

**SUPPLEMENTAL TESTIMONY of SAMANTHA HARRIS**  
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Before the

**UNITED STATES HOUSE OF REPRESENTATIVES**  
**COMMITTEE ON EDUCATION AND LABOR,**  
**CIVIL RIGHTS AND HUMAN SERVICES SUBCOMMITTEE**

September 10, 2020 hearing

On the Basis of Sex: Examining the Administration's Attacks on Gender-Based Protections

October 5, 2020

Chairman Scott,

On September 21, you sent questions posed by Representative James Comer to me, and requested that I provide written answers to those questions to supplement my testimony of September 10. I am grateful for the opportunity to address the Committee again. Thank you for inviting me to provide my additional thoughts for the hearing record.

### Questions

**1. Ms. Harris, you mentioned that the Trump Administration’s regulation went through a thorough public review and comment process, in contrast to the Obama Administration’s guidance, which was issued with no public feedback at all. Why is the formal rulemaking process, with public notice and comment, so important?**

Many of the rules that have the greatest impact on our lives are enacted by administrative agencies. But unlike laws enacted by a legislature, administrative regulations are enacted by unelected officials. The notice and comment process, therefore, is essentially the only opportunity for affected stakeholders and citizens more generally to have a potential say in rules that are going to govern their daily lives. This is why, at the federal level, the Administrative Procedure Act requires substantive rules that impose new obligations to be subject to public notice and comment. The previous administration called the April 4, 2011 “Dear Colleague” letter a “significant guidance document” and alleged that it need not proceed through public notice and comment. But in fact, the “Dear Colleague” letter imposed extensive new obligations on stakeholders—such as the obligation to use the “preponderance of the evidence” standard, and the obligation to make any right of appeal available to both complainants and respondents. Moreover, when pressed by Senator Lamar Alexander in a live hearing on June 26, 2014, then-Assistant Secretary for Civil Rights at the Department of Education Catherine Lhamon argued that while the Department’s guidance documents were merely guidance, she still expected institutions to comply.<sup>1</sup> The exchange illuminates why the notice and comment process is so essential:

**Senator Alexander:** Ms. Lhamon, you talk about something called guidance, and I’ve got here about 66 pages of guidance under Title IX. Now, do you expect institutions to comply with your Title IX guidance documents?

**Assistant Secretary Lhamon:** We do.

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<sup>1</sup> *Sexual Assault on Campus: Working to Ensure Student Safety Before the S. Comm. on Health, Educ., Labor & Pensions*, 113th Cong. (2014) (exchange between Sen. Lamar Alexander and Catherine Lhamon, Assistant Secretary for Civil Rights, U.S. Dep’t. of Educ.) (exchange begins at 50:00) *available at* <https://www.help.senate.gov/hearings/sexual-assault-on-campus-working-to-ensure-student-safety>.

**Senator Alexander:** You do? Then why do—what authority do you have to do that? Why do you not then go through the same process of public comment and rule and regulation that the same department is over here is going through under the Clery Act?

**Assistant Secretary Lhamon:** Well, we would if they were regulatory changes, but—

**Senator Alexander:** Why are they not regulatory changes? You require 6000 institutions to comply with this, correct?

**Assistant Secretary Lhamon:** We do.

And yet, despite imposing new obligations and despite the fundamental rights the obligations affected, no one had the opportunity to comment on this guidance before it was issued. Colleges and universities and the people who live, study, and work in their communities just had to comply.

The new Title IX regulations, by contrast, went through a lengthy notice and comment process. Reviewing the differences between the proposed rule and the final rule—not to mention the 2,000 pages of commentary addressing public comment in great detail—it is obvious that the Department of Education took the input it received very seriously. Unlike the case of the 2011 “Dear Colleague” letter, the Department’s formal rulemaking and final rule is the product of informed, considered input from stakeholders on all sides of these issues, from due process advocates, to victims’ rights groups, to college and university administrators and attorneys. This feedback was critical to crafting a rule that balances the interests of all parties involved.

**2. Ms. Harris, you mention in your written testimony that some campuses’ preparation materials for Title IX coordinators have been problematic. Could you explain the issues that FIRE has identified with how some campuses have educated their Title IX coordinators and how the Trump Administration’s regulations address those problems?**

FIRE’s concern is with the materials used to train those who will serve as investigators and adjudicators in Title IX cases—people whose job it is to be neutral. Unfortunately, many universities have trained people for these roles using materials that rely on generalizations and stereotypes, something that is wholly inappropriate for people whose job it is to judge only the case before them, based on the evidence. If, for example, a jury empaneled to hear a murder trial were given a jury instruction that stated “99% of accused murderers are guilty,” we would immediately understand that—even if that statistic were true—it would be impermissibly prejudicial because the jury’s only job is to decide whether there are facts proving that *the individual in front of them* is guilty. And yet universities’ training materials would routinely include information about things like the relative rarity of false rape

accusations—an assertion that, true or not, casts no light on the *individual* case under consideration but is likely to impermissibly prejudice an investigator or adjudicator.

Not only do the new regulations prohibit the use of training materials that rely on stereotypes and generalizations, they also require transparency: institutions are now required to make their training materials publicly available on their website. This ensures that institutions cannot say one thing publicly and do another thing privately.

**3. Ms. Harris, in general, private colleges and universities are not required to protect the Constitutional due process rights of students in the same way public colleges and universities are. Could you talk about how these regulations affect private colleges and universities?**

Private colleges and universities are not subject to the due process clause, but the overwhelming majority of them promise basic fairness in their campus disciplinary processes. Moreover, Title IX—which binds any university, public or private, receiving federal funds—requires that complaints of sex discrimination be adjudicated in a way that is both prompt and equitable. For many years now, a large number of institutions have been adjudicating Title IX cases in ways that are anything but equitable, holding proceedings in which the respondents are effectively required to defend themselves with one hand tied behind their back because of a lack of notice, a lack of access to evidence, an inability to challenge the credibility of the other party, etc. In crafting the new regulations, the Department of Education recognized the lack of basic fairness in Title IX proceedings and now requires both public and private institutions (unless they are exempt from Title IX) to provide procedural protections to ensure that Title IX cases are handled equitably.

**4. Ms. Harris, you noted that many progressives-in-good-standing criticized the Obama Administration’s approach to these issues and have supported the Trump Administration’s regulation. Even many Democrats now express a strong commitment to due process even as they criticize the Trump Administration’s efforts to guarantee those same rights for students. In your career, have you experienced any other policy issue that has united such a diverse collection of advocates and stakeholders? To what do you credit that dynamic?**

In the September 7, 2017 speech announcing the Department of Education’s repeal of prior agency mandates on Title IX and embarking on the notice and comment process that ultimately produced the new Title IX regulations, Secretary Betsy DeVos set forth the principles that would guide the Department’s efforts: “Every survivor of sexual misconduct must be taken seriously. Every student accused of sexual misconduct must know that guilt is not predetermined. These are non-negotiable principles.”<sup>2</sup>

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<sup>2</sup> Betsy DeVos, U.S. Sec’y of Educ., Prepared Remarks on Title IX Enforcement (Sept. 7, 2017), *available at* <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement> (“In order to ensure that America’s schools employ clear, equitable, just, and fair procedures that inspire trust and

Shortly after that speech, a poll found that roughly 73% of those surveyed agreed with the Secretary’s stated guiding principles.<sup>3</sup> This broad public support was unsurprising because most people inherently understand that sexual violence cannot go unaddressed, but that cutting corners on due process flies in the face of our American values and best traditions of fundamental fairness.

Indeed, as my original testimony before the Committee emphasized, the late Justice Ruth Bader Ginsburg shared the belief that America needed to enforce Title IX in a manner that is both effective and fair to all parties.<sup>4</sup>

The new Title IX regulations earned support from people across the political spectrum because they remained true to the basic principle of balance and fairness to all articulated by Secretary DeVos when she first announced that the Department would be revisiting its approach and crafting legally binding regulations.

FIRE is hopeful that Congress will also cut through the hyperbole that has dominated the criticisms of the new regulations to evaluate them with an eye towards whether they meet DeVos’s stated goal of protecting the rights of all students. FIRE believes that the regulations strike that balance.

As for whether the diverse support for the Title IX reforms stand out as a unique example of bipartisanship in today’s hyper-partisan political climate, FIRE is gratified that our work protecting free speech rights on college campuses in state legislatures typically enjoys broad bipartisan support, too. In fact, FIRE-backed legislation to ban the use of misleadingly labeled “free speech zones” that often quarantine student expression to tiny and remote areas of campus have passed with bipartisan support in 16 states,<sup>5</sup> even garnering unanimous or nearly unanimous support in 5 of them.<sup>6</sup>

There may be some issues where Americans are currently too divided to reach consensus. But just as we have seen bipartisan support for campus free speech on the state level,

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confidence, we will launch a transparent notice-and-comment process to incorporate the insights of all parties in developing a better way.”).

<sup>3</sup> *Most Americans Agree with DeVos on Sexual Misconduct on Campuses*, RASMUSSEN REPORTS (Sept. 13, 2017), available at

[https://www.rasmussenreports.com/public\\_content/politics/current\\_events/social\\_issues/most\\_americans\\_agree\\_with\\_devos\\_on\\_sexual\\_misconduct\\_on\\_campuses](https://www.rasmussenreports.com/public_content/politics/current_events/social_issues/most_americans_agree_with_devos_on_sexual_misconduct_on_campuses).

<sup>4</sup> National Constitution Center, *A Conversation with Justice Ruth Bader Ginsburg*, YOUTUBE (Feb. 12, 2018), <https://www.youtube.com/watch?v=sN7rhjPBFts>.

<sup>5</sup> H.B. 258 (Va. 2014); S.B. 93 (Mo. 2015); H.B. 2615 (Ariz. 2016); S.B. 17 (Ky. 2017); S.B. 17-062 (Colo. 2017); H.B. 54 (Utah 2017); H.B. 527 (N.C. 2017); S.B. 723 (Tenn. 2017); S.B. 4 (Fla. 2018); S.B. 339 (Ga. 2018); S.B. 364 (La. 2018); S.B. 156 (Ark. 2019); H.B. 254 (Ky. 2019); H.B. 1087 (S.D. 2018); S.F. 274 (Iowa 2018); SB 361 (Okla. 2019); S.B. 18 (Tex. 2019); H.B. 498 (Ala. 2019).

<sup>6</sup> H.B. 258 (Va. 2014); S.B. 93 (Mo. 2015); S.B. 17-062 (Colo. 2017); H.B. 54 (Utah 2017); S.B. 723 (Tenn. 2017); S.B. 156 (Ark. 2019).

Congress can demonstrate that we are united on the aim of protecting students from sexual misconduct without jettisoning the procedural protections that lend credibility to those efforts.

Thank you again for your focus on this important issue and for your consideration of my perspective.