SEEKING CLARITY IN THE TITLE IX CONFUSION:
CROSS-EXAMINATION REQUIREMENT IN TITLE IX
HEARINGS UNDER DUE PROCESS

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I. INTRODUCTION

As students returned to colleges and universities in August, they faced a stark reality: approximately twenty percent of all students would experience an attempted or completed incident of nonconsensual sexual contact.¹ For survivors of these attacks, the experience can be extremely traumatizing.² To aid these students, universities can rely on Title IX of the Education Amendments Act of 1972 ("Title IX") to provide a system in which student survivors of sexual assault can find justice without having to go through the criminal justice system.³ Universities that receive federal funding must provide investigatory, hearing, and decision processes for claims of sexual assaults made by members of the campus community.⁴ While each individual university creates and maintains their own Title IX policies, all schools must comply with pertinent federal regulations.⁵

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¹ David Cantor et al., Univ. of Pa., Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct 23 (2015).
³ 20 U.S.C. § 1681 (2019). While Title IX applies to all schools receiving federal funding, this article will focus on institutions of higher education.
⁴ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,497 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter Nondiscrimination on the Basis of Sex].
⁵ Id.
Since 2010, the balance between the rights of the accused and the accuser in Title IX hearings has seen significant changes in both directions. Federal guidance from the Obama administration implemented many protections for accusers, which encouraged the reporting of sexual assaults and aid for those survivors. While these protections served a necessary purpose, some of the protections came at the expense of the due process rights of the accused. After the election of President Donald Trump, the Department of Education (“DOE”) sought to push the balance of rights back in favor of the accused, but, as evidenced by the outcry of responses during the public comment period for the proposed Title IX regulations, it pushed the balance too far in the opposite direction. To find a solution that provides an equilibrium between the rights of both parties, the DOE and universities must combine aspects of both eras of guidance to protect all parties’ rights.

In attempting to reach that equilibrium, the federal government has recently released three different, and somewhat contradictory, official responses to cross-examination in university Title IX hearings. The mixed guidance created confusion for universities regarding how to create policies and procedures for Title IX proceedings. Compliance with Title IX and its regulations can dictate federal funding; therefore, understanding and implementing Title IX correctly is a crucial issue for universities. In addition to the federal regulations, there is an “escalating wave” of federal suits by

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9. See Nondiscrimination on the Basis of Sex, supra note 4, at 61,497.

10. First, on September 7, 2018, the Sixth Circuit Court of Appeals decided Doe v. Baum, 903 F.3d 575, 578 (6th Cir. 2018). Second, on November 16, 2018, DOE released proposed regulatory rules regarding Title XI for public comment. Nondiscrimination on the Basis of Sex, supra note 4, at 61,497. And, third, on August 6, 2019, the First Circuit Court of Appeals decided Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56, 59 (1st Cir. 2019).

students accused of sexual assault claiming due process violations involving universities. Although federal executive and judicial guidance on this topic is fragmented, analysis of the importance of cross-examination to due process rights offers clarity that parties in Title IX hearings should have an opportunity to cross-examine opposing witnesses. In consideration of practical and public policy issues, however, universities should impose limits on who may ask the questions and how the hearings shall proceed.

In Part II, this Comment will outline the DOE Title IX guidance under the Obama and Trump administrations and the recent circuit split regarding whether cross-examination in these hearings is constitutionally mandated under due process. Part III will analyze due process and its application in the context of university hearings, and Part IV will discuss difficulties in implementing cross-examination in these hearings. In Part V, this Comment will propose several solutions that the DOE and universities can implement as part of a larger solution to this issue.

II. APPLICABLE LAW AND GUIDANCE

In the last decade, the political and judicial guidance regarding Title IX policy and procedures has been influenced by significant political shifts and an increased focus on sexual violence among university students. During the Obama presidency, Vice President Joe Biden and the DOE shed light on the continually emerging sexual assault problem on campuses and implemented protections for accusing parties to encourage reporting sexual violence. In announcing the strengthened response to campus sexual misconduct, former Secretary of Education Arne Duncan

13. See, e.g., Baum, 903 F.3d at 578 (reasoning that cross-examination in Title IX proceedings is paramount to upholding due process).
15. See Anderson, supra note 6 (tracking the changes in Title IX policy under the Obama Administration and the Trump Administration).
16. See Letter from Russlynn Ali, supra note 7, at 3; see also Memorandum from Catherine E. Lhamon, supra note 7.
emphasized that “[e]very school would like to believe it is immune from sexual violence but the facts suggest otherwise. . . . Our larger goal is to raise awareness to an issue that should have no place in society and especially in our schools.”

In 2011, a campaign led by Biden, Duncan, and Assistant Secretary for Civil Rights Russlyn Ali, shifted Title IX’s spotlight from intercollegiate athletics to sexual violence on college and university campuses. Ali began her influential 2011 Dear Colleague Letter (“DCL”) with troubling statistics supporting the increased focus on sexual violence: “[A]bout 1 in 5 women are victims of completed or attempted sexual assault while in college. . . . [Additionally,] approximately 6.1 percent of males were victims of completed or attempted sexual assault during college.” Ali suggested multiple procedural safeguards that would lead to the “prompt and equitable” resolution of sexual misconduct cases. During this time period, attorneys and advisors generally did not play significant roles in Title IX hearings, so the accused student would have to personally cross-examine the accusing student—if cross-examination was offered at all. Regarding cross-examination, Ali wrote that “[the Office of Civil Rights (“OCR”)] strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing.” Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.” The letter does not mention other cross-examination methods.

18. Id.
20. Id. at 6.
22. See Letter from Russlynn Ali, supra note 7, at 12.
23. Id.
24. Id.
After the election of Donald Trump in 2016 and the subsequent appointment of Secretary of Education Betsy DeVos, the DOE rescinded the 2011 DCL and other Obama-era guidance on the subject. On November 16, 2018, the DOE released a new proposed regulation for Title IX compliance focusing on “clarity for schools, support for survivors, and due process rights for all.” This proposed guidance includes a requirement for cross-examination in live hearings, which states that “[a]t the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party’s advisor of choice.” After the release of this draft regulation, a public comment period opened for sixty days, and the DOE received over 100,000 public comments on this proposed regulation.

Between September 2018 and October 2019, with a lack of official guidance from the DOE, the Courts of Appeals for the Sixth and First Circuits both weighed in on the cross-examination issue. Both courts reviewed the due process rights of students found responsible in Title IX hearings, but the courts differed in their analysis of whether the substantive benefits of cross-examination outweighed the practical concerns.

The first decision came in Doe v. Baum, a Sixth Circuit case regarding a dispute between the University of Michigan and one of its students. Doe, a male student, faced an accusation of sexual assault from Roe, a female student, arising from a sexual encounter.

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27. Nondiscrimination on the Basis of Sex, supra note 4, at 61,498.


29. Doe v. Baum, 903 F.3d 575 (6th Cir. 2018); Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56 (1st Cir. 2019).

30. Baum, 903 F.3d at 575; Haidak, 933 F.3d at 56.

31. Baum, 903 F.3d at 578.
between the two at a party. 32 After three months of investigation and interviews of twenty-five witnesses, two distinctly different stories emerged, and the investigator determined that the evidence supporting a finding of sexual assault was not more convincing than the evidence in opposition of it. 33 Neither party had an opportunity to cross-examine any witnesses during the process. 34 On Roe’s appeal, the University’s Appeals Board concluded that Roe’s description of events was “more credible” and pursued sanctions against Doe. 35 With expulsion pending, Doe agreed to withdraw from the University, just thirteen credit hours short of graduation. 36

Doe then sued the University in the United States District Court for the Eastern District of Michigan, claiming that the University’s disciplinary proceedings violated the Due Process Clause and Title IX. 37 He argued that, because the University’s decision turned on a credibility finding, the University was required to provide him an opportunity to cross-examine Roe and adverse witnesses. 38 The district court granted the University’s motion to dismiss, but on appeal, the Sixth Circuit reversed the decision regarding the due process challenge. 39 The appellate court focused its due process analysis on “the opportunity to be heard,” especially in cases in which credibility of witnesses is a determining factor. 40 The court further emphasized that cross-examination is “the greatest legal engine ever invented” for uncovering the truth, and additionally reasoned that the risk of due process deprivation is “all the more troubling considering the significance of Doe’s interests and the minimal burden that the university would bear by allowing cross examination.” 41 Finally, the court stated that cross-examination “takes aim at credibility like no other procedural device.” 42 Adversarial questioning allows parties to test “memory, intelligence, or

32. Id. at 578–79.
33. Id. at 579–80.
34. Id. at 580.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id. at 588.
40. Id. at 581.
41. Id. at 581–82. The court found that the University of Michigan allows cross-examination in all misconduct hearings except those for sexual assault, so the infrastructure necessary for cross-examination is already in place at the school. Id. at 582.
42. Id. at 582 (citing Doe v. Univ. of Cincinnati, 872 F.3d 393, 401–02 (6th Cir. 2017)).
potential ulterior motives,” and it gives the fact-finder an opportunity to observe a witness’s demeanor under adversarial questioning.43 After this decision, schools in this appellate jurisdiction risked violating due process if they did not provide parties the opportunity to cross-examine in Title IX hearings.

On August 6, 2019, in Haidak v. Univ. of Massachusetts-Amherst, the First Circuit declined to follow the Sixth Circuit in requiring that schools offer cross-examination in Title IX hearings.44 In this case, Lauren Gibney, a student at the University of Massachusetts-Amherst (“UMass-Amherst”), filed a Title IX complaint against fellow student James Haidak for physical assault during their “tumultuous relationship.”45 The primary physical confrontation between Gibney and Haidak occurred while they were studying abroad in Barcelona, Spain, where both parties struck one another.46 A few months before the hearing on this complaint, UMass-Amherst instituted a new policy “under which charged students could no longer question other students directly, but instead could submit proposed questions for the Board to consider posing to the witness.”47 Haidak, in conformance with this policy, submitted thirty-six questions for the Hearing Board to ask Gibney, but before the hearing, the Assistant Dean of Students, in her discretion, trimmed the list down to sixteen questions to give to the Board.48 At the hearing, the Board questioned each student three times, and none of the questions asked of Gibney were worded identically to Haidak’s submitted questions, though some questions did elicit the information sought by Haidak.49 The Board found Haidak responsible for assault, and, after appeal, the Associate Dean of Students upheld the decision.50

In the Federal District Court for the District of Massachusetts, Haidak sued the University asserting that it violated his due process rights by not allowing cross-examination.51 The district

43. Id. at 581–82.
44. Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56, 69 (1st Cir. 2019).
45. Id. at 61–62.
46. Id. at 61.
47. Id. at 64.
48. Id.
49. Id.
50. Id. at 64–65.
51. Id. at 65.
court granted UMass-Amherst’s motion to dismiss. On appeal, Haidak argued that the First Circuit should follow the Sixth Circuit decision in Baum. The court disagreed and dismissed the action, stating that cross-examination conducted by the student or his representative would not increase the probative value and decrease the risk of erroneous deprivation so much that it is constitutionally required. Additionally, the court recognized the reasonable fear that student-conducted cross-examination would lead to “displays of acrimony or worse.” In addressing Baum, the First Circuit elaborated that “the court took the conclusion one step farther than we care to go, announcing a categorical rule that the state school had to provide for cross-examination by the accused or his representative in all cases turning on credibility decisions.” The court also expressed its concern that if it mandated cross-examination, it would create a slippery slope in which Title IX hearings would soon mimic “jury-waived” criminal trials, which would overwhelm administrative resources and outweigh the system’s educational effectiveness. The court did, however, recognize that schools can effectively find ways to provide cross-examination without student-conducted questioning. The UMass-Amherst policy concerned the court because the question-filtering could create the possibility that no one would confront Gibney’s accusations.

III. DUE PROCESS AND APPLICATION TO UNIVERSITY HEARINGS

The Fifth Amendment to the U.S. Constitution mandates that “no person shall be deprived of life, liberty, or property without due process of law[.]” Due process requires, at a constitutional minimum, notice and “the opportunity to be heard,” but the determination of what being “heard” means requires contextual analysis

52. Id. at 76.
53. Id. at 69.
54. Id. at 69–70.
55. Id. at 69.
56. Id.
57. Id. at 69–70.
58. Id. at 69.
59. Id. at 70.
60. U.S. CONST. amend. V. In this context, a student has a property right to an education; thus, any deprivation of this right without due process would violate the Fifth Amendment. See Goss v. Lopez, 419 U.S. 565, 575 (1975).
considering the parties’ competing interests.\textsuperscript{61} While due process is often considered primarily in the criminal justice system, the protections generally extend to proceedings in which the “information obtained in a non-criminal forum could be used against the provider in a ‘separate’ criminal matter[,]” such as Title IX hearings.\textsuperscript{62}

\textbf{A. Due Process in Juvenile Delinquency Cases}

Since college students involved in these hearings typically range from seventeen to twenty-three years old, assessing protections of the age ranges above and below this group provides significant insight.\textsuperscript{63} In evaluating juvenile delinquency cases at adjudication, juvenile defendants enjoy the guaranteed right to confront their accuser and cross-examine opposing witnesses.\textsuperscript{64} After recognizing a fragmented juvenile court system that did not always recognize juvenile due process rights, the U.S. Supreme Court in \textit{In re Gault} mandated that juvenile courts must ensure that defendants receive the right to notice of proceedings, the right against self-incrimination, the right to counsel, and the right to confront the opposing party and cross-examine witnesses.\textsuperscript{65} The Court reasoned that although the juvenile proceedings are not official criminal proceedings, the juveniles must receive certain due process rights because they could face significant punishments.\textsuperscript{66}

As both juveniles in quasi-judicial delinquency proceedings and adults in criminal proceedings enjoy the right to cross-examine opposing witnesses during their hearings, the right to cross-examine should extend to these university students who could be either juveniles or young adults. The \textit{Gault} Court considered the significant punishments juveniles could face in its analysis, including juvenile detention, near-constant supervision, and strict curfews.\textsuperscript{67} In his concurring opinion, Justice Hugo Black emphasized that “to

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\item\textsuperscript{61} Grannis v. Ordean, 234 U.S. 385, 394 (1914); Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018).
\item\textsuperscript{63} See Digest of Educ. Stat., Total Fall Enrollment in Degree-Granting Postsecondary Institutions, By Attendance Status, Sex, And Age: Selected Years, 1970 Through 2028, NAT'L CTR. FOR EDUC. STAT. (2017), https://nces.ed.gov/programs/digest/d18/tables/dt18_303_40.asp.
\item\textsuperscript{64} \textit{In re Gault}, 387 U.S. 1, 42 (1967).
\item\textsuperscript{65} \textit{Id}. at 33, 42, 55, 57.
\item\textsuperscript{66} \textit{Id}. at 21–23.
\item\textsuperscript{67} \textit{Id}. at 22–24.
\end{itemize}
hold that others subject to heavier punishments could, because they are children, be denied these same constitutional safeguards” would violate fundamental values of fairness and due process. Like juvenile courts, university misconduct proceedings include an element of education and rehabilitation, but students accused of sexual assault also face potential criminal proceedings, a reputation as a sex offender, and the inability to continue their education. With such significant potential consequences, students should be afforded the right to cross-examination in these cases.

B. DOE Response to Application of Due Process Protections

While it is clear that due process protections should apply in Title IX hearings, deciding which protections apply and systematically implementing these concepts creates significantly more issues. The OCR in the 2011 DCL presents a stark separation between the due process requirements for criminal cases and Title IX hearings. Ali writes, “if at the conclusion of [a criminal] investigation, the individual is tried and found guilty, the individual may be imprisoned or subject to criminal penalties. . . . By contrast, a Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required.” Law professor J. Brad Reich, however, aptly recognized that, while this distinction is technically true, it misses the development of increasing judicial action in university misconduct and discipline cases. If student due process rights are scrupulously attended to at the university proceeding level, then courts will hear fewer instances of information in criminal trials related to the sexual assaults that are violative of due process and will hear fewer cases regarding processes that do not honor due process rights. The deemphasized approach to due process rights by the DOE in 2014 and universities following its guidance “increases the

68. Id. at 61 (Black, J., concurring).
69. See Doe v. Baum, 903 F.3d 575, 582 (6th Cir. 2018).
70. See Memorandum from Catherine E. Lhamon, supra note 7, at 24–26 (discussing the lack of a uniform system for applying Title IX and, instead, providing various ways that Title IX is applied and the differing protections it offers based on the circumstances).
71. Id. at 27.
72. Id.
73. Reich, supra note 62, at 21–22.
74. Id.
likelihood that alleged offenders are subject to criminal action because it decreases protections in campus proceedings.\textsuperscript{75}

At a 2017 convention of university attorneys, Assistant Secretary for Civil Rights at the DOE, Candice Jackson, emphasized that a significant shift from the Obama DOE will be a refocus on protecting the civil rights of students.\textsuperscript{76} In pursuing that goal, the DOE mandated certain due process protections in its draft guidance such as notice requirements, investigatory guidelines, and cross-examination opportunities in hearings.\textsuperscript{77} Specifically, the draft regulations require the party’s advisor, who would advocate the party’s interests, to ask the cross-examination questions.\textsuperscript{78} In support of this requirement, the regulations cite Baum’s discussion of the role that allowing advisors to cross-examine witnesses would have on diminishing emotional trauma and acrimonious behavior.\textsuperscript{79} Additionally, “the proposed regulation allows either party to request that the recipient facilitate the parties’ sequestration in separate rooms during cross-examination while observing the questioning live via technological means.”\textsuperscript{80}

While the proposed regulations recognize that Title IX hearings are not criminal proceedings, it makes significant effort to preserve the due process right to cross-examination.\textsuperscript{81} Unlike the Obama administration, which differentiated between criminal proceedings and Title IX hearings by the differences in severity of punishments,\textsuperscript{82} the proposed regulations recognize the significance of possible punishments for the accused in Title IX cases.\textsuperscript{83} The 2014 DOE Title IX Questions and Answers focused on incarceration, which universities cannot impose, as the primary criminal punishment.\textsuperscript{84} As a result, the DOE deemed any due process protections as unnecessary in this context.\textsuperscript{85} The Trump DOE, alternatively,

\textsuperscript{75} Id. at 22.
\textsuperscript{77} Nondiscrimination on the Basis of Sex, supra note 4, at 61,464.
\textsuperscript{78} Id. at 61,476.
\textsuperscript{79} Id. (citing Doe v. Baum, 903 F.3d 575, 581, 583 (6th Cir. 2018)).
\textsuperscript{80} Nondiscrimination on the Basis of Sex, supra note 4, at 61,476.
\textsuperscript{81} See id. at 61,474–75.
\textsuperscript{82} Memorandum from Catherine E. Lhamon, supra note 7, at 27.
\textsuperscript{83} Nondiscrimination on the Basis of Sex, supra note 4, at 61,476.
\textsuperscript{84} Memorandum from Catherine E. Lhamon, supra note 7, at 27.
\textsuperscript{85} See Nondiscrimination on the Basis of Sex, supra note 4, at 61,464.
“recognizes the high stakes for all parties involved in a sexual harassment investigation, and recognizes that the need for recipients to reach reliable determinations lies at the heart of Title IX’s guarantees for all parties.”86 While this proposed cross-examination approach has received significant criticism,87 the recognition that the due process right of cross-examination is necessary in Title IX hearings is crucial for protecting the rights of all parties in these high-stakes cases.

IV. POTENTIAL ISSUES WITH CROSS-EXAMINATION

To create an effective system of cross-examination in Title IX hearings, universities must address several potential systemic problems. However, the emergence of technology and the increasing role of outside advisors allow for the minimization of such issues. The paramount importance of cross-examination renders solutions for problems such as the traumatizing effect of cross-examination and the possibility of acrimonious behavior an important topic for analysis.88 As the Haidak court indicated, uncertainty exists as to balancing probative value with the potential for error;89 therefore, to maintain an effective cross-examination system, proposed solutions must meet the needs of all parties involved.

A. Unnecessary Trauma or Intimidation of Accuser

First, a significant public policy concern arises when survivors of sexual assault must relive their trauma when telling their story in investigations and hearings.90 Survivor advocacy groups argue that allowing adversarial cross-examination of a survivor would risk unnecessary emotional distress and intimidation, especially if the accused student personally conducts the questioning.91 The Center for American Progress warned of issues with the proposed

86. Id. at 61,476.
87. See, e.g., Busta, supra note 28.
88. See supra Part III.
89. See Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56, 69 (1st Cir. 2019).
regulations that “[c]ross-examination is highly problematic and likely to jeopardize the rights and safety of student survivors.” The Center for American Progress also pointed to the Obama-era guidance that stated “[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.” Generally, this argument focuses on party-on-party questioning in which survivors would have to directly face their alleged attacker, but the argument also extends to adversarial questions asked by other people.

While this argument carries significant weight and minimizes emotional damage to survivors in Title IX proceedings, potential solutions can allow for the accused to pose questions without undue emotional trauma or intimidation. The proposed regulations recognize that accused-on-accuser cross-examination is not a viable solution and aim to avoid “any unnecessary trauma that could arise from personal confrontation between the complainant and the respondent” by requiring the advisor to ask cross-examination questions. These regulations would also allow for either party to request that the parties sit in separate rooms for the cross-examination period. Eliminating the potential for emotional trauma in these instances is an untenable goal as sexual assaults and gender violence are inherently emotional, but the proposed regulations offer two significant proposals toward a solution.

B. Limited Probative Value and Increased Possibility for Error

In Haidak, the First Circuit recognized another potential issue with cross-examination in this setting: the limited additional probative value of this questioning and the increased potential for error in the hearings. The court noted that “[i]n the hands of a
relative tyro, cross-examination can devolve into more of a debate; and when the questioner and witness are the accused and the accuser, schools may reasonably fear that student-conducted cross-examination will lead to displays of acrimony or worse.98 In its analysis, the court states that research has not determined that one form of questioning in these contexts is superior to others; thus, since there is no research to support that cross-examination increases the probative value, it is not constitutionally required.99 Additionally, since the emotional nature of accused-on-accuser questioning could lead to increased problems in the hearing, the court did not want to join the Sixth Circuit in requiring any type of cross-examination.100

Although the First Circuit did not want to require cross-examination, it did note that several possible solutions could alleviate its concerns.101 The court cited the Foundation for Individual Rights in Education’s stance that allowing the hearing panel to ask questions submitted by the accused for cross-examination meets due process requirements in this context if the hearing panel is not given unlimited discretion in choosing which questions to ask.102 Since the primary fear regarding this issue stems from direct confrontation, an advisor or a neutral spokesperson can allay the concerns by asking questions.103 Additionally, there is added probative value in cross-examination through observing a witness’s demeanor and directly testing memory and potential ulterior motives.104

C. Lack of Legal Training for Hearing Boards

Based on the construction of most university misconduct hearing boards, which primarily consist of a mix of students, faculty, and staff, almost all of the decision-makers involved in these hearings lack any relevant legal experience.105 While the Campus Sexual Violence Elimination Act requires that university officials who receive annual training on, among other things, “how to conduct an

98. Id.
99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
investigation and hearing process that protects the safety of victims and promotes accountability” conduct Title IX proceedings, around twenty-five percent of schools fail to provide proper training in conjunction with the statute. In one example, in a hearing panel consisted of the college’s vice president of human resources, an assistant psychology professor, and the director of the campus bookstore, “the panelists acted as prosecutors, judges, and jury, without any limitations or guidelines for their questioning.”

In the proposed regulations, the DOE addresses the training issue for decision-makers in these hearings. The proposed regulation requires at least sixteen hours of training annually for any decision-maker in a Title IX case. This training must include instruction on how to conduct a proceeding that protects the due process rights of all parties involved. Although this training does not replace legal knowledge in how to oversee cross-examinations, it should provide sufficient knowledge for how to properly conduct the proceedings, especially when additional protections such as physical or technological barriers between parties are in place during cross-examination phases.

V. PROPOSED SOLUTIONS TO PROTECT DUE PROCESS RIGHTS

In considering the federal and judicial guidance of the past decade, the pendulum of the protection of party rights has swung from overprotection of the accuser to overprotection of the accused. In the wake of the confusion following these hearings, the DOE has an opportunity to find a balance that adequately protects all parties involved. While it is unclear what aspects might change after the public comment period, the DOE should take into consideration a combination of solutions presented by the various government bodies. These proposed solutions particularly consider the

106. 20 U.S.C. § 1092 (2019); Coray, supra note 105, at 73; see also Margaret Drew, It’s Not Complicated: Containing Criminal Law’s Influence On The Title IX Process, 6 TENN. J. RACE, GENDER, & SOC. JUST. 191, 240 (2017) (arguing that poor training and selection processes for Title IX decision-makers remain in need of reform).
107. Coray, supra note 105, at 60.
108. Nondiscrimination on the Basis of Sex, supra note 4, at 61,497.
109. Id. at 61,486.
110. Id. at 61,497.
resources of universities and students, the desire for efficient resolutions, and the protection of all parties’ rights.

A. Revised UMass-Amherst Process

The first solution directly addresses the potential conflict with student-on-student questioning. In Haidak, the court discussed the UMass-Amherst cross-examination system in which the accused student submitted questions to the Assistant Dean of Students to present for the hearing panel to ask during the hearing.\textsuperscript{112} While the court liked the use of a neutral questioner in this system, it criticized the complete discretion that the Assistant Dean and hearing panel possessed in deciding the form of the questions and if they would be asked at all.\textsuperscript{113} Since none of Haidak’s proposed questions were asked to Gibney because of the discretion of the administrators, this system ignored the accused’s due process right to confront the accuser.\textsuperscript{114}

In pursuance of a neutral questioner, universities can implement a similar system of parties proposing questions for cross-examination, but the administrators and hearing panel cannot have unlimited discretion to change or discard questions. By allowing a neutral person to ask cross-examination questions, the heightened emotion and potential for acrimonious conduct surrounding survivors’ being questioned directly by their alleged attackers are limited.\textsuperscript{115} This solution does not place significant administrative burdens on universities as they can include questioning training in their mandated training for Title IX decision-makers.\textsuperscript{116} Additionally, this role of the panel does not interfere with its ability to listen to testimony and observe the witness.

\textsuperscript{112} Since the hearing occurred during the 2013-2014 academic year, the court discusses the 2013-2014 policy. Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56, 69 (1st Cir. 2019). For the current UMass-Amherst policy, see University of Massachusetts-Amherst Student Code of Conduct, UNIV. MASSACHUSETTS-AMHERST (July 1, 2019), http://www.umass.edu/dean_students/sites/default/files/documents/07.01.2019%20Code%20of%20Student%20Conduct.pdf.

\textsuperscript{113} Haidak, 933 F.3d at 69.

\textsuperscript{114} Id. at 70.

\textsuperscript{115} Nondiscrimination on the Basis of Sex, supra note 4, at 61,472–73.

\textsuperscript{116} Id. at 61, 846.
B. The Role of the Advisor

In Title IX hearings, the role and identity of advisors remain up for debate.117 The proposed regulations mandate that cross-examination be conducted by advisors rather than the parties themselves, but it remains unclear who can serve as an advisor and the extent to which they can participate.118 In some cases, students want a parent or friend to serve as their advisor, but some students choose to hire an attorney as their advisor.119 Additionally, when a student does not have an advisor, universities must provide an advisor to conduct cross-examination, and the regulations do not delineate whether this appointed advisor must be an attorney.120 Questions of fairness arise if one party has a trained attorney to cross-examine witnesses and the other party has a person without legal training. Allowing attorneys to participate in these proceedings also opens a slippery slope that could lead to these hearings’ becoming jury-waived criminal trials.121

Despite the question about who can serve as an advisor, allowing advisors to conduct cross-examination alleviates the concerns surrounding issues associated with student-on-student questioning.122 The use of advisors in this capacity also promotes efficiency, especially if it allows attorneys who have experience with cross-examination to ask the questions. Attorney Fran Sutton, however, provides a warning: “Not every criminal defense attorney can say, ‘Oh yeah, I can handle a campus case,’ because they’re extremely different. . . . It’s kind of like if you needed brain surgery and you said, ‘Oh well I’ll use my eye doctor because that’s kind of close to the brain.’”123 She emphasized that “[e]very single case is different, every student is different, every claim is different—UNC-Chapel Hill has different rules than UNC-Charlotte.”124 While the question of whether attorneys should serve as advisors in these hearings is an issue deserving of its own separate analysis, the use of any

117. Id. at 61, 474.
118. Id. at 61, 475.
119. See, e.g., Ciesielski, supra note 21.
120. Nondiscrimination on the Basis of Sex, supra note 4, at 61,475–76, 61,488.
121. Haidak, 933 F.3d at 69–70.
122. Id.
123. Ciesielski, supra note 21.
124. Id.
advisor to conduct cross-examination can serve as part of the solution to the problems of cross-examination in this context.

C. Physical and Technological Barriers

Finally, physical and technological barriers between the parties can serve as another technique to protect the rights of the accused and the accuser, particularly during cross-examination. To prevent acrimonious conduct caused by the proximity of the parties during hearings, some universities maintain a barrier between the parties.125 Other schools keep the parties separated in different rooms during cross-examination and allow one party to observe the hearing through a live video feed.126 Southern University delineates a clear system of alternative testimony measures in its Sexual Misconduct Policy, which describes alternative testimony options "such as placing a privacy screen in the hearing room or allowing the alleged victim to testify outside the physical presence of the accused individual, such as in another room or by electronic means such as videoconferencing."127 The Policy also clarifies that "[w]hile these options are intended to help make the alleged victim more comfortable, they are not intended to work to the disadvantage of the respondent."128 Many universities already have this sort of technology for use in student misconduct hearings, so the infrastructure is already in place, and the separation of the parties allays the fear of error in the proceedings from face-to-face confrontation between the accused and the accuser.129

VI. Conclusion

Although the future of Title IX regulations and guidance remains uncertain, the recent judicial guidance in this area strongly suggests the importance of some form of cross-examination to

126. See, e.g., Nondiscrimination on the Basis of Sex, supra note 4, at 61,476.
128. Id.
129. Nondiscrimination on the Basis of Sex, supra note 4, at 61,476.
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protect the due process rights of the accused.130 While the First and Sixth Circuits disagree on whether or not to mandate certain forms of cross-examination, both courts spoke to the importance of cross-examination in determining the truth, especially when credibility of the parties is a central issue.131 With this recognition of the due process issues, the DOE and individual universities must take steps to find balance between the Obama-era focus on the accuser’s rights and the Trump-era focus on the rights of the accused. Achieving this balance is critically necessary to protect the rights and interests of both parties adequately.

The solution to maintaining a balance between the rights of both parties must be multi-faceted. Solutions such as allowing attorneys to cross-examine students will foster significant debate. The DOE and individual universities, however, can begin implementing solutions such as neutral questioners and physical and technological barriers to implement a system that protects the due process right to cross-examination while also providing safeguards against procedural error and survivor re-traumatization. This issue will remain significant for the DOE and the federal judiciary in the future, and this circuit split could cause the United States Supreme Court to rule on this issue.

130. See Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018); see also Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56, 69 (1st Cir. 2019).
131. Haidak, 933 F.3d at 69; Baum, 905 F.3d at 581–82.