

## **The Selective Shield of Due Process: Analysis of the U.S. Department of Education’s 2020 Title IX Regulations on Live Cross-Examination**

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*The U.S. Department of Education (DoE) released new Title IX regulations in May 2020, including the requirement that postsecondary institutions conduct live hearings with direct cross-examination for sexual misconduct reports. The 2,033-page document included a summary of public comments and the DoE’s discussion of those comments. We analyzed this publicly available document to answer two questions. (1) What are the primary concerns of the cross-examination requirement for victims within the Department’s summary of public comments? (2) How did the Department respond to these victim concerns? We conducted a content analysis, with a specific focus on the DoE’s summary of survivor-focused comments regarding cross-examination and the DoE’s discussion of and changes made in response to those comments. We identified four overarching survivor-focused concerns and four categories of DoE responses. Our findings suggest that*

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*the DoE did not meaningfully address survivor-focused concerns, but instead, selectively wielded “due process” as a shield to deflect critiques and legitimize the myth that sexual misconduct allegations inherently lack “credibility.” The lack of protections for victims is a significant departure from legal norms in other settings. Our findings identify the importance of legislators working with survivor-activists, practitioners, and researchers to ensure complainants receive adequate procedural protections.*

Sexual misconduct is a widespread problem within institutions of higher education, with victimization surveys indicating women and lesbian, gay, bisexual, transgender, and queer (LGBTQ) students are at greatest risk (Cantor et al., 2017; Coulter et al., 2017; Desmarais, Reeves, Nicholls, Telford, & Fiebert, 2012; Fedina, Holmes, & Backes, 2016; Fisher, Cullen, & Turner, 2000). The term *sexual misconduct*, used here, captures all forms of sex and gender-based discrimination that schools must address under federal and state law, including rape, sexual assault, sexual and gender-based harassment, stalking, and intimate partner violence. Students who experience sexual misconduct are likely to experience adverse educational outcomes (e.g., lower GPA, higher likelihood of dropout) and mental health consequences (e.g., anxiety, depression, posttraumatic stress, suicidal ideation; Baker et al., 2016; Campbell, Dworkin, & Cabral, 2009; Dworkin, Menon, Bystrynski, & Allen, 2017; Jordan, Combs, & Smith, 2014; Santaularia, Hart, Haskett, Welsh, & Faseru, 2014). A university’s failure to provide adequate services to victims can produce feelings of institutional betrayal—“when an institution causes harm to an individual who trusts or depends upon that institution”—which is linked to traumatic symptoms similar in nature and severity to the original act of sexual misconduct (Smith & Freyd, 2014, p. 578). It is for these reasons that student activists, academics, and government officials have increasingly called for universities to improve policies and procedures for reporting sexual misconduct.

Title IX is federal legislation originally passed as part of the U.S. Education Amendments Act of 1972, which bars sex discrimination within educational institutions that receive federal funds (U.S. Department of Justice, 2015). In 1997 and 2001, the U.S. Department of Education (DoE or “the Department”) Office for Civil Rights first released guidance on how schools must respond to students’ reports of sexual misconduct as a prohibited form of sex discrimination under Title IX (U.S. Department of Education, 1997, 2001). In 2011, under President Obama’s administration, the DoE increased pressure on universities to improve their response to sexual misconduct by providing more specific recommendations for establishing effective and equitable grievance procedures under Title IX in a *Dear Colleague Letter* (U.S. Department of Education, 2011, 2014). Although sexual violence was considered a prohibited form of sex discrimination (i.e.,

included within the definition of “sexual harassment”) under prior OCR guidance and case law, the 2011 *Dear Colleague Letter* centered sexual violence in its guidance on Title IX in order to increase institutions’ attention to this specific issue.

However, recent years have seen a shift in the DoE’s focus on sexual misconduct. Citing concerns about rights for those accused of sexual misconduct, the DoE under the Trump administration proposed new Title IX regulations with more prescriptive requirements for the adjudication of sexual misconduct, most notably that postsecondary institutions must conduct live hearings with direct cross-examination (U.S. Department of Education, 2018). In May 2020, the DoE released a 2,033-page document that included an extensive summary of public comments on the proposed regulations made during the Notice and Comment period, and the Department’s discussion of those comments and justification of the final regulations (U.S. Department of Education, 2020). In the current study, we analyze this document to assess whether or not the regulations were responsive to sexual misconduct victims’ rights and concerns. Specifically, we perform a qualitative analysis of the section addressing the mandate for live hearings with cross-examination, including the Department’s summary and discussion of public comments focused on implications for complainants (i.e., survivor-focused concerns) and the changes and justifications the Department made in response to those comments.

### **Terminology**

When describing those who have experienced sexual misconduct, there is a longstanding debate regarding the terminology of *victim* versus *survivor*, as both terms are used by those who have experienced misconduct (Hockett & Saucier, 2015; Spry, 1995). In the current study, we use *victim* and *survivor* interchangeably to describe those who have experienced sexual misconduct. We also use the term *complainant* when referring to victims/survivors who have reported sexual misconduct (and the term *respondent* refers to those accused of sexual misconduct). We use the terms *college* and *university* interchangeably to represent institutions of higher education, and the DoE also refers to colleges and universities as *postsecondary institutions* and *recipients*.

### **Background on Title IX and Evolving Guidance from the DoE**

The application of Title IX to cases of sexual misconduct was first established through case law. In the landmark case *Alexander v. Yale University*, Yale students successfully argued that sexual harassment was a form of sex discrimination prohibited under Title IX (*Alexander v. Yale University*, 1980). The Supreme Court has repeatedly ruled that students who report experiencing sexual misconduct

perpetrated by an employee or student can sue for monetary damages under Title IX if the school does not adequately respond to their report, including in *Franklin v. Gwinnett County Public Schools* (1992), *Gebser v. Lago Vista Independent School District* (1998), and *Davis v. Monroe County Board of Education* (1999). The DoE Office for Civil Rights, which is responsible for enforcing Title IX, published federal guidance on sexual misconduct in 1997, providing schools with information about how to identify and prevent sexual misconduct (U.S. Department of Education, 1997). The DoE updated this guidance in 2001, in a 48-page document, reaffirming the compliance standards of schools under Title IX as a condition of receiving continued federal funding (U.S. Department of Education, 2001). It was 10 years before the DoE took additional steps to ensure that institutions were adequately addressing campus sexual misconduct.

In 2011, under the administration of President Obama, the DoE published a *Dear Colleague Letter* reminding schools of their mandate to take immediate and effective action to protect students who report sexual misconduct to their schools (U.S. Department of Education, 2011). Three years later, the DoE released a Q&A document further clarifying and explaining Title IX guidance, which included more detailed information about specific requirements for sexual misconduct grievance procedures (U.S. Department of Education, 2014). These documents stated that schools must establish investigation and adjudication procedures that provide equitable rights to complainants and respondents (e.g., equal opportunity to present evidence as well as to review statements) but did not require live hearings and discouraged cross-examination. Instead, the DoE recommended indirect questioning, in which parties submit questions to a trained hearing panel, who would determine the relevance of and ask these questions (U.S. Department of Education, 2014). The DoE also permitted single-investigator models, in which complainants and respondents would forego a hearing altogether and complete these exchanges in writing (U.S. Department of Education, 2014). The goal of this guidance was to establish a more equitable adjudication process and also ensure that survivors of sexual misconduct are able to report without enduring additional trauma within a hearing.

However, in the following years, there was social and political backlash to the OCR's renewed focus on addressing sexual misconduct in higher education. Men's rights activist groups, such as the National Coalition for Men Carolinas (NCFMC), Families Advocating for Campus Equality (FACE), and Stop Abusive and Violence Environments (SAVE), publicly opposed the 2011 *Dear Colleague Letter* and called for increased "due process rights" for respondents (for an overview, see Barthélemy, 2020). These sentiments were shared by some groups who were less overtly politically motivated, including some university faculty who wrote open letters (e.g., Bartholet, Gertner, Halley, & Gensen, 2017) and published books (e.g., Kipnis, 2017) on the topic. Under the Trump administration, the DoE issued a *Dear Colleague Letter* in 2017 that

withdrew the 2011 and 2014 sexual misconduct guidance (U.S. Department of Education, 2017). In this letter, the DoE cited concerns about due process rights for the accused and stated the intention to develop new Title IX rules with an opportunity for public comment. The DoE then proposed new regulations in November of 2018, which included more prescriptive requirements for the adjudication of sexual misconduct, such as the requirement of live hearings with cross-examination of complainants, respondents, and witnesses (U.S. Department of Education, 2018). A 60-day Notice and Comment period followed, during which the DoE received more than more than 124,000 public comments on the regulations (U.S. Department of Education, 2020). In May 2020, the DoE published their final Title IX regulations within a 2,033-page document, which summarizes the public comments and the Department's response to those comments, including the explanation of and justification for the final regulations (U.S. Department of Education, 2020). These regulations require institutions to implement live hearings with cross-examination (§106.45 (b)(6)(i)), which has been particularly controversial.

### **Cross-Examination in Sexual Misconduct Disciplinary Hearings**

Advocates for students accused of sexual misconduct have argued that cross-examination is necessary to ensure due process for respondents during university sexual misconduct proceedings, likening it to the due process protections that defendants receive in criminal and civil courts, including rights to discovery and live hearings with direct cross-examination (e.g., Kruth, 2018; Yoffe, 2017). Recently, the Sixth Circuit court has ruled in favor of cross-examination as a means of due process for the accused in university sexual misconduct adjudication proceedings, including in *Doe v. University of Cincinnati* (2017) and *Doe v. Baum* (2018). *Doe v. University of Cincinnati* (2017) emphasized the need for a hearing panel to evaluate an alleged victim's "credibility" by allowing the respondent to submit questions to the panel (*Doe v. Cincinnati*, 2017), while *Doe v. Baum* (2018) asserted that when an accused student faces a serious sanction (e.g., expulsion, suspension) and the allegation presents an issue of "credibility," the university must hold a hearing with cross-examination (*Doe v. Baum*, 2018). A California Court of Appeals decision that occurred after the Notice and Comment period made a ruling similar to *Doe v. Baum* (*Doe v. Allee*, 2019). These rulings aligned with a broader "disciplined student narrative" in public discourse (Behre, 2019), which focuses on protecting the due process rights of respondents through the use of live cross-examination, among other mechanisms (e.g., Bartholet et al., 2017; Kipnis, 2017). Advocates for the accused argue that cross-examination is required to test the "credibility" of parties in cases of sexual misconduct, particularly complainants' credibility.

In opposition to these arguments, many courts have ruled against the need for live and direct cross-examination in the adjudication of sexual misconduct in institutions of higher education. Two Supreme Court cases, specifically, *Goss v. Lopez* (1975) and *Mathews v. Eldridge* (1976), have provided parameters on what due process protections must be afforded to students in a disciplinary hearing. *Goss v. Lopez* (1975) ruled that students who may be temporarily suspended from a public school are entitled to due process protections, including notice of the allegation and an opportunity to present their side of the story pertaining to the allegation. *Mathews v. Eldridge* (1976) established a “balancing test” that lower courts can use to determine whether or not a person received adequate due process during an administrative disciplinary process. Legal scholars have argued that indirect questioning through an investigator or hearing panel sufficiently achieves the appropriate balance between the rights of a complainant and respondent (O’Toole, 2017). The First, Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuit Courts, and district courts in the Seventh and Eighth Circuits, have all ruled that live and direct cross-examination is not required to provide due process for an accused student in a disciplinary proceeding (Migler, 2017). Most recently, the First Circuit decision in *Haidak v. University of Massachusetts-Amherst* (2019) explicitly contradicts *Doe v. Baum* (2018) and *Doe v. Allee* (2019), asserting that direct cross-examination is not required for due process in sexual misconduct proceedings. Instead, the court ruled that due process of law was satisfied if the university conducted “reasonably adequate questioning” (p. 26), such as indirect cross-examination through a hearing panel (*Haidak v. University of Massachusetts-Amherst*, 2019). Nonetheless, the DoE final regulations retained the requirement of live cross-examination.

### Current Study

While there has been increasing attention on the rights and preferences of respondents in the adjudication of sexual misconduct in higher education, the current study returns to the intended focus of Title IX: the students who are impacted by gender and sex-based discrimination. Survivors and their advocates have expressed concern about the implications of cross-examination in university sexual misconduct proceedings, arguing that live cross-examination requires colleges to act as a court of law and favors the rights of the accused over those who have experienced sexual misconduct (e.g., Green, 2018; Kreighbaum, 2018). Moreover, the process of cross-examination is often traumatizing for survivors (Campbell, 2008; Konradi, 2007; Parsons & Bergin, 2010), which may be of particular concern when questioning will occur outside of a controlled courtroom setting wherein complainants have greater procedural protections. It is essential that all due process concerns are balanced against the equally strong legal mandate for the protection of civil rights on campus (Triplett, 2012).

In this study, we sought to examine how sexual misconduct victims' rights and concerns were addressed in the revision of the 2020 U.S. Department of Education's regulation on Title IX. To achieve this aim, we pursued two research questions. (1) What are the primary concerns of the cross-examination requirement for victims within the Department's summary of public comments? (2) How did the Department respond to these victim concerns? We analyzed the section on *Hearings* (pp. 1044–1229), including the DoE's summary of survivor-focused comments, which focused on the implications of cross-examination for complainants, and the Department's discussion of those comments and any changes made in response to those comments. This study provides an in-depth analysis of the Department's summary of public concerns about cross-examination for complainants, and the Department's reaction to these concerns and justification for requiring live hearings with direct cross-examination.

## Method

### Data

The data for this study consists of the DoE's final rule, entitled "*Non-discrimination on the Basis of Sex in Education Programs or Activities Receiving Financial Assistance*" (U.S. Department of Education, 2020). This publicly available document is 2,033 pages in length, and contains many subsections, including: (a) information regarding implementation (e.g., effective date); (b) an executive summary; (c) an analysis of the types of public comments received; (d) sections summarizing public comments on each major component of the regulations and the department's discussion in response to the comments; (e) a regulatory impact analysis; (f) additional information about related regulations (e.g., Executive Orders, Regulatory Flexibility Act); and (g) the final regulations (see U.S. Department of Education, 2020 for a link to the document). In the current study, we analyzed the section on *Hearings*. This section of the document focused on § 106.45 (b)(6)(i) of the final regulations, requiring live hearings with cross-examination, and spanned pages 1044 to 1229 ( $N = 186$  pages). This section opened with a preamble that summarized the comments in support of cross-examination as a means of ensuring due process for students accused of sexual misconduct (pp. 1044–1051) and the Department's reaction to these comments (i.e., thanking the commenters for their agreement and asserting that no changes were made to the final regulations as a result of those comments; pp. 1051–1056). The remaining 173 pages in this section consisted of summaries of survivor-focused comments, including frequent concerns raised by commenters, and the Department's discussion of those comments and any changes made in response to those comments. Our analysis focused specifically on these 173 pages. Given our aim to understand the implications of requiring live hearings with cross-examination for

students who experience sexual misconduct, we did not analyze public comments that were focused on the accused (i.e., respondents).

### **Analysis Approach**

We used content analysis to analyze these data, a technique for organizing qualitative data into meaningful pieces of information or categories (Weber, 1990). To answer our first research question (*What are the primary concerns of the cross-examination requirement for victims within the Department's summary of public comments?*), the first author and the third author read the entire section on Hearings with a specific focus on the Department's summary of survivor-focused comments. We operationalized "survivor-focused" to include any comment that referenced the rights or well-being of victims/survivors or complainants, including comments that spoke about the implications for students in general. The first and third author independently developed a set of notes regarding the types (or categories) of concerns they identified in these data. Using these notes as a guide, all three authors identified and reached consensus upon four overarching codes that captured categories of survivor-focused concerns: (1) *cross-examination is traumatizing for survivors*; (2) *there are inadequate procedural protections for complainants*; (3) *cross-examination undermines the spirit of Title IX*; and (4) *cross-examination is not required to achieve truth and due process*. Comments that focused on accused students or respondents were not included in these codes unless the comment also contained information about victims/survivors or complainants.

Using the same approach to answer our second research question (*How did the Department respond to these victim concerns?*), the first and second author read the entire section on Hearings with a specific focus on the Department's responses to the survivor-focused concerns. We operationalized "department response" to include any discussion of comments related to the rights or well-being of victims/survivors or complainants and changes made in response to those comments. The first and second author independently developed detailed notes regarding the categories of responses they identified in these data. Using these notes as a guide, all three authors identified and reached consensus on the overarching codes that captured four categories of Department responses: (1) *due process protections focus on the "credibility" of sexual misconduct complaints*; (2) *not addressing concerns of survivors and their allies*; (3) *minimizing concerns of survivors and their allies*; and (4) *making small changes and/or clarifications*. The Department's discussion of comments related to respondents was not included in these codes unless the discussion also contained information relevant to complainants.

After all authors reached consensus about the eight overarching categories, we applied these categories to data using Dedoose version 8.2. The coding scheme is in the Appendix. The text was split into thirds, with the first author applying the



categories to pp. 1051–1116, the second author applying them to pp. 1116–1173, and the third author applying them to pp. 1174–1229. To establish reliability, 10% of excerpts (i.e., text coded in these data) were independently coded by two different authors and interrater reliability was excellent (Cohen's kappa = .85; Cohen, 1960). Any discrepancies in coding were resolved through conversation until consensus was reached.

## Results

### Survivor-Focused Concerns

First, we identified survivor-focused concerns regarding the requirement that institutions implement live hearings with cross-examination to adjudicate sexual misconduct reports. To reiterate, we identified four overarching categories: (1) *cross-examination is traumatizing for survivors*; (2) *there are inadequate procedural protections for complainants*; (3) *cross-examination undermines the spirit of Title IX*; and (4) *cross-examination is not required to achieve truth and due process*. The DoE did not identify any survivor-focused comments supportive of cross-examination in this context. Each of the four categories is discussed in detail below.

### Cross-Examination Is Traumatizing for Survivors

The Department summarized many comments that argued survivors will face trauma during a live hearing with cross-examination, in addition to the trauma experienced by the initial victimization and other parts of the reporting and adjudication process. Commenters purported that the purpose of an adversarial cross-examination process is to delegitimize complainants, which invokes aggressive questioning tactics (e.g., attacking a complainant's character) and sexual assault myths (e.g., suggesting that women lie about sexual violence). Such a process retraumatizes survivors and may result in serious psychological harms.

Commenters identified how "cross-examination is designed to point out inconsistencies in a person's testimony" (p. 1086). As such, this process frequently results in "complainants [being] questioned via verbal attacks on the complainant's character rather than sensitively in a respectful manner designed to aid the fact-finding process" (p. 1067). In fact, commenters described how, after reporting a sexual assault, "victims' number one fear is often cross-examination...while they do not fear the truth, they fear defense lawyers' attempts to confuse them and blame them for not remembering every single part of the story" (p. 1068). During cross-examination, survivors face harmful and aggressive questioning tactics, including "interrupting, asking for only yes-no answers,

asking illogical questions, grilling on minute details of the incident, and asking irrelevant personal questions” (p. 1071).

The Department described how commenters cited research (e.g., Zydervelt, Zajac, Kaladelfos, & Westera, 2017) to illustrate how cross-examination frequently relies on myths about sexual assault, such as:

...the belief that victims invite sexual assault by the way that they dress, their consumption of alcohol, their sexual history or their association with males with whom they are not in a relationship; the belief that many women make false allegations of rape; the belief that genuine assault would be reported to authorities immediately; and the belief that victims would fight back—and therefore sustain injury or damage to clothing—during an assault (p. 1093).

Commenters stated that requiring a cross-examination process that frequently relies on myths and aims to undermine survivors’ credibility is not only traumatizing, but also perpetuates harmful notions about sexual violence. For instance, commenters argued that, in comparison to other campus misconduct or disciplinary issues, “singling out sexual misconduct complainants for a procedure designed to intimidate and undermine the complainant’s credibility heightens the misperception that the credibility of sexual assault complainants is uniquely suspect” (p. 1056).

Commenters argued that because cross-examination questions are intended to attack survivors’ character and build the case that either the survivor is to blame or is otherwise mistaken in their accusation, this process is inherently traumatizing. Requiring students to participate in an adversarial cross-examination “will revictimize, retraumatize, and scar survivors of sexual harassment...will exacerbate survivors’ PTSD (posttraumatic stress disorder), RTS (rape trauma syndrome), anxiety, depression” (pp. 1056–1057). Commenters included stories of their own traumatic experiences with cross-examination. For instance, after undergoing cross-examination—“with the perpetrator telling each question to a judge, who then asked the question over Skype if the judge approved the question”—one commenter stated that they were “diagnosed a week later with PTSD” (pp. 1202–1203). Other commenters argued that the harm of cross-examination extends beyond the trauma experienced during the hearing, explaining that they would “feel permanently traumatized, would drop out of school, or would even contemplate suicide” (pp. 1058–1059). In sum, commenters urged the Department to reconsider the use of live cross-examination due to the problematic and traumatic nature of this process.

### **Inadequate Procedural Protections for Complainants**

A second category we identified within commenters’ concerns was that the Title IX regulations offer inadequate procedural protections for survivors within a live hearing with cross-examination, particularly given the strong potential for

retraumatization. For instance, commenters asserted that cross-examination in a university disciplinary process (and as outlined in the regulations) will not offer procedural protections for the victim that are guaranteed within a criminal or civil trial, such as “the right to representation by counsel, rules of evidence, and a judge ruling on objections” (p. 1070). Moreover, institutions do not have the power of a court of law (e.g., “institutions have no power to hold an attorney in contempt, and attorneys are trained to be very aggressive” p. 1070), which means that institutions may struggle to curtail aggressive and hostile attorneys who serve as advisors. Moreover, commenters raised procedural concerns regarding the Department’s requirement that decision-makers disregard statements made by survivors (including the initial formal complaint) and witnesses who do not submit to cross-examination. Commenters noted that, in a court of law, “Federal Rules of Evidence allow out-of-court statements to be admitted in certain circumstances and for limited purposes” (p. 1165). Moreover, commenters stated that the regulations offer inadequate procedural protections because institutions “do not have subpoena powers to compel parties and witnesses to attend hearings” (p. 1165). As a result of these problems, commenters argued that using cross-examination outside of a controlled courtroom setting would not protect survivors according to previous legal precedent.

Additionally, commenters asserted that the few procedural protections proposed by the Department will be ineffective. For instance, the regulations require that an advisor, rather than the accused, conduct the cross-examination. However, commenters noted that this does not actually protect survivors, as each party is allowed any advisor of their choosing, and cross-examination could be conducted by “a respondent’s angry parent, fraternity brother, roommate, or other person untrained in conducting cross-examination” (p. 1069). In another example, the Department asserted that survivors will be protected from abusive questioning because decision-makers are required to exclude irrelevant questions. However, commenters said that “school administrators are ill-equipped to make nuanced legal determinations about the relevant scope of questions and answers” (p. 1070). Commenters noted that “extensive training will be necessary for [decision-makers] and advisors conducting cross-examination, and recipients will not have the resources, time, and money to make cross-examination workable” (pp. 1121–1122). Thus, commenters identified the problems that can occur when cross-examination takes place outside a courtroom, and also that the regulations offer inadequate procedural protections for victims.

### **Cross-Examination Undermines the Spirit of Title IX**

Commenters offered critiques that cross-examination in this context will undermine the spirit of Title IX and create a legally prohibited hostile environment for survivors. For instance, commenters were concerned that these hearings would

actively discourage survivors from coming forward, as “fear of undergoing such a retraumatizing experience will chill reporting of sexual harassment and cause more victims to stay in the shadows” (p. 1057). If survivors are unable or unwilling to come forward, this will exacerbate a harmful, hostile campus environment. Moreover, commenters identified how these inequities will be exacerbated when students hold other marginalized identities. For instance, commenters argued that “Black female students are disadvantaged by cross-examination due to negative, unsupportable stereotypes that Black females are aggressive and sexually promiscuous” (p. 1080). Commenters also noted how inequities will uniquely affect undocumented students and LGBTQ students, “because cross-examination will make Title IX proceedings more legalistic and undocumented students, and LGBTQ students, are already wary of the criminal justice system” (p. 1117). The fact that some students will be able to afford to pay an attorney to serve as an advisor, while others will not, also means that not all students will have an equitable reporting experience. Commenters noted that “the financial disparity will fall hardest on students of color including children of immigrants, international students, and first-generation students, as they are more likely to come from an economically disadvantaged background and cannot afford expensive lawyers” (p. 1119). Together, commenters identified how this process will result in a number of inequities that clearly undermines the spirit of Title IX—which is ensuring equal access to education.

### **Cross-Examination Is Not Required to Achieve Truth and Due Process**

The fourth and final category was the assertion that live hearings with cross-examination are not required to offer adequate due process protections for those accused of sexual misconduct. As commenters noted, “neither the Constitution, nor other Federal law, requires cross-examination in school conduct proceedings” (p. 1096). Moreover, commenters noted that federal case law is split in terms of how courts view cross-examination in this context, “with the weight of Federal case law favoring significant limits on cross-examination by requiring, at most, questioning through a panel or submission of written questions rather than traditional, adversarial cross-examination” (p. 1097). The commenters asserted that there are other ways to assess credibility of claims that are not only better for survivors, but also more developmentally sensitive and trauma-informed. For instance, commenters advocated for the use of indirect questioning methods, such as submitting questions to a hearing panel or a neutral college administrator. Commenters asserted that, through such a process, “fairness, including testing credibility, can be fully achieved without live, adversarial cross-examination” (p. 1099). Commenters noted that this is the model that many institutions use and that “such practices have been upheld by nearly all Federal court decisions considering them” (p. 1100). Commenters noted that the Department does allow

for indirect methods of questioning within elementary and secondary schools, and there is no reason to believe that this process would be less effective in institutions of higher education.

Finally, commenters noted how scientific evidence raises concerns about the efficacy of cross-examination in cases of sexual misconduct. For instance, commenters raised concerns with the Department's assertion that an essential component of live cross-examination is that it allows decision-makers to assess "demeanor" while questions are answered, as "credibility is typically based on a number of factors...[and] the most unreliable factor is demeanor" (p. 1078). Evidence suggests that "how people interpret another person's demeanor is easily misconstrued" and "what people often mistake for signs of deception are often actually indicators of stress-coping mechanisms" (p. 1078). Based on empirical research, commenters argued that "trauma shapes memory patterns making details of sexual violence difficult to remember, such that traditional cross-examination may lead to a mistaken conclusion that a trauma victim is lying" (p. 1086). Commenters noted that survivors of sexual misconduct often respond in ways that may seem counterintuitive, and this can lead observers to unfairly judge their credibility based on assumptions about how a survivor "should" act. Thus, commenters advocated for alternatives to live cross-examination (e.g., indirect cross-examination) that are currently used, have been upheld in federal courts, and avoid problems that arise in trying to determine survivors' credibility based on their behavior during live cross-examination.

### **Department of Education Responses**

In the second part of our analysis, we identified four overarching categories within the Department's reply to the survivor-focused concerns, including: (1) *due process protections focus on the "credibility" of sexual misconduct complaints*; (2) *not addressing concerns of survivors and their allies*; (3) *minimizing concerns of survivors and their allies*; and (4) *making small changes and/or clarifications*. We did not identify any Department responses that entirely addressed a survivor-focused concern. Each of the four categories is discussed in detail below.

*Due process protections focus on the "credibility" of sexual misconduct complaints.* Throughout the Department's discussion, the primary explanation for requiring live cross-examination was due process, with a myopic focus on the due process they believe will be offered by an adversarial process intended to question complainants' credibility. The Department repeatedly asserted that cross-examination is the only means of achieving "truth" in the face of the "credibility" concerns that they believe are inherent in and unique to sexual misconduct allegations. For instance, the Department stated that allegations of sexual harassment "often turns on plausible, competing factual narratives of an incident involving

sexual or sex-based interactions” (p. 1054). As a result, the Department expressed the belief that cases of sexual misconduct, in particular, raise concerns about the “credibility” of the complainant, stating that:

The Department believes that without the credibility-testing function of cross-examination, whether the complainant’s claim is meritorious cannot be ascertained with sufficient assurance (p. 1176).

The new regulations stipulate that statements made by a complainant or witness during the investigation process—including the initial formal report—cannot be considered by the decision-maker if that complainant or witness does not submit to cross-examination. Their rationale for this mandate expresses the belief that sexual misconduct allegations are particularly suspect:

Because party and witness statements so often raise credibility questions in the context of sexual harassment allegations, the decision-maker must consider only those statements that have benefited from the truth-seeking function of cross-examination (p. 1179).

In defending this stance, the Department relied on anomalous case law that supports live cross-examination as an element of due process within university disciplinary proceedings for sexual misconduct (i.e., *Doe v. Baum*, 2018), while disregarding other rulings that contradict this stance. For instance, “the Department acknowledges...that Federal appellate courts that have considered this particular issue in recent years have taken different approaches” and “the Department is aware that...the First Circuit decided a Title IX sexual misconduct case in which the First Circuit disagreed with the Sixth Circuit’s holding regarding cross-examination” (pp. 1101–1102 and p. 1108, respectively). Yet, the Department choose to focus on *Doe v. Baum*, quoting and agreeing with the Sixth Circuit’s reasoning regarding the need for cross-examination of complainants and witnesses in cases of sexual misconduct: “[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” (p. 1103).

The Department made selective, deliberate choices in what elements of “due process” should be required in this context—defending the decision to require cross-examination while disregarding other elements of due process (e.g., right to legal counsel) because “in the context of sexual harassment allegations in an education program or activity, the strictures of the Sixth Amendment do not apply” (p. 1074). The Department asserted that they “carefully selected those procedures in § 106.45 as procedures rooted in principles of due process” (p. 1116), and the procedure they deemed essential for due process is one that necessitates adversarial questioning of a complainant’s “credibility.” Thus, the Department’s call for due process protections in the context of a disciplinary hearing is specifically focused on the perceived issue of “credibility.”

*Not addressing concerns of survivors and their allies.* When responding to specific concerns raised, the second category we identified was the Department not addressing the concern. In some of these cases, the DoE replied by simply stating that they “disagree” with the concern. For example, when responding to the critique that cross-examination is traumatizing because it is an interrogation of the victim, the Department stated, “The Department disagrees that cross-examination places a victim (or any party or witness) ‘on trial’ or constitutes an interrogation” (p. 1060). Similar responses arose in the Department’s response to commenters’ concerns about inadequate procedural protections. For instance, in response to commenters’ concerns about disparities that may arise between a complainant’s advisor and a respondent’s advisor (e.g., if a respondent can hire a skilled lawyer but a complainant cannot), the DoE stated that they “disagree that cross-examination at a live hearing means that a complainant’s case will be contingent on the effectiveness of the complainant’s advisor” (p. 1120). When commenters asserted that one party advisor should not hold a position of power over the other party (e.g., a complainant’s and respondent’s department chair serves as the advisor for the respondent), the DoE responded, “The Department does not believe it is necessary to forbid assigned advisors from being persons who exercise any administrative or academic authority over the other party” (p. 1149).

The DoE also disregarded data presented by commenters that supported their critiques. For example, after commenters offered empirical evidence that cross-examination is a flawed procedure, the DoE responded, “While commenters contended that some studies cast doubt on the effectiveness of cross-examination in eliciting accurate information...that literature has not persuaded U.S. legal systems to abandon cross-examination” (p. 1082). Another way that the Department did not engage with commenters’ concerns was by arguing that cross-examination benefits survivors. For instance, “cross-examination levels the playing field by giving a complainant as much procedural control as a respondent, regardless of the fact that exertion of power and control is often a dynamic present in perpetration of sexual assault” (p. 1096). In asserting that cross-examination is beneficial to survivors, the Department did not address repeated comments detailing how this process is harmful. The Department also did not entertain suggestions for less traumatic procedures (e.g., indirect questioning); instead, the Department suggested that survivors can avoid cross-examination by not pursuing a formal complaint: “complainants can report sexual harassment and receive supportive measures without even filing a formal complaint” (p. 1063). These responses simply disregarded commenters’ concerns.

*Minimizing concerns of survivors and their allies.* The third category we identified in the Department’s response to commenters’ survivor-focused concerns was minimization of those concerns. In particular, when responding to the assertion that cross-examination is traumatizing for survivors, the

Department's response minimized its traumatic impact. For example, the Department used phrases like "inconvenience" and "potential trauma" when discussing the impact of cross-examination on survivors. The Department expressed that survivors' trauma is simply a "perception" and does not necessarily reflect reality, for instance, "The Department is aware that the perception, and in some circumstances the reality, [that] cross-examination in sexual assault cases has felt to victims like an emotional beating" (pp. 1071–1072). Another similar example follows:

The Department appreciates commenters who described experiences being questioned by party advisors as feeling like the advisor asked questions in a disempowering, blaming, and condescending way; however, the Department notes that such questioning may feel that way to the person being questioned...and this does not necessarily mean that the questioning was irrelevant or abusive (p. 1075).

In each of these examples, the Department minimized the commenters' concerns about trauma survivors' experience during cross-examination by labeling trauma as a "perception" or a "feeling," and suggesting survivors' trauma is an irrational response to cross-examination.

*Making small changes and/or clarifications.* Lastly, when addressing concerns raised, the Department frequently responded with small changes to the regulations and clarifications in their discussion of the regulations. Within this category, there were a number of small changes made to § 106.45 (b)(6)(i) of the regulations, which did not address (or fully address) commenters' critiques of cross-examination. For instance, in response to the concern that the process of cross-examination is traumatic for survivors, the Department stated that they revised the regulations so a party could request that questioning occur in separate rooms facilitated by technology:

The Department appreciates the opportunity to clarify that contrary to the fears of some Commenters... § 106.45(b)(6)(i) is revised to require recipients to hold the entire live hearing...with the parties in separate rooms (facilitated by technology) so that the parties need never be face-to-face, upon a party's request (p. 1064).

However, commenters stated that cross-examination in separate rooms using technology is also traumatic, and raised additional concerns about cross-examination, so the aforementioned revision did not fully address the concerns. Furthermore, commenters argued and provided evidence that cross-examination frequently involves invasive, abusive questioning in an attempt to undermine survivors' credibility (e.g., questions about past sexual behavior). The Department revised the final regulations to include rape shield protections, which specify that "questions and evidence about the complainant's sexual predisposition is never relevant and [questions] about a complainant's prior sexual behavior are not relevant with two exceptions" (p. 1183). While rape shield protections are important,



the two exceptions allowed by the DoE open the possibility that questions about complainants' sexual behavior can be used in questioning. Moreover, the Department offered respondents a way to inquire about complainants' other sexual relationships:

Where a respondent might wish to prove the complainant had a motive to fabricate or conceal a sexual interaction...respondents in that scenario could probe a complainant's motive by, for example, inquiring whether a complainant had a dating or romantic relationship with a person other than the respondent (p. 1190).

Another small change in response to commenters' critiques centered around decision-makers. For instance, the Department repeated the assertion that cross-examination will not include abusive questions because "the decision-maker must determine the relevance of each cross-examination question before a party or witness must answer" (p. 1194). The Department further supported the role of decision-makers by stating "decision-makers must be trained to serve impartially" (p. 1089) and "we...require decision-makers to be trained on issues of relevance, including application of the rape shield protections" (p. 1201). However, the regulations did not offer best practices for the content and delivery of a training that will ensure decision-makers are "impartial" or "trauma-informed," nor require decision-makers to have legal training in determining relevance. The Department asserted that institutions "have discretion to include trauma-informed approaches in the training provided to...decision-makers" (p. 1087). Moreover, the Department stated that questions about a complainant's character can be considered "relevant" in a hearing: "where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence" (p. 1137). Thus, the changes provided did not fully address commenters' concerns regarding cross-examination.

In addition to minor changes to the regulations, the Department also addressed comments with small clarifications in their discussion of the regulations. For instance, when responding to commenters' concerns that cross-examination designed to aggressively question a complainants' "credibility" results in additional trauma, the Department reiterated that an advisor, rather than the respondent, conducts the cross examination: "The complainant's advisor will conduct the cross-examination of the respondent and, thus, the complainant will not be retraumatized by having to personally question the respondent" (p. 1060). This clarification dismissed other commenters who expressed concerns about advisors and the inherently traumatizing experience of live cross-examination. Additionally, the Department asserted that institutions can set rules of decorum for hearings and allow complainants to take breaks. For example, they stated: "The final regulations do not prevent a recipient from adopting rules of decorum for a hearing to ensure respectful questioning" (p. 1075) and "the final regulations do not

preclude a recipient from adopting rules (applied equally to complainants and respondents) that govern the taking of breaks” (p. 1206). Thus, institutions are encouraged but not required to adopt rules of decorum, and institutions may vary in the content and enforcement of such rules.

### Discussion

The current study examined how sexual misconduct victims’ rights and concerns were addressed in the Department of Education’s 2020 regulations on Title IX. We analyzed the section on *Hearings*, including the DoE’s summary of survivor-focused comments regarding cross-examination and the discussions and changes made in response to those comments. In defending the requirement of live cross-examination, one of our primary findings was the selective way that the Department of Education attends to “due process.” The Department calls on the need for due process when requiring adversarial cross-examination—which is explicitly intended to interrogate the “credibility” of sexual misconduct allegations—and disregards commenters’ arguments that this process will offer inadequate due process protections for complainants. In our analysis of survivor-focused comments, commenters identified that essential protections for victims undergoing cross-examination in a court of law are not afforded under the DoE’s new regulations for hearings (e.g., representation by an attorney, rules of evidence, a legally trained judge ruling on relevance). In the criminal justice system, The Victim Rights Clarification Act of 1997 affords victims the right to attend and testify at a trial, but victims are not required to submit to cross-examination during a trial for a case to move forward. States also afford such protections for victims, such as Washington state’s restriction on Sixth Amendment rights to confront accusers in the interest of protecting sexual assault victims, which states that sexual assault victims in criminal trials using closed-circuit television to testify is constitutionally adequate under Sixth Amendment case law (Mohammadian, 2012).

Under the new regulations, complainants are required to submit to live cross-examination for their report and statements to be considered by the decision-maker. This requirement is unique to campus adjudication processes and places burdens on survivors that they would not face in the criminal justice system. Within campus adjudication, this requirement is unique to sexual misconduct and is not mandated for other types of disciplinary proceedings. Our analysis of survivor-focused comments illustrated a clear argument that direct cross-examination is not required to achieve truth and ensure due process in sexual misconduct hearings. For instance, commenters offered evidence that federal case law overwhelmingly allows indirect cross-examination (e.g., submissions of written questions) to probe party and witness statements.

In response, the Department repeatedly asserted that decision-makers cannot accurately determine the “truth” of sexual misconduct allegations—and, in

the process, offer due process—without rigorously testing credibility via live cross-examination. However, evidence indicates that cross-examination does not serve a significant “truth-seeking function.” Observing a victim’s demeanor during cross-examination to predict their truthfulness will be “about as accurat[e] as a coin flip” (Bennett, 2014, p. 2). Research consistently finds that adversarial cross-examination, especially in cases that involve traumatic events, does not illicit a more truthful, accurate account of the event (Chan, Manley, & Lang, 2017; Segovia, Strange, & Takarangi, 2017; Valentine & Maras, 2011). The style of questioning used during cross-examination can also affect the accuracy of witness answers; for instance, leading questions decrease the accuracy of memory recall (Valentine & Maras, 2011; Wheatcroft & Ellison, 2012; Zajac & Cannan, 2009). Leading and closed questions are frequently used to question complainants during cross-examination, with defense lawyers (or in this case, advisors) seeking to control evidence and convey a plausible alternative story rather than uncover a complete and accurate account of the incident of sexual misconduct (Ellison, 2000; Kebbell, Deprez, & Wagstaff, 2003; Smith & Skinner, 2012, 2017; Zajac & Cannan, 2009). In fact, legal scholars have argued that “cross-examination, by definition, represents an attempt to discredit the witness” (Zajac & Cannan, 2009 p. S48). In sexual misconduct cases, cross-examination of complainants exploits deeply held sociocultural beliefs and misunderstandings of sexual violence (Orenstein, 2007; Smith & Skinner, 2012, 2017). For instance, myths are used to portray the complainant’s behavior as “abnormal,” “irrational,” or inconsistent with expectations about how a victim “should” have acted before, during, and after an incident of sexual harassment or assault (Smith & Skinner, 2012, 2017). These myths play a strong role in influencing people’s perceptions of victim “credibility” in these cases. Law enforcement officials view victims as less credible when they were drinking, did not physically resist, delayed reporting, and/or did not exhibit the “right” emotions and, as a result, are less likely to pursue these cases (Campbell, Menaker, & King, 2015; O’Neal, 2019; Sleath & Bull, 2017).

Another major finding in our analysis was commenters’ assertion that elements of cross-examination (e.g., aggressive questioning, undermining the complainant’s character, relying on myths and misconceptions of sexual violence) are traumatizing for survivors. Evidence is clear that undergoing adversarial cross-examination is harmful for survivors’ mental health (Campbell, 2008; Konradi, 2007; Parsons & Bergin, 2010). Encountering reactions that express doubt and blame is associated with increased psychopathology among survivors of sexual violence (Dworkin, Brill, & Ullman, 2019). The trauma that survivors experience when interacting with the criminal justice system is experienced as secondary victimization (Campbell & Raja, 1999; Campbell, 2008; Parsons & Bergin, 2010). Our analysis found that that the DoE largely responded to these concerns by ignoring and minimizing them—for instance, through simply disagreeing that cross-examination is an interrogation of the victim and suggesting that trauma caused

by cross-examination is a misguided “feeling” and does not “necessarily mean that the questioning was irrelevant or abusive.” The few changes that the DoE did introduce in response to complainant-focused comments did not fully or adequately address commenters’ concerns. The regulations now allow a party to request that questioning occur in separate rooms facilitated by technology, but the Department described a commenter who said they were diagnosed with PTSD after being cross-examined in this manner. The regulations now include rape shield protections (e.g., prohibiting questions about a complainant’s past sexual behavior), but the two exceptions still leave opportunity for questions about complainants’ sexual behavior. The DoE reiterated that the regulations require that an advisor (not the respondent) cross-examines a complainant, but commenters explained that cross-examination by an advisor is still traumatic. The DoE asserted that their changes to the regulations adequately addressed commenters’ concerns, for instance, by arguing that having respondents’ chosen advisors conduct cross-examination of complainants rather than respondents themselves means that live cross-examination will no longer necessitate trauma. However, the changes and clarifications made offer no clear, consistent safeguards for survivors based upon the evidence commenters offered.

A final major finding is that these regulations introduce the high likelihood of inconsistency in policy and practice safeguards offered to complainants within postsecondary adjudication processes. For instance, many of the Department’s changes and clarifications that claimed to offer protections for survivors can be implemented at an institution’s “discretion” (e.g., the content and quality of training for decision-makers, the use of trauma-informed training and questioning, the rules of “decorum” established for cross-examination). The regulations did not offer, or mandate, best practices for the content and delivery of training that will ensure decision-makers are “impartial” or “trauma-informed,” nor require decision-makers to have legal training in determining relevance of questions during cross-examination. Thus, these protections will vary across institutions and will rely heavily on the actions of individual decision-makers. Research consistently finds that policies and procedures for investigating and adjudicating sexual misconduct differ across campuses (Graham et al., 2017; Konradi, 2017; Richards, 2019; Sabina, Verdiglione, & Zadnik, 2017). Moreover, a recent study of schools in Maryland found that the majority of colleges and universities that used a trial-oriented hearing process did not provide specific written rules for questioning complainants (Konradi, 2017).

Title IX was enacted to ensure that no student faces sex discrimination in educational programs, and for decades, this has included sexual harassment and assault (e.g., *Alexander v. Yale University*, 1980; *Kelly v. Yale University*, 2003; U.S. Department of Education, 2001). Regulations that offer inconsistent protections for students who report sexual misconduct undermine the spirit of Title IX. If one campus establishes clear rules of evidence and decorum and

implements annual trauma-informed training for their decision-makers (who have legal expertise), and another campus has no written rules of evidence or decorum and offers one online training for their decision-makers (who have no legal expertise), students who report sexual misconduct on these campuses will face vastly different experiences during a hearing. It is essential that Title IX regulations enhance equal access to education, not exacerbate inequities.

### **Policy Implications**

Organizational practices that create a hostile environment for women and gender-diverse students—especially in ways that could permit sexual harassment and assault—are still illegal under Title IX and a myriad of other laws. As commenters noted, the requirement of live hearings with cross-examination is also legally contentious. As written, the current regulation stands in opposition to many state laws and judicial precedent (e.g., *Haidak v. University of Massachusetts-Amherst*, 2019; *Mathews v. Eldridge*, 1976; Mohammadian, 2012; O’Toole, 2017; Triplet, 2012). Our analysis notes how the lack of protections for complainants during cross-examination is also a significant departure from legal norms in other settings (Orenstein, 2007), including the criminal justice system, which the DoE claims to emulate via the requirement of cross-examination. As with other ambiguous and contentious laws, what is deemed in compliance with Title IX—including the legality of the regulation itself—will be decided in the courts (Edelman, 1992, 2016; Edelman, Uggen, & Erlanger, 1999). The final regulations released by the Trump administration, and the mandate that schools comply with the final regulations by mid-August (a timeframe of approximately three months), has drawn criticism from many organizations, several of which have filed lawsuits attempting to block parts of the rule (e.g., *Commonwealth of Pennsylvania v. DeVos*, 2020). These organizations include the American Council on Education, the American Civil Liberties Union, Know Your IX, state attorneys general, legal scholars, and mental health practitioners, among others (ACLU, 2020; Cantalupo, 2019; Gersen, 2020). These tensions create a confusing legal environment for universities attempting to comply with the 2020 Title IX rule. New legislative action could provide clarity. Our analyses identify the importance of legislators working closely with survivor-activists, practitioners, and researchers to ensure complainants receive adequate procedural protections.

Still, we recognize that universities must respond to the new regulations, regardless of what may happen in the courts in the future. To minimize harm to survivors, our analyses suggest that universities must be mindful when implementing the live cross-examination mandate. For instance, decision-makers will not only be tasked with ruling on sexual misconduct cases, but also making key determinations such as the types of questions complainant must endure during cross-examination and whether the advisor conducting the cross-examination should be

removed from the hearing for inappropriate or abusive questioning. There are a number of discretionary steps that institutions could make to enhance decision-makers' efficacy: (1) designate a panel of decision-makers, as permitted in the new regulations, so that no one individual is the sole decision-maker; (2) require decision-makers to receive annual training on trauma-informed questioning and rape-shield protections by non-university experts on sexual violence (e.g., a state coalition against sexual assault); (3) institute term limits and a process to recall decision-makers who have demonstrated biases, such as perpetuating rape myths or racist stereotypes; and (4) prohibit decision-makers from holding a conflict of interest (e.g., knowing a complainant or respondent, working in the Office of General Counsel or the Dean of Students' Office). These steps align with commenters' suggestions summarized by the Department. These protections (although not mandated in the regulations) align with commenters' concerns and other judicial precedents and state laws that aim to safeguard complainants' rights.

### **Limitations and Future Directions**

Some limitations of this study include the exclusion of respondent-focused comments and the sole focus on the requirement of live cross-examination within postsecondary institutions, which represents 185 pages of the 2,033-page policy document published by the DoE. We chose to center the Department's discussion of survivor-focused comments in the study given the criticism of many organizations that the final regulations prioritize the rights of respondents over the rights and welfare of complainants (e.g., ACLU, 2020; Cantalupo, 2019; Gersen, 2020). Although the final regulations appear to be highly responsive to respondent concerns (e.g., see Anderson, 2020 and North, 2020), additional research will be needed to fully understand any respondent-focused concerns regarding cross-examination and how the Department responded to those comments. We also recommend additional research on survivors' concerns about the new regulations, as our study relies on DoE summaries of survivor-focused comments that were included in the document rather than the original comments submitted by the commenters.

Additionally, the Department's final regulations include many unprecedented changes, such as allowing schools to choose their own standards of evidence and the removal of interim measures (U.S. Department of Education, 2020). We chose to focus on the mandate of live cross-examination within campus adjudication processes because it was particularly controversial and will require substantial changes to many institutions' adjudication processes. However, this work cannot speak to survivor-focused concerns about other components of the final regulations and the Department's responses to those concerns. Thus, as schools implement new policies and procedures to align with the new regulations, research will be needed to document the choices that institutions are making where

flexibility is allowed (e.g., choosing preponderance of evidence or clear and convincing standard) and the effects of these changes on campus climate. Research will also need to be conducted to understand the effects of the implementation of the new hearing procedures on student reporting of sexual misconduct, how many reports proceed with an investigation and formal adjudication, and the outcomes of adjudication processes.

## Conclusion

Our analysis of the Department of Education’s discussion of the new Title IX regulations revealed several important points. It is noteworthy that none of the survivor-focused comments discussed by the DoE expressed support for the use of adversarial, live cross-examination in sexual misconduct disciplinary proceedings. Additionally, there was no instance in which the Department’s response fully embraced survivor-focused concerns or implemented a suggested change in its entirety. Instead, our analysis suggests that the Department selectively wields “due process” as a shield to deflect concerns about the process of cross-examination for complainants and legitimize the myth that sexual misconduct allegations inherently lack “credibility.”

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## Appendix

### Coding Scheme

*Cross-examination is traumatizing for survivors.* Definition: Comments asserting that victims/survivors will experience additional trauma during direct, adversarial cross-examination, because the purpose of cross-examination is to attack and delegitimize complainants and cross-examination frequently relies on rape myths (e.g., women frequently lie about rape) to undermine complainants “credibility.”

- E.g., “The commenter stated that even with technology separating the commenter from the perpetrator, the commenter was still diagnosed a week later with PTSD (posttraumatic stress disorder).”

*There are inadequate procedural protections for complainants.* Definition: Comments asserting that there are inadequate procedural protections to protect complainants under the new regulations, particularly protections that would mitigate the potential for traumatization during cross-examination. For example, arguments that protections offered in the new regulations will be ineffective and that protections offered in the criminal and civil justice systems are missing in the new regulations.

- E.g., “Without further guidance on how to apply the rape shield limitations, the exceptions contained in this provision may still subject complainants to unwarranted invasions of privacy, character attacks, and sex stereotyping, and suggested that the final regulations specify how recipients should enforce the rape shield protections.”

*Cross-examination undermines the spirit of Title IX.* Definition: Comments asserting that the new regulations, particularly direct, adversarial cross-examination, undermine the spirit of Title IX. For example, arguments that the new regulations on hearings will create a hostile environment, exacerbate inequalities on the basis of gender, race, class, and LGBTQ+ identity, and limit equal access to education.

- E.g., “Commenters argued that the financial disparity will fall hardest on students of color including children of immigrants, international students, and first-generation students, as they are more likely to come from an economically disadvantaged background and cannot afford expensive lawyers. Commenters expressed concern that LGBTQ students will be at greater financial disadvantage than other students.”

*Cross-examination is not required to achieve truth and due process.* Definition: Comments asserting that a live hearing with direct, adversarial cross examination is not actually required to achieve truth and due process during a sexual misconduct disciplinary proceeding. For example, arguments that there are other ways to assess credibility of sexual misconduct allegations/reports (e.g., submitting questions through a panel), and that these processes are not only better for survivors, but also more scientifically sound (e.g., there is little evidence that observing a complainant's demeanor during a live hearing achieves truth).

- E.g., “Commenters argued that indirect cross-examination, or submitted questions, is sufficient to meet constitutional due process requirements under the Supreme Court’s *Mathews v. Eldridge* balancing test and avoids risks inherent to cross-examination in an educational rather than courtroom setting, namely, that outside a courtroom lawyers or other advisors could engage in hurtful, harmful techniques that may impede educational access for the parties. Commenters argued that a trained fact-finder listening to party advisors ask questions and introduce evidence is a reactionary approach and a proactive approach is preferable, whereby the trained decision-maker elicits appropriate, relevant information from the parties and witnesses.”

*Due process protections focus on the “credibility” of sexual misconduct complaints.* Definition: The Department’s discussion of “due process” offered by the new regulations (specifically, within hearings) asserts that direct, adversarial cross-examination is the only means of achieving truth in the face of the “credibility” concerns that are inherent in sexual misconduct allegations. Other due process concerns that were raised, especially ones raised in survivor-focused comments, are disregarded as inapplicable to a higher education disciplinary process.

- E.g., “The Department believes that in the context of sexual harassment allegations under Title IX, a rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements. If statements untested by cross-examination may still be considered and relied on, the benefits of cross-examination as a truth-seeking device will largely be lost in the Title IX grievance process.”

*Not addressing concerns of survivors and their allies.* Definition: The Department’s response to concerns raised in survivor-focused comments simply disagrees with the concern or expresses that The Department does not care about that concern.

- E.g., “The Department disagrees that the rape shield language is too broad.”

*Minimizing concerns of survivors and their allies.* Definition: The Department's response to survivor-focused commenters' concern that cross examination will be traumatizing for survivors minimizes this experience. For example, asserting that some complainants may "perceive" cross examination as traumatizing, but it is not.

- E.g., "The Department appreciates commenters who described experiences being questioned by party advisors as feeling like the advisor asked questions in a disempowering, blaming, and condescending way; however, the Department notes that such questioning may feel that way to the person being questioned by virtue of the fact that cross-examination is intended to promote the perspective of the opposing party, and this does not necessarily mean that the questioning was irrelevant or abusive."

*Making small changes and/or clarifications.* Definition: The Department's response to specific concerns raised within survivor-focused comments includes a small change and/or clarification about the regulations. For example, restating that advisors (rather than the accused) will conduct cross examination and stating that parties can request direct, adversarial cross-examination facilitated through video technology. These small changes and/or clarifications do not fully address the commenters' concerns (e.g., commenters asserted that cross-examination by an advisor and via technology is traumatizing).

- E.g., "We have also revised this provision so that upon a party's request the parties must be in separate rooms for the live hearing, and not only for cross-examination. We have also revised § 106.45(b)(6)(i) to add a requirement that recipients create an audio or audiovisual recording, or transcript, of any live hearing held and make the recording or transcript available to the parties for inspection and review."

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