

Chairwoman Bonamici, Ranking Member Cline, and distinguished members of the subcommittee, thank you for allowing me the opportunity to testify here today. The new Title IX regulations are not an attack on gender-based protections. Rather, they restore Title IX's original focus on a complainant's access to education. They re-align with decades of regulatory and judicial decisionmaking about Title IX. And they clarify and standardize disciplinary procedures following numerous court decisions about what Title IX and the due process clause require of colleges and universities in these cases. In all of these regards, the new regulations are a sorely-needed correction to a system that had strayed very far from its original purpose.

The focus on access to education is evident in the regulations' requirement that colleges and universities offer supportive measures to all complainants, whether or not they file a formal complaint. The regulations also return control to complainants in other important ways, such as by allowing for informal resolution when both parties prefer that route, and by ensuring that medical records cannot be used without a party's consent.

The regulations also restore a definition of harassment and a jurisdictional scope that were established by the Supreme Court in *Davis v. Monroe County Board of Education*. After *Davis* was decided in 1999, the Clinton Administration's OCR issued Guidance in 2001 explicitly stating that even though *Davis* concerned the liability context, "the definition of hostile environment sexual harassment used by the Court in *Davis* is consistent with the definition" used by the Department for administrative enforcement. OCR further stated that "schools benefit from consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action. A multiplicity of definitions would not serve this purpose."

The Department departed radically from this in the years between 2011 and 2017, when it instructed schools to define sexual harassment far more broadly -- and, at public institutions, unconstitutionally -- as "any unwelcome conduct of a sexual nature." The 2001 Guidance did use the phrase "unwelcome conduct of a sexual nature" to generally *describe* sexual harassment, but it was not -- as some argue -- the operative definition in that Guidance. Rather, the Department adopted an operative definition that it asserted was consistent with the one set forth by the Court in *Davis*.

Similarly, the jurisdictional limitations imposed by the regulations come directly from the Supreme Court's decision in *Davis*, where the Court stated that "the language of Title IX" —

which, again, addresses only discrimination that occurs under an education program or activity — “cabins the range of misconduct that the statute proscribes.” The Court wrote that “the statute’s plain language confines the scope of prohibited conduct based on the recipient’s degree of control over the harasser and the environment in which the harassment occurs.” The Supreme Court has defined the jurisdictional limits of Title IX. It is not within the authority of an agency to ignore those limitations.

Finally, the regulations establish uniform, fair procedures for institutions to use in adjudicating sexual misconduct complaints. In response to the hundreds of lawsuits from respondents who allege they were denied a fair process, there has emerged a patchwork of case law surrounding Title IX, such that one’s rights in a Title IX proceeding depend on where one lives and attends college. It fell to the Department of Education, therefore, to standardize the rights of students under what is, after all, a federal civil rights statute. This is the agency’s proper role and statutory charge. Moreover, the Department is obligated to ensure that students’ constitutional rights, including First Amendment and due process rights, are not violated in the implementation of Title IX, and that has been a rampant problem over the past 10 years. The procedural safeguards in the new regulations -- a live hearing, cross-examination, meaningful notice and access to evidence, the presumption of innocence -- are all things that various courts have held are part of students’ due process rights. Now these essential provisions will protect all students.

Thank you very much for your time. I look forward to answering your questions.