UNITED STATES COMMISSION ON CIVIL RIGHTS

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Kenneth L. Marcus
Assistant Secretary
Office for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

January 30, 2019

Re: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Secretary Marcus:

Thank you for publishing the proposed revisions to Title IX regulations. In this comment, I explain the reasons for my support of these proposed revisions.

§ 106.12 Educational institutions controlled by religious organizations

I support the proposed revisions to 34 C.F.R. § 106.12(b). Subsection (a) provides that "This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such an organization." Current subsection (b) requires any institution that wishes to avail itself of the exemption must ask the Assistant Secretary for the exemption. Revised subsection (b) states that an educational institution which is controlled by a religious organization may seek an assurance of exemption from the Assistant Secretary, but is not required to do so before asserting the exemption.

I support this change for several reasons. First, I am generally in favor of simplifying compliance with federal regulations, no matter who is involved. For example, 34 C.F.R. § 106.34(b) allows recipients to have single-sex class and extracurricular activities if certain requirements are met. 34 C.F.R. § 106.34(b)(4) requires recipients to conduct evaluations every two years to ensure that the reasons for the single-sex class or extracurricular activities are not based upon "overly broad generalizations" and further the goals of the classes or activities. It would not be unusual for a religious university to hold single-sex religious retreats because they believe this can help the spiritual growth of students. This would seem to fall within the requirements of 34 C.F.R. § 106.34, but a university might be leery of going forward with the retreat unless it received permission from the Assistant Secretary under current 34 C.F.R. § 106.12(b). The ability to rely on the religious exemption without seeking one in advance better respects religious liberty and simplifies matters for institutions.

In my capacity as a member of the U.S. Commission on Civil Rights, I have been concerned about increasing incursions upon religious liberty, which led to the Commission's 2013 briefing on the topic.[1] In the five years since that briefing was held, I have witnessed a marked increase in hostility toward religious liberty among witnesses who appear at the Commission, some of whom will likely serve in future administrations. I suspect that if and when they return to government, they will use current subsection (b) to burden religious institutions.

§ 106.45 Grievance Procedures for Formal Complaints of Sexual Harassment

The proposed revisions to § 106.45 are also an improvement over the current regulations governing how educational institutions must respond to complaints of sexual harassment. The current regulation is too vague to provide useful guidance on how to respond to these complaints.[2] I understand this is why the previous administration issued Dear Colleague letters regarding responses to complaints of sexual harassment, but this issue should be addressed through the rulemaking process, as is being done here.

Both alleged perpetrators and alleged victims of sexual misconduct are entitled to "basic fairness" and due process in the adjudication of the events.[3] Too often in recent years, educational institutions have not treated alleged perpetrators with basic fairness and due process. Many of these cases have wound up in federal court, which is expensive and time-consuming for all involved, particularly the students who seek to clear their names and academic records. In fairness to educational institutions, "'Basic fairness' is an uncertain and elastic concept".[4] The proposed regulations, if implemented, would bring some certainty to these proceedings for students, administrators, and faculty.

The proposed grievance procedures include several requirements that are particularly important: 1) Providing both parties with adequate notice of the sexual harassment complaint and the details thereof[5]; 2) Requiring institutions to allow complainants and respondents to be accompanied by an advisor of their choice[6]; 3) Requiring institutions of higher education to permit cross-examination of complainants and respondents[7]; 4) Providing both parties with an opportunity to view the evidence[8]; 5) Requiring that the decision-maker(s) is someone other than the Title IX

[1] U.S. Commission on Civil Rights, Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Rights Laws, 2016, https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF.
[2] 34 C.F.R. 106.8(b).
A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.
[3] Doe v. Brandeis Univ., 177 F.Supp.3d 561, 601 (D.Mass. 2016).
[4] Id.
[5] 34 C.F.R. § 106.45(b)(2).
[6] 34 C.F.R. § 106.45(b)(3)(iv).
[7] 34 C.F.R. § 106.45(b)(3)(vii).
[8] 34 C.F.R. § 106.45(b)(3)(viii).

coordinator[9]; and 6) Requiring that the recipient apply the same standard (preponderance of the evidence or clear and convincing) that it uses when disciplining faculty.[10]

The grievance procedures required by the proposed regulations are similar to *Loudermill's* due process requirements for public sector employees.[11] When public universities are involved, there are constitutional due process requirements similar to those at issue in the public employment context.[12] "Suspensions or expulsions from school implicate protected property interests, and allegations of sexual assault can impugn a student's reputation and integrity triggering their liberty interests."[13] This is particularly true in the higher education context. Expulsion for sexual harassment is part of an individual's permanent disciplinary record, and may make it impossible for him or her to enroll at another institution, to be accepted into graduate school, to be accepted as a member of the bar, or generally to be hired in any but the most menial jobs – and in some cases, perhaps not even those. Therefore, it is vital that due process be observed in order to get to the truth of what happened. As the Court wrote in *Loudermill*:

> First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.
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> Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect. [citations omitted][14]

Allowing a student to present his version of events and engage in cross-examination is likewise of obvious value in the disciplinary context.[15] As the Sixth Circuit has stated, "[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."[16]

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[9] 34 C.F.R. § 106.45(b)(4)(i).
[10] 34 C.F.R. § 106.45(b)(4)(i).
[11] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).
[12] Doe v. Univ. of Cincinnati, 872 F.3d 393, 399 (6th Cir. 2017)("State universities must afford students minimum due process protections before issuing significant disciplinary decisions.").
[13] Gischel v. Univ. of Cincinnati, 302 F.Supp.3d 961, 976 (S.D. Ohio 2018).
[14] Loudermill at 543.
[15] Doe v. Univ. of Cincinnati, 872 F.3d 393, 399-402 (6th Cir. 2017).
[16] Doe v. Baum, 903 F.3d 575, 587 (6th Cir. 2018).

It is also important that the investigatory and decisionmaking functions be separated in cases of alleged sexual harassment and sexual assault. This protects the complainant, the respondent, and the investigator. Obviously all investigators should strive to be impartial, but it is also likely that in some cases, the investigator will form her own opinion in the course of the investigation. This can, and has, exposed investigators who were also decisionmakers to personal liability.[17]

For all these reasons, I support the proposed revisions to the Title IX regulations discussed in this comment. Thank you for considering my views.

Sincerely,

Peter Kirsanow
Commissioner

[17] Doe v. Miami Univ., 882 F.3d 579, 601 (6th Cir. 2018).
John alleges that Vaughn, one of three members of his Administrative Hearing Panel, was biased against him because: (1) she was his investigator, prosecutor, and judge; and (2) she had pre-determined his guilt. . . .
Here, John argues that Vaughn's dual roles undermined her neutrality enough to overcome the presumption of impartiality afforded school officials. For support, John alleges that Vaughn dominated the hearing and that her remarks were designed to reduce John's credibility while bolstering Jane's credibility. Vaughn's alleged dominance on the three-person panel raises legitimate concerns, as she was the only one of the three with conflicting roles. Furthermore, John alleges that Vaughn announced during the hearing that "I'll bet you do this [i.e., sexually assault women] all the time." This statement implies that Vaughn had determined prior to the hearing that John was responsible for the misconduct alleged in this incident and had a propensity for engaging in sexual misconduct. Thus, although an individual's dual roles do not per se disqualify him or her from being an impartial arbiter, here John has alleged sufficient facts plausibly indicating that Vaughn's ability to be impartial "had been manifestly compromised."[citations omitted]