Comment of Allen Harris PLLC Regarding the Department of Education's Proposed Regulations on Title IX Enforcement

Department of Education Notice of Proposed Rulemaking
ED-2021-OCR-0166, RIN 1870-AA16 (July 12, 2022)

Submitted September 12, 2022

Robert L. Shibley, Of Counsel
Michael Thad Allen, Partner
Samantha K. Harris, Partner
Allen Harris PLLC
PO Box 673
Narberth, Pennsylvania 19072
(860) 288-5481
www.allenharrislaw.com

Introduction

Allen Harris PLLC is a law firm that focuses on representing students and faculty members whose civil liberties, most prominently including their rights to free speech and due process, are under attack. Collectively, we have nearly five decades of combined experience in defending these rights, both in institutional disciplinary hearings and in the courts of law. We are gravely concerned by the threats to due process rights and free speech posed by the proposed changes to the 2020 Title IX regulations currently in force.

Many of the proposed changes in this Notice of Proposed Rulemaking (referred to in this Comment as the "2022 NPRM") are arbitrary and capricious, seemingly designed to restore to campus administrators the unjustified—and often abused—micromanagement of both speech and behavior. No evidence suggests that this social experiment has been working, and the number of lawsuits on behalf of the accused on campus, which is nearing 1,000, indicates that it has failed.

More obviously, the 2022 NPRM invites institutions to establish (or re-establish) discredited and outmoded free speech and due process policies and procedures that violate established legal precedent.

While hardly an exclusive list, this Comment highlights four of the most serious problems with the 2022 NPRM's proposed changes to Title IX regulations in the areas of 1) due process and 2) free speech.

1. Due Process and Fair Procedure Problems Presented by the 2022 NPRM

A. Reintroducing the disastrous inquisitorial model for Title IX investigations and making live hearings optional flies in the face of established appellate court law and unlawfully denies the accused the right to face his or her accuser.

The right to face one's accuser is one of the most cherished and sacred rights in Anglo-American jurisprudence. Until the 2020 Title IX regulations came into effect, however, parties were routinely denied this right in Title IX proceedings.[1] Instead, institutions of higher education frequently relied on investigators who were and are (by professional standards) amateurish, and whose investigations often did not even approach the level of best practices, such as those taught to professional interrogators.[2]

The 2020 regulations, in Section 106.45(b)(6)(i), went a long way towards resolving this problem by including the following provision:

> For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

The 2022 NPRM, on the other hand, reopens the door to inquisition-style processes in which a single investigator, hired or employed by the university, may conduct a great deal of the investigation, prosecution, and judgment functions on his or her own. This concentrates in one person roles that centuries of experience tell us should be separated in disciplinary hearings. The proposed changes mean that institutions may, at their choice, abandon live hearings and render some critical procedural protections optional—including protections that federal courts have increasingly said are *not* optional.

This denies everyone a fair process. Fundamentally, the majority of campus Title IX cases boil down to a credibility assessment—these are cases in which there are typically no witnesses and often no physical evidence. A proceeding in which the parties can confront one another before a decision-maker who can perform a real-time credibility assessment benefits the more credible party. Our firm represents both complainants and respondents in campus Title IX proceedings, and we feel strongly that all parties need these protections.

Our practice also teaches us that universities will exercise any discretion to strip students of procedural protections. In fact, in every case we know of in which schools are (for example) empowered to police off-campus conduct outside the rules imposed by the

---

[1] See https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2019-2020/

[2] See, e.g., Susan Brandon & Simon Wells, *Science-Based Interviewing* (2019).

current Section 106.45, they have chosen to create a parallel policy that limits the right to a live hearing with cross-examination—with predictably arbitrary results.

Foremost among these procedural protections that will be lost is the right of the parties to confront one another through a meaningful form of cross-examination. This requires a live hearing with questions asked and answered, and relevant follow-up questions asked—the very thing that the inquisitorial process eliminates. Yet the 2022 NPRM's proposed language for Section 106.46(f)(1)(i) states that allegations may be evaluated and credibility assessed by:

> Allowing the decisionmaker to ask the parties and witnesses, **during individual meetings with the parties** or at a live hearing, relevant and not otherwise impermissible questions under §§ 106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, before determining whether sex-based harassment occurred and allowing each party to propose to the decisionmaker or investigator relevant and not otherwise impermissible questions under §§ 106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, that the party wants asked of any party or witness and **have those questions asked during individual meetings with the parties** or at a live hearing under paragraph (g) of this section subject to the requirements in paragraph (f)(3) of this section…

[Emphases ours.] This is simply not good enough.

In our own cases, we continually see that cross-examination is essential to a full and fair process. In one instance, a student who was found responsible under a single-investigator process had his case re-heard under the 2020 Title IX regulations, which took effect during the course of his case. When a decision-maker was able to assess the credibility of both parties in the context of a live hearing with cross-examination, that student was found not responsible.

The form of evaluating credibility proposed by the NPRM (that is, leaving it to a single investigator who acts as detective, prosecutor, judge, and jury) has been found flatly insufficient in the college disciplinary context by multiple courts. Most notably, in *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), the Sixth Circuit Court of Appeals, which covers the entirety of the states of Michigan, Ohio, Kentucky, and Tennessee, found that

> 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…. [T]he university must allow for some form of *live* questioning *in front of* the fact-finder."

Baum, at 582-583 [emphases in original; internal citations omitted]. Institutions in those four states eliminate the possibility of live cross-examination only at their peril.

The Sixth Circuit is not the only court to find that cross-examination is in many cases a constitutional requirement for due process in public college disciplinary hearings. In a Title IX case at the University of Massachusetts-Amherst, the First Circuit wrote that it agreed "with a position taken by the Foundation for Individual Rights in Education, as amicus in support of the appellant -- that due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'" *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019). The U.S. Court of Appeals for the Fifth Circuit recently adopted this standard as well in *Walsh v. Hodge*, 975 F.3d 475 (5th Cir. 2020), writing that "we agree with the position taken by the First Circuit 'that due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'" *Walsh*, at 485. State laws may even require this of private universities in various states: in *Doe v. Univ. of the Sciences*, 961 F.3d 203 (3d Cir. 2020), the Third Circuit discussed the meaning of basic fairness as required of Pennsylvania private universities by state law and found that it required cross-examination, writing,

> To be sure, the investigator listened to Doe during her two interviews with him. But USciences did not provide Doe a real, live, and adversarial hearing. Nor did USciences permit Doe to cross-examine witnesses—including his accusers, Roe 1 and Roe 2. As we explained above, basic fairness in the context of sexual-assault investigations requires that students accused of sexual assault receive these procedural protections.

Id., at 216.

Given these precedents, it is bizarre that the Department of Education would seek to tell institutions that they may return to conducting Title IX proceedings without providing for live hearings that would meet these constitutional and state law requirements. It is the very definition of caprice for the Department to make regulatory changes that practically beg colleges to enact policies that will immediately cause them to run afoul of our Constitution and Federal courts.

B. Inviting institutions to provide only a summary of the evidence in Title IX hearings, and not requiring them to inform the parties that they may receive all of the evidence on request, risks abuses by—and lawsuits against—educational institutions.

Shockingly poor investigation, handling, and reporting of evidence has long been an unfortunate hallmark of campus Title IX proceedings. It is therefore highly problematic that the 2022 NPRM's proposed language for Section 106.46 (e)(6)(i) would make it even easier for evidence-related abuses to occur. It reads:

> A postsecondary institution must provide either equitable access to the relevant and not otherwise impermissible evidence, or to the same written investigative report that accurately summarizes this evidence. If the postsecondary institution

> provides an investigative report, it must further provide the parties with equitable access to the relevant and not otherwise impermissible evidence upon the request of any party.

Leaving aside the worthy debates over what "equitable" access (as opposed to the more straightforward "equal" access) to evidence might mean, allowing institutions to present only a summary of the evidence to the parties, without requiring them to inform the parties that they may request access to *all* of the evidence, seems designed to allow institutions to play games with the evidence. Any summary of the evidence as written by the institution will necessarily reflect the biases of the author of the summary. The temptation for the author to characterize the evidence in a way that advances the institution's preferred outcome—in favor of either the accuser or the accused, depending on circumstance—will be hard to resist. And not requiring institutions to let the parties know they can look at the evidence for themselves practically invites obfuscation of that fact.

This can only encourage further bad, or at least slipshod, behavior relating to evidence. In one case at a Connecticut university, a Title IX coordinator actually destroyed his notes in order to prevent the inadequate nature of his investigation from being discovered, leading a federal court to enter a presumption of bias against the university as a matter of law on a spoliation of evidence finding. *Doe v. Quinnipiac Univ.*, 404 F. Supp. 3d 643, 657 (D. Conn. 2019) ("destroyed evidence relates directly to Plaintiff's claims that he was subjected to an unfair investigatory process in both his capacities as a respondent and complainant"). This year, the Second Circuit also had to remind universities, when a professor sued over a miscarriage of justice dating from before the 2020 rules went into effect, that the absence of evidence of "secret" relationships is not, in fact, evidence that a secret relationship exists. *Vengalattore v. Cornell Univ.*, 36 F.4th 87, 108 (2d Cir. 2022).

A Seventh Circuit case also highlights the danger of this proposed language. In *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019), Judge (now Justice) Amy Coney Barrett, writing for the court, detailed a Naval ROTC student's allegations about his Title IX hearing. Purdue's investigators prepared a report before his hearing, but,

> consistent with Purdue's then-applicable procedures, [Purdue's Dean of Students] neither gave him a copy of the report nor shared its contents with him. Moments before his committee appearance, however, a Navy ROTC representative gave John a few minutes to review a redacted version of the report. To John's distress, he learned that it falsely claimed that he had confessed to Jane's allegations. The investigators' summary of John's testimony also failed to include John's description of Jane's suicide attempt.

Id., at 657. Not only did the court find in that case that "withholding the evidence on which [Purdue] relied in adjudicating his guilt was itself sufficient to render the process fundamentally unfair," *id.* at 663, it also indicates the hazards of summarization, noting that the investigators' summary left out an important part of John's testimony.

It is vitally important for the Department to confront the fact that it is responsible for regulating an industry that, time and time again, has not only shown overt contempt for due process, but a contempt for evidence itself in favor of results-driven processes. Thankfully, the damaging effects of this particular suggestion for regulatory change could be mitigated by adding language that would require institutions to inform the parties that they are entitled to all of the evidence upon request.

2. Free Speech Problems Presented by the 2022 NPRM

A. The new definition of student-on-student sexual harassment would punish First Amendment-protected speech, and violates U.S. Supreme Court precedent.

The 2022 NPRM would change the definition of hostile environment harassment in Section 106.2 of the current Title IX regulations to one that conflicts with the definition established by the Supreme Court in the case of *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

In *Davis*, the Supreme Court stated that Title IX required institutions, on pain of legal liability, to police alleged sexual harassment of students by students that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis*, at 651.

Yet thanks in large part to previous guidance from the Department of Education, students were repeatedly subjected to campus investigations and even punished for speech that came nowhere near meeting this threshold. Examples are legion, but just this past spring, the Kansas City Art Institute (KCAI) expelled an art student for retweeting images of *hentai*, a form of Japanese cartoon pornography. KCAI's justification for expelling an art student for publicly retweeting art was that the retweets were "potential sexual harassment" and contributed "to a hostile learning environment."[3]

Although not all schools were compliant or adjudicated it correctly, the 2020 Title IX regulations aimed to remedy this problem by finally writing into regulations the Supreme Court's definition of peer hostile environment harassment, which was precisely crafted to avoid censoring student speech protected by the First Amendment. The 2022 NPRM would unjustifiably abandon the Supreme Court's careful definition and introduce one that would purport to give campus authorities far wider authority to police speech. The proposed definition reads:

> *Hostile environment harassment.* Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity

[3] See https://www.thefire.org/kansas-city-art-institute-expels-student-for-retweeting-sexual-art.

(*i.e.,* creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

(i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
(ii) The type, frequency, and duration of the conduct;
(iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct;
(iv) The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and
(v) Other sex-based harassment in the recipient's education program or activity.

The most obvious problem with this definition is that it replaces the Supreme Court's "severe, pervasive, **and** objectively offensive" language with "severe **or** pervasive." [Emphasis ours.] It should not have to be stated, though apparently it *does* have to be stated, that "and" and "or" do not mean the same thing.

This change would be a disaster for free speech. Many ideas, concepts, and expressions of speech and opinion about sex or gender that are or can be highly offensive to some or even most people are common and pervasive on our nation's campuses. They are nevertheless protected by the First Amendment.

The most obvious current example is discussion about transgender issues. Discussions about the morality of changing one's gender versus discouraging such changes, of the need for students to use another person's preferred pronouns versus the need for people to be free to disregard those preferences, and even discussions about whether it is or is not possible to change one's gender at all are common and pervasive on today's campuses. Even the use (or lack of use) of preferred pronouns themselves is likely to be "pervasive." The opinions expressed on both sides can certainly be subjectively offensive to those who oppose them, and they may even be seen as objectively offensive to various campus communities.

It is nevertheless crucial that students be able to have such discussions without fear of punishment. Such discussions are obviously protected speech under the First Amendment. Yet the 2022 NPRM definition of sexual harassment would provide campuses with significant cover to punish those whose speech proved unpopular on campus. This is insupportable. The Constitution does not change depending on whether a student is at Mississippi State or UC-Davis.[4]

Worse still—at least for colleges who will find themselves forced, on pain of potentially losing all federal funding, to adopt it—the 2022 NPRM definition is practically dead on arrival in at least one federal circuit. In *Speech First, Inc. v. Cartwright*, 32 F.4th 1110

[4] According to a 2022 survey by the Foundation for Individual Rights and Expression, out of all public universities surveyed, Mississippi State students are the least tolerant of liberal speakers, while University of California, Davis are the least tolerant of conservative speakers. *See* https://rankings.thefire.org/rank.

(11th Cir. 2022), the U.S. Court of Appeals for the Eleventh Circuit, which covers the entire states of Alabama, Georgia, and Florida, declared a discriminatory harassment policy that, with regard to sex and gender, is functionally the same as that promulgated by the 2022 NPRM to be "almost certainly unconstitutionally overbroad," saying that "any number of statements—some of which are undoubtedly protected by the First Amendment—could qualify for prohibition under its sweeping standards." *Id*., at 1125. That policy purports to forbid:

> Discriminatory harassment that is so severe or pervasive that it unreasonably interferes with, limits, deprives, or alters the terms or conditions of education (e.g., admission, academic standing, grades, assignment); employment (e.g., hiring, advancement, assignment); or participation in a university program or activity (e.g., campus housing), when viewed from both a subjective and objective perspective.

The policy's further elaboration on the factors to be considered, *id.*, at 1114-1115, only increases its similarity to the definition in the 2022 NPRM.

While the Eleventh Circuit did not have to formally declare the policy to be unconstitutional in order to preliminarily enjoin its use, *it could not have been clearer* that the policy would not survive at the merits stage of a facial challenge. That means that with the 2022 NPRM, the Department of Education has set colleges in at least three states on a direct collision course with lawsuits and liability, despite surely knowing about the *Cartwright* decision as well as about the Administrative Procedure Act's (APA's) prohibitions on regulations that are arbitrary and capricious, or that are contrary to a constitutional right.

B. The regulations' gag order prohibiting students from discussing their cases with others violates their free speech rights.

The 2022 NPRM's proposed language for Section 106.46 (e)(6)(iii) serves as an unjustifiable and unconstitutional gag order on students involved in Title IX disciplinary processes. It reads, in pertinent part:

> A postsecondary institution must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the sex-based harassment grievance procedures…

In the United States, trials and court documents are, with few exceptions, open to the public, because "justice" done in secret is invariably rife with abuse and is rarely justice at all. Indeed, the closed nature of Title IX tribunals is undoubtedly a huge factor in the abuses we have observed for more than a decade. It is common for institutions to tell accused students that sharing information about their cases or the process with anyone is forbidden, sending the (false) message that they must face the full weight of the process alone, without even an attorney, family member, or close friend to help them.

At public universities, this restriction is a prior restraint on speech and is thoroughly unconstitutional. As the Supreme Court wrote in a case about a judge's gag order over reporting on a criminal case, "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights…. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

If everyone involved in the disciplinary process could be trusted to be entirely just and incorruptible, this might be less of a problem. But if someone is being railroaded or treated unfairly by a disciplinary process, going public with his or her concerns may be the only remedy available. Perhaps the best-known examples are those of University of North Carolina student Landen Gambill, who was charged with violating the school's honor code after publicly complaining about how the university treated her when she made sexual assault allegation against a fellow student[5]; and of Northwestern University Professor Laura Kipnis, who was investigated for violating Title IX for publicly critiquing the university's Title IX policies in the Chronicle of Higher Education—an absurd investigation that only terminated after she wrote about it in the same publication.[6]

Students who believe they are being falsely accused must be free to defend themselves to friends or others who might find out about the charges from any number of campus sources. They must also be free to use the details of the accusations and evidence against them to locate their own evidence and witnesses, and perhaps convince them to participate in the process. And most critically, students must be free to share the details of their case with trusted family or advisors, or with people who might be able to locate suitable people who can support them. Unless this provision could somehow be amended to list these and all other conceivable instances of protected speech as forms of "authorized" disclosures—an impossible task—this provision is unconstitutional and therefore violates the APA.

Conclusion

In this Comment, Allen Harris has touched on only four of the most obvious and severe problems in the 2022 NPRM. We also recommend that the Department of Education and other interested parties examine the comments of the Foundation for Individual Rights and Expression (FIRE) and of Speech First, Inc., as they consider the proposed regulations.

[5] See https://www.thefire.org/scandal-over-handling-of-rape-charge-prompts-unc-to-suspend-speech-code-fire-had-warned-unc-that-rule-was-unconstitutional/

[6] See Robert L. Shibley, *Twisting Title IX* 12-16 (2016).