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 Questions for the Record from Senate Democrats

May 2, 2019

Questions from Senator Warren

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 note at the outset that I was asked to testify based on my experience as an attorney representing students in Title IX disciplinary proceedings and related litigation. I have limited my comments to issues that are within the scope of my experience.

I would also like to emphasize, as I said in my oral and written testimony, that I am strongly committed to the protection of the legitimate interests of both complainants and respondents in Title IX proceedings. Schools should take all complaints seriously, provide supportive measures for and guidance to both parties, give the parties opportunities to resolve complaints informally, assign trained and impartial officials to conduct full and fair investigations and adjudications where a formal proceeding is necessary, and follow their own procedures and contractual obligations. Though I was heartened by the expressed commitment of Senators and witnesses to fair and transparent proceedings, I remain concerned by the national polarization on these topics, and by the apparent assumption of many that measures to give accused people – usually men – a fair hearing are a strike against justice for women. Title IX prohibits gender discrimination, and the effort to correct discrimination against one gender does not justify discrimination against another. What is often missing from the public discourse is an understanding that misconduct occurs on a spectrum, and often there are plausible competing narratives and no independent witnesses or corroborating evidence, particularly when alcohol or drugs are involved. A person accused of sexual harassment or assault, as with any other serious wrongdoing, should receive notice, a thorough and fair investigation, and a meaningful opportunity to be heard before being subjected to serious, life-altering sanctions. As we consider and debate these matters, we should model and reinforce a commitment to our nation's foundational principles of justice, to the benefit of all students, schools, and the nation as a whole. And while the focus of the Committee's hearing was on efforts to address conduct after the fact, it is important for us as a nation to consider other steps to address the conditions and attitudes that lead to contested sexual assault complaints, including excessive use of alcohol and drugs, and to provide more effective education on consensual sexual conduct.

1. **According to data from the U.S. Department of Justice, only one in five women who are sexually assaulted on campus will actually report the attack to the police.[1] What should Congress do to encourage students to report incidences of harassment and assault?**

With respect to the Department of Justice publication referenced in the question, I would like to offer some points of clarification. First, the publication stated that it was based on responses to the National Crime Victimization Survey (for the period 1995-2013), and used the term "victims" to refer to people who reported in the survey that they had been raped or assaulted. Second, it stated that 20% of "female victims ages 18 to 24 enrolled part time or full time in a post-secondary institution" reported to police. For this figure, the publication did not address where alleged assaults occurred or whether the alleged assaulter was a fellow student, and specifically did not include reports to "other officials or administrators." Third, based on the survey, the publication set forth a rate of rape or sexual assault of 6.1 per 1000 female college students from 1995 to 2013, with the rate trending significantly downwards, from 9 per 1000 in 1997 to 4.3 per 1000 in 2013. As set forth in my written testimony, policymakers and advocates often claim that one in five women is sexually assaulted in college, and the Department of Justice's figures, generated by an office with substantial experience in producing statistics for questions related to crime and criminal activity, show a much lower rate – though, of course, even one sexual assault is too many. Finally, I note that the publication reported a rate of rape or sexual assault 1.2 times higher for college-aged females ***not*** enrolled in a post-secondary school: 7.6 per 1000 from 1995 to 2013. Of course, survey responses and figures do not prove sexual assault occurred. As I stated in my testimony and discuss again below, a finding of sexual harassment or assault in a specific case must depend on the individual facts of that case.

Turning to Senator Warren's question, given the focus of the HELP Committee and the April 2 hearing, I assume the question pertains to whether Congress should act to encourage students to report harassment and assault ***to their schools***.

First, in addressing that question, Congress should have a thorough understanding of the measures that are already in place to encourage reporting. Six years have passed since the last year referenced in the Department of Justice's publication, and substantial progress has been made. In my experience, schools are already doing a great deal to encourage students to come forward if they encounter or witness harassment or assault. Based on long-standing federal law, all colleges and universities have a dedicated Title IX office, at least one and often a number of

[1] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. (2014). Rape and Sexual Victimization Among College-Aged Females, 1995-2013. https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf .

Title IX coordinators, and specific Title IX policies and procedures. These policies and procedures, published to students and employees and generally available on line, explain the options for reporting sexual harassment to the school or to law enforcement and the procedures for making and resolving complaints to the school. Schools offer continual training. They support advocacy groups. They host awareness campaigns such as "Take Back the Night" and "It's On Us." They provide extensive health and support services for students who believe they have experienced sexual harassment or assault, including services students can obtain without reporting to their Title IX offices. In my experience, students in 2019 know they have recourse at their schools, as well as through the criminal (and civil) justice system. Under the current legal framework, students may make their own decisions about whether or not to report an assault to the school and/or police. The Department of Education, in its 2018 Notice of Proposed Rulemaking, reported hearing "from a wide range of stakeholders about the importance of a school taking into account the wishes of the complainant in deciding whether or not a formal investigation and adjudication is warranted."[2] Students' right to decide whether or not to go to the police should also be respected.

Second, while the goal of ensuring that any student who is sexually harassed or assaulted feels comfortable in reporting the offense is a commendable one, the central purpose of a grievance procedure should be to ensure reliable results ***in particular cases***. The overall goal must be to ensure that campus disciplinary proceedings are fundamentally fair to both parties; that each individual case is decided based on the facts of that case, objectively and fairly assessed; and that ***no*** student (whether complainant or respondent, and regardless of gender) is unjustifiably deprived of access to an education.[3]

To that end, schools should: a) resolve, and publicize their resolve, to take every complaint of sexual harassment or assault seriously; b) resolve, and publicize their resolve, to ensure complaints are handled through a process that is prompt and fundamentally fair to both parties; c) make sure all members of the school community know the school's policies and the protections available to all parties; d) offer appropriate, non-punitive support services to both parties, to increase the likelihood that they can continue their education, whether or not conduct

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[2] *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

[3] I emphasize that Title IX's 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 are routinely excluded from and denied the benefits of their school's educational programs and activities, whether or not they are found responsible. I explained this at length in response to Questions for the Record from Senator Alexander, which I understand will be included in the record for consideration by all Committee members.

of concern rises to the level of a particular definition of harassment and whether or not a formal complaint is filed; e) offer the parties the option of addressing a complaint through informal resolution processes; f) if a formal proceeding does occur, provide a fundamentally fair process and impartial decisionmakers; and g) educate the school community about the importance of fair procedures in a nation committed to the rule of law and the fact that both parties (as well as the schools themselves) benefit from disciplinary procedures that are fair, prompt, and reliable. Clear options for supportive measures and informal resolutions, with steps to ensure fair procedures and reliable outcomes if a formal grievance procedure takes place and with appropriate education, should encourage students who encounter sexual harassment or assault to report to and seek support from their schools.

2. **From your perspective, how would each of the following aspects of the Department of Education's proposed rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," affect a complainant's likelihood of reporting harassment or assault?**
    a. **The live cross examination requirement;**
    b. **The proposed definition of harassment, which would narrow the scope of what incidences of sexual misconduct schools are required to respond to;**
    c. **The geographic location limitations, which would limit instances where schools may respond to sexual harassment and assault to school grounds, activities, and programs;**
    d. **The clear and convincing standard requirement; and**
    e. **The actual knowledge standard and requirements for filing formal complaints.**

I am not aware of empirical data connecting the specifics of campus procedures to reporting patterns, and do not have a basis to answer the question specifically.

That said, I will share my thoughts, based on my experience and observations, on points a and d first, and then points b, c and e.

First, regarding points a and d, as discussed above and in my oral and written testimony, measures to ensure fair procedures and reliable outcomes in Title IX grievance procedures benefit both complainants and respondents, and are increasingly being required by the courts. In my written and oral testimony, I explained why live cross-examination is essential to a fair proceeding, and cited cases allowing accused students to sue their schools when they were not given the opportunity to cross-examine their accusers. In my responses to questions for the record from Senator Alexander, I cited additional cases reaching that result, including at least a dozen since early 2018 alone. In my written testimony, I also addressed the importance of the clear and convincing standard, given the severe and life-long consequences of sexual harassment

or assault charges, the anti-respondent, anti-male bias that pervades Title IX disciplinary proceedings now, and the need to ensure schools reach just results, not simply adopt fairer procedures on paper.

The Department of Education's proposed requirements regarding live hearings and cross-examination and provisions regarding the standard of evidence should also be considered in the context of the regulations as a whole. As set forth in my written testimony, the Department proposes to give schools and parties more flexibility to pursue informal, non-punitive resolutions. Only if a case advances to the formal grievance procedure will a live hearing and cross-examination be required, and the standard of evidence applied. And those cases are particularly likely to involve credibility issues and competing narratives, where cross-examination is essential for determining the truth. When live hearings and cross-examination do take place, the impact on students can be mitigated with measures to ensure respectful treatment of parties and witnesses; prevent irrelevant, unfair, or badgering questions; and keep the parties separated by use of screens or technology.

As California's Second Appellate District Court of Appeal held last year, ***both*** parties suffer from unfair procedures that deny a full testing of the allegations:

> Due process - two preeminent words that are the lifeblood of our Constitution. Not a precise term, but most everyone knows when it is present and when it is not. It is often most conspicuous by its absence. Its primary characteristic is fairness. It is self-evident that a trial, an adjudication, or a hearing that may adversely affect a person's life must be conducted with fairness to all parties. Here, a university held a hearing to determine whether a student violated its student code of conduct. Noticeably absent was even a semblance of due process. ***When the accused does not receive a fair hearing, neither does the accuser.***
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> It is ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy. This case turned on the Committee's determination of the credibility of the witnesses. Credibility cannot be properly decided until the accused is given the opportunity to adequately respond to the accusation. The lack of due process in the hearing here precluded a fair evaluation of the witnesses' credibility. ***In this respect, neither Jane nor John received a fair hearing.***

Doe v. Regents of Univ. of California, 28 Cal. App. 5th 44, 46, 61 (Cal. Ct. App. 2018) (emphasis added).

If institutions of higher education properly educate their communities about the importance of fundamentally fair proceedings to ensure fair and reliable outcomes, the options for supportive measures and informal resolutions, and the protections available if live hearings do occur, students who experience sexual harassment or assault should be more rather than less willing to report to and seek support from their schools. And if schools' procedures are fairer and more reliable, they will also be less vulnerable to lawsuits. Litigation can extend the life of an allegation for years, and will often require complainants to sit for a deposition and/or provide documents, whether or not they are parties.

Second, regarding points b, c, and e, I have no data that would allow me to express an opinion on how these provisions could impact reporting. As I stated in my written testimony, I believe commenters have raised legitimate concerns about the proposed definitions and conditions that give rise to schools' duty to respond, and there is room for discussion and compromise. Counterproposals include, on the one hand, expanded definitions of sexual harassment and the conditions that give rise to a duty to respond, and, on the other, measures to ensure schools do not circumvent key procedural protections by handling cases of serious alleged misconduct outside of the Title IX process. While this is beyond the scope of the issues I was asked to address at the hearing, I encourage lawmakers and the Department to consider the comments and requests for clarification regarding the Department's proposed definitions of sexual harassment and sexual assault (Section 106.30 of the proposed regulations), the "deliberate indifference" standard (Section 106.44(a)); and the standards for what constitutes conduct within a school's "education program or activity" (Section 106.44(a)).

Questions from Senator Rosen

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 note at the outset that I was asked to testify based on my experience as an attorney representing students in Title IX disciplinary proceedings and related litigation. I have limited my comments to issues that are within the scope of my experience.

I would also like to emphasize, as I said in my oral and written testimony, that I am strongly committed to the protection of the legitimate interests of both complainants and respondents in Title IX proceedings. Schools should take all complaints seriously, provide supportive measures for and guidance to both parties, give the parties opportunities to resolve complaints informally, assign trained and impartial officials to conduct full and fair investigations and adjudications where a formal proceeding is necessary, and follow their own procedures and contractual obligations. Though I was heartened by the expressed commitment of Senators and witnesses to fair and transparent proceedings, I remain concerned by the national polarization on these topics, and by the apparent assumption of many that measures to give accused people – usually men – a fair hearing are a strike against justice for women. Title IX prohibits gender discrimination, and the effort to correct discrimination against one gender does not justify discrimination against another. What is often missing from the public discourse is an understanding that misconduct occurs on a spectrum, and often there are plausible competing narratives and no independent witnesses or corroborating evidence, particularly when alcohol or drugs are involved. A person accused of sexual harassment or assault, as with any other serious wrongdoing, should receive notice, a thorough and fair investigation, and a meaningful opportunity to be heard before being subjected to serious, life-altering sanctions. As we consider and debate these matters, we should model and reinforce a commitment to our nation's foundational principles of justice, to the benefit of all students, schools, and the nation as a whole. And while the focus of the Committee's hearing was on efforts to address conduct after the fact, it is important for us as a nation to consider other steps to address the conditions and attitudes that lead to contested sexual assault complaints, including excessive use of alcohol and drugs, and to provide more effective education on consensual sexual conduct.

1. **As others have expressed today, I am incredibly concerned with the proposed rollbacks of Title IX protections for sexual assault survivors and how they would jeopardize student safety, particularly students in my home state of Nevada. Among other harmful provisions, the Department of Education's proposed rule only allows schools to investigate a report of sexual harassment if it occurred "*within* a school's own program or activity." At University of Nevada Las Vegas (UNLV) – a public university with the highest student enrollment rate in my state – only 6 percent of**

full-time students reside on campus. UNLV is a commuter campus, so the majority of students experience sexual violence, harassment, or misconduct involving fellow students *outside* the campus or university-sponsored program or activity. Likewise, in a 2016 survey of sexual conduct and campus safety, 79 percent of University of Nevada Reno students reported that "unwanted sexual conduct affecting students occurs *off campus*". And this doesn't even account for the many Nevadans who attend other commuter campuses like Truckee Meadows Community College, Nevada State College, and College of Southern Nevada. Changing the rules so schools only have to respond if the incident occurred *on* campus would have a direct negative impact on survivors of sexual assault and harassment in Nevada. Just because assault or harassment took place off campus, students may be forced to see their harasser on campus every day, and their education can be impacted – potentially resulting in them dropping out of school altogether.

a. Given that Title IX itself does not state that discriminatory conduct must occur during a school activity for there to be a discriminatory environment, how is this proposed change appropriate?

b. Nevada institutions like UNLV have pledged to continue to offer support and resources to survivors of off-campus assaults, even if this rule goes into effect. Unfortunately, not all schools will do the same. How will these changes affect the rate of student reporting of sexual misconduct?

As background for my response, I note that Senator Alexander, in his opening statement at the April 2 hearing, outlined the statutes and binding regulations that govern campus Title IX proceedings. As Senator Alexander also stated, the guidance documents issued during the previous administration, including OCR's 2011 Dear Colleague Letter and the 2014 Questions and Answers on Title IX Sexual Violence, did not undergo formal rulemaking procedures and were not legally binding, though OCR behaved as if they were – and schools responded accordingly. In my written testimony, I described those guidance documents and related actions by the federal government between 2011 and 2016. Doubtless the government's actions were motivated by the legitimate and necessary goal of making sure schools take sexual harassment and assault seriously. However, as set forth in my written testimony, the end result has been that schools have essentially eliminated fundamental fairness and due process protections for respondents – the great majority of whom are male – and have undermined the legitimacy of campus disciplinary proceedings and outcomes. Concerns about these developments have been voiced in public and scholarly commentary, by universities and colleges, in several state legislatures, and in an increasing number of opinions from federal and state courts

In this context – including developing case law and escalating concerns that individual Title IX complaints are not being justly resolved – the Department of Education has modified its position on Title IX enforcement. In September 2017, it withdrew the 2011 Dear Colleague Letter and the 2014 Questions and Answers on Title IX Sexual Violence, and released a new interim Q&A to guide schools on how to investigate and adjudicate sexual misconduct allegations under federal law. In November 2018, it issued a Notice of Proposed Rulemaking including proposed amended Title IX regulations. The basic statutory and regulatory framework that Senator Alexander summarized is still in place, and still requires schools to provide a prompt, fair, and impartial investigation and resolution. Court opinions also provide roadmaps for what that entails.

In response to Senator Rosen's question a, as I stated in my written testimony, I believe commenters have raised legitimate concerns about the proposed definitions and conditions that give rise to schools' duty to respond, including the standards for what constitutes conduct within a school's "education program or activity" (Section 106.44(a) of the proposed regulations). Counterproposals include, on the one hand, expansion of the conditions that give rise to a duty to respond, and, on the other, measures to ensure schools do not circumvent key procedural protections by handling cases of serious alleged misconduct outside of the Title IX process. While this is beyond the scope of the issues I was asked to address at the hearing, I encourage lawmakers and the Department to consider the comments and requests for clarification on that subject. I do note that the Department stated in its Notice of Proposed Rulemaking that "[w]hether conduct occurs within a recipient's education program or activity does not necessarily depend on the geographic location of an incident (e.g., on a recipient's campus versus off of a recipient's campus)," and cited case law developing standards for making this determination.[4]

With respect to question b, I am not aware of empirical data connecting the specifics of campus procedures to reporting patterns, and do not have a basis to answer the question specifically. In general, however, in my experience, the support services and resources schools offer for students who believe they have experienced sexual harassment or assault are available whether or not a student wishes to file a complaint with the school's Title IX office. I am not aware of any school that has announced it would cease offering support and resources to students who report off-campus assault if the proposed regulations go into effect. Any college or university president who did so would likely face substantial, and deserved, campus criticism. Moreover, while the goal of ensuring that any student who is sexually harassed or assaulted feels comfortable in reporting the offense is a commendable one, the central purpose of a grievance procedure should be to ensure reliable results ***in particular cases***. The overall goal for Title IX

[4] *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 FR at 61468, https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

grievance procedures must be to ensure that campus disciplinary proceedings are fundamentally fair to both parties; that each individual case is decided based on the facts of that case, objectively and fairly assessed; and that ***no*** student – whether complainant or respondent, and regardless of gender – is unjustifiably deprived of access to an education.[5]

[5] I emphasize that Title IX's 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 are routinely excluded from and denied the benefits of their school's educational programs and activities, whether or not they are found responsible. I explained this at length in response to Questions for the Record from Senator Alexander, which I understand will be included in the record for consideration by all Committee members.

Questions from Senator Sanders

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 note at the outset that I was asked to testify based on my experience as an attorney representing students in Title IX disciplinary proceedings and related litigation. I have limited my comments to issues that are within the scope of my experience.

I would also like to emphasize, as I said in my oral and written testimony, that I am strongly committed to the protection of the legitimate interests of both complainants and respondents in Title IX proceedings. Schools should take all complaints seriously, provide supportive measures for and guidance to both parties, give the parties opportunities to resolve complaints informally, assign trained and impartial officials to conduct full and fair investigations and adjudications where a formal proceeding is necessary, and follow their own procedures and contractual obligations. Though I was heartened by the expressed commitment of Senators and witnesses to fair and transparent proceedings, I remain concerned by the national polarization on these topics, and by the apparent assumption of many that measures to give accused people – usually men – a fair hearing are a strike against justice for women. Title IX prohibits gender discrimination, and the effort to correct discrimination against one gender does not justify discrimination against another. What is often missing from the public discourse is an understanding that misconduct occurs on a spectrum, and often there are plausible competing narratives and no independent witnesses or corroborating evidence, particularly when alcohol or drugs are involved. A person accused of sexual harassment or assault, as with any other serious wrongdoing, should receive notice, a thorough and fair investigation, and a meaningful opportunity to be heard before being subjected to serious, life-altering sanctions. As we consider and debate these matters, we should model and reinforce a commitment to our nation's foundational principles of justice, to the benefit of all students, schools, and the nation as a whole. And while the focus of the Committee's hearing was on efforts to address conduct after the fact, it is important for us as a nation to consider other steps to address the conditions and attitudes that lead to contested sexual assault complaints, including excessive use of alcohol and drugs, and to provide more effective education on consensual sexual conduct.

1. **As you know, Secretary DeVos rescinded guidance issued by the Obama Administration that helped schools understand their responsibility to address campus sexual assault and ensure student safety and rights. Colleges and universities are focused on policies and procedures, the Department of Education ensures schools comply with federal law and it seems students, faculty and visitors to campus are an afterthought. Based on your experience working in the field of criminal law, how should the views, perspectives and experiences of students and**

various stakeholders taken into account to ensure that everyone feels safer on campus?

I would like to open with some background regarding the previous administration's guidance and where it fit within the statutory and regulatory framework governing campus Title IX proceedings.

As Senator Alexander outlined in his opening statement at the April 2 hearing, federal statutes and legally binding regulations forbid gender discrimination and retaliation at federally funded educational institutions (i.e., most colleges and universities in the United States) and require prompt and equitable disciplinary proceedings. These include Title IX itself, which 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); the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, as amended in 2013, which states that school disciplinary procedures for alleged sexual misconduct must "provide a prompt, fair, and impartial investigation and resolution," 20 U.S.C. § 1092(f)(8)(B)(iv)(I)(aa); binding regulations implementing Title IX, issued by the Department of Education and Department of Justice, which require schools to "adopt and publish grievance procedures providing for prompt and equitable resolution of student . . . complaints alleging any action which would be prohibited" by Title IX and implementing regulations, 34 C.F.R. 106.8(b) and 45 C.F.R. § 86.8(b); and binding regulations implementing the Clery Act, which specify the requirements for "prompt, fair, and impartial" proceedings, including notice, fair investigations, compliance with schools' policies, transparency to both accuser and accused, equal access to evidence, impartial officials, and explanations of "the rationale for the result and the sanctions," 34 C.F.R. § 668.46(k). A guidance document issued by the Office for Civil Rights (OCR) in 2001, after public notice and comment, also outlined the elements of a fair and equitable process; stated that "[a]ccording due process to both parties involved, will lead to sound and supportable decisions"; and made clear that Title IX's "due process" requirement applies to both public and private colleges and universities. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at 2, 20, 22, https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf).

As Senator Alexander also stated in his opening, the guidance documents issued during the previous administration, including OCR's 2011 Dear Colleague Letter and the 2014 Questions and Answers on Title IX Sexual Violence, did not undergo formal rulemaking procedures and were not legally binding, though OCR behaved as if they were – and schools responded accordingly. In my written testimony, I described those guidance documents and related actions by the federal government between 2011 and 2016. Doubtless the government's actions were motivated by the legitimate and necessary goal of making sure schools take sexual harassment

and assault seriously. However, as set forth in my written testimony, the end result has been that schools have essentially eliminated fundamental fairness and due process protections for respondents – the great majority of whom are male – and have undermined the legitimacy of campus disciplinary proceedings and outcomes. Concerns about these developments have been voiced in public and scholarly commentary, by universities and colleges, in several state legislatures, and in an increasing number of opinions from federal and state courts.

In this context – including developing case law and escalating concerns that individual Title IX complaints are not being justly resolved – the Department of Education has modified its position on Title IX enforcement. In September 2017, it withdrew the 2011 Dear Colleague Letter and the 2014 Questions and Answers on Title IX Sexual Violence, and released a new interim Q&A to guide schools on how to investigate and adjudicate sexual misconduct allegations under federal law. In November 2018, it issued a Notice of Proposed Rulemaking including proposed amended Title IX regulations. The basic statutory and regulatory framework, summarized above, is still in place, and still requires schools to provide a prompt, fair, and impartial investigation and resolution. Court opinions also provide roadmaps for what that entails.

While the goal of ensuring that everyone feels safer on campus is a commendable one, the central purpose of a grievance procedure should be to ensure reliable results ***in particular cases***. The overall goal must be to ensure that campus disciplinary proceedings are fundamentally fair to both parties; that each individual case is decided based on the facts of that case, objectively and fairly assessed; and that ***no*** student – whether complainant or respondent, and regardless of gender – is unjustifiably deprived of access to an education.[6] The stakeholders here are not just students and schools, but everyone concerned with the long-term negative effects of government deprivation of civil liberties.

2. **The Clery Act, amended by the Violence Against Women Act (VAWA), requires colleges and universities across the United States to disclose information about crime on and around their campuses. The law applies to most institutions of higher education because it compels compliance in order to participate in federal student financial aid programs. Again, based on your experience working in the field of criminal law, are schools fully complying with the Clery Act? Is the Department of Education properly enforcing the Clery Act and VAWA?**

[6] I emphasize that Title IX's 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 are routinely excluded from and denied the benefits of their school's educational programs and activities, whether or not they are found responsible. I explained this at length in response to Questions for the Record from Senator Alexander, which I understand will be included in the record for consideration by all Committee members.

Respectfully, this question is not within the scope of my experience in representing individual students.

3. **Colleges and universities seem to be struggling with the repeal of the Obama Title IX rules since they provided much needed guidance for institutions experiencing rising cases of sexual assault and harassment. While Secretary DeVos has proposed new guidelines, they are not in effect and have drawn criticism for favoring the rights of the accused over those of the survivor and for not actually preventing or addressing campus sexual assault. In the meantime, how can colleges and universities strengthen their campus disciplinary process to ensure that all students are safer on and near campus, especially if students feel discouraged from coming forward about sexual assaults and other acts of violence?**

For background relevant to this question, please see my response to Question 1 and my written testimony. As I have noted, the basic statutory and regulatory framework governing Title IX proceedings is still in place, and the courts have provided roadmaps for what is required. While the Department has opened a notice and comment proceeding for its proposed regulations, to ensure all stakeholders are heard before legally binding regulations are issued, it has issued interim guidance for schools on how to investigate and adjudicate allegations under federal law.

Regarding the concern that students "feel discouraged from coming forward," I note that, in my experience, schools are already doing a great deal to encourage students to come forward if they encounter or witness sexual harassment or assault. Based on long-standing federal law, all colleges and universities have a dedicated Title IX office, at least one and often a number of Title IX coordinators, and specific Title IX policies and procedures. These policies and procedures, published to students and employees and generally available on line, explain the options for reporting sexual harassment to the school or to law enforcement and the procedures for making and resolving complaints. Schools offer continual training. They support advocacy groups. They host sexual awareness campaigns such as "Take Back the Night" and "It's On Us." They provide extensive health and support services for students who believe they have experienced sexual harassment or assault, including services students can obtain without reporting to their Title IX offices. In my experience, students in 2019 know that they have recourse at their schools, as well as through the criminal (and civil) justice system. Under the current legal framework, students may make their own decisions about whether or not to report an assault to the school and/or police.

In addition, as I said with respect to the goal of ensuring people feel safe, the goal of encouraging students to come forward about sexual assault is a commendable one, but the central purpose of a grievance procedure should be to ensure reliable results in particular cases. To that end, schools should: a) resolve, and publicize their resolve, to take every complaint of sexual harassment or

assault seriously; b) resolve, and publicize their resolve, to ensure complaints are handled through a process that is prompt and fundamentally fair to both parties; c) make sure all members of the school community know the school's policies and the protections available to all parties; d) offer appropriate, non-punitive support services to both parties, to increase the likelihood that they can continue their education, whether or not conduct of concern rises to the level of a particular definition of harassment and whether or not a formal complaint is filed; e) offer the parties the option of addressing a complaint through informal resolution processes; f) if a formal proceeding does occur, provide a fundamentally fair process and impartial decisionmakers; and g) educate the school community about the importance of fair procedures in a nation committed to the rule of law and the fact that both parties (as well as the schools themselves) benefit from disciplinary procedures that are fair, prompt, and reliable. Clear options for supportive measures and informal resolutions, with steps to ensure fair procedures and reliable outcomes if a formal grievance procedure takes place and with appropriate education, should encourage students who encounter sexual harassment or assault to report to and seek support from their schools.

Measures to ensure fair procedures and reliable outcomes in Title IX grievance procedures benefit both complainants and respondents, as well as the schools themselves, and are increasingly being required by the courts. In my written and oral testimony, I explained why live hearings and cross-examination in particular are essential to a fair proceeding, and cited cases allowing accused students to sue their schools when they were not given the opportunity to cross-examine their accusers. In my responses to questions for the record from Senator Alexander, I cited additional cases reaching that result, including at least a dozen since early 2018 alone. In my written testimony, I also addressed the importance of the clear and convincing standard, given the severe and life-long consequences of sexual harassment or assault charges, the anti-respondent, anti-male bias that pervades Title IX disciplinary proceedings now, and the need to ensure schools reach just results, not simply adopt fairer procedures on paper.

The Department of Education's proposed requirements regarding live hearings and cross-examination and provisions regarding the standard of evidence should also be considered in the context of the regulations as a whole. As set forth in my written testimony, the Department proposes to give schools and parties more flexibility to pursue informal, non-punitive resolutions. Only if a case advances to the formal grievance procedure will a live hearing and cross-examination be required, and the standard of evidence applied. And those cases are particularly likely to involve credibility issues and competing narratives, where cross-examination is essential for determining the truth. When live hearings and cross-examination do take place, the impact on students can be mitigated with measures to ensure respectful treatment of parties and witnesses; prevent irrelevant, unfair, or badgering questions; and keep the parties separated by use of screens or technology.

As California's Second Appellate District Court of Appeal held last year, ***both*** parties suffer from unfair procedures that deny a full testing of the allegations:

> Due process - two preeminent words that are the lifeblood of our Constitution. Not a precise term, but most everyone knows when it is present and when it is not. It is often most conspicuous by its absence. Its primary characteristic is fairness. It is self-evident that a trial, an adjudication, or a hearing that may adversely affect a person's life must be conducted with fairness to all parties. Here, a university held a hearing to determine whether a student violated its student code of conduct. Noticeably absent was even a semblance of due process. ***When the accused does not receive a fair hearing, neither does the accuser.***
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> It is ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy. This case turned on the Committee's determination of the credibility of the witnesses. Credibility cannot be properly decided until the accused is given the opportunity to adequately respond to the accusation. The lack of due process in the hearing here precluded a fair evaluation of the witnesses' credibility. ***In this respect, neither Jane nor John received a fair hearing.***

Doe v. Regents of Univ. of California, 28 Cal. App. 5th 44, 46, 61 (Cal. Ct. App. 2018) (emphasis added).

If institutions of higher education properly educate their communities about the importance of fundamentally fair proceedings to ensure fair and reliable outcomes, the options for supportive measures and informal resolutions, and the protections available if live hearings do occur, students who experience sexual harassment or assault should be more rather than less willing to report to and seek support from their schools. And if schools' procedures are fairer and more reliable, they will also be less vulnerable to lawsuits. Litigation can extend the life of an allegation for years, and will often require complainants to sit for a deposition and/or provide documents, whether or not they are parties.

Finally, I would like to express my concern about the use of the term "survivor" in this context. A campus Title IX disciplinary tribunal hears allegations between a complainant and a respondent, or between an accuser and an accused—*not* between "the accused [and] the survivor." Deeming the complainant a survivor prejudges the outcome of the case. As the U.S. District Court of Massachusetts held in *Doe v. Brandeis University*, "Whether someone is a 'victim' is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. Each case must be decided on its own merits, according to its own facts."[7] A

[7] *Doe v. Brandeis Univ*., 177 F. Supp. 3d 561, 573 (D. Mass. 2016).

fair system – designed not to prejudge the case but to treat both parties with respect and to ensure that the school's goal is to determine the truth of the allegations – remains the best way to ensure safety for all students without denigrating the rights of any.

4. **What changes to Secretary DeVos' proposed Title IX guidance would you recommend to ensure that the administration does not create a campus sexual assault disciplinary process that favors wealthier students and their families who can afford attorneys and consultants to guide them through the labyrinth of filing a formal complaint with the "appropriate person," notification requirements, live cross examinations, and extensive knowledge of criminal procedure?**

As I have stated, fundamentally fair campus proceedings are essential and required by law.[8] In my experience, under the system as it exists now, schools generally make very substantial efforts to ensure that reporting is easy and provide complainants ample support and resources throughout the process, including access to advisors trained in advocating for reported victims of sexual assault. Respondents have commonly not received the same support or resources, and they have been the ones who need money and connections to protect themselves. I have frequently seen cases in which school policies are unclear and internally inconsistent. Sometimes school officials themselves do not understand their own policies and have not given accused students even the most basic protections, such as notice, access to evidence, and impartial decisionmakers. The existing system has been particularly detrimental to poor students, and disproportionately students of color.[9]

Procedures that are fundamentally fair and transparent will make it more rather than less likely that students without economic means will be treated fairly. And the Department's proposals encourage schools to provide support and resources for both parties, regardless of whether a formal complaint is filed and regardless of whether the alleged conduct fits certain regulatory

[8] It is important to note that Title IX proceedings are not criminal proceedings, though the consequences for respondents can be severe and permanent.

[9] *See* Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases; Is the system biased against men of color?*, The Atlantic (Sept. 11, 2017), https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/; Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*,18 Nevada Law Journal 107 (Fall 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035999 ("increasingly muscular Title IX enforcement—launched with the best of intentions in response to real problems— almost certainly exacerbates yet another systemic barrier to racial justice and equal access to educational opportunities"). Please also see my answers to Senator Alexander's QFRs, where I cite comments filed by students and their families who have suffered harm from unfair campus procedures, including through substantial legal bills.

definitions, and give schools and parties more flexibility to pursue informal resolution. These provisions offer a path to resolve matters at lower economic and emotional cost to both parties. I do believe policymakers and schools should give more consideration to how to ensure that both parties have suitable, trained advisors if a formal grievance proceeding takes place and a live hearing with cross-examination is necessary.