September 12, 2022

Secretary Miguel A. Cardona
United States Department of Education
Lyndon Baines Johnson Building
400 Maryland Ave., SW
Washington, DC 20202

Docket No: ED-2021-OCR-0166

Re: Comment of Independent Women's Forum and Independent Women's Law Center regarding lack of due process and fundamental fairness in proposed Title IX rule.

Dear Secretary Cardona:

During the 16th and 17th centuries, English authorities wielded the powers of a tribunal known as the Star Chamber to crush political and religious dissent. Our Founding Fathers regarded this system of justice as so grossly unfair that they crafted many of our constitutional protections precisely to avoid its abuses. *See* Jennifer C. Braceras, Opinion, *College Sex Meets the Star Chamber*, Wall Street J. (Oct. 23, 2016), https://www.wsj.com/articles/college-sex-meets-the-star-chamber-1477001578. And yet, centuries later, the Department of Education has proposed a rule that would authorize, and at times *require*, disciplinary procedures that deprive an accused individual of procedural protections necessary to preserve due process and basic fairness. That rule is eerily similar to, and at times worse than, the very Star Chamber that our founders hoped to avoid. It should be withdrawn.

Independent Women's Law Center and Independent Women's Forum

Independent Women's Law Center (IWLC) is a project of Independent Women's Forum (IWF), a non-profit, non-partisan 501(c)(3) organization founded by women to foster education and debate on legal, social, and economic policy issues. IWLC supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for equal opportunity, individual liberty, and the rights of women and girls.

IWLC and IWF strongly oppose the proposed rule and submit these comments to highlight specific ***due process and fairness problems*** in the notice of proposed rulemaking entitled, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," set forth at 87 Federal Register 41,390 ("the proposed rule").

IWLC and IWF believe that all postsecondary students—the majority of whom are women—benefit from a fair and unbiased process for adjudicating claims of sex discrimination on campus. The Department's proposed rule, however, is anything but fair or unbiased.

Due Process and Basic Fairness

One of the proposed rule's major deficiencies is the absence of an adequate opportunity for the accused to be heard. An opportunity to be heard "at a meaningful time and in a meaningful manner" is a fundamental requirement of due process. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). Accused students at public universities are constitutionally entitled to robust procedural protections. *See Doe* v. *Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019); *Doe* v. *Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988). Because a finding of sexual misconduct can irreparably harm a student's educational, professional, and social prospects, basic fairness demands that private schools be required to provide such protections as well. In 2020, the Department issued a rule requiring that all funding recipients provide procedural protections. 34 C.F.R § 106.45. That rule should be retained.

At a bare minimum, due process requires timely notice of the charges against an individual and an opportunity for the accused to review the evidence and present his or her side of the story. *Univ. of Cincinnati*, 872 F.3d. at 399–400; *see also Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016) (finding a lack of basic

fairness where the university did not provide specific notice of charges or allow the examination of evidence or cross-examination, used the same individual as investigator and adjudicator, limited appeal rights, and utilized a "preponderance of the evidence" standard for determining responsibility).

Below are just a few of the many ways in which the proposed rule violates basic norms of fairness and due process.

A. Verbal Complaints and Access to Evidence

Federal courts have held that, in providing notice, schools must inform the accused of the specific charges against him or her and must provide the accused access to the evidence of guilt. *Purdue Univ.*, 928 F.3d at 663 (citing *Goss v. Lopez*, 419 U.S. 565, 580 (1975)); *see also Doe v. Miami Univ.*, 882 F.3d 579, 603 (6th Cir. 2018); *Brandeis Univ.*, 177 F. Supp. 3d at 603–06.

The Department's proposed rule would eliminate the current requirement, found in 34 C.F.R. § 106.30(a), that formal Title IX complaints be written. Instead, it allows investigations to proceed solely on the basis of verbal complaints. 87 Fed. Reg. at 41,567 (proposed § 106.2). But verbal complaints are often vague and imprecise, making it difficult, if not impossible, to provide accurate and adequate written notice to accused students and denying them the opportunity to prepare a proper response as required by law.

In addition, the proposed rule fails to satisfy the demands of due process because it requires only that the recipient "[p]rovide each party with a *description* of the evidence that is *relevant* to the allegations of sex discrimination and not otherwise impermissible." 87 Fed. Reg. at 41,576 (proposed § 106.45(f)(4) (emphasis added)). The proposed rule allows this description to be verbal. 87 Fed. Reg. at 41,481. In contrast, the existing regulations governing cases involving sexual harassment require a recipient to provide "both parties an equal opportunity *to inspect* and review *any evidence* obtained as part of the investigation that is directly *related to* the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination." 34 C.F.R. § 106.45(b)(5)(vi) (emphases added).

In other words, under the proposed rule, Title IX coordinators are permitted to screen information and present to the parties a mere description of the evidence they believe

is relevant to the accusation. The proposed rule denies parties the right to inspect all of the evidence collected by the Title IX coordinator. Under such a regime, it is possible that a Title IX coordinator may withhold information that he or she believes is not relevant but which is, in fact, critical to a party's case. Moreover, because the proposed rule allows the decisionmaker and the Title IX coordinator to be the same person (*see* 87 Fed. Reg. at 41,466, proposed § 106.45(b)(2)), the decision maker could potentially know and base his or her decision on certain information related to the complaint that the parties have not had a fair opportunity to contextualize or challenge.

Providing the parties an interpretation of only that evidence a coordinator deems relevant, as opposed to offering physical access to all of the related evidence, clearly impairs an accused person's ability to mount an effective defense.

> All of this leads to our first request: ***Please clarify how you believe an accused will be able to rebut an allegation without access to a clear, written complaint and all evidence related to that complaint.***

B. Live Hearings and Cross-Examination

Another serious deficiency in the proposed rule is the absence of live hearings and cross-examination. Because cases of sexual harassment and assault regularly turn on witness credibility, a live hearing with cross-examination is often the *only* way for an accused person to have a meaningful opportunity to tell his or her side of the story. *See Univ. of Cincinnati*, 872 F.3d at 396 (when a student's future depends on "he said/she said" assessments, a "failure to provide any form of confrontation of the accuser" renders proceedings "fundamentally unfair"); *see also Miami Univ.*, 882 F.3d at 600 (when the credibility of an alleged victim is at issue "the university must provide a way for the adjudicative body to evaluate the victim's credibility"); *Brandeis Univ.*, 177 F. Supp. 3d at 605 (failure to allow cross-examination "raises profound concerns"); *see also Doe v. Baum*, 903 F.3d 575, 582 (2018) ("[w]ithout the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives"); *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (university student entitled to cross-examine accuser in a sexual assault case because the case turned on the accuser's credibility); *Univ. of Cincinnati*, 872 F.3d at 401–02 (same); *Neal v. Colo. State Univ.-Pueblo*, 2017 WL 633045, at *24–25 (D. Colo. 2017) (same).

And yet, the proposed rule would allow schools to proceed without live hearings, on the basis of written witness statements. 87 Fed. Reg. at 41,578 (proposed § 106.46(f)(1)(i)). To the extent that there is questioning of witnesses, that questioning is to be done by the "the decisionmaker . . . during individual meetings with the parties *or* at a live hearing." 87 Fed Reg. at 41,578 (proposed § 106.46(f)(1)(i) (emphasis added)). This is insufficient. Due process and basic fairness demand that *the accused* have the opportunity to challenge the credibility of all witnesses and to test the evidence for him or herself.

> This analysis gives rise to our second request: ***Please clarify how an accused will be able to test the credibility of the witnesses and tell his or her side of the story absent live hearings with cross-examination.***

C. Punitive Supportive Measures

The proposed rule would also require a recipient to impose supportive measures that are allegedly necessary to restore or preserve a student's access to an education program or activity, even if such measures "burden a respondent," *before* a determination that sex discrimination has occurred—so long as the supportive measures are "imposed for non-punitive and non-disciplinary reasons." 87 Fed. Reg. at 41,569 (proposed § 106.2). The proposed rule states that such measures may include leaves of absence or "involuntary changes in class, work, housing, or extracurricular or any other activity regardless of whether or not there is a comparable alternative," and does not specify whether such involuntary changes may be imposed on the complainant, the respondent, or both. *Id.* at 41,573 (proposed § 106.44(g)(1)). That vagueness, coupled with the provision allowing supportive measures to burden a respondent prior to a finding of responsibility, makes it possible, if not likely, that schools will impose such drastic measures on the accused.

The notion that such burdensome measures are not "punitive" is nonsensical. If a measure burdens an individual—particularly if it involves severe action such as involuntary removal from educational opportunities—the act is by definition "punitive," regardless of the subjective reason for imposing it. Here, the proposed rule appears not only to permit institutions to involuntarily remove the accused from aspects of his or her educational programs, but also to permit institutions to impose extra and unknown supportive measures, depending on what those institutions deem "reasonable." *Id.* If adopted, this "punish first, assess responsibility later" approach

would override the fairness and balance required by long-standing rules, *see* 34 C.F.R. § 106.8(c) (requiring the "prompt and equitable" resolution of claims).

This leads to our third request: ***Please clarify whether "supportive measures" can include involuntarily removing the accused from classes, activities, housing, and other aspects of an educational program prior to a finding of responsibility. If so, please explain how the agency believes it is fair and equitable to "support" the accuser by imposing what amount to punitive temporary measures on the accused.***

D. Non-physical Safety

The proposed rule also permits a recipient to remove an accused student from an education program on an "emergency" basis without due process in order to alleviate an "immediate and serious" threat to another student's health or safety. 87 Fed. Reg. at 41,574 (proposed § 106.44(h)). The proposed rule conspicuously removes the requirement that a recipient determine that there is a threat to a student's *physical* safety before removing the respondent from the program. Furthermore, the rule provides little guidance as to what constitutes an "immediate and serious" threat justifying removal of a student without prior process, particularly regarding subjective mental or emotional harm.

Accordingly, we ask that the agency ***clarify:***

(1) Whether the rule would allow immediate removal from an education program due to another student's subjective mental or emotional distress; and

(2) The standards by which a recipient may determine that the perceived threat to a student's non-physical health or safety is "immediate and serious" such that removing another student from an education program without prior process is warranted.

E. Single Investigator

Finally, the proposed rule concludes that uniting the investigatory and adjudicatory roles would raise no risk of bias because "the recipient is not in the role of prosecutor seeking to prove a violation of its policy," but rather "the recipient's role is to ensure that its education program or activity is free of unlawful sex discrimination, a role that does not create an inherent bias or conflict of interest in favor of one party or another." 87 Fed. Reg. at 41,467.

This rationale is inherently flawed. Recipients have powerful incentives to err on the side of punishing respondents. After all, a recipient risks losing federal funding for under-enforcing against discrimination, but likely faces no risk in over-enforcing against non-discriminatory conduct. Indeed, in this respect recipients are *more* incentivized to treat respondents unfairly than are prosecutors against defendants, as prosecutors do not risk losing federal funds for under-prosecution.

> Accordingly, ***please clarify how the agency believes investigative and adjudicatory roles can fairly be combined in light of recipients' incentives to err on the side of punishment.***

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IWF and IWLC respectfully request that the Department withdraw the proposed rule.

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