0064-9000 (describing student's experience and sharing specific recommendations based on that experience: the student was found responsible without a hearing and expelled, his parents learned about the situation when they received a call that he was suicidal and in the hospital, and they sued and won. "Many of us have daughters, some women have experienced sexual assault themselves and we strongly agree that victims need protection. However, it should never come at the expense of an innocent accused student. The goal should be to find the truth and provide a fair process given the high stakes for both students. Both victims and falsely accused students experience profound trauma"); Comments of Anonymous parent, https://www.regulations.gov/document?D=ED-2018-OCR-0064-7160 (sharing perspective from having had a daughter who was sexually assaulted and a son accused of sexual assault while in college. "We all, as a family, appreciate the hesitancy of victims to come forward, and we certainly want those guilty of sexual crimes to

These stories are consistent with what I have observed firsthand. I urge the Committee to consider these stories, and to remember that complainants and respondents are people – young people – who deserve a fair and impartial resolution based on the facts of their individual cases.

2. Are campus disciplinary proceedings distinguishable from workplace disciplinary actions? If so, why?

I believe this question stems from the fact that some have suggested that workplace disciplinary proceedings use single investigator models without hearings and cross-examination, and that the same model is therefore appropriate for student proceedings. As I explain below, such generalizations ignore the substantial variation in workplace protections and do not justify efforts to deny important procedural protections in the campus setting. Indeed, many schools offer their employees greater rights and protections than the Department of Education's proposed regulations would provide. In addition, courts are increasingly recognizing the need for fundamental protections in student disciplinary proceedings. Both historical and practical considerations support those protections.

First, employers handle disciplinary proceedings in a wide variety of ways and workers are subject to a wide variety of procedures and protections. Some employees are at will. Some are protected by statutes, regulations, handbooks (which may or may not be contractually binding), contracts or collective bargaining agreements, with provisions that differ for different employers, and sometimes also for different employees at the same company. The broad generalizations about "workplace models" are not based on evidence and do not support efforts to deny accused students fair processes in campus proceedings.

Second, the rights and protections many colleges and universities give their employees are greater than the rights and protections that would be guaranteed by the Department of Education's proposed regulations. Indeed, in comments to the proposed regulations, many schools protested the proposal that universities apply the same standard of evidence in student Title IX proceedings as they use in employee proceedings. The Association of Independent Colleges and Universities of Massachusetts (AICUM), for example, argued that student disciplinary cases are "fundamentally different" from employee proceedings. "Campus conduct proceedings involving faculty and other employees are governed by existing state laws,

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be prosecuted. However, to deny basic and established constitutional rights to the accused becomes a slippery slope and begs the question of which other situations should be considered for the repeal of one's constitutional rights?"); Comments of Craig Stanfill, https://www.regulations.gov/document?D=ED-2018-OCR-0064-10624 (student who was accused a few months before graduation and exonerated over a year later lost two years of his professional life because of the withholding of his degree and inability to apply for graduate school or find a permanent job); Comments of Mark Shaw, https://www.regulations.gov/document?D=ED-2018-OCR-0064-10413 (student was exonerated eight months after complaint was made, but was damaged by the campus restrictions imposed during that period); Comments of Anonymous student, https://www.regulations.gov/document?D=ED-2018-OCR-0064-9043.

collective bargaining agreements, faculty by-laws, and/or other constraints, which institutions often have no power unilaterally to change."[6]

I am not arguing here that students should necessarily have every right enjoyed by faculty or by employees governed by a collective bargaining agreement. I am simply pointing to the protections colleges and universities give their employees – particularly *academic* employees – to illustrate that it is inappropriate to advocate for limiting accused students' rights in disciplinary proceedings by suggesting that there is some uniform "workplace model" involving decisions made by a single investigator, with no live hearings and no opportunity to confront the other party or witnesses.

The University of Washington provides just one example of a workplace model involving substantial procedural protections – including separation of investigative and adjudicative functions, steps to ensure impartial decisionmakers, steps to ensure all relevant evidence is gathered and shared with the parties, right to a hearing, and right to cross-examination. Administrative Policy Statement 46.3, "Resolution of Complaints Against University Employees," describes how the university handles complaints against university employees, including complaints involving alleged sexual harassment or sexual violence. As an initial matter, complaints may be addressed through local investigation and resolution or through the University Complaint Investigation and Resolution Office (UCIRO) process. In the UCIRO process, an investigator "acts as a neutral, objective fact-finder" and produces "a summary of the allegations investigated and the facts determined." "As warranted, UCIRO will refer the result to the appropriate administrative head to determine whether corrective actions should be taken involving the individual whose behavior is the subject of the complaint ***in accordance with the individual's employment program***." *Id.*, http://www.washington.edu/admin/rules/policies/APS/46.03.html (emphasis added).

Complaints against faculty are governed by the Faculty Code, which sets forth "the adjudicative procedures to be used in resolving disputes involving faculty members that cannot be resolved by informal means." Ch. 28, http://www.washington.edu/admin/rules/policies/FCG/FCCH28.html. The chapter starts by strongly encouraging the use of informal dispute resolution. *Id.* If the UCIRO files "a written report that claims reasonable causes exist to adjudicate charges" against a faculty member, the first step is a determination of reasonable cause, to be made by the provost with the assistance of a special committee of three faculty members "who are not involved in the

[6] Comments of AICUM, at 13, http://aicum.org/wp-content/uploads/2019/01/AICUM-public-comments-on-Notice-of-Proposed-Rulemaking-%E2%80%9CNPRM%E2%80%9D-amending-regulations-implementing-Title-IX-of-the-Education-Amendments-of-1972-Title-IX%E2%80%9D-Docket-ID-ED-2018-OCR-0064.pdf; *see also* Comments of Association of Governing Boards of Universities and Colleges, https://www.regulations.gov/document?D=ED-2018-OCR-0064-7550 (stating that requiring consistency across all proceedings would impact "myriad campus matters, constituencies and processes," including "collective bargaining agreements, institutional governance decisions, as well as state-law-regulated and non-Title IX disciplinary policies and procedures").

matter being considered" and who will not "subsequently serve on any panel hearing or review any adjudication arising out of or related to the matters set forth in the report." Section 28-32(A).

For "[c]omprehensive adjudication," defined as "the formal hearing process used for all cases except the minor cases that are resolved with brief adjudications," the Code sets forth extensive rights and protections, including the following provisions:

- "In selecting members of a particular hearing panel, the Chair of the Adjudication Panel shall attempt to achieve the highest degree of diversity and impartiality and make every possible effort to select panel members with differing backgrounds that the Chair deems relevant to the issues at hand and the persons involved. This requirement is especially important to observe in cases where unlawful discrimination is alleged. The purposes of this provision are to broaden the perspective of the panel, and increase the panel's ability to understand the motivations of the persons involved." Section 28-32(G).
- "The role of any member of a hearing panel . . . shall be that of an impartial fact finder and judge and shall not be that of an advocate for any of the parties to the adjudication." Section 28-32(H).
- A pre-hearing conference will be held at which "the hearing officer, the panel and the parties shall discuss and agree upon the evidence to be presented and the issues to be addressed at the hearing." Section 28-52(D).
- The hearing officer "shall issue a Prehearing Order . . . which shall set forth the issues to be addressed at the hearing, the factual issues which are uncontroverted, the witnesses to be called and the other evidence to be presented, the extent to which any discretionary rights to participate will be given to nonparty participants, the extent to which depositions, requests for admission and any other form of discovery will be allowed and any other matters the hearing panel shall deem appropriate in setting the procedure to be followed at the hearing." Section 28-52(E).
- "Any faculty member who is a party to a proceeding under this chapter shall have the right to be represented by counsel at all stages in the proceedings." Section 28-52(G).
- "The hearing officer may instruct any person who is a party to the adjudication or an administrative officer or administrative employee of the University to appear and to give testimony under oath or affirmation." A person who refuses to comply is subject to sanctions, including dismissal or the drawing of adverse inferences. Section 28-52(H).
- "The hearing officer may at any time issue any discovery or protective orders that he or she deems appropriate, and such orders shall be enforceable under the provisions of Chapter 34.05 RCW regarding civil enforcement of agency actions." Section 28-52(K).
- "The parties and nonparty participants of right and their advisors and representatives" are entitled to be present at the hearing. Section 28-53(A).
- "The hearing shall either be recorded, audio only or video, or transcribed by a court reporter, as determined by the hearing panel. . . . Copies of the recording or transcript shall be made available to any party or nonparty participant of right at University expense upon request." Section 28-53(B).

- "If the facts in the case or relief requested are in dispute, testimony of witnesses and other evidence relevant to the issues and to the relief requested shall be received if offered. The hearing officer may admit and consider evidence on which reasonably prudent people are accustomed to rely in the conduct of their affairs," and shall "refer to the Washington Rules of Evidence as non-binding guidelines for evidentiary rulings. All testimony of parties and witnesses shall be given under oath or on affirmation." Section 28-53(C).
- "To the extent necessary for full disclosure of all relevant facts and issues, the hearing officer shall afford to all parties and nonparty participants the opportunity to respond, present evidence and argument, conduct cross-examination and submit rebuttal evidence . . . ." Section 28-53(D).
- "The parties shall have the opportunity to confront all witnesses." Section 28-53(F).

Third, as I explained in my written testimony, campus disciplinary proceedings have been in a spotlight in recent years. Courts are increasingly holding that students accused of sexual harassment or assault are entitled to certain procedural protections, and that how respondents are treated in disciplinary proceedings can constitute gender discrimination. The case law continues to develop regarding the obligations of both public and private institutions. When similar issues about unfair processes and arbitrary results arise in the workplace context, courts, regulators, and others should be just as concerned to ensure fair procedures in the workplace. Indeed, a federal court recently ruled that a tenured professor who alleged he was fired without a hearing and without consideration of exculpatory evidence stated a valid gender discrimination claim. *Fogel v. Univ. of the Arts*, No. CV 18-5137, 2019 WL 1384577 (E.D. Pa. Mar. 27, 2019).

Fourth, with the above points in mind, there are historical and practical considerations that support requiring robust procedural protections before students are deprived of their educations.

a. Historical considerations. Title IX applies to federally funded educational institutions, and thus to almost every college and university in the United States. Starting with the Office for Civil Rights' 2011 Dear Colleague Letter, the federal government has used the threat of withdrawal of funding to dictate campus procedures for sexual harassment and assault allegations. The government's pressure has led to massive Title IX bureaucracies at colleges and universities.[7] While individual schools have different policies and procedures, there are common elements (some prescribed by the government and others that are an outgrowth of its mandates) and common themes, including presumptions of guilt, use of a "single investigator" model that involves inherent conflicts of interest and severely limits the respondent's ability to challenge the complainant's account, denial of meaningful cross-examination, erosion of other procedural protections for respondents, and systemic gender discrimination. As noted above and in my written testimony, courts are already responding by holding that schools must

[7] For one example, a 2016 *Harvard Crimson* article discussed "Harvard's web of 50 Title IX coordinators at each of the 12 schools and units." *See* Andrew Duehren and Emma Talkoff, *Seeking Trust: Navigating Harvard's Sexual Assault Policies*, Harvard Crimson (March 10, 2016), https://www.thecrimson.com/article/2016/3/10/harvard-sexual-assault-policies/.

avoid discrimination and provide procedural protections, including live hearings and cross-examination. For public institutions, courts have confirmed these protections are mandated by the Constitution's Due Process and Equal Protection clauses. In this context, it is critical that lawmakers, regulators, and schools also take action to undo the harm that has been done. If employers are using unfair procedures to discipline their employees, that is of course an important concern and should be addressed, but it does not change the fact that campus disciplinary procedures need reform now.

b. General practical considerations. (I say "general" because individual cases and circumstances differ, and overall these considerations are on a spectrum). First, students generally pay tuition for an education at a particular school, including enrollment for a time period and a degree from that school. Given the way the education system works, a student who is sanctioned midway through an academic year or midway through his college career (even if just shortly before graduation) can lose credit for courses he took and paid for, may be unable to graduate from the school that accepted his tuition, and may be unable to transfer to a comparable institution or have his previous coursework accepted. If his transcript contains a notation of the disciplinary finding (as many schools and some states require), or if he has to complete the Common Application, his job and transfer applications may never even be considered. There are good reasons to require a formal process before a student is deprived of the education he paid for and is substantially impeded in seeking other educational opportunities. Second, at many schools, students study, work, live, and socialize in the context of the school community. Many contested student complaints involve sexual encounters between young people who are sexually inexperienced, are engaged in the casual hook-up culture prevalent on campuses, or both. They may have misread or misinterpreted each other's feelings or intent. Often both parties have consumed alcohol or drugs, further diminishing their ability to make clear decisions, communicate effectively, or remember what happened. Disputes often center not on whether particular conduct occurred but whether it was consensual. In such ambiguous and nuanced situations, live hearings and cross-examination are critical both for the parties to explore and test each other's accounts and for the decisionmakers to observe the parties as they testify. Of course these observations may not apply to all schools and all students, and employees may have analogous arguments. But again, whether or not fair procedures are available in the workplace does not change the need to act now to ensure fair procedures on school campuses. And I note that workers have an important legal protection that students do not: Title VII of the Civil Rights Act of 1964 allows legal challenges to employment practices that have a disparate impact on a protected class of individuals (including a particular gender), whether or not the employer intends to discriminate. In contrast, courts have held that a plaintiff bringing a claim under Title IX must plead and ultimately prove "particularized" facts to show that a

school was motivated by gender bias.[8] This has allowed schools to argue, and some courts to hold, that they are free to discriminate against respondents and for complainants even though this discrimination overwhelmingly harms men.[9]

Some have argued that the federal government should not be overly prescriptive in this area and that additional protections for students will be too costly. This ignores the realities: the government is already prescriptive, schools already invest huge sums in their Title IX bureaucracies, fair treatment for both complainants and respondents is required both by existing law and by our basic principles of justice, and the system that currently exists does not provide fair processes or fair and reliable outcomes.[10]

3. Some have argued that the 6th Circuit Court of Appeals decision, *Doe v. Baum*, was decided based on the fact that University of Michigan offered live cross-examination in other disciplinary proceedings, but not in proceedings involving sexual assault. However, the holding is not specific to those facts. Do you view *Doe v. Baum* as unique to its facts, or is the holding broader?

Doe v. Baum, 903 F.3d 575 (6th Cir. 2018), is not unique to its facts. The Court's decision is based on long-standing precedent regarding fair disciplinary processes and stands for three broad propositions. First, due process requires that "if a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension." *Id.* at 581. Second, due process requires that "when the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination;" i.e., "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." *Id.* And third, for purposes of a Title IX "erroneous outcome" claim (which can be asserted against either a private or a public school), a plaintiff who alleges "the university did not provide an opportunity for cross-examination even though credibility was at stake in his case . . . has pled facts sufficient to cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome." *Id.* at 585-86.[11]

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[8] *See, e.g., Doe v. Baum*, 903 F.3d 575, 585 (6th Cir. 2018).

[9] See my written testimony, p.9 n.26.

[10] Live hearings and cross-examination may not be required or necessary in every case involving alleged sexual misconduct. The Department of Education's proposed regulations represent an effort to reserve formal Title IX proceedings for alleged conduct that could deprive a complainant of educational opportunities, and give schools and parties more flexibility to pursue informal, non-punitive resolutions. And in general, the case law on these issues requires hearings when the potential sanctions are as serious as expulsion or suspension, and cross-examination when the decision turns on credibility. *See, e.g., Baum*, 903 F.3d at 581.

[11] "A university violates Title IX when it reaches an erroneous outcome in a student's disciplinary proceeding because of the student's sex." *Id.* Courts have held that "[t]o survive a motion to

The Court's reasoning confirms that it intended its ruling to apply broadly. Among other things, it repeated the classic statement that cross-examination is "'the greatest legal engine ever invented for uncovering the truth.'" It also noted that cross-examination is critical both because it allows parties "to identify inconsistencies in the other side's story" and because it "gives the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted." *Id.* at 581 (internal citation omitted).

Only *after* finding "a significant risk that the university erroneously deprived Doe of his protected interests" by denying him cross-examination did the Court note that "[t]his risk is all the more troubling considering the significance of Doe's interests and the minimal burden that the university would bear by allowing cross-examination in Doe's case." *Id.* at 582. "As it turns out," the Court stated, "the university already provides for a hearing with cross-examination in all misconduct cases other than those involving sexual assault." *Id.* The Court used this observation to bolster the ruling it had already made, not to limit the applicability of the ruling.

The Court then went on to further emphasize the importance of cross-examination, roundly rejecting the university's argument that Doe was adequately protected by being allowed to review the complainant's statement and identify inconsistences for the investigator. "Cross-examination is essential in cases like Doe's because it does more than uncover inconsistencies—it 'takes aim at credibility like no other procedural device.' . . . 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. 'It is of great importance in the distribution of justice that witnesses should be examined face to face, that the parties should have the fairest opportunity of cross-examining them in order to bring out the whole truth; there is something in the manner in which a witness delivers his testimony which cannot be committed to paper, and which yet very frequently gives a complexion to his evidence, very different from what it would bear if committed to writing . . . .'" *Id.* at 582-83 (internal citations omitted).

Developments after *Baum* Court's ruling confirm its breadth. The University of Michigan filed a petition for rehearing en banc. Other Michigan universities, which did not have the same procedures, filed an amicus brief. The Sixth Circuit denied the petition, saying the original panel had already fully considered the issues it raised and that on consideration by the full court "[n]o

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dismiss under the erroneous-outcome theory, a plaintiff must plead facts sufficient to (1) 'cast some articulable doubt' on the accuracy of the disciplinary proceeding's outcome, and (2) demonstrate a 'particularized ... causal connection between the flawed outcome and gender bias.'" *Id.* at 585.

judge has requested a vote on the suggestion for rehearing en banc."[12] Universities in the Sixth Circuit are now revising their procedures to comply with the Court's ruling.[13]

4. Aside from the 6th Circuit's decision in *Doe v. Baum*, what are other courts around the country saying on the issues of live hearings, cross-examination, and the single-investigator model in university disciplinary proceedings?

As I stated, the rulings in *Doe v. Baum* and other cases are solidly based on long-standing precedent requiring that people accused of serious misconduct are entitled to a reasonable opportunity to defend themselves before impartial decisionmakers. This is constitutionally required for public institutions, and courts have applied similar requirements to private institutions based on Title IX, federal regulations, state law, or contractual documents.

One of the earliest, and most powerful, description of those rights in the context of a student disciplined under Title IX was in *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 603 (D. Mass. 2016), where the Court held that a private university did not provide the accused student the "basic fairness" required by state law and the parties' contract. "Here, Brandeis failed to provide a variety of procedural protections to John, many of which, in the criminal context, are the most basic and fundamental components of due process of law." *Id.* at 603. These "basic and fundamental components" included the right to confront the accuser; to present evidence at a hearing; and to separation of investigation, prosecution, and adjudication functions.

Regarding cross-examination, the Court said:

> Brandeis did not permit John to confront or cross-examine J.C. [the complainant], either directly or through counsel. Presumably, the purpose of that limitation was to spare J.C. the experience of being subject to cross-examination. While protection of victims of sexual assault from unnecessary harassment is a laudable goal, the elimination of such a basic protection for the rights of the accused raises profound concerns.
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> In the famous words of John Henry Wigmore, cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 3 Wigmore, Evidence § 1367, p. 27 (2d ed. 1923). The ability to cross-examine is most critical when the issue is the credibility of the accuser. . . .
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> Here, there were essentially no third-party witnesses to any of the events in question, and there does not appear to have been any contemporary corroborating evidence. The entire investigation thus turned on the credibility of the accuser and the accused. Under the circumstances, the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding.

[12] *Doe v. Baum*, No. 17-2213 (6th Cir.), Docs. 49, 55, 56.

[13] *See Universities confront Title IX policy changes after proposed regulations, federal court rulings* (Mar. 31, 2019), http://www.kentwired.com/latest_updates/article_0d03846c-53de-11e9-82d5-17570f289133.html.

Id. at 604-05.

Regarding the university's use of a single investigator model, the Court said:

> Under the Special Examiner Process, a single individual was essentially vested with the powers of an investigator, prosecutor, judge, and jury. Furthermore, those decisions were not reviewable except as to certain narrowly defined categories.
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> The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions. The dangers of such a process can be considerably mitigated if there is effective review by a neutral party, but here that right of review was substantially circumscribed.

Id. at 606.

The Sixth Circuit's decision in *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017), from which the *Baum* decision logically flowed, made clear again that the cross-examination requirement is rooted in due process and legal precedent and essential to reliable results, and that "***[r]eaching the truth through fair procedures is an interest Doe and UC have in common***." *Id.* at 402 (emphasis added).

> "The Due Process Clause will not shield [a student] from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted." *Goss [v. Lopez]*, 419 U.S. [565,] at 579, 95 S. Ct. 729. UC, of course, also has a "well recognized" interest in maintaining a learning environment free of sex-based harassment and discrimination. *Bonnell v. Lorenzo*, 241 F.3d 800, 822 (6th Cir. 2001). To that end, "ensuring allegations of sexual assault on college campuses are taken seriously is of critical importance, and there is no doubt that universities have an exceedingly difficult task in handling these issues." *Brandeis*, 177 F.Supp.3d at 602 (citation omitted).
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> But if a university's procedures are insufficient to make "issues of credibility and truthfulness . . . clear to the decision makers," that institution risks removing the wrong students, while overlooking those it should be removing. *See Furey v. Temple Univ.*, 884 F. Supp. 2d 223, 252 (E.D. Pa. 2012). "The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is." *Goss*, 419 U.S. at 579–80, 95 S. Ct. 729. Cross-examination, "the principal means by which the believability of a witness and the truth of his testimony are tested," can reduce the likelihood of a mistaken exclusion and help defendants better identify those who pose a risk of harm to their fellow students.

Id.

Other cases addressing the need for hearings and cross-examination in the specific context of campus Title IX proceedings are described below.

In series of recent cases in California state court, the courts have directed both public and private universities to set aside decisions finding male students responsible for sexual misconduct, and have held that when a disciplinary decision turns on credibility, parties and witnesses must be subjected to questioning and cross-examination at a live hearing before a neutral adjudicator who cannot be the same person as the investigator. *See, e.g.*, *Doe v. Allee*, 30 Cal. App. 5th 1036 (Cal. Ct. App. 2019). In the *Allee* case, the Court stated that "[f]or practical purposes, common law requirements for a fair disciplinary hearing at a private university mirror the due process protections at public universities," including "'a full opportunity to present [respondent's] defenses.'" *Id.* at 1061-62. Citing multiple cases, the Court held that when credibility is at stake, the accused must be allowed to cross-examine the accuser and adverse witnesses. It noted that a cross-examiner may "delve into the witness' story to test the witness' perceptions and memory;" may "expose testimonial infirmities such as forgetfulness, confusion, or evasion;" and may "reveal[] possible biases, prejudices, or ulterior motives' that color the witness's testimony." And, the Court noted, the "strategy may also backfire, provoking the kind of confident response that makes the witness appear more believable to the fact finder than [the cross-examiner] intended. . . . Whatever the outcome, 'the greatest legal engine ever invented for the discovery of truth' will do what it is meant to: 'permit[] the [fact finder] that is to decide the [litigant]'s fate to observe the demeanor of the witness in making his statement, thus aiding the [fact finder] in assessing his credibility.'" *Id.* at 1065-66 (internal citations omitted). The *Allee* Court also disapproved the university's use of a single investigator to resolve Title IX complaints without a hearing. In the Court's words:

> As we have explained, in USC's system, no in–person hearing is ever held, nor is one required. Instead, the Title IX investigator interviews witnesses, gathers other evidence, and prepares a written report in which the investigator acts as prosecutor and tribunal, making factual findings, deciding credibility, and imposing discipline. The notion that a single individual, acting in these overlapping and conflicting capacities, is capable of effectively implementing an accused student's right of cross–examination by posing prepared questions to witnesses in the course of the investigation ignores the fundamental nature of cross–examination: adversarial questioning at an in–person hearing at which a neutral fact finder can observe and assess the witness' credibility . . . In light of these concerns, we hold that when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (e.g., videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments. That factfinder cannot be a single individual with the divided and inconsistent roles occupied by the Title IX investigator in the USC system.

Id. at 1068-69.

In *Doe v. Regents of Univ. of California*, 28 Cal. App. 5th 44 (Cal. Ct. App. 2018), the Court's ruling illustrates that the right to cross-examination is the right to ***effective*** cross-examination, and must include access to relevant information and the ability to ask questions relating to the respondent's defense. In that case, the university allowed a detective to testify about a single phrase from a sexual assault response team (SART) report without requiring production of the entire report to the hearing committee or the respondent. "Without access to the complete SART report, [respondent] did not have a fair opportunity to cross-examine the detective and challenge the medical finding in the report. The accused must be permitted to see the evidence against him. Need we say more?" *Id.* at 57. The university also violated respondent's rights by allowing the complainant to refuse to answer questions relating to his defense. "This deprived John of his right to cross-examine Jane and impeded his ability to present relevant evidence in support of his defense." *Id.* at 60.

In *Norris v. Univ. of Colorado, Boulder*, No. 1:18-CV-02243-LTB, 2019 WL 764568 (D. Colo. Feb. 21, 2019), the Court discussed cases holding that "a lack of ***meaningful*** cross-examination may contribute to a violation of due process rights of an accused student in a disciplinary hearing regarding sexual assault. . . . So with the credibility of the parties in the investigation at issue . . ., the lack of a full hearing with cross-examination provides evidence supporting a claim for a violation of his due process rights." *Id.* at *15 (emphasis added).

One of the cases *Norris* cited for the proposition that cross-examination must be "meaningful" was *Gischel v. Univ. of Cincinnati*, 302 F. Supp. 3d 961 (S.D. Ohio 2018). In that case, the Court found a viable procedural due process claim based on allegations that a hearing panel refused to ask entire categories of questions plaintiff deemed critical to his defense. This included questions to the complainant regarding her "inconsistent or inaccurate statements about how much she drank, the last events she remembered, and whether she was drugged." *Id.* at 978-79.

In *Oliver v. University of Texas Southwestern Medical School*, No. 3:18-CV-1549-B, 2019 WL 536376 (N.D. Tex. Feb. 11, 2019), the Court denied the university's motion to dismiss a student's procedural due process and Title IX claims. "[B]ased on Oliver's allegations, it appears that UTSW did not present any witnesses to the alleged assault for Oliver to effectively cross-examine such as Rowan [the complainant], nor did UTSW present key evidence [including audio files which plaintiff eventually proved the complainant had doctored, and pictures which established that complainant's bruises were from an injury at work, before the parties' alleged encounter]. . . . The Court recognizes that neither the Supreme Court nor the Fifth Circuit has explicitly required any one of these procedures. But taken together, the allegations show Oliver was not afforded sufficient procedural mechanisms in light of the facts and circumstances of this case and what he stood to lose. . . . [T]here was a substantial risk of erroneously depriving Oliver's interests through the procedures used, and the probable value of disclosing that evidence or having Rowan testify is clearly shown." *Id.* at *11, 13. The Court reached this conclusion without citing the Sixth Circuit cases, basing its decision on "the minimum procedural due-process required in previous cases" decided by the Fifth Circuit and the Supreme Court. *Id.* at *13. Regarding plaintiff's Title IX claim, the Court held that the "inference of gender bias in the erroneous outcome is further exacerbated by the fact that Oliver was never given access to the

incriminating evidence against him nor was Rowan required to testify against him at trial, which significantly limited his ability to mount a viable defense." *Id.* at *18.

In *Doe v. Univ. of Mississippi*, No. 3:18-CV-138-DPJ-FKB, 2019 WL 238098 (S.D. Miss. Jan. 16, 2019), the Court denied a university's motion to dismiss a student's due process claim, in part because the student plausibly alleged that allowing him to cross-examine his accuser would have added "some value to the hearing." *Id.* at *10. The Court cited a 1970 U.S. Supreme Court opinion for the principle that "'[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.'" *Id.* at *9 (internal citation omitted). The Court also said that, even though the Fifth Circuit has not ruled on the specific issue, it was proper to address the need for cross-examination under the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). *Id.* at *9. *Mathews* held that procedural due process "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Id.* at* 6 (citing *Mathews*). In the context of school disciplinary proceedings, courts applying *Mathews* consider three factors: "'(a) the student's interests that will be affected; (b) the risk of an erroneous deprivation of such interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (c) the university's interests, including the burden that additional procedures would entail.'" *Id.* (citing *Plummer v. Univ. of Houston*, 860 F.3d 767, 773 (5th Cir. 2017). The university argued that requiring cross-examination would significantly burden it, but the Court stated that the Sixth Circuit does not require cross-examination in every case [as I noted above] and cited a Supreme Court case noting the "need for cross-examination 'where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings.'" *Id.* at *10 (internal citation omitted).

In *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 584 (E.D. Va. 2018), the Court denied a motion to dismiss a student's Title IX claim, holding among other thing that allegations that the student "was deprived the opportunity to identify and interview potential witnesses, to gather exculpatory evidence, to meet with the adjudicator in person, and to cross-examine [complainant], … taken together, [] warrant concern that [respondent] was denied a full and fair hearing." *Id.* at 584.

In *Powell v. Montana State Univ.*, No. CV 17-15-BU-SEH, 2018 WL 6728061 (D. Mont. Dec. 21, 2018), the Court denied a university's motion for summary judgment on a student's due process claims, in part because he was denied the right to cross-examine a witness against him. The Court cited the Sixth Circuit's decisions and said they were consistent with Ninth Circuit precedent expressing the view that "a charge resulting in a disciplinary suspension of a student 'may require more formal procedures' to satisfy components of our system of constitutional due process." *Id.* at *7 (internal citations omitted).

In *Lee v. University of New Mexico*, No. 17-1230, Order, at 2-3 (D.N.M. Sept. 20, 2018), available at https://www.thefire.org/lee-v-university-of-new-mexico/, the Court – citing only the Fourteenth Amendment itself – denied a motion to dismiss a student's due process claims, holding that "Lee's allegations plausibly support a finding that his sexual misconduct

investigation resolved into a problem of credibility such that a formal or evidentiary hearing, to include the cross-examination of witnesses and presentation of evidence in his defense, is essential to basic fairness."

In *Doe v. Pennsylvania State Univ.*, 336 F. Supp. 3d 441 (M.D. Pa. 2018), the Court denied a motion to dismiss a student's due process claims. The university used an "Investigative Model" in which a hearing panel resolved cases based on a paper record compiled by an investigator, with no in-person testimony and no opportunity for cross-examination. In concluding this model raised constitutional concerns, the Court emphasized "PSU's interest in securing ***accurate*** resolutions of student complaints like the one at issue here. PSU's educational mission is, of course, frustrated if it allows dangerous students to remain on its campuses. Its mission is equally stymied, however, if PSU ejects ***innocent*** students who would otherwise benefit from, and contribute to, its academic environment." *Id.* at 449 (Court's emphasis).

> When the panel determined Mr. Doe's responsibility and sanction, it was relying solely on the Investigative Packet and its written responses. Mr. Doe's main objection to this paper-only Investigative Model is that it prohibited him from telling his story directly to the panel, and from challenging Ms. Roe's version of events before that panel. . . . In a case like this, however, where everyone agrees on virtually all salient facts except one—i.e., whether or not Ms. Roe consented to sexual activity with Mr. Doe—there is really only one consideration for the decisionmaker: credibility. After all, there were only two witnesses to the incident, with no other documentary evidence of the sexual encounter itself. As a result, in this Court's view, the Investigative Model's virtual embargo on the panel's ability to assess that credibility raises constitutional concerns. Consequently, while this Court is consistently "mindful of [the Supreme Court's] admonition [that j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint," Defendants' motion to dismiss Mr. Doe's due process claim for a failure to state a claim upon which relief can be granted will be denied.

Id. at 450-51 (internal citations omitted).

In *Doe v. Alger*, 175 F. Supp. 3d 646, 661–662 (W.D. Va. 2016), the Court held a male student adequately alleged a procedural due process violation where a university appeal panel reversed a decision that cleared the student of alleged rape, without hearing live testimony despite the credibility issues. In a later opinion, the Court granted summary judgment to the student. 228 F. Supp. 3d 713 (W.D. Va. 2016).

5. Are there rules or guidelines institutions should adopt to govern the live questioning of witnesses or parties in campus disciplinary proceedings? If so, do you have specific suggestions on what rules or guidelines institutions should adopt?

Yes. As the Sixth Circuit observed in *Baum* and Senator Alexander suggested at the hearing, the concern that direct interaction between an accuser and accused will cause trauma does not justify denying cross-examination altogether, but the concern can be mitigated by allowing "the accused student's agent to conduct cross-examination on his behalf. After all, an individual aligned with

the accused student can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker." *Baum*, 903 F.3d at 583. Schools can, should, and do adopt measures to ensure respectful treatment of parties and witnesses and prevent irrelevant, unfair, or badgering questions. Schools can also allow a witness or party to be questioned outside the other party's physical presence, e.g., by using a witness screen or allowing questioning via Skype. *See id.* & n.3. For cross-examination to be meaningful, however, the parties and decisionmakers must be able to observe people as they testify, whether live or through electronic means. *Id.*

6. **Do you have any specific suggestions on what guidelines or parameters, if any, should be used when informal resolution methods, such as mediation or restorative justice, are selected as a way to resolve sexual misconduct allegations, including sexual assaults?**

Yes. Schools should establish in advance the kinds of informal resolutions they will offer, and should publicize the availability of informal resolution processes. When a complaint is filed, schools should notify both parties clearly and prominently that informal resolution is available, what it would involve, and the consequences of participating in it (including whether a student who opts to participate could later change his or her mind, and whether statements made during an informal resolution could later be used in a formal proceeding if one occurs). It would be appropriate for schools to encourage informal resolution – as the University of Washington does in its procedures for faculty – but they should not pressure parties to participate in an informal process. An informal resolution should proceed only if both parties give voluntary, written consent. Informal resolutions should be facilitated by a person or persons who are trained and skilled in the process, and should be conducted in a way that is fair and respectful to both parties.

7. **Should institutions be able to implement a statute of limitations to report an allegation of sexual misconduct, including sexual assault?**

Yes. I have frequently seen cases in which a complaint is made to a school many months or years after an alleged incident occurred. At that point memories have faded, witnesses may be unavailable, and evidence may have been lost, making a fair and reliable resolution virtually impossible. At the same time, as long as both complainant and respondent attend the school, the school has an interest in addressing alleged sexual harassment or assault, and in some circumstances may have a legal obligation. There are different ways to approach this issue, and I would recommend it be addressed with input from many stakeholders. A few points to consider:

- A school could adopt a time limit with a provision it will consider significant extenuating circumstances that prevented the complaint from being brought within the period.
- Adopting and publicizing a limitations period could encourage complainants to bring their complaints at a time when they can be fairly and reliably resolved – to the benefit of

both complainants and respondents. If the time period is reasonable and the school makes clear complaints are taken seriously, that should not pose an undue deterrent to reporting.

- If an alleged act continues to have effects after the limitations period expires, the school could address those effects without opening a disciplinary process. The Department's proposed regulations suggest various forms of non-punitive supportive measures that may be appropriate apart from a formal disciplinary process, finding, or sanction, including "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." Proposed 34 CFR § 106.30.
- A school may provide that it will not conduct a disciplinary proceeding if either the complainant or the respondent no longer attends the school; indeed, the school may not have jurisdiction in those circumstances. Regardless, a complainant who is still enrolled could be given supportive measures.

* * *

While this was not addressed in Senator Alexander's written questions, the Senator asked me during the hearing whether a respondent's testimony in a Title IX proceeding could be used against him in a criminal proceeding. I answered that it could, and I would like to supplement that answer here. The risk is very real, particularly when students are questioned without legal representation or without proper notice of the accusations against them. A 2015 article describes the case of a University of Wisconsin student whose statement during a Title IX investigation was used to arrest him. "The accused student denied the charges when interviewed by police, [Susan] Riseling [a university administrator and then-campus police chief] said. In his disciplinary hearing, however, he changed his story in an apparent attempt to receive a lesser punishment by admitting he regretted what had occurred. That version of events was 'in direct conflict with what he told police,' Riseling said. Police subpoenaed the Title IX records of the hearing and were able to use that as evidence against the student. 'It's Title IX, not Miranda,' Riseling said. 'Use what you can.'" Jake New, *Making Title IX Work*, Inside Higher Ed (July 6, 2015), https://www.insidehighered.com/news/2015/07/06/college-law-enforcement-administrators-hear-approach-make-title-ix-more-effective.

If a Title IX proceeding continues while a criminal investigation is pending, a respondent's right to avoid self-incrimination must be protected and no adverse inference should be drawn if the respondent limits his participation or testimony.

Respectfully submitted,

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