KAISERDILLON PLLC

1099 14TH ST. NW
8th FLOOR WEST
WASHINGTON, DC 20005
(240) 640-2850
WWW.KAISERDILLON.COM

Comments of KaiserDillon PLLC in Support of Proposed Rules That Would Restore Fairness to Title IX Adjudications on Campus

Department of Education Notice of Proposed Rulemaking
Docket No. ED-2018-OCR-0064, RIN 1870–AA14
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Submitted January 30th, 2019

I. Introduction

Our firm has represented more than 100 students at more than 80 colleges, universities, and secondary schools nationwide. Although our practice consists largely of defending the accused (both male and female), we have also represented accusers. Our firm is widely recognized by the national media as one of the country's leading firms in this area; Partners Matt Kaiser and Justin Dillon both speak and write extensively on Title IX issues. We were also the first firm in the country to win summary judgment against a university in the modern Title IX era, which we did against George Mason University in 2016.

In short, few firms have seen as many of these cases as we have. Few firms have seen the tremendous cost—both emotional and financial—that the former Administration's Title IX policies have imposed on accused students. And we believe that, by and large, the proposed regulations would constitute an enormous step towards restoring fairness in these proceedings. They would also restore autonomy to accusers, whose ability to shape the course of their own cases was stripped by the previous Administration.

Our comments here will be brief, as we co-signed, and join in full, the *Comments of Concerned Lawyers and Educators in Support of Fundamental Fairness for All Parties in Title IX Grievance Proceedings*, which has been submitted under separate cover.

Finally, we think it is worth noting upfront why you will inevitably hear more criticism of these regulations than support of them. We have heard, as recently as this morning on NPR, that accusers' groups have literally thrown comment-writing pizza parties. Of course, everyone should participate in the process of petitioning their government; we do not begrudge these advocacy efforts. But you should not mistake volume for value.

Accused students simply don't have the same option to participate publicly in this conversation. If an accused student is found responsible, people reason, they must have done it. If they're found not responsible, then many people believe that they did it and the school

mishandled the case. If you publicly identify yourself as a "falsely accused rapist," most people either won't hear or will ignore the first two words.

So again: as you consider the comments that have been submitted, please keep in mind that falsely accused students are differently situated than those who claim to be victims. There is no upside to signing their names to a comment explaining what happened to them.

II. Comments on Specific Provisions

A. Section 106.44(c): Emergency Removal

The proposed rule would permit a respondent to be removed on an emergency basis as long as the school, among other things, "provides the respondent with notice and an opportunity to challenge the decision immediately following the removal." The devil is in the details here. For years, schools have abused "interim suspensions" as a way to force respondents off campus with little or no due process. We have even seen public schools, which are bounded by constitutional limits, do this.

While we think this rule is a step in the right direction, it could go further by listing factors that should be considered. Such factors could include whether violence was alleged (which it rarely is in cases involving alleged incapacitation), how long the complainant took to file a complaint, whether the complainant has reported the allegations to the police, and whether there are other, less restrictive measures that could be taken. The point here is to limit emergency suspension to situations where there is an actual, exigent threat to the student body that reasonable people would recognize as such.

During any emergency hearing, schools should also be required to share all available evidence with the respondent, permit him an opportunity to be heard, and allow his advisor to cross-examine any witnesses against him. We worry that if these full procedural rights are not extended, you will be creating a loophole that allows emergency measures to effectively replace a fuller process.

B. Section 106.45(a): Discrimination on the Basis of Sex

We support the proposed change that would add that "a recipient's treatment of the respondent may constitute discrimination on the basis of sex under Title IX." This will encourage schools to be more careful in how they treat both sides.

It might also be important, here or elsewhere, to address one common defense raised by schools in virtually every Title IX lawsuit: that because any bias in the process is biased against the *accused*, not against *male students*, there is no bias on the basis of sex. Schools argue that, because the policies are sex-blind, they cannot discriminate on the basis of sex.

This, of course, is nonsense. If a school creates a special disciplinary process, apart from its normal code of conduct, that it knows will apply overwhelmingly to one sex—and it then makes that process tilt uniquely against the students it applies to—it is engaging in sex discrimination. But schools routinely try to escape that common-sense conclusion, and unfortunately, courts sometimes agree with them.

C. Section 106.45(b)(1): General requirements for Grievance Procedures

This section reeks of common sense. A few parts bear particular comment.

First, this section would instruct schools that a remedy after a responsibility finding must be "designed to restore or preserve access to the recipient's education program or activity." It should go further by stating that it may not always be necessary to remove a respondent from campus to accomplish this goal. The respondent could be instructed to move to a different residence or to not attend the same classes as the complainant; he could even be instructed, in lieu of suspension or expulsion, to complete some portion of his education online. In short, only responsibility findings regarding the most serious allegations may necessitate a respondent's wholesale removal from his educational environment.

The requirement that the investigation evaluate both inculpatory *and* exculpatory evidence is also crucial. Too many Title IX investigations bury exculpatory evidence deep into the attachments to an investigation report and fail to mention or address such evidence in the body of the report itself. This requirement could help change that.

The Department should add, in the section barring bias, that a "reasonable person" standard be applied to evaluating bias. In one case we handled, for example, the single administrator tasked with ruling on the respondent's appeal of his responsibility finding had recently retweeted the following tweet by End Rape on Campus: "To survivors everywhere, we believe you." To put it mildly, that is not appropriate where the credibility of a complaining witness is often the central issue in the case. Yet the school overruled our bias objection, stating that nothing suggested that he was biased against *this particular* respondent. A "reasonable person" standard, perhaps paired with something noting that a history of working or advocating on one side or another of this issue might constitute bias, could help solve this problem.

The section requiring unbiased training materials is also crucially important, given how biased some training materials can be. For example, as of 2014, one public university's training materials for their hearing panels contained statements such as "False allegations of rape are not common…. [R]eputable research places the rate in the general population between 2% and 10%." This is effectively telling the factfinder that there is a 92-98% chance the accuser is telling the truth. Just as no court would let a prosecutor introduce statistical evidence like that during a sexual assault trial, a college should not be allowed to do so, either. Finally, because sunlight is the best disinfectant, this rule should go further by requiring schools to publish all such training materials on their websites.

Finally, we recommend that language be added requiring the complainant to prove the *absence* of consent (as opposed to requiring the respondent to prove the *presence* of consent). This would make clear that the burden of proof stays with the complainant (or the school). Currently, many schools require the respondent to prove that there was consent, either by using an affirmative consent standard or placing undue emphasis on a common provision stating that consent to one sexual act does not necessarily imply consent to another sexual act. In either scenario, the burden of proof inevitably shifts to respondents to prove their innocence, which is inconsistent with centuries-old understandings of due process.

D. Section 106.45(b)(2): Notice of Allegations

Schools have continued to evade the more robust notice requirements of the September 2017 guidance. To that end, this section should require schools to give the respondent a copy of the complainant's written complaint, if one exists, when sending the notice of investigation. If one does not exist, schools should be required to give the respondent, at a minimum, a substantially verbatim summary of the complainant's allegations, including information about the date, time, alleged conduct, and identity of the accuser.

Some schools, when faced with allegations by people who insist they want to remain anonymous, nonetheless move forward with an investigation anyway. The Department should consider adding language stating that such an approach is appropriate in only the most serious cases and that, in general, schools should not investigate respondents when the complainants refuses to identify themselves.

E. Section 106.45(b)(3): Investigations of a Formal Complaint

This section, too, is critically important to restoring fairness in these cases. A few parts of it bear particular note.

The provision that would "[n]ot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence" is enormously important. Some schools—including a major research university in Washington, DC—bar parties from contacting witnesses in their case. Not contacting other parties—contacting *witnesses*.

It is also important that advisors continue to be allowed to be present at (and sometimes participate in) any grievance proceeding or related meeting, as this provision would allow.

Requiring a live hearing at higher-education institutions, with live cross-examination by the parties' advisors, is perhaps the single most important proposed change in the entire proposed rule. No change will do more to ensure that these hearings are fair. In our experience, schools often fail to challenge an accuser's testimony in any meaningful way. They simply don't ask hard questions. We have seen far too many cases where, for example, a series of text messages provides strong evidence of the accused student's innocence—but the investigator or the panel never asks a single question about them.

Moreover, having the advisors, as opposed to the parties, do the cross-examining will mean that the questioning will be left to the professionals, or at least to adults who will be better attuned to the nuances of these cases. The concern, expressed by some victims' groups, that aggressive attorneys will berate the accuser is overblown. Attorneys, and presumably non-attorney advisors, know better than to alienate the factfinder, which is what berating would do. Advisors can be—and should be—reasonably instructed not to be abusive.

We also support the provision that would require schools to provide the parties with a copy of the investigation report at least ten days before the hearing. But we believe it should go further and require that schools *give the parties a hard or electronic copy of the report*. Many schools refuse to do this, citing privacy concerns, and instead force students and their advisors to go into a room and review the report there. Parties are allowed to take notes, but only

handwritten ones. Their phones and laptops are confiscated before the review. This is particularly problematic in complex cases, where the investigative report and its attachments can run hundreds of pages long. Indeed, we have even handled cases at schools that *put administrators in the room during the review*—making it impossible to have a private conversation about the documents, not to mention trampling on attorney-client privilege. Any privacy concerns can be addressed by having recipients sign a nondisclosure agreement (as long as any such agreement does not preclude the use of the materials in a subsequent lawsuit, which may well be void on public policy grounds in any event).

F. Section 106.45(B)(4)(I): Standard of Evidence

The proposed rule would allow schools to choose between the preponderance-of-the-evidence and clear-and-convincing-evidence burden of proof. Along with the requirement of cross-examination, raising the burden of proof is a vital part of reform in this area. But while allowing schools to choose the higher standard sounds good in theory, it would mean in practice that virtually every school will choose preponderance.

Letting schools choose is thus the functional equivalent of ensuring that the burden will remain, as many schools tendentiously put it in their actual policies, "50 percent plus a feather. Indeed, since the 2011 "Dear Colleague" Letter was withdrawn in September of 2017, schools have had the freedom to raise the burden of proof to "clear and convincing evidence." To our knowledge, none have done so. Thus, the Department should mandate the clear-and-convincing standard rather than giving schools a choice. A higher standard would be more appropriate for a process that has life-altering consequences for the accused.

Critics of raising the burden of proof often argue that because the preponderance standard applies in most civil cases, it should apply on campus, too. But that is grossly misleading. In civil cases, both parties have a panoply of rights they do not have on campus—full-blown cross-examination conducted by a lawyer and overseen by a judge; the power to compel witness testimony through the use of subpoenas; extensive discovery tools; and often the right to a jury, to name just a few of the most obvious ones. Moreover, the entire case is overseen by an actual judge. So we hope the Department will not fall for this common argument.

Given how many campus sexual misconduct cases involve alcohol use, we also believe the Department should add language requiring schools to define incapacitation in a way that clearly distinguishes it from mere intoxication, as many (but not all) schools do. One school's sexual misconduct policy, for example, makes a very clear distinction between those two states: "Incapacitation is a state beyond drunkenness or intoxication. A person is not necessarily incapacitated merely as a result of drinking or using drugs. The impact of alcohol and other drugs varies from person to person. One is not expected to be a medical expert in assessing incapacitation. One must look for the common and obvious warning signs that show that a person may be incapacitated or approaching incapacitation. Although every individual may manifest signs of incapacitation differently, typical signs include slurred or incomprehensible speech, unsteady gait, combativeness, emotional volatility, vomiting, or incontinence. A person who is incapacitated may not be able to understand some or all of the following questions: 'Do you know where you are?' 'Do you know how you got here?' 'Do you know what is happening?' 'Do you know whom you are with?'"

But that school is an outlier. Many schools routinely confuse intoxication with incapacitation, assuming—and training their panelists—that drunk sex is rape. But that, of course, is not true. *Incapacitated* sex is indeed rape—but there is often a world of difference between being, for example, too drunk to drive and too drunk to have sex. The Department should require schools to make this distinction more clearly, which would also align schools' policies with the standard used in the criminal law.

G. Section 106.45(B)(4): Determination Regarding Responsibility

We strongly support the proposal in this section that would preclude the investigator from also serving as the decision-maker in a case, which would bar the so-called "single investigator model." (We have referred to that model elsewhere as the "Javert model," after Inspector Javert from *Les Misérables*.) While some investigators are capable of being unbiased—usually outside attorneys with experience in handling employment matters—too many are either in-house Title IX ideologues or former law enforcement officers who specialized in sexual assault cases and have a bias for prosecution. Moreover, the single-investigator model, by definition, eliminates effective confrontation of witnesses. Even when paired with a later hearing, an investigator's finding is inevitably a heavy thumb on the scale.

We also support this section's proposed requirement that schools explain the basis for their decisions. Too many schools issue cursory explanations that fail to grapple with the actual evidence—and especially the exculpatory evidence—in a case. Indeed, this rule could go further by requiring schools to directly address—rather than simply ignore—exculpatory evidence, and to explain their findings in detail. We would support such a change and see no downside to it.

H. Section 106.45(B)(5): Appeals

We believe that the Department should require schools to offer appeals, and to limit appeals only to parties who have been found responsible for a violation. There is no reason that a complainant who loses at a hearing should have a second bite at the apple on appeal, which is doubly true if the burden of proof remains as low as preponderance of the evidence. Allowing only the accused to appeal is a foundational principle of criminal law. Moreover, we believe that the Department should require schools to allow respondents to appeal on four grounds: procedural error; newly discovered evidence; excessive sanction; and that the finding was supported by insufficient evidence.

Many schools limit the grounds for appeal to the first two grounds, which can often make appeals meaningless. They often define "procedural error" so narrowly as to render it useless, and it is a rare case in which a respondent could discover new evidence between the time that a panel decision is made and an appeal must be filed. Requiring schools to permit an appeal on insufficient-evidence and excessive-sanction grounds, moreover, allows for an often-useful second layer of review and will ensure more consistency across decisions and sanctions.

Finally, the Department should give an appealing party at least seven days to appeal an adverse decision. Some schools give parties as little as three days, making an effective appeal almost impossible—especially when, as often happens, a student who believes he did nothing wrong fails to seek an experienced advisor before the hearing because he fails to understand the risk, and realizes it only when he is found responsible and harshly sanctioned.

I. Section 106.45(B)(6): Informal Resolution

We strongly support this section, which would return some degree of autonomy to complainants in these cases. We have seen cases in which a complainant decides not to move forward—or even specifically asks the schools not to move forward—but the school moves forward nonetheless, arguing that it has no choice. If complainants want to resolve a matter informally—whether through mediation, restorative justice, or some other means—then they should be allowed to do so. Taking away this choice by flatly barring informal resolution, as the previous Administration did, is both pointless and paternalistic.

The concern that allowing informal resolution would permit schools to sweep allegations under the rug is misplaced. The cultural effect of the previous Administration's Title IX enforcement efforts cannot be overstated. Schools now know, and have often learned the hard way, that they must take sexual misconduct cases seriously. A process that would both guarantee more fairness to respondents and restore more autonomy to complainants is hardly at odds with that.

III. Responses to Directed Questions

A. Training

As discussed above at Section II.C, we believe that is crucially important that schools be required to use unbiased training materials, and that far too few of them do. The current trend toward "trauma-informed investigation" is perhaps the best example of that. In our experience, "trauma-informed investigation" is not what, if done correctly, it should be—training that teaches the investigator to treat both sides fairly and with sensitivity. Rather, it is too often "guilt-assuming investigation"—that is, it starts by *assuming that there has been a trauma*, which is the very thing that the investigation is supposed to determine. Such an approach turns the burden of proof on its head, creating a situation in which the investigator starts by believing the accuser, while the accused student is forced to prove his innocence. This is precisely the opposite of what is actually required in most schools' policies, but they fail to see the disconnect.

Moreover, in our experience, "trauma-informed" questioning often becomes softball questioning for the accuser and hardball questioning for the accused. Time and again, we have seen investigators fail to press accusers to explain, for example, plainly exculpatory text messages, while simultaneously grilling accused students over minor inconsistencies.

To that end, the Department should warn schools that any training that *assumes* a trauma has occurred, or that encourages investigators not to ask both sides hard questions, will not comply with its Title IX obligations.

B. Standard of Evidence

Please see our response at III.F above.

C. Potential Clarification Regarding "directly related to the allegations"

We worry that this language would create a loophole that would allow schools to decide, without telling the parties, how they define "directly related." A biased administrator, for

example, could decide that exculpatory evidence is too attenuated to be "directly related" to the allegations. Say, for example, that a school receives evidence that the complainant has previously fabricated an allegation of sexual assault. A school might consider such information not "directly related" to allegations in the current case—and thus permit it to suppress exculpatory information without the respondent's ever knowing about it.

Something like this could happen even if the decisionmaker is not biased. As anyone who has ever done criminal defense work knows, prosecutors often fail to see the exculpatory value of certain information. Sometimes they think it's not relevant. Sometimes they think their case is so strong that this one little piece of evidence couldn't possibly make a difference. Such decisions don't have to be nefarious to be wrong. Where you stand depends on where you sit, and defense lawyers will often think of angles, based on what *they* know about a case, that would never occur even to the most honest prosecutor.

That is why we believe that "directly related" has the makings of a problematic loophole. The Department should consider changing it to "evidence that bears in any way on the allegations, including any evidence regarding the credibility of the parties."

IV. Conclusion

We hope that the Department will find these comments useful as it proceeds through the rulemaking process. We also applaud and thank the Department for its courageous stand on behalf of traditional American ideals of fairness and due process, which are a cornerstone of any democratic society and which we should never cease to safeguard—even when it can be unpopular to do so.