COMMENT ON PROPOSED TITLE IX REGULATION

Live Hearing and Cross-Examination

Submitted by SAVE

This Comment is to be included as part of the Administrative Record

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The Department of Education's 2020 Title IX regulation requires at §106.45(b)(6)(i) that institutions of higher education conduct a live hearing with cross-examination for the parties including questions challenging credibility.

In contrast, the DOE's recently proposed Title IX regulation:

1. Would abolish the requirements for postsecondary schools to conduct a live hearing and require cross-examination. §106.46(f)(1).
2. Would permit, but not require, questioning by either party (in a live hearing), but only questions the decisionmaker allows and determines are not "unclear" or "harassing," thereby giving the decisionmaker unilateral power to arbitrarily limit questioning. §106.46(f)(3).

This proposal ignores the relevant case law. Three appellate courts and 16 trial courts affirmed a requirement for live hearings, based mostly on constitutional due process and statutory grounds. The key findings of each of these decisions are listed below.

Live hearings are essential because they allow for the parties to be questioned in person, and allow the decision-maker to evaluate the credibility of the parties. SAVE strongly urges that the revised Title IX regulation retain the provision for live hearings, as stated in the 2020 regulation at Section 106.45(b)(6)(i).

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Appellate Court Decisions

1. *Doe v. University of Sciences*, 961 F.3d 203, 214 (3d Cir. May 29, 2020) (reversing the district court's order dismissing Doe's complaint because of fairness issues and Doe plausibly stating a Title IX violation and breach of contract): "In other private-university cases, Pennsylvania courts have similarly determined that fairness includes . . . the ability to participate in a live, adversarial hearing during which the accused may present evidence and a defense."

2. *Doe v. Allee*, 242 Cal. Rptr. 3d 109 (Cal. App. 5th Jan. 4, 2019) (reversing the trial court's judgment against Doe with directions to grant Doe' petition for writ of administrative mandate

and set aside the findings that Doe violated the University's sexual assault policy because Doe was denied fundamental fairness throughout his sexual assault allegation):

a. "[I]n [the University of Southern California (USC)] system, no in–person hearing is ever held, nor is one required . . . fundamental fairness requires, at a minimum, that the university provide . . . a hearing in which the witnesses appear in person or by other means[.]" *Id.* at 135, 137.

b. "[Doe] was entitled to . . . a hearing at which the witnesses appeared in person or by other means[.]" *Id.* at 138.

3. *Doe v. Univ. of S. California*, 200 Cal. Rptr. 3d 851, 873 (Cal. Ct. App. Apr. 5, 2016) (reversing trial court's affirmation of University's decision that Doe violated USC sexual misconduct policy for lack of a fair hearing which violates Doe's procedural due process rights): "Here, [University Student Conduct Office] relied on information never revealed to John, and the Appeals Panel suspended John on a different theory than [University Student Conduct Office]. John was not provided any information about the factual basis of the charges against him, he was not allowed to access any evidence used to support those accusations unless he actively sought it through a written request, and he was not provided with any opportunity to appear directly before the decisionmaking panel to rebut the evidence presented against him. While a full trial-like proceeding with the right of cross-examination is not necessary for administrative proceedings, we cannot agree with USC that the process afforded to John met the standards of a fair hearing…"

Trial Court Decisions

1. *Doe v. Columbia University*, Case 1:20-cv-06770-GHW, at *44 (S.D.N.Y. Aug 1, 2021) (denying the University's MTD Doe's Title IX erroneous outcome claim in imposing interim suspension, Title IX selective enforcement claim in the Jane Doe 1 proceeding, Title IX erroneous outcome claim in the Jane Doe 4 proceeding, and Title IX erroneous outcome claim in the Jane Doe 3 proceeding because Doe plausibly stated all claims listed above): "But [John Doe] was never given a hearing of any sort, and has pleaded that the opportunity Columbia offered him to appeal the decision in writing did not constitute a meaningful opportunity to be heard."

2. *Doe v. New York University*, 1:20-CV-01343-GHW, 2021 WL 1226384 (S.D.N.Y. Mar. 31, 2021) (denying MTD on Title IX grounds):

a. Accused student's technical difficulties while participating in hearing over Zoom (while all other participants met in-person), which student claims affected his ability to understand and answer accurately the questions posed to him, "adequately pleads a procedural flaw." *Id.* at *18.

b. "First, Plaintiff alleges fundamental procedural flaws with the hearing itself. Here, the procedural flaws flow from that fact that Plaintiff was studying abroad in Australia at the time of his disciplinary hearing and thus attended remotely, while everyone else participating in the hearing attended in-person. Plaintiff requested that NYU wait to hold the hearing until he came back to New York and could participate in-person. That NYU decided to conduct the hearing remotely in and of itself does not appear to be a

procedural flaw, as the Procedures explain that 'a Complainant or Respondent is not required to participate in person at the hearing in order for the hearing to proceed.' But the Policy also provides that 'all students have the right to ... [p]articipate in a process that is fair, impartial, and provides adequate notice and a meaningful opportunity to be heard.' As alleged, Plaintiff's ability to participate meaningfully in the hearing was impaired by technical issues." *Id*. at *17.

3. *Doe v. American Univ.*, No. 19-CV-03097 (APM), 2020 WL 5593909, at *4 (D.D.C. Sep. 18, 2020) (denying MTD on Title IX grounds): "[The investigator] submitted her Investigation Report to AU's office of Student Conduct and Conflict Resolution Services, which convened a sanctioning panel. On June 3, 2019, Doe was informed that he could participate in the sanctioning panel by giving a statement by Skype or phone, or by submitting a written statement. Doe also was told that an 'advisor [would] be permitted to attend the sanctioning panel.' Doe was in Kuwait at the time, so he chose to submit a written statement. During the sanctioning panel, the Director of Student Conduct and Conflict Resolution explained that members of the sanctioning panel could be disqualified on the ground of personal bias. She stated, however, that 'if the Respondent is not here, he does not have the opportunity to recuse anyone.' To this day, Doe does not know the identities of two of the three sanctioning panel members."

4. *Doe v. Michigan State University, et al.*, No. 1:18-CV-1430 (W.D. Mich. Sep. 1, 2020) (denying the university's MTD because Doe plausibly claimed a due process violation):

    a. "Hence, consistent with how Plaintiff has framed the proposed class in this case ('All MSU students and/or former students ... subjected to a disciplinary sanction ... without first being afforded a live hearing and opportunity for cross[-]examination of witnesses'), Plaintiff's procedural due process claim is specifically based on his claimed right to 'a live hearing and cross-examination.'" *Id*. at *12-13.

    b. "In short, at this pleading stage, taking the facts as true and reading all inferences in Plaintiff's favor, Plaintiff has plausibly demonstrated a violation of a clearly established right." *Id*. at *15.

5. *Doe v. University of Michigan*, 448 F. Supp. 3d 715 (E.D. Mich. Mar. 23, 2020) (granting Doe's motion for partial summary judgment and denying the university's MTD on due process grounds):

    a. "First, the condition under which a hearing is required under the policy is vague. It merely states that a hearing will be provided 'where warranted,' without further explanation. (Dkt. 47-3, pg. 32). The Sixth Circuit is clear that a hearing is warranted when a fact finder 'has to choose between competing narratives to resolve a case' *Baum*, 903 F.3d at 578. The University's Interim Policy should be similarly clear in order to dispel confusion and hold their administration accountable to provide a fair process in every case. An accused student's rights must be guaranteed—not left open for interpretation." *Id.* at 733.

    b. "Imposing a suspension, prior to a hearing and adjudication is unconstitutional." *Id.*

6. *Doe v. White*, No. BS171704 (Cal. Sup. Ct. Feb. 7, 2019) (Order setting aside Doe's expulsion for failing to assess Jane's credibility): "John was facing potentially severe consequences and the Committee's decision against him turned on believing Jane, the Committee's procedures should have included an opportunity for the Committee to assess Jane's credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee's asking her appropriate questions proposed by John or the Committee itself. That opportunity did not exist here."

7. *Doe v. The Trustees of the State of California*, No. BS167329, at *9 (Cal. Sup. Ct. Feb. 5, 2019) (granting Doe's writ of mandate for lack of fairness during the adjudicative process): "[T]he [adjudicative] Committee's procedures should have included an opportunity for the Committee to assess Jane's credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee's asking her appropriate questions proposed by John [Doe] or the Committee itself."

8. *Doe v. Northern Michigan University*, 393 F. Supp. 3d 683, 694 (W.D. Mich. May 28, 2019) (denying MTD for failure to state due process claim because Doe plausibly stated due process violations): "Plaintiff has made out a plausible claim that he was entitled to a live hearing with an opportunity to cross-examine his accuser. Although he was able to present his version of the facts to [Dean of Students and Title IX Coordinator], he was not able to testify directly to the [hearing board], which was the body that was ultimately responsible for his discharge."

9. *Norris v. University of Colorado, Boulder*, 362 F. Supp. 3d 1001, 1011 (D. Colo. Feb. 21, 2019) (Denying MTD on Title IX grounds): "Plaintiff notes he does not simply disagree with the Investigators' findings, but instead his Complaint sets forth a litany of grievances which he argues denied him of a fair and impartial process. In part, Plaintiff disputes the University's actions of: … denying Plaintiff a hearing"

10. *Doe v. U. of Mississippi*, 361 F. Supp. 3d 597, 611 (S.D. Miss. Jan. 16, 2019) (holding that Doe had raised plausible claims of sex bias and due process violations): "Doe complains that 'prior to the hearing, [he] was not informed that he had the right to know the identity of the panel members or the right to challenge a panel member.' He says when he arrived for his hearing, 'he learned that all the panel members had not yet been selected,' so '[t]he hearing was delayed in order for the University to find a third panel member,' who 'was presented with the case file for the first time' '[a]approximately fifteen minutes before the hearing began.' Doe asserts that 'one of the female panel members selected… to preside over his hearing had previously mocked the defenses raised by men accused of sexual assault.' And he contends that 'one of the panelists did not even identify himself at the hearing' making it impossible for Doe to 'reasonably assess the appropriateness of that panel member."

11. *Doe v. University of Southern Mississippi*, et al., 2:18-cv-00153-KS-MTP, at *10 (S.D. Miss. Sep. 26, 2018) (granting Doe a preliminary injunction on due process grounds): "Without a live proceeding with Plaintiff present, the risk of erroneous deprivation of Plaintiff's interest in his reputation, education, and employment is significant. Additional procedural safeguards such as hearing the testimony and either being able to ask questions or submit questions would both

assist the truth-seeking process and help to ensure the protection of Plaintiff's constitutional rights."

12. *Doe v. Pennsylvania State University*, 336 F. Supp. 3d 441, 450 (M.D. Pa. Aug. 21, 2018) (denying defendant's motion to dismiss because of due process violations): "Mr. Doe's main objection to this paper-only Investigative Model is that it prohibited him from telling his story directly to the panel, and from challenging Ms. Roe's version of events before that panel . . . [i]n a case like this, however, where everyone agrees on virtually all salient facts except one—*i.e.*, whether or not Ms. Roe consented to sexual activity with Mr. Doe—there is really only one consideration for the decision maker: credibility. After all, there were only two witnesses to the incident, with no other documentary evidence of the sexual encounter itself. As a result, in this Court's view, the Investigative Model's virtual embargo on the panel's ability to assess that credibility raises constitutional concerns."

13. *Culiver v. U.S.*, No. 2:17-cv-03514-JS-SIL, Document 48, at *13 (E.D.N.Y. July 6, 2017) (requiring the Government to submit charges against plaintiffs within ten days because they have not been afforded due process): "Under your [Marine Acadamy's] own rules and regulations you're supposed to have a hearing. You don't have a hearing. You're supposed to do something. You haven't done a thing, but it's under investigation."

14. *Doe v. Alger*, 228 F. Supp. 3d 713, 730 (W.D. Va. Dec. 23, 2016) (granting Doe summary judgment on his procedural due process claim): "[T]he appeal board effectively reversed the decision of the hearing board . . . without hearing any live testimony[.]"

15. *John Doe II v. The Pennsylvania State University*, No. 4:15-CV-02108, at *1-2 (M.D. Pa. Nov. 6, 2015): (granting Plaintiff's TRO because he demonstrated it was reasonably likely that his due process rights were violated since he was not given a live hearing): "Plaintiff has adequately demonstrated that he is reasonably likely to succeed on the merits of his 42 U.S.C. § 1983 claim brought pursuant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution in light of the potential inadequacy of the procedure afforded him by Defendants during a disciplinary hearing that resulted in his two-semester suspension from The Pennsylvania State University[.]"

16. *King v. DePauw Univ.*, S.D. Ind. No. 2:14-CV-70-WTL-DKL, 2014 WL 4197507, at *13 (S.D. Ind. Aug. 22, 2014) (granting PI enjoining enforcement of King's suspension from university on breach of contract grounds): "First, the delay in the investigation was substantial, and a jury readily could determine that King was prejudiced by the fact that for most of the witnesses the night in question was likely just another Friday night on campus, so there was little reason to remember specific details. By the same token, the jury could find it troubling that after the substantial delay caused by the time J.B. took to decide whether to make a formal complaint, the Board was unwilling to give King an additional week to prepare for the hearing."