National Coalition For Men Carolinas (NCFMC)

January 21, 2019

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-1100

Re: Docket ID ED–2018–OCR–0064, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Federal Register Vol. 83, No. 230, November 29, 2018, p. 61462.

Dear Secretary DeVos,

Thank you for providing the public with an opportunity to comment on the Department's Notice of Proposed Rulemaking (NPRM) proposing to amend regulations implementing Title IX of the Education Amendments of 1972 (Title IX). I write to express our strong support to the proposed rules as published in the Federal Register on November 29, 2018 with minimal changes noted.

I am writing in my capacity as President of the Carolinas chapter of the National Coalition For Men (NCFM), a 501(c)(3) registered non-profit organization which is the oldest men's human rights organization in America. NCFM Carolinas (NCFMC) is dedicated to ensuring fair and equitable treatment for all mankind.

We advocate on behalf of discriminated men inclusive of college students that have been discriminated in Title IX related campus disciplinary hearings which are almost exclusively male students. In regard to Title IX misconduct cases, we have worked with over a hundred students and their families as they try to navigate a flawed college disciplinary system that is incapable of providing a fair and reliable factual determination when a school investigates and adjudicates a sexual harassment complaint.

Colleges and universities across the country are failing to afford their students due process and fundamental fairness in their disciplinary proceedings. These institutions investigate and punish offenses ranging from vandalism and housing violations to felonious acts of sexual assault, handling many cases that are arguably better left to courts and law enforcement. But their willingness to administer what is effectively a shadow justice system has not been accompanied

by a willingness to provide even the most basic procedural protections necessary to fairly adjudicate accusations of serious wrongdoing.[1]

Just how badly are colleges and universities across the country failing to afford accused students due process and fundamental fairness in their disciplinary proceedings? We cite recent data as provided in the Foundation for Individual Rights in Education (FIRE) *Spotlight on Due Process 2018* report:

- Nearly three quarters (73.6%) of America's top 53 universities do not guarantee students that they will be presumed innocent until proven guilty.
- Only slightly more than half of schools (52.8%) require that fact-finders—the institution's version of judge and/or jury—be impartial.
- Fewer than one third of institutions (30.2%) guarantee a meaningful hearing, where each party may see and hear the evidence being presented to fact-finders by the opposing party.
- 47 out of the 53 universities studied receive a D or F grade from FIRE for at least one disciplinary policy, meaning that they fully provide no more than 4 of the 10 elements of a fair procedure that FIRE rated.
- Most institutions have one set of standards for adjudicating charges of sexual misconduct and another for all other non-academic charges. 86.8% of rated universities receive a D or F for protecting the due process rights of students accused of sexual misconduct.[2]

Accused male students have been subjected to and victimized by an inequitable, biased and discriminatory Title IX campus adjudication process that has often and rightfully been described as a kangaroo court in which the accused (male) student is predetermined guilty, denied due process and almost always summarily expelled or long-term suspended.

As significant as it is to ensure that both complainant and respondent are afforded every procedural aspect of due process, it would in our opinion be a mistake to cite and solely rely on due process rulings to justify the new proposed regulation. Therefore, we will endeavor to explain how due process helps remedy *discrimination* against accused males, namely by requiring decisions based on credible evidence which greatly reduces the role of gender bias and stereotypes in decision-making which will result in fair and reliable determinations.

While recognizing that no law or regulation can completely eliminate gender (or racial) bias from the system, bias can be reduced by expanding the evidence considered by decision-makers. Less evidence results in more decisions based on bias and stereotypes. Bias is so flagrant in low-evidence decisions that one doesn't need to look far to find not just individual instances of discrimination, but systemic discrimination leading to class-action lawsuits, in areas like police stops, or stop-and-frisk policies.[3] The remedy? Fuller investigations which seek and gather more evidence and which will deliver fewer decisions tainted by gender bias or stereotypes.

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[1] Foundation for Individual Rights in Education (FIRE) *Spotlight on Due Process 2018* (https://www.thefire.org/spotlight/due-process-reports/due-process-report-2018/)

[2] Ibid

[3] "Driving While Black' in Maryland," ACLU, www.aclu.org/cases/driving-while-black-maryland

We support and applaud the overarching principles of the proposed regulations in that they purport to promote the purpose of Title IX by requiring recipients to address sexual harassment, assisting and protecting victims of sexual harassment and ensuring that due process protections are in place for individuals accused of sexual harassment.

We believe that it is absolutely vital that recipients understand their legal obligations including what conduct is actionable as harassment under Title IX, the conditions that would initiate a mandatory response by the recipient, and the particular requirements that such a response should meet so that recipients protect the rights of their students to access education free from sex discrimination, gender bias or both.

We fully support the Department' proposed definitions for "sexual harassment" and "actual knowledge" in § 106.30 which will greatly aid recipients in the meaning of these terms. However, one of the more problematic areas that recipients appear to be struggling with is that of consent. Specifically, that lack of consent may be based on the temporary or permanent mental or physical incapacity of the victim, including incapacity due to ingestion of drugs or alcohol. The Department should inform recipients that inebriation is not equivalent to incapacitation.

It would appear that the Department suggests that the regulations do not prevent (or require) a school from using affirmative consent as part of its code of conduct. We believe an "affirmative consent" standard would be contrary to the proposed regulations requirement that schools afford respondents a presumption of innocence. An "affirmative consent" standard unfairly shifts the burden of proof to a respondent accused of sexual misconduct to prove him or herself innocent.[4]

Furthermore, "affirmative consent" policies have far more "disparate impact" on males than any procedural technicality addressed by the proposed regulation. Indeed, in practice, "affirmative consent" policies are proxies for intentional discrimination -- inherently having a disparate impact on men because women are content to let men initiate things even when they turn out to be welcome.

Such policies are designed to obtain convictions almost automatically, rather than actually protect anyone or create a workable code of behavior. In the real world, nobody says "may I touch your breast" before doing so. So, rigorously applied, campus "affirmative consent" policies define every college male as guilty of some degree of sexual offense.

Consent is logically neither necessary nor sufficient for liability for sexual harassment, which is what Title IX deals with (rape is just one form of sexual harassment covered by Title IX). Thus, accused men should not have to prove BOTH consent AND welcomeness. Title IX only requires a person to show the conduct was welcome to defeat a claim of sexual harassment, not that it was BOTH welcome AND consensual. The Department should clarify that an "affirmative consent" standard in fact violates Title IX inasmuch as it is used to disadvantage respondents, one particular sex over another.

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[4] *See* Samantha Harris, *University of Miami Law Prof: Affirmative Consent Effectively Shifts Burden of Proof to Accused*, (Sept. 11, 2015), https://www.thefire.org/university-of-miami-law-prof-affirmative-consent-effectively-shifts-burden-of-proof-to-accused/.

Notwithstanding the aforementioned, we shall endeavor to provide greater specificity to our comments on a section-by-section basis as follows:

I. **Recipient's response to sexual harassment** *(Proposed 34 CFR 106.44)*

A. Standard for Sexual Harassment 106.44(a): NCFMC supports the Department's adoption of the Supreme Court standards for sexual harassment as proposed. In this regard we endorse the proposed definition of sexual harassment being consistent with the text of Title IX and with the Supreme Court's decisions in *Gebser* and *Davis*. The proposed regulation reasonably defines sexual harassment as either an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient or an individual's participation in unwelcome sexual conduct; or unwelcome conduct on the basis of sex that is *so* severe, pervasive, and objectively offensive that it denies a person access to the recipient's education program or activity; or sexual assault as defined in 34 CFR 668.46(0) (implementing the Clery Act).

By following the text and purpose of Title IX, the definition includes sex-based discrimination that is sufficiently serious as to deprive a student of access to a funding recipient's educational program or activity. We believe that this definition recognizes and incorporates consistent language used by the Court related to the interpretation and thus implementation of Title IX.

B. Safe Harbors 106.44(b): We endorse the overarching objectives in this rule but seek a slight modification to the proposed regulations under this section by requesting that paragraph (b)(2) be omitted in its entirety. The basis for this request is having knowledge of Title IX related cases in which a female student complainant typically is embarrassed or outraged by an affectionate interest expressed by a male student (respondent) and then collaborates with other female students directing them to file additional individual misconduct complaints against the male student because the female students' belief the male student is "creepy" and on that basis alone should be removed from campus. We agree with all other paragraphs within this section.

C. Emergency Removal 106.44(c): We request modification to this section specifically seeking the inclusion of clarifying language that would safeguard a student's access to education while carefully weighing a recipient's need to remove a student expressing threatening behavior. Stated another way, a high bar should be required in order to justifying the disruption of one's educational experience, with the burden of proof of whether or not a student exhibited threatening behavior falling on the recipient. Our reasoning is straightforward, we have seen far too many situations where a school weaponized emergency removal as a de facto punishment aimed at students accused of Title IX related sexual misconduct.

Members of our organization have experienced firsthand the harmful effects of recipient issued interim suspensions under the guise of an "emergency removal" to satisfy the recipients desire to immediately suspend, remove from campus and hence isolate a student accused of sexual misconduct. Recipient emergency removal decisions are often hastily

made without any opportunity provided to the accused student to receive, review or challenge the decision-making used by the recipient to justify the student's removal. Therefore, additional language needs to be included under this section of the proposed regulations in order to safeguard and protect students against abusive practices. There are far too many instances where recipients routinely removed male students accused of sexual misconduct from their campuses under the emergency removal pretext of "determining if the accused may present a danger or threat of safety to self or others".

In the absence of any evidence suggesting such threatening student behavior ever existed, it is our belief and contention that several recipient's weaponized emergency removal policies by issuing interim suspensions aimed exclusively at male students thereby depriving male students' access to educational benefits, a violation of Title IX. In this regard, we would highlight a few recent cases. The first case originates at Wesley College, in which OCR found that Wesley College violated Title IX by failing to provide accused students with essential procedural protections[5]. Among the list of recipient violations, OCR held that *"While a school must assess whether the accused may present a danger or threat to the safety of self and others, an interim suspension was imposed the same day as the college received the report against the student even though the college had not interviewed the student."*[6] We also cite the *Tanyi v. Appalachian State University* lawsuit in which the Court recognized that the accused student Tanyi suffered a deprivation due to being interim suspended. As noted by the Court, "*Tanyi, however, was suspended for twenty days while awaiting the second Student B hearing, thus suffering a deprivation.*"[7]

While we recognize that there are times when an individual's behavior is so violent or threatening that it requires removal from campus for safety or health purposes, it is the flagrant abuse by recipients in routinely issuing suspensions in the name of "safety" that has resulted in a deprivation of accused (almost exclusively male) students their right to participate in school programs or activities. Lastly, we believe that the Department should examine concerns we have regarding recipient's policies or processes that require students to submit to a psychological evaluation as a condition of readmittance to the school imposed on them following an "emergency removal" suspension.

We deem such a demand to be intrusive and unreasonable unless there is irrefutable evidence supporting a mental health concern. Should such an evaluation be warranted the proposed regulations should require that the evaluation be conducted by a licensed medical professional without any ties to the recipient institution as a medical evaluation conducted by a recipient employee or third-party recipient provider presents a conflict of interest. Furthermore, any evaluation conducted by a licensed medical doctor should be deemed a student medical record protected by applicable medical record privacy laws. The recipient should be directed by regulation not to require the student to waive this privacy right.

[5] Wesley College Complaint No. 03-15-2329
[6] Ibid
[7] *Tanyi v. Appalachian State University* (Civil Action No. 5:14-CV-170RLV), Defendants' Motion to Dismiss (Doc. 30)

D. Administrative Leave 106.44(d): NCFMC supports this rule and for consistency purposes recommends that language is added that directs a recipient to provide similar if not identical grievance procedures to a non-student employee respondent as provided for students in § 106.45(b) to ensure the same due process protections.

II. **Grievance procedures for formal complaints of sexual harassment** (*Proposed 34 CFR 106.45*)

We support with slight modifications, the regulations proposed under new section 106.45 which addresses required grievance procedures for formal complaints of sexual harassment. Additional comments under this regulation are provided below.

A. Discrimination on the Basis of Sex 106.45: – NCFMC supports this section and acknowledges the importance of providing fair and equitable treatment to both complainant and respondent throughout the complaint process.

We raise the issue of *bias* based on sex stereotypes when no evidence exists beyond that of the statements of complainant and respondent, essentially amounting to "he said / she said" recollections of the incident in question which is often clouded by alcohol or drug impaired memories. Time and again we have seen cases of bias against males in campus discipline (which violates Title IX) with the person or persons responsible for adjudicating the case assuming that males are perpetrators based on their sex and that women are victims due to their sex.

So prevalent and widespread is this form of discrimination in Title IX disciplinary hearings that our organization was able to identify multiple cases discovered through public records requests from public universities situated in our home state of North Carolina. The evidence we gathered formed the basis of the complaint we filed with OCR (ref: Complaint #11-18-2155) in which we brought forth a charge of systemic bias based on sex by University of North Carolina employees against male students accused of sexual misconduct or harassment.

Biased Title IX training materials that portray men as predators who use alcohol or other substances on women to commit rape and which promote false, debunked statistics which were unfavorable to males were used throughout the UNC system training of Title IX investigators, coordinators and adjudicators. It would be laughable if it wasn't so devastating to Title IX adjudication outcomes that the companies that created and distributed these training materials are almost exclusively hired by universities to conduct Title IX training for their Title IX office employees.

We are not alone in raising a red flag concerning institutional bias against accused male students. The NCHERM Group, which manages the membership associations ATIXA and NaBITA, has served over 3,000 school and college clients, and has represented more than 250 colleges and universities as legal counsel, has been troubled by recipient bias that stacks the cards against accused students:

> "Why are we systemically failing to protect the rights of all students? FIRE took a shot at higher education on January 19th, 2017, calling administrators amateurs in addressing sexual violence. If you resent that characterization, we need to stop resembling it. Sharpen the qualifications of those at your colleges who are the custodians of due process and advance the level of training that is afforded to them. Read recent decisions involving George Mason University, James Madison University, and Brandeis University to realize how far we still need to come in this field. Don't be fooled by the fact that higher education wins some of these lawsuits, as the law favors institutions. The bar on due process lawsuits is high, and courts have been deferential to college disciplinary decisions, though that historical deference is eroding as judges lose patience with skewed college proceedings."[8]

One doesn't need to look far to find validation of the bias directed against male students accused of sexual misconduct from a UNC institution. The systemic belief that women don't lie about sexual assault and that a reporting female student needs to be viewed as a victim is validated by comments from Jill Moffitt, Title IX Administrator at UNC-Ashville who stated recently that "**When the victim says they were assaulted, they're assaulted** (emphasis added). What they want to do is their business. What we want to do is empower them"[9]

UNC is certainly not alone in perpetuating institutional bias favoring one sex over another and Federal courts are taking notice:

> "…our courts have also heard scores of cases filed by male students against colleges and universities that expelled them for sexual misconduct, and therefore Title IX has also come to stand for the idea that schools must give accused students a fair process. This evolution in Title IX's meaning came about because courts perceived many of the expulsion procedures as unfair. Courts chose to read Title IX's ban on sex discrimination to demand fair treatment of the accused, despite the considerable leeway that schools were supposed to have over student discipline. In a 2016 case, a male student disciplined for sexual misconduct sued Columbia University under Title IX, alleging that the investigative process was unfair; the Second Circuit Court of Appeals held that an institution's motivation "to favor the accusing female over the accused male," in order to shield itself from lawsuits or criticism for not protecting women from sexual assault, could be evidence in itself of unlawful sex discrimination against males."[10]

There is (and historically has been) irrefutable evidence that shows disparate criminal sentencing based on sex (gender). As noted under comments submitted on January 14, 2019 by an individual submitter who identifies as Urban Lawyer (ID: ED-2018-OCR-0064-6365, Tracking Number: 1k3-97md-4vry):

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[8] THE 2017 NCHERM GROUP WHITEPAPER: DUE PROCESS AND THE SEX POLICE

[9] Emily Henderson, "UNCA community hopes to improve reputation of sexual misconduct discussions", *thebluebanner.net,* (November 14, 2017)

[10] Jeannie Suk Gersen, "The Transformation of Sexual-Harassment Law Will Be Double-Faced", *The New Yorker,* (December 20, 2017), https://www.newyorker.com/news/news-desk/the-transformation-of-sexual-harassment-law-will-be-double-faced

> Gender stereotypes are pervasive in adjudications of alleged wrongdoing, due to widespread gender bias shared throughout society. See, e.g., Sonja B. Starr, "Estimating Gender Disparities in Federal Criminal Cases," 17 American Law & Econ. Rev. 127 (2015). As the University of Michigan notes, "If you're a criminal defendant, it may help a lot to be a woman. Prof. Starr's recent paper, 'Estimating Gender Disparities in Federal Criminal Cases,' looks closely at a large dataset of federal cases, and reveals some significant findings. After controlling for the arrest offense, criminal history, and other prior characteristics, 'men receive 63% longer sentences on average than women do,' and '[w]omen are twice as likely to avoid incarceration if convicted.' This gender gap is about six times as large as the racial disparity that Prof. Starr found in another recent paper." See "Study Finds Large Gender Disparity in Federal Criminal Cases," Nov. 16, 2012. "Other research has found evidence of the same gender gap." See "Men Sentenced To Longer Prison Terms Than Women For Same Crimes, Study Says," Huffington Post, Sept. 11, 2012.
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> The federal government itself found large gender disparities in how similarly-situated men and women are treated even in the criminal justice system, where safeguards are greater. For example, the Bureau of Justice Statistics has found that women who commit unprovoked killings of their husbands receive sentences less than half as long as men who commit unprovoked killings of their wives. (See, e.g., Patrick A. Langan, Ph.D, "Spouse Murder Defendants in Large Urban Counties," BJS, Sept. 1995, at pg. 3 ("The average prison sentence for unprovoked wife defendants was 7 years, or 10 years shorter than the average 17 years for unprovoked husband defendants") (www.bjs.gov/content/pub/pdf/SPMUREX.PDF).

We would add to this body of work the following information citing from the United States Sentencing Commission recent report entitled *Demographic Differences in Sentencing: An Update to the 2012 Booker Report (November 2017):*

- Female offenders of all races received shorter sentences than White male offenders during the Post-Report period, as they had for the prior four periods.
- White female offenders were 13.1 percent more likely than White male offenders to receive a nongovernment sponsored below range sentence.
- Black female offenders were 9.5 percent more likely than White male offenders to receive a non-government sponsored below range sentence.

Taking into account the disparate treatment accused males receive, be it in criminal cases (where due process protections are available) or in campus Title IX disciplinary proceedings (where due process protections are not readily available), the due process protections covered by the proposed regulation should not *merely be allowed*, they should be mandated if for no other reason than to detect, identify and remedy sex discrimination and stereotyping.

We are encouraged to see that the Department recognizes that unfair, biased or preferential treatment (based on sex) by a recipient during the complaint process would constitute discrimination on the basis of sex under Title IX and believe that the Department's new regulation will receive deference from the courts as to its predictive judgment about whether its regulation helps prevent, remedy, or detect sex discrimination and stereotyping. It is our opinion that more procedural protections will result in less bias, increased reliable determinations and fewer lawsuits for recipients.

B. Grievance Procedures 106.45(b)(1): NCFMC supports this section and applauds the Department for ensuring that foundational due process safeguards such as: a presumption of innocence, fair and equitable treatment of all parties, objective evaluation of both inculpatory and exculpatory evidence, the removal of harmful stereotyping materials from Title IX training programs, reasonably prompt timeframes for completing the grievance process and supportive measures are provided by recipient equitably for the benefit of both complainant and respondent.

   We urge the Department to improve this rule by requiring that recipients make available for public view all Title IX related training material in order to provide transparency and accountability to taxpayers.

   We also suggest that the Department add the highlighted language (in bold) below to subsection (iv) to strengthen the burden the recipient bears for determining responsibility:

   > (iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance procedure. ***The recipient bears the burden of demonstrating that the respondent is responsible for the alleged conduct and may not infer responsibility based solely on the respondent declining to present testimony, evidence, or witnesses in response to a formal complaint.***

C. Notice of Allegations 106.45(b)(2): NCFMC supports this section with slight modification and acknowledges the importance of proper notification for both complainant and respondent. Paragraph (b)(2) should be amended to have the following language added ***that a recipient is required to disclose the identity of the complainant to the respondent and may not rely on anonymous complaints of misconduct.***

D. Investigations of a Formal Complaint 106.45(b)(3): NCFMC supports this section and stresses the importance that a fair and equitable investigation plays in ensuring reliable determinations of Title IX related complaints. We wholeheartedly endorse the Department setting forth specific standards to govern investigations of formal complaints of sexual harassment as provided in this regulation.

   We do however raise a concern around the issue of what constitutes a reasonable time to file a complaint. We have heard of several cases where a complainant waited over

a year to file a complaint when witnesses and evidence were no longer available to the accused party. Therefore, we suggest that The Department revise this section and require a recipient to dismiss a formal complaint when the complainant has unreasonably delayed in filing. We believe that a reasonable time to file a complaint should be not more than 90 days from the date of the alleged incident.

We applaud the Department directing institutions of higher education to provide grievance procedures that provide for a live hearing and which requires the recipient decision-maker to permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those that challenge credibility.

Providing for cross-examination during a hearing is consistent with the U.S. Court of Appeals for the Sixth Circuit which held that in conducting Title IX investigations, colleges and universities are required to provide parties an opportunity to cross-examine witnesses in the presence of a neutral fact-finder in cases hinging on the credibility of such witnesses. *Doe v. Baum, et al.*, Case No. 17-2213 (6th Cir. Sept. 7, 2018).

In this regard, we commend the Department for recognizing cross examination as the "greatest legal engine ever invented for the discovery of truth" and would note that denying cross-examination can violate **both** state **and** federal law. As noted by Hans Bader, "Under many state APAs, students have a right to cross-examine their accuser, as courts have made clear in cases such as *Arishi v. Washington State University*, 385 P.3d 251 (Wash. App. 2016) and *Liu v. Portland State University*, 383 P.3d 294 (Or. App. 2016)." Hans Bader, *Time to Ed Obama-Era Fed Micromanagement of Colleges Under Title IX*, CNS News, Feb. 22, 2017.[11]

It is our view that the proposed Title IX regulation should *allow* cross-examination required by state or federal law, even if it does not *require* it, because the Supreme Court suggested in its *Davis* decision that colleges should be free to do things required by statutes or constitutional safeguards, even if they prevent disciplinary action that would otherwise be required by Title IX. *See Davis v. Monroe County Board of Education*, 526 U.S. 629, 649 (1999) (observing that schools are free to avoid doing something that would "expose it to constitutional or statutory claims" against them, in response to the dissent's objection that discipline would otherwise violate state or federal law in many cases).

The *Davis* decision suggests that accommodating rights (even state-law rights that might otherwise by overridden by the Constitution's Supremacy Clause if they conflict with Title IX) is a permissible thing. Title IX is not a due-process statute, but it does accommodate statutory and constitutional procedural rights. Thus, Title IX regulations should require colleges to allow provisions like cross-examination that are required by state statutory law, not merely if it is required by federal constitutional due-process law.

[11] https://www.cnsnews.com/commentary/hans-bader/time-end-obama-era-fed-micromanagement-colleges-under-title-ix.

E. Standard of evidence 106.45(b)(4)(i): While acknowledging that this regulation improves upon previous guidance issued by the Department, NCFMC opposes this section in its current form. We firmly believe that it is necessary to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and strongly recommend the proper standard that is most appropriate is that of the clear and convincing standard.

Moreover, as noted by the Department, Title IX grievance proceedings are analogous to various kinds of civil administrative proceedings, which often employ a clear and convincing evidence standard. See *Nguyen v. Washington Dept: of Health*, 144 Wash. 2d 516 (2001) (requiring clear and convincing evidence in sexual misconduct case in a professional disciplinary proceeding for a medical doctor as a way of protecting due process); *Disciplinary Counsel v. Bunstine*,136 Ohio St. 3d 276 (2013) (clear and convincing evidence applied in sexual harassment case involving lawyer).

These cases recognize that, where a finding of responsibility carries particularly grave consequences for a respondent's reputation and ability to pursue a profession or career, a higher standard of proof can be warranted. This same logic applies to students who are about to matriculate and enter a profession or career which they invested themselves in through their studies at a recipient institution.

Three different standards are used in courts of law. It is widely recognized that each of the three judicial standards of proof requires a different level of confidence in the facts supporting a decision, namely:

- beyond a reasonable doubt requires at least 95% confidence that the facts support a guilty verdict
- clear and convincing requires at least 70-75% confidence that the facts support the decision
- preponderance of evidence requires at least 50.1% confidence that the facts support the decision.

Given that it only requires a 50.1% confidence level to find a student responsible, a preponderance of evidence standard is far too low a bar for a matter as serious sexual assault especially when one considers the irrevocable harm that awaits a guilty finding.

Furthermore, the courts have likewise found that the preponderance standard is too low a standard. In *J. Lee v. The University of New Mexico*, No. CIV. 17-1230 JB\LF, the Court stated:

> "[T]he Court concludes that preponderance of the evidence is not the proper standard for disciplinary investigations such as the one that led to Lee's expulsion, given the significant consequences of having a permanent notation such as the one UNM placed on Lee's transcript."

This ruling is the first to hold explicitly that the preponderance standard is constitutionally improper. It's worth noting that Judge Browning also held that Lee pled plausible due process concerns because UNM does not provide an evidentiary hearing in sexual misconduct cases, while doing so in other disciplinary matters.

Elsewhere, a strongly worded dissenting opinion in the Fifth Circuit's divided ruling in *Plummer v. Univ. of Houston*, 860 F.3d 767 (5th Cir. 2017), described disciplinary hearings in sexual misconduct cases as "quasi criminal" with long-lasting impacts on the accused. The majority decision in Plummer did not address the issue finding it to have been waived on appeal, but the dissent advocated for a higher standard of review, noting that "[e]levating the standard of proof to clear and convincing, a rung below the criminal burden, would maximize the accuracy of the fact finding." Id. at 782 & n.11.[12]

Beyond the stigma of being branded a rapist for life, there is expulsion and the loss of educational attainment, harm of one's family name and reputation, loss of career and future earnings, and in some states, potentially being required to register as a sex offender. The Department should modify this rule to require that recipients use a clear and convincing standard in order to ensure a greater degree of confidence in recipient decisions which would benefit both complainants and respondents equally.

F. Determination Regarding Responsibility 106.45(b)(4): NCFMC supports this section in its entirety. Furthermore, we appreciate the Department' understanding that a finding of responsibility has life-time consequences so getting the determination right must be one of the highest priorities in the grievance process. As demonstrated time and again, the single-investigator model has been an abject failure in regards to providing reliable decisions therefore under no circumstances should a recipient be allowed to appoint a decision-maker who serves as prosecutor, judge and executioner.

The U.S. Court of Appeals for the Sixth Circuit held that in conducting Title IX investigations, colleges and universities are required to provide parties an opportunity to cross-examine witnesses in the presence of a neutral fact-finder in cases hinging on the credibility of such witnesses. *Doe v. Baum, et al.*, Case No. 17-2213 (6th Cir. Sept. 7, 2018). By affirming that these rights apply in Title IX cases, the *Doe* decision calls into question the single-investigator model used by many educational institutions and suggests that institutions subject to Title IX in the Sixth Circuit may need to reconsider their Title IX policies and procedures in light of this ruling.[13]

The single-investigator model has proven deeply problematic in the years since its popularity began to grow. A number of the lawsuits by accused students alleging a lack of fundamental fairness in campus judicial proceedings turn on the problems

[12] *Higher Education Law Alert*; Nixon Peabody LLP (September 25, 2018)

[13] https://www.jdsupra.com/legalnews/sixth-circuit-provides-expansive-due-86469/

inherent in that model. As one federal judge held in Doe v. Brandeis University (2016):

> "The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions."[14]

As FIRE accurately states, "By explicitly requiring the investigative and adjudicative functions to be performed by separate people, the proposed regulations increase fairness for both parties. After all, a school's single investigator may have a bias that cuts either way, so separating these functions lessens the chance that any type of bias, whether in favor of complainants or respondents (or particular individuals) might infect the process."[15]

We applaud the Department for believing that "fundamental fairness to both parties requires that the intake of a report and formal complaint, the investigation (including party and witness interviews and collection of documentary and other evidence), drafting of an investigative report, and ultimate decision about responsibility should not be left in the hands of a single person. Rather, after the recipient has conducted its impartial investigation, a separate decision-maker must reach the determination regarding responsibility; that determination can be made by one or more decision-makers (e.g., a panel), but no decision-maker can be the same person who served as the Title IX Coordinator or investigator."

G. Appeals 106.45(b)(5): NCFMC opposes this rule as it would permit an accuser to appeal the outcome of a school hearing that has cleared the accused of wrongdoing thereby directing a recipient to prosecute a student twice for the same offense which we believe violates the constitutional principles underlying our justice system's prohibition of "double jeopardy."

While recognizing that double jeopardy applies to criminal cases, the proposed regulation appears to allow the retrying of a student for the same offense which in our opinion assails this constitutional concept. We also note that prior to the 2011 guidance issued by OCR, many recipients had a longstanding practice of only allowing appeals by the student who would be the subject of discipline under the recipient's misconduct policy. The Department should adopt this longstanding practice as the new standard and revise the language in the section accordingly.

Lastly, while double jeopardy does not legally apply to this rule, constitutional due-process requirements might justify limiting the scope of any appeals by a complainant. We cite a recent case in which a judge held that a college violated the accused's due process rights by holding a new hearing on the issue of the student's

[14] https://www.thefire.org/responding-to-criticisms-of-the-proposed-department-of-education-title-ix-regulations/

[15] Ibid

guilt or innocence after the accused was previously found not guilty, and then finding him guilty. See *Tanyi v. Appalachian State University*, Docket No. 5:14-CV-170RLV, 2015 WL 4478853, at *6, 2015 U.S. Dist. LEXIS 95577 (W.D.N.C. July 22, 2015) (rejecting most of accused students' due process claims, but also finding that holding a second hearing after he previously had been found not guilty of sexual assault was a violation of due process; rejecting college's reliance on the April 4, 2011 Dear Colleague letter to try to justify a second hearing). This case would suggest that any appeal right for complainants must be limited to blatant errors, not just the fact that reasonable people could find the accused student guilty after other people found him not guilty. To be clear, we believe that in cases of sexual assault or harassment, appeals should be reserved to the subject of discipline under the recipient's misconduct policy.

H. We support the proposed regulations under Section(s): 106.45(b)(6) - Informal resolutions; 106.45(b)(7) - Recordkeeping; 106.45(b)(8) – Retaliation; 106.6(d) – Constitutional protections; 106.8 (d) – Adoption of grievance procedures.

The comments above conclude our review of the proposed regulations provided in this rulemaking. We now turn our attention and comments to the *Directed Questions* portion of this rulemaking.

In response to the Department's Directed:

- Question 4, we urge you to strengthen the language setting forth training requirements for Title IX Coordinators, investigators, and decision-makers (Section 106.45 (b)(1)(iii)). The Department should require recipient colleges and universities to disclose publicly the training materials for Title IX coordinators, investigators, and decision-makers, in order to verify that they are free from bias, in keeping with these proposed regulations. Although Section 106.45(b)(7) requires recipients to make these training materials available to the Department and to complainants and respondents for review, these materials should be available to the public in order to promote confidence in the fairness of recipients' Title IX grievance procedures.

- Question 6, we urge the Department to require a uniform standard of evidence for all Title IX cases, and to require that this standard be one of clear and convincing evidence (Section 106.45(b)(4)(i)). Given the gravity of charges of sexual harassment, and the need for both claimant and respondent to have confidence that the system will reach the truth, recipients must use a standard that yields reasonable certainty. The preponderance of evidence standard, which permits recipients to assign responsibility on the basis that the respondent is "more likely than not" guilty, fails to yield sufficient certainty and is therefore inappropriate.

- Question 8, we urge the Department to require recipients to maintain record of their Title IX training materials in a public manner. Section 106.45(b)(7) requires recipient institutions to maintain these records for three years, and to make them available to the Department and to complainants and respondents for review. But in order for students,

employees, and members of the public to trust that recipient institutions will handle complaints of sexual harassment in a fair manner, these training materials must be made public. We strongly suggest that recipients are directed by regulation to make such materials publicly available either on the recipient's website or through a publication.

In closing, NCFM Carolinas applauds the Department for its diligence in ensuring that the proposed regulations address sexual harassment under Title IX aligning the Department's regulations with the text and purpose of Title IX and Supreme Court precedent. We support and endorse due process safeguards that neutralize bias based on sex and which are inclusive of fair and equitable treatment of complainants and respondents as articulated in the new regulations.

We believe the enactment of the new regulations will provide for reliable determinations especially if the Department adopts our recommendations requiring recipients to use the clear and convincing standard of evidence, issuing clarifying language that would safeguard a student's access to education while carefully weighing a recipient's need to remove a student expressing threatening behavior, requiring recipients to make available to the public Title IX related training materials they use, and reserving appeals solely for students that are the subject of discipline under the recipient's misconduct policy thereby eliminating concerns of double jeopardy.

Respectfully submitted,

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