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Before the

**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR,
CIVIL RIGHTS AND HUMAN SERVICES SUBCOMMITTEE**

September 10, 2020 hearing

On the Basis of Sex: Examining the Administration's Attacks on Gender-Based Protections

Chairwoman Bonamici, Ranking Member Cline, and honorable members of the Subcommittee:

The Foundation for Individual Rights in Education (FIRE; thefire.org) is a nonpartisan, nonprofit organization dedicated to defending student and faculty rights on America's college and university campuses. These rights include freedom of speech, freedom of assembly, legal equality, due process, religious liberty, and sanctity of conscience – the essential qualities of individual liberty and dignity.

FIRE thanks you for inviting us to offer our perspective on the Trump Administration's efforts to reform the federal government's enforcement of Title IX, the critically important federal law that holds educational institutions accountable when they turn a blind eye toward discrimination on the basis of sex.

Access to higher education is critical for Americans. Indeed, the importance of postsecondary education is one of the few things upon which President Trump and former Vice President Joe Biden agree.¹

The stakes are extremely high for both the student complainant and the accused student in campus disciplinary proceedings, and it is essential that neither student's ability to receive an education is curtailed unjustly. When a university dismisses an accusation of a sexual assault without adequate investigation, it has both broken the law and failed to fulfill its moral duty. Far too many schools have taken this path. Similarly, when a college expels an accused student after a process that includes few, if any, meaningful procedural safeguards, it too has failed to fulfill its legal and moral obligations. Far too many schools have taken this path as well. The Department of Education crafted the new Title IX regulations based on the understanding that Title IX must be enforced by protecting the rights of complainants and accused students alike.

INTRODUCTION AND BACKGROUND

The new Title IX regulations are not an attack on gender-based protections. Rather, they are a return to alignment with decades of regulatory and judicial decisionmaking from which the Department of Education departed dramatically with its Title IX guidance and enforcement between 2011 – when the Office for Civil Rights issued a “Dear Colleague” letter that radically transformed the way sexual misconduct cases were handled on campus – and 2017, when the Dear Colleague letter was repealed.

¹ See *Proposals to Reform the Higher Education Act*, THE WHITE HOUSE (Mar. 18, 2019) <https://www.whitehouse.gov/wp-content/uploads/2019/03/HEA-Principles.pdf> (“The last century has produced an American economy where more jobs than ever before require at least some postsecondary education or skill development.”); see also *The Biden Plan for Education Beyond High School*, <https://joebiden.com/beyondhs/#> (last visited Sept. 6, 2020) (“In today’s increasingly globalized and technology-driven economy, 12 years of education is no longer enough for American workers to remain competitive and earn a middle class income.”).

Although Title IX was passed in 1972, it was not until 1977 that a court first recognized that sexual harassment – not just overt discrimination in areas like admissions and recruitment – could violate the statute’s prohibition on sex discrimination.² That decision concerned only *quid pro quo* sexual harassment; it was not until the mid-1990s that the Office for Civil Rights (OCR) and the courts began to rule that Title IX covered not only *quid pro quo* harassment by faculty, but also student-on-student sexual harassment resulting in a hostile environment.³

In 1997, OCR released *Sexual Harassment Guidance* affirming that schools must respond to student-on-student “hostile environment” harassment because failing to do so “permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX.”⁴ Then, in 1999, the Supreme Court ruled in *Davis v. Monroe County Board of Education* (a decision authored by Justice Sandra Day O’Connor and joined by Justices Ruth Bader Ginsburg, David Souter, John Paul Stevens, and Stephen Breyer) that pursuant to Title IX, educational institutions can be liable in monetary damages for deliberate indifference to “hostile environment” harassment, but only when the conduct in question was “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”⁵

In 2001, OCR released a revised version of the 1997 *Guidance* that addressed the *Davis* decision. The 2001 *Guidance* stated that it defined sexual harassment consistently with the standard set forth in *Davis*. That *Guidance*, which went through the notice-and-comment process, instructed educational institutions that “the definition of hostile environment sexual harassment used by the Court in *Davis* is consistent with the definition” used by the Department.⁶ In explaining its reasoning, OCR stated that “schools benefit from consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action. A multiplicity of definitions would not serve this purpose.”⁷

While critics of the new regulations have stated that the use of the sexual harassment definition from *Davis* represents a departure from established OCR standards, it was in fact

² *Alexander v. Yale*, 459 F. Supp. 1, 5 (D. Conn. 1977) (“[I]t is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education.”).

³ See Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROB. 299, 315 (2000); see also *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415 (N.D. Cal. 1996); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006 (W.D. Mo. 1995).

⁴ U.S. Dep’t of Educ., Off. for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Mar. 13, 1997), <http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>.

⁵ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).

⁶ U.S. Dep’t of Educ., Off. for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

⁷ *Id.*

the prior administration that departed radically from prior practice in terms of the interpretation and enforcement of Title IX.

In 2013, the Departments of Education and Justice entered into a Title IX resolution agreement with the University of Montana that was explicitly announced as “a blueprint for colleges and universities throughout the country.”⁸ In that agreement, OCR departed dramatically from the *Davis* definition of sexual harassment it approved in the 2001 revised guidance, instead stating that “sexual harassment should be more broadly defined as ‘any unwelcome conduct of a sexual nature,’” including “verbal conduct.”⁹ Although OCR privately backed away from the statement that this resolution agreement should serve as a blueprint for schools nationwide, it never communicated that retreat to schools themselves.¹⁰ Therefore, in the years immediately following, a large number of institutions revised their definition of sexual harassment to be “any unwelcome conduct of a sexual nature,” an extraordinarily broad definition that is entirely subjective and at odds with the First Amendment.

Following the issuance of the 2011 Dear Colleague Letter, FIRE began to receive a large number of reports from students around the country that they believed they had been denied due process in campus sexual misconduct proceedings. While it was a positive development that the federal government’s attention was dissuading institutions from sweeping allegations under the rug, many schools dispensed with hearings and adopted an investigative model where one person served as investigator, prosecutor, judge, and jury — particularly after a report of the White House Task Force to Protect Students from Sexual Assault praised this “single investigator” model.¹¹ Other schools had hearing panels, but trained them using prejudicial materials¹² that relied on improper stereotypes and

⁸ Letter from Anurima Bhargava, Chief, U.S. Dep’t of Justice, Civil Rights Div., and Gary Jackson, Reg’l Dir., U.S. Dep’t of Justice, Civil Rights Div., to Royce Engstrom, President, Univ. of Mont., and Lucy France, Univ. of Mont. Counsel (May 9, 2013), at 1, <http://www.justice.gov/opa/documents/um-ltr-findings.pdf>. See also U.S. DEP’T OF JUSTICE & DEP’T OF EDUC., DOJ CASE NO. DJ 169-44-9, OCR CASE NO. 10126001, RESOLUTION AGREEMENT AMONG THE UNIVERSITY OF MONTANA – MISSOULA, THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, EDUCATIONAL OPPORTUNITIES SECTION AND THE U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS 2 (May 9, 2013), available at <http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf>.

⁹ *Id.*

¹⁰ Press Release, Foundation for Individual Rights in Education, ‘Blueprint’ No More? Feds Back Away from New Campus Speech Restrictions (Nov. 21, 2013), <https://www.thefire.org/feds-back-away-from-new-campus-speech-restrictions>.

¹¹ White House Task Force To Protect Students from Sexual Assault, *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault* (2014), <https://www.justice.gov/archives/ovw/page/file/905942/download> (“Some schools are experimenting with new models – like having a single, trained investigator do the lion’s share of the factfinding – with very positive results.”).

¹² See *Stanford Trains Student Jurors That ‘Acting Persuasive and Logical’ is Sign of Guilt; Story of Student Judicial Nightmare in Today’s ‘New York Post,’* FIRE (July 20, 2011), <https://www.thefire.org/stanford-trains-student-jurors-that-acting-persuasive-and-logical-is-sign-of-guilt-story-of-student-judicial-nightmare-in-todays-new-york-post>; see also Excerpted Pages from Stanford Dean’s Administrative Review Process Training Materials, 2010-2011, available at <https://d28htnjz2elwuj.cloudfront.net/pdfs/bb4ff4c3aff9d3b2450c44e9ec2f28f1.pdf>.

questionable science.¹³ Some schools provided students with adequate notice of the allegations against them; at other schools, students would find themselves called into meetings and suddenly asked to answer questions about the details of events months or years prior, with little to no information about what they were alleged to have done.

The manner in which institutions were addressing sexual misconduct allegations from the Dear Colleague Letter in 2011 until its repeal in 2017 drew widespread criticism, and not only from FIRE. Our concerns were echoed by a diverse range of widely respected organizations, individuals, legal scholars, and an increasing number of state and federal courts.¹⁴

The courts were beset by complaints from students that schools were mishandling these investigations and adjudications, with allegations of students defending themselves alone against rape allegations without the opportunity to see the evidence against them or to question their accuser, students being denied the opportunity to present exculpatory evidence, and schools blatantly ignoring or even suppressing exculpatory evidence. Some will say these are just isolated anecdotes, but since 2011, more than 600 lawsuits have been filed by respondents alone, not to mention the many suits by complainants alleging that schools mishandled these investigations and adjudications in ways that harmed them, too.

In response to the hundreds of lawsuits from respondents alleging they were denied a fair process, there emerged a patchwork of case law surrounding Title IX, such that — until the new regulations took effect — one's rights in a Title IX proceeding depended upon where one was living and attending school. In New York, for example, a court recently held that a Title IX investigator's failure to thoroughly investigate inconsistencies in a complainant's story may have violated Title IX's requirement of an equitable proceeding.¹⁵ The United States Court of Appeals for the Seventh Circuit found potential gender bias in Purdue University's decision, by a Title IX investigator, to credit the account of a complainant without hearing directly from her.¹⁶ Other courts, however, have looked at similar facts and found no Title IX violation.¹⁷ It fell to the Department of Education, therefore, to standardize the rights of students under what is, after all, a federal civil rights statute. This is the agency's proper role and statutory charge.

¹³ Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, THE ATLANTIC (Sept. 8, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211>.

¹⁴ Tyler Coward, *Mountain of evidence shows the Department of Education's prior approach to campus sexual assault was 'widely criticized' and 'failing'*, FIRE (Nov. 15, 2018), <https://www.thefire.org/mountain-of-evidence-shows-the-department-of-educations-prior-approach-to-campus-sexual-assault-was-widely-criticized-and-failing>.

¹⁵ *Doe v. Colgate Univ.*, 2020 U.S. Dist. LEXIS 75989 (N.D.N.Y. Apr. 30, 2020).

¹⁶ *Doe v. Purdue Univ.*, 928 F.3d 652, 669 (7th Cir. 2019).

¹⁷ See Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49 (2019).

The Department of Education also has an obligation to ensure that students' constitutional rights are not violated in the implementation of Title IX, and that has been a rampant problem over the past ten years. The procedural safeguards in the new regulations — a live hearing, cross-examination, meaningful notice and access to evidence, the presumption of innocence — have been identified by courts as essential components of students' due process rights. It is a common misconception that due process rights apply only in the criminal setting. While due process rights are greater in that setting, students enrolled at public universities do have procedural due process rights that those universities must uphold, and in many cases, students' procedural rights have been violated in the course of campus sexual misconduct adjudications.

It is also a misconception that procedural protections benefit the accused at the complainant's expense. While procedural protections benefit accused students, they also play a vital role in protecting the interests of complainants. The process of thoroughly vetting accusations gives findings of responsibility their legitimacy.

For years, public confidence in university Title IX grievance procedures across the country has been low¹⁸ — and for good reason. As the Rape, Abuse & Incest National Network (RAINN) argued in its 2014 letter to the White House Task Force to Protect Students from Sexual Assault:

While we respect the seriousness with which many schools treat such internal processes, and the good intentions and good faith of many who devote their time to participating in such processes, the simple fact is that these internal boards were designed to adjudicate charges like plagiarism, not violent felonies. The crime of rape just does not fit the capabilities of such boards. They often offer the worst of both worlds: they lack protections for the accused while often tormenting victims.¹⁹

Campus sexual misconduct proceedings have too often failed complainants. For example, after the University of Michigan settled a lawsuit by agreeing to set aside its finding against the accused student, the complainant issued the following statement through her attorney:

I caution all University of Michigan students and their parents to avoid reporting sexual violence or using the university's Title IX process at all costs. . . . I urge you to be aware: the university process will take far longer than they represent it to take, the university does not follow through on commitments of support they purport to

¹⁸ A 2014 HuffPost/YouGov poll found that only fourteen percent of those surveyed thought colleges and universities do a good job handling cases of students reporting rape, sexual assault, or harassment. Sixty percent said they trusted colleges and universities to properly handle someone reporting rape, sexual assault, or harassment "a little," while twenty three percent said they did not trust them at all. Peter Moore, *Poll Results: Sexual Assault*, YouGov (Feb. 3, 2014, 3:34 PM), <https://today.yougov.com/topics/legal/articlesreports/2014/02/03/poll-results-sexual-assault>.

¹⁹ Letter from Scott Berkowitz & Rebecca O'Connor, Rape, Abuse & Incest National Network (RAINN), to the White House Task Force to Protect Students from Sexual Assault (Feb. 28, 2014), *available at* <https://perma.cc/H67Z-Q9VF>.

offer, and it does not follow its own mandated procedures when investigating sexual violence on its campus. Worst of all, I have come to believe they do not care about individual students seeking help and are more concerned with producing the paperwork which demonstrates compliance with U.S. Department of Education mandates. With the multiple efforts and initiatives the university has undertaken and administrators have espoused, the biggest threat on campus has now become the Title IX Sexual Assault Policy as implemented by the University.²⁰

Litigation over the University of Kentucky's handling of Title IX complaints revealed how that school's process led a complainant to draw a similar conclusion.²¹ In an editorial in the *Washington Examiner*, I explained how the woman's case demonstrates that a lack of due process in campus proceedings harms complainants as well as the accused:

According to [the complainant's] lawsuit, the university held the first hearing without the accused student present, because he was attending a proceeding related to his criminal case. At the first university hearing, he was found responsible for sexual misconduct. But a university appeals board found that his due process rights had been violated because he had been unable to attend the hearing, and ordered a new, second hearing. The female student did not participate in the second hearing, and the accused student was again found responsible.

However, the appeals board again found that the accused student's due process rights had been violated, this time because he had been unable to question his accuser. The appeals board ordered another, third hearing, which the female student says caused her "mental health to deteriorate." The accused student was found responsible a third time, the finding was overturned again on appeal, and the matter was sent back for a fourth hearing.

When the university filed a motion asking the court to dismiss the woman's case, the court declined. The court stated that "the University bungled the disciplinary hearings so badly, so inexcusably, that it necessitated three appeals and reversals in an attempt to remedy the due process deficiencies," and that this had "profoundly affected Plaintiff's ability to obtain an education at the University of Kentucky." Moreover, the court held, the fact that the university had not yet scheduled a fourth hearing raised the possibility that the university had acted with "deliberate indifference" towards the alleged victim.

Had the university conducted a full and fair hearing in the first place, this woman's ordeal could have been over years ago. Instead, it continues to drag on more than two years later because of an undisputed lack of due process. This is a prime example

²⁰ David Jesse, *U-M drops nonconsensual sex finding to settle suit*, DETROIT FREE PRESS (Sept. 12, 2015, 11:13 AM), <https://www.freep.com/story/news/local/michigan/2015/09/12/u-m-drops-nonconsensual-sexfinding-settle-suit/72145304>.

²¹ *Doe v. Univ. of Ky.*, 2016 U.S. Dist. LEXIS 117606, *8 (E.D. Ky. Aug. 31, 2016), *modified on other grounds*, 2018 U.S. Dist. LEXIS 135633 (E.D. Ky. Aug. 10, 2018).

of why due process is critical to protecting the interests of everyone involved in a judicial proceeding.²²

The examples from Michigan and Kentucky demonstrate that the presence of meaningful procedural protections furthers Title IX's goal of addressing sex-based discrimination. Unfair proceedings, which have unfortunately represented the status quo on our nation's campuses for too long, benefit no one. By delivering errant results such as those discussed above, flawed proceedings undermine confidence in the system and cripple the ability of both the Department and individual educational institutions to effectively address sex-based discrimination. It is therefore unsurprising that Title IX grievance procedures predating the new regulations faced overwhelming criticism from a diverse range of organizations, individuals, scholars, and state and federal courts for providing insufficient procedural protections. And it is also unsurprising that principled feminists and legal scholars like University of San Francisco law professor Lara Bazelon,²³ former ACLU president and New York Law School professor Nadine Strossen,²⁴ and Harvard Law School professors Jeannie Suk Gersen,²⁵ Janet Halley, Elizabeth Bartholet, and Nancy Gertner have, with only a few caveats, embraced the reforms.²⁶

THE DEPARTMENT OF EDUCATION'S TITLE IX REGULATIONS PROTECT THE RIGHTS OF ALL

Given these failures, the Department of Education correctly decided that it had to step in and provide much greater clarity about schools' obligations in Title IX cases. The new regulations – which thoughtfully took into account an unprecedented amount of feedback from the public during the notice and comment period, providing thorough answers over hundreds of pages to public comments and suggestions – are carefully crafted to protect the rights of all parties.

While the title of this hearing implies that the Title IX regulations are part of an effort to undermine gender-based protections, the preamble to the Title IX regulations makes clear that their protections extend to everyone. For example, because it is clear that campus sexual misconduct is not limited to heterosexual contexts, the preamble to the regulations unambiguously declares:

²² Samantha Harris, *Due process is crucial to justice, both for accusers and the accused*, WASH. EXAMINER (Jan. 17, 2017), <https://www.washingtonexaminer.com/due-process-is-crucial-to-justice-both-for-accusers-andthe-accused>

²³ Lara Bazelon, *I'm a Democrat and a Feminist. And I Support Betsy DeVos's Title IX Reforms.*, N. Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/opinion/-title-ix-devos-democrat-feminist.html>.

²⁴ See Michael Powell, *Trump Overhaul of Campus Sex Assault Rules Wins Surprising Support*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/us/college-sex-assault-rules.html>.

²⁵ Jeannie Suk Gersen, *How Concerning Are the Trump Administration's New Title IX Regulations?*, NEW YORKER (May 16, 2020), <https://www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations>.

²⁶ Wesley Yang, *The Revolt of the Feminist Law Profs*, CHRON. OF HIGHER EDUC. (Aug. 7, 2019), <https://www.chronicle.com/article/the-revolt-of-the-feminist-law-profs>.

For consistency, throughout this preamble we use the acronym “LGBTQ” while recognizing that other terminology may be used or preferred by certain groups or individuals, and our use of “LGBTQ” should be understood to include lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, and other sexual orientation or gender identity communities. We use the phrase “persons of color” to refer to individuals whose race or ethnicity is not white or Caucasian. We emphasize that every person, regardless of demographic or personal characteristics or identity, is entitled to the same protections against sexual harassment under these final regulations, and that every individual should be treated with equal dignity and respect.²⁷

The regulations restore Title IX’s original focus on a complainant’s access to education. Title IX, when enacted, was never meant to create a shadow justice system on campus. Rather, it was designed to ensure that sex-based discrimination did not prevent students from pursuing their education. Over the years, courts concluded that to comply with Title IX, institutions must promptly and equitably investigate and adjudicate allegations of sexual misconduct, on the basis of the idea that if sexual misconduct was allowed to run rampant, women in particular would feel less comfortable pursuing their education, and could be less inclined to do so.

What resulted was the creation of campus judiciaries, investigating and deciding often very complex, fact-intensive inquiries into allegations of sexual misconduct. Gradually, therefore, the focus of institutions’ Title IX offices became less about how an institution could help a complainant continue his or her education, and more about meting out punishment to those deemed offenders. To refocus schools’ attention on addressing a complainant’s ability to stay in school, the regulations require schools “to offer supportive measures to every complainant, by engaging in an interactive process by which the Title IX Coordinator contacts the complainant, discusses available supportive measures, considers the complainant’s wishes with respect to supportive measures, and explains to the complainant the option for filing a formal complaint.”²⁸

The new regulations also give complainants greater control over the process and over their privacy in the process. For example, rather than requiring all employees to be mandatory reporters, the regulations allow universities to “decide which of their employees must, may, or must only with a student’s consent, report sexual harassment to the recipient’s Title IX Coordinator (a report to whom always triggers the recipient’s response obligations, no matter who makes the report).²⁹ Another important way the regulations support complainants’ ability to decide how to proceed is by allowing institutions to offer informal resolution processes, like mediation and other alternative dispute resolution processes

²⁷ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 at 30,031 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) [hereinafter Regulations].

²⁸ *Id.* at 30,041.

²⁹ *Id.* at 30,040.

that focus on restorative justice.³⁰ To ensure that schools do not steer students down this path in order to conceal the true number of allegations on their campus, these informal procedures may be offered only after a formal complaint is filed. Moreover, informal procedures may be used only after both students are advised in writing of their options and provide their written consent. If either student changes their mind prior to agreeing to informal resolution, the student may pursue a formal grievance. There may be any number of reasons that a student would not want to pursue a formal process, and FIRE has often heard privately from administrators that the previous “all or nothing” approach, which did not allow for any type of mediation, discouraged some complainants from coming forward. By granting students the autonomy to decide how to proceed, the regulations place Title IX’s focus on ensuring equal educational access.

The regulations also protect complainants’ privacy by providing that an institution cannot “access, consider, disclose, or otherwise use” a party’s medical records without the party’s voluntary, written consent. Under this provision, medical records that would ordinarily be deemed relevant are only allowed if the party provides the records themselves or consents to their use in the proceeding.³¹

The regulations require the use of fair procedures to adjudicate Title IX complaints. They include robust procedural requirements that institutions must follow when investigating and adjudicating Title IX complaints. To ensure a fair process, and restore credibility to campus proceedings, the regulations require detailed notice; a presumption of innocence; the right to review the evidence in the institution’s possession, whether or not the institution intends to use that evidence in the proceeding; a live hearing; and the ability, through an advisor, to cross-examine the other party and any witnesses. Moreover, to prevent the use of training materials that may improperly bias investigators and adjudicators against a complainant or respondent, the regulations require the publication, on an institution’s website, of all materials used to train such personnel.

The regulations require institutions, for Title IX purposes, to define sexual harassment in accordance with the Supreme Court’s *Davis* decision. This, as discussed earlier, is a return to the longstanding position of the Department of Education that was set forth in OCR’s 2001 *Revised Sexual Harassment Guidance*.

THE JURISDICTIONAL LIMITATIONS IN THE TITLE IX REGULATIONS WERE IMPOSED BY THE SUPREME COURT

Much of the criticism of the new regulations has centered on the limits they place on schools’ jurisdiction to investigate and adjudicate off-campus conduct under their Title IX policies. The jurisdictional limitations imposed by the regulations come directly from the Supreme Court’s decision in *Davis*, where the Court stated that “the language of Title IX” — which, again, addresses only discrimination that occurs under an education program or

³⁰ *Id.* at 30,054.

³¹ *Id.* at 30,303.

activity — “cabins the range of misconduct that the statute proscribes.”³² The Court wrote that “the statute’s plain language confines the scope of prohibited conduct based on the recipient’s degree of control over the harasser and the environment in which the harassment occurs.”³³ The Supreme Court has defined the jurisdictional limits of Title IX. It is not within the authority of an agency to ignore those limitations.

THE IMPLEMENTATION DEADLINE WAS FAIR

A number of critics have argued that, particularly in light of the Covid-19 pandemic, the 90-day implementation period did not give institutions adequate time to comply with the regulations. This criticism is misplaced for several reasons.

First, institutions were on notice for nearly two years of the proposed changes that would likely be required. Second, the regulations were not issued until May 2020 in part because of efforts at obstruction levied by many of the same organizations now claiming that institutions were not given enough time to comply. In November 2019, the regulations moved into review by the White House Office of Management and Budget (OMB), their final stage before enactment. OMB review is not a second notice-and-comment period, but rather one last opportunity to raise concerns that may previously have been overlooked. Immediately, opponents of the rule began scheduling OMB meetings out as far as possible — something that a Tulane University Title IX coordinator admitted in an Instagram video was a “strategy to try to delay the regulations” deliberately undertaken by the National Women’s Law Center and other organizations.³⁴ Their delay strategy worked, and OMB review did not conclude until March 27, 2020. Had opponents of the regulations not engaged in this deliberate obstruction, the regulations would very likely have been released sometime in late 2019, months before the Covid-19 pandemic.

Moreover, institutions’ legal obligation to continue to protect students from sexual misconduct did not abate because institutions were also grappling with the pandemic. In fact, as the National Women’s Law Center wrote in a letter to university presidents on March 31: “Meaningfully enforcing civil rights is not an obligation that dissipates in the face of institutional hardships—even during these unprecedented times.”³⁵ FIRE agrees. Indeed, it is especially important to preserve civil rights and liberties such as freedom of expression and due process during times of crisis. If students are not afforded fundamentally fair hearings—as they so often were not under the prior approach—and schools maintain harassment policies that infringe on students’ right to freedom of speech, those failures must be remedied, just as allegations of sexual misconduct must be addressed.

³² *Davis*, 526 U.S. at 644 (1999).

³³ *Id.*

³⁴ Tulane Title IX (@tulanetitleix), INSTAGRAM, https://www.instagram.com/tv/B-hgmk0nRUz/?igshid=9tsk5uaj0e9m&mod=article_inline (last visited Sept. 6, 2020).

³⁵ Letter from National Women’s Law Center to University Presidents and Title IX Administrators (Mar. 31, 2020), available at <https://www.knowyourix.org/covid-19-and-title-ix-letter>.

In an op-ed on March 30, attorney Justin Dillon and Professor KC Johnson made the observation that these past few months may have been the ideal time for institutions to revise their sexual misconduct policies. After all, with students studying remotely, they predicted that “the number of Title IX cases is about to drop precipitously.”³⁶

To date, two federal courts have refused to enjoin the regulations, noting that the legal challenges to them were not likely to succeed on the merits.³⁷ At this point, the debate over the timing of the regulations is now moot. The compliance deadline of August 14, 2020 is behind us, and a vast majority of institutions proved they were capable of making reforms by meeting that deadline.

CONCLUSION

Combating sex-based discrimination through effective enforcement of Title IX without infringing on free speech or due process rights is both possible and necessary. Accordingly, FIRE is pleased that the Department of Education has revisited its approach to handling these responsibilities.

Too many critics of the Department’s new approach have argued that by providing due process protections to the accused, the proposed regulations threaten the safety of victims. FIRE does not agree that procedural protections put victims at risk. Nor do many others, including Justice Ruth Bader Ginsburg. During a conversation with National Constitution Center president and CEO Jeffrey Rosen last February, Justice Ginsburg weighed in on the importance of restoring due process to these proceedings.³⁸ In discussing the #MeToo movement, Rosen asked the Justice, “What about due process for the accused?” Justice Ginsburg responded:

Well, that must not be ignored and it goes beyond sexual harassment. The person who is accused has a right to defend herself or himself. And we certainly should not lose sight of that, recognizing that these are complaints that should be heard. So, there’s been criticism of some college codes of conduct for not giving the accused person a fair opportunity to be heard, and that’s one of the basic tenets of our system, as you know. Everyone deserves a fair hearing.

Rosen asked follow-up questions. The exchange went as follows:

³⁶ Justin Dillon and KC Johnson, *Coronavirus Is No Excuse to Delay the Education Department’s New Title IX Regulations*, NATIONAL REVIEW (Mar. 30, 2020), <https://www.nationalreview.com/2020/03/coronavirus-is-no-excuse-to-delay-the-education-departments-new-title-ix-regulations>.

³⁷ *New York v. U.S. Dep’t of Educ.*, No. 20-CV-4260 (JGK), 2020 U.S. Dist. LEXIS 142603 (S.D.N.Y. Aug. 9, 2020); *Pennsylvania v. DeVos*, 2020 U.S. Dist. LEXIS 144400 (D.D.C., Aug. 12, 2020).

³⁸ National Constitution Center, *A Conversation with Justice Ruth Bader Ginsburg*, YOUTUBE (Feb. 12, 2018), <https://www.youtube.com/watch?v=sN7rhjPBFts>.

Rosen: Are some of those criticisms of the college codes valid?

Ginsburg: Do I think they are? Yes.

Rosen: I think people are hungry for your thoughts about how to balance the values of due process against the need for increased gender equality.

Ginsburg: It's not one or the other. It's both. We have a system of justice where people who are accused get due process, so it's just applying to this field what we have applied generally.

Justice Ginsburg's point is clear and persuasive: Due process for the accused and justice for victims must never be considered mutually exclusive. The new regulations realize this truth and make great strides towards ensuring that the needs of complainants and accused students alike are met.

Thank you very much for addressing this important issue and for considering FIRE's input. We are deeply appreciative of this opportunity to share our perspective, and offer our assistance to you as you move forward. I look forward to answering your questions.