

STATEMENT OF ANNE H. MEEHAN
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BEFORE THE
HEALTH, EDUCATION, LABOR AND PENSIONS COMMITTEE
UNITED STATES SENATE
ON
REAUTHORIZING THE HIGHER EDUCATION ACT: ADDRESSING CAMPUS SEXUAL
ASSAULT AND ENSURING STUDENT SAFETY AND RIGHTS

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Mr. Chairman, Senator Murray, and members of the Committee, thank you for inviting me to speak with you today. My name is Anne Meehan and I am the Director of Government Relations at the American Council on Education (ACE). ACE represents more than 1,700 public and private, two- and four-year colleges and universities and related higher education associations. I submit this testimony on behalf of ACE and the higher education associations listed at the end of my testimony.

As Congress works to reauthorize the Higher Education Act, we appreciate the Committee holding this hearing on addressing campus sexual assault and ensuring student safety and rights. I have been asked here today to talk about the variety of campus disciplinary processes used by colleges and universities to respond to allegations of sexual misconduct involving students, and ways to help ensure these processes are fair to both the survivor and the accused. My comments will focus on sexual assault between students because this has been an important emphasis of institutions and policymakers in recent years.

Two federal laws—the Clery Act and Title IX—require colleges and universities to address sexual assault on their campuses (Clery via statute and regulations and Title IX via regulations and guidance). Although different in scope, these laws also contain important requirements for campus disciplinary processes used to address sexual assault, including that these processes must be fair. Campuses take complying with these, and all applicable laws, very seriously. In addition to wanting to fulfill their legal obligations in this area, colleges and universities want to do the right thing. College and universities are committed to maintaining campus environments that are safe, supportive, and responsive so all students can benefit from the widest possible array of educational opportunities.

Unfortunately, campus sexual assault cases can be extremely difficult to resolve. They may involve differing accounts about what happened; few if any witnesses; little or no physical evidence; conduct and recollections impaired by alcohol or drug use; and, perhaps, understandably, a significant, but understandable, time lapse between the event and the

filing of a report. The central issue in most of these cases is whether consent has been given, and this can be very difficult to determine based on the evidence available. For these and other reasons, law enforcement authorities often decline to pursue these cases through the criminal justice system, although campuses need to consider these situations in the context of their student conduct codes and disciplinary processes, independent of whether criminal charges are filed.

It is important to remember that while sexual assault is a serious crime, colleges and universities are not courts. Campus disciplinary processes are designed to determine whether an individual has violated an institution's specific code of conduct—not whether someone is guilty of a crime.

In addressing campus sexual assault, colleges and universities have three overarching goals. First, we want to support the survivor. Second, we want processes that are fair to both parties. And third, while we appreciate clarity about what is expected of us, we also need flexibility to address these difficult cases in a compassionate and effective way for the individuals involved and for the campus communities in which they arise. Today, our discussion will focus on this second goal—ensuring a fair process for both parties.

Finally, when considering potential legislation on this topic, the long view is important. Sadly, the scourge of sexual assault is unlikely to be eradicated in this country or on our campuses anytime soon, although colleges and universities continue to strive toward that goal. Campuses will continue to adapt, evolve and improve their prevention and awareness programs, as well as their support services and disciplinary processes to address sexual assault when it does occur. We encourage policymakers to be cautious about locking requirements into statute that could limit institutions' ability to incorporate the latest understandings, research, and state of the art techniques designed to address this serious problem.

CAMPUS DISCIPLINARY PROCESSES VARY

It is critical to understand that campus disciplinary processes vary significantly from institution to institution, based on, among other things, the institution's mission, student populations, its culture, resources, and staffing of the campus. Although it can be difficult to generalize across more than 4,000 degree-granting institutions, processes generally fall into either a "hearing" or "non-hearing" model, with significant variation within these models, between different institutions, and even across units within the same institution.

Under a common version of a non-hearing model, a complainant reports sexual misconduct and indicates he or she would like to begin a formal disciplinary process. A trained sexual assault investigator is assigned to conduct a preliminary investigation to determine whether the allegations, if true, would be sufficient to constitute a violation of campus conduct standards. Assuming there is a sufficient basis, the investigator then notifies the complainant and respondent of the intent to proceed with a formal investigation and sets up time to interview the parties. The parties are interviewed, often multiple times, and are

given the opportunity to identify evidence to pursue, witnesses to interview, and questions to ask the other party, in addition to information independently identified by the investigator. In deciding what questions to ask, the investigator relies not only upon clarifying questions suggested by the parties, but also on their own experience and prerogative to inquire thoroughly and seek clarification of inconsistencies, to promote fairness to both parties. This approach can effectively replicate the cross-examination approach used in some hearing-based models.

The investigator then prepares a draft report that contains the parties' statement, witness statements and a summary of any other evidence gathered during the investigation. Both parties would be presented with the draft, given an opportunity to respond, challenge any evidence, suggest additional areas for investigation, or provide new evidence now available. After incorporating this feedback, the investigator finalizes the investigative report. If additional evidence has been gathered, the parties are again given an opportunity to provide a response, which is added to the final report, and the final report is then submitted to the decision maker.

The decision maker may be a single individual or a panel. In a non-hearing model, the decision maker reviews the report and determines whether the evidence supports a finding of responsibility. The decision maker may also direct the investigator to go back and collect additional information regarding an issue before making a final decision. The decision maker may agree or disagree with the investigator's conclusions or weighing of the evidence—however, the decision maker's finding must be based on the information in the report and parties' responses.

Among non-hearing models, one model that has been the subject of recent discussion is the so-called "single-investigator" model. Most typically, this term is used to refer to a model where one individual, usually highly trained in investigating sexual assault cases, both investigates the matter and decides whether a violation of campus conduct rules has occurred.

Like non-hearing models, hearing models also come in many variations. The investigative phase is similar to a non-hearing model. However, at the conclusion of the investigation, the summary report, investigative file, and responding statements of the parties will be presented for review to a hearing officer or a hearing panel. (If the facts are not in dispute, some institutions will allow the students to mutually agree to opt for a summary disposition, instead of a full hearing.) The information presented to the hearing panel will also be presented to the parties with sufficient time for them to prepare, and a hearing date will be set. At the hearing, the investigator often presents an oral summary of the investigation and is available to answer questions posed by the panel. The hearing panel will ask questions of the parties and witnesses based on the information collected during the investigation. While the parties may be in the same room for the hearing, an option is often available to enable them to be in separate rooms with one party permitted to watch the other party on a live video feed. While some institutions do allow for direct cross-

examination by one party (or the party's representative) of the other party and any other witnesses, many do not. Where direct cross is not permitted, institutions often allow the parties to test the credibility of the other party and any witnesses by submitting written questions to a hearing panel, which reviews the questions to determine their appropriateness, and then poses them directly to the party or witness.

Regardless of the model used, after a finding of responsibility or non-responsibility is made, institutional processes determine whether an appeal is permitted, and the grounds on which a party may appeal. When there is a finding of responsibility, institutions differ on whether the same decision maker determines the sanction or whether another campus official or panel determines the sanction.

“FAIRNESS” REQUIREMENTS IN TITLE IX AND CLERY

Title IX is a civil rights law. It says, “No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” While the statute does not specifically mention either “sexual assault” or “campus disciplinary processes,” Title IX regulations, guidance, and case law determine institutions’ obligations. In November 2018, the Department of Education proposed new regulations for Title IX, which have proven controversial, generating more than 100,000 comments in response. While there is much debate about what the final regulations should entail, there are important Title IX obligations that are well-settled and not in dispute. Among them is that sexual harassment, which includes sexual assault, is a prohibited form of sex discrimination under Title IX. When allegations of sexual assault arise, institutions must take prompt action to eliminate the harassment, remedy its effect, and prevent its recurrence. It is also well-accepted law that when resolving allegations of sexual assault, campus disciplinary processes must be “prompt and equitable.”

The Clery Act is the part of the Higher Education Act designed specifically to address campus safety issues—it requires institutions to report crimes that occur on campus and certain related property and it requires institutions to have a number of policies and practices related to safety. Clery, through statute and regulation, also provides a framework of requirements designed to ensure fairness in campus disciplinary processes involving sexual assault. Clery requires, among other things, that campus disciplinary processes must:

1. Provide for a “prompt, fair and impartial investigation and resolution.”
2. Be conducted by officials who receive annual training on issues related to sexual assault and how to conduct an investigation and hearing process that “protects the safety of victims and promotes accountability.”
3. Permit the complainant and the respondent to be accompanied by an “advisor of their choice” during the institutional disciplinary process, or any related meeting or proceeding.

4. Be completed within reasonably prompt timeframes designated by an institution's policy, including a process that allows for extension for good cause with written notice to the complainant and respondent.
5. Be conducted in a manner consistent with institutional policies and transparent to the parties.
6. Include timely notice of meetings at which the complainant or respondent, or both, may be present.
7. Provide "timely and equal access" to "any information that will be used during informal and formal disciplinary meetings and hearings."
8. Be "conducted by officials who do not have a conflict of interest or bias" against either party.

These requirements and others—the result of Violence Against Women Act (VAWA) amendments enacted in 2013—provide fundamental building blocks of what fair campus disciplinary processes should include. To the extent campus disciplinary processes did not include these features at the time of VAWA's passage (although most did), they have been readily incorporated. These elements are consistent with institutions' overarching goal of ensuring a fair process for both parties. They are also sufficiently high level as to give campuses the flexibility to meet these requirements in a way that makes sense for their institution.

Given this existing framework, we do not believe that additional changes in this area are necessary. However, if Congress feels the need to do more, it could consider the following:

- Some of the Clery requirements I mentioned are embodied in regulation and not in statute. If they are of fundamental importance to Congress, and Congress would like to insulate them from change through a regulatory process, Congress could consider incorporating them into the statutory language. For example, the regulatory requirement for "timely and equal access" to information that will be used during the campus disciplinary process could be explicitly stated in statute.
- Congress could consider whether campuses should be required to provide the parties notice of an intent to proceed with a formal campus disciplinary process, and the allegation. We believe most institutions already do this, but it could be explicitly referenced in statute. If Congress wants to do this, it should take care to ensure that the language is flexible to accommodate cases where it is appropriate to do so. For example, local police might ask the university to hold off initiating a disciplinary process to avoid alerting the subject of a criminal investigation. Similarly, the time when a victim of dating/domestic violence comes forward to report is often viewed as the most dangerous time for that individual—so there would need to be a safety plan in place before notifying the respondent of a formal disciplinary process.

- Another element of a fair disciplinary process is the ability to respond to evidence gathered in order to challenge adverse information, and to test the credibility of a party or witnesses. In speaking with member institutions, campuses do provide this opportunity, both in hearing and non-hearing disciplinary models. Congress could consider whether there are ways to ensure campus disciplinary processes reflect this principle, while again avoiding the pitfalls of overly-prescriptive, one-size-fits-all requirements. While ACE would be very concerned about a requirement that all institutions provide for direct cross-examination in a live hearing setting, flexible language that allows one party to propose questions to be asked of the other party—through an investigator, or some other process—could be considered and would be consistent with many existing institutional practices.

GENERAL OBSERVATIONS FOR POLICYMAKERS

In determining whether these or other changes are necessary or appropriate, we urge Congress to proceed cautiously, keeping the following observations in mind:

1. Colleges and universities are not courts, nor should they be. We do not have the resources, personnel, or expertise of the criminal and civil justice system. We do not have subpoena powers, rules of evidence, or the ability to hold an attorney in contempt. Efforts that attempt to turn us into quasi-courts, or to impose court-like procedures and terminology, are misguided and likely to result in unintended consequences.

For example, the recent Title IX NPRM would require all institutions to provide a live hearing with direct cross-examination by an advisor of a party's choice. Colleges and universities have grave concerns with this proposal, which could undermine efforts to encourage survivors to come forward, as well as efforts to be fair to both parties, turn our disciplinary processes into courtrooms, and create a cottage industry of legal advisors. The use of direct cross-examination, and the exclusion of statements from any party who is unwilling to be subject to direct cross, is likely to result in a highly adversarial process where attorney advisors attempt to break down the survivor, the accused, or witnesses to the events—in an effort to have their statements excluded from consideration. This proposal also raises equity concerns, when one student has the financial resources to hire an expensive and aggressive litigator, and the other student does not. If a respondent is facing a possible parallel criminal proceeding, a respondent's lawyer may advise the student not to participate in a live hearing with direct cross-examination, even though the respondent's lawyer would allow the student to participate in non-live hearing process. If a live hearing is required, the respondent's lack of participation is more likely to result in a finding of responsibility.

There are many ways campuses allow parties to respond to allegations, challenge evidence, seek clarification, and test credibility of witnesses that do not involve a live hearing and do not require direct cross-examination. There are many reasons why a

particular survivor or accused student might not “present” well in a live setting: cultural differences, implicit bias, the effects of trauma or extreme stress, a low-income student may not have the same level of support as a wealthier student to prepare for a live hearing format, differences in age and verbal skills of the participants, etc. There may be a benefit to giving students additional time to process a question and form their response outside of a live-hearing format. An assumption that the search for the truth of the matter in a disciplinary process can be achieved *only* through live, face-to face observation of the parties under direct cross-examination is a flawed one.

As another example, the NPRM, and some legislative proposals, have inappropriately imported the phrase “due process” when attempting to describe the need for fair processes for both parties.

“Due process” is a term most commonly associated with protections provided by law enforcement and the judicial system for criminal defendants where an accused individual’s life or liberty is at risk. Indeed, Black’s Law Dictionary defines “due process” in the context of criminal law: “Embodied in the due process concept are the basic rights of a defendant in criminal proceedings and the requisites for a fair trial.” While public institutions are required to provide certain due process protections under the Fourteenth Amendment to the U.S. Constitution, private institutions are not, and the type and amount of process required of public institutions in these situations is far less than the process due in a criminal trial. Campus disciplinary hearings are neither “criminal proceedings” nor “trials.”

Words matter. The use of the phrase “due process” in federal law contributes to a faulty perception that federal criminal trial-like constitutional due process protections must be provided on all campuses, public and private, for sexual assault proceedings, and is likely to result in substantially more civil litigation. We strongly support a process that is fair to both respondents and complainants, that is carefully designed to be even-handed, and that does not disadvantage either party. However, when incorporating this concept in federal statute or regulation, we recommend using “fair process” or “procedural fairness” instead.

2. Colleges and universities are highly diverse—in institutional-type, in the populations they serve, and in their educational missions. Not all institutions are residential. Not all have athletic programs. Some are small, faith-based institutions. Some are graduate-level only. Some serve adult students who commute. The standards institutions set for their campus communities, as reflected through their policies and codes of conduct also vary significantly, as do their campus disciplinary processes. While it is perfectly appropriate for Congress to set the guardrails about what a fair process entails, it should give institutions flexibility in how they meet this goal. Highly prescriptive, one-size-fits-all federal requirements are unlikely to work well and may actually undermine efforts to be fair to both parties. The problems I described regarding a live hearing with a direct cross-examination requirement for all institutions is just one illustration of why this

rigid approach is both unnecessary and unwise. Campuses have many different processes that can be used to fairly determine whether a student is responsible for a conduct code violation. New hearing models and state of the art techniques may arise that will provide even better processes, which is another reason policy makers should avoid dictating a particular process.

3. Be aware of the many different sources of obligations on institutions in this area—in addition to the federal laws already discussed, there are other federal laws, state and local laws, judicial decisions regarding process requirements, and institutional policies. In one state, at least four pieces of campus sexual assault-related legislation are currently pending—state legislation on this topic has been passed or is pending in many others. Adding more federal requirements on top of the multitude of existing requirements is likely to result in confusing, overlapping, and potentially conflicting obligations. There has been significant churn in this area of the law, which makes it difficult for even the most-committed and well-resourced campuses to keep up with various requirements. Remember that changes will require revision of policies and practices and new trainings for staff. As one Title IX official for a major university campus described it, “No matter how knowledgeable about this area you are, no matter how hard you work, no matter how much you are committed and how much you care, it is hard to know if you are meeting all the different legal requirements.” If this is challenging for a major university, imagine what it is like for small, less-resourced institutions to sort out all the various requirements, particularly when the majority of institutions in this country do not have a dedicated general counsel on staff.
4. When considering policy in this area, institutions must have the ability to address conduct that violates their community standards, even if it occurs “off-campus” or otherwise falls outside what the law requires campuses to do. This was another concern raised by the recent NPRM, which is unclear on this point and appears to force institutions to “dismiss” a complaint that falls outside the Title IX definition, or outside an “education program or activity,” even if that conduct is antithetical to campus values and prohibited under our conduct codes. While the preamble of the NPRM suggests that institutions would have the discretion to pursue these cases, preamble language does not have the force of law. Given the fundamental importance of this issue to colleges, campuses must have clear and unambiguous authority to pursue cases beyond what the law requires.

For example, an institution receives a report of a sexual assault involving two students that occurs in an off-campus house owned by a fraternity, where that fraternity is not recognized or sponsored by the institution. It is unclear whether under this scenario, the location of the assault would place it outside the NPRM’s definition of an “education program or activity.” But regardless, the alleged conduct would be a serious violation of the institution’s code of conduct and one that the school would feel compelled to address in order to maintain a safe campus. Similarly, a university learns that a student has been accused of sexually assaulting another student while both are home on summer break.

While far removed from the university's programs, the campus general counsels I speak with tell me they would absolutely address this conduct through a disciplinary process, especially given that the students are likely to encounter one another when they return to campus. Many campus codes explicitly state that their expectations for student conduct apply regardless of whether the conduct occurs on or off campus. This is also important from a risk management perspective—if an institution has reason to believe a student poses a safety risk to other students, it needs to be able to investigate, assess, and, if necessary, discipline and remove that student from its community.

We believe that when sexual misconduct violates campus community standards, institutions must continue to have the right to pursue these matters through their disciplinary processes, regardless of whether the incident falls within the scope of Title IX. The campus general counsels I have spoken with tell me they absolutely want the ability to pursue these cases, and federal law should make clear that they may do so.

5. Finally, while we appreciate the focus of today's hearing is on how to improve campus disciplinary processes, we also encourage the Committee to consider ways the federal government can help support campuses in their prevention efforts. No matter how effective and fair our campus disciplinary processes are, our ultimate goal is to prevent sexual assault from occurring in the first place.

The Clery Act requires institutions to provide primary and ongoing sexual assault education and prevention programs for students and employees. Institutions have invested significant resources in expanded and innovative programming, with bystander prevention and consent education at the core of these efforts. I would like to highlight just a few of the efforts currently underway:

- NASPA – Student Affairs Administrators in Higher Education's "Culture of Respect" initiative builds the capacity of institutions to end sexual violence through ongoing, expansive organizational change. NASPA has created a "prevention programming matrix" which provides a curated list of more than 30 different theory-driven and evidence-based sexual violence prevention programs to help institutions identify the program that best meets their needs.
- The University of Washington incorporates a program called "Green Dot," which is popular on many campuses. The Green Dot strategy aims to shift campus culture by tapping the power of peer influencers (campus leaders, student-athletes) to increase proactive, preventative behavior. Every choice to be proactive as a bystander is categorized as a "new behavior" and thus a "Green Dot." Individual decisions (green dots) group together to create larger change.
- Vanderbilt University employs a variety of prevention strategies, targeted specifically to the needs of its community. For example, after survey data indicated that a significant number of students had experienced dating violence

prior to coming to college, Vanderbilt enhanced its dating violence prevention programming by adding additional modules on this topic. Vanderbilt's programming also includes a theater-based program called True Life, which takes place during students' freshman orientation week. Through a series of skits, performed by Vanderbilt students and based on actual situations experienced by the students, the program addresses topics such as sexual assault, dating violence, and substance abuse, among others.

While many promising practices have emerged, additional federal support, possibly through grants, could help institutions evaluate the effectiveness of various approaches, share and scale best practices, and tailor programming to the particular needs of an institution. Efforts to educate students about healthy relationships and respect for others while still in high school and *before* they come to college is another piece of the prevention puzzle. While colleges and universities continue to ramp up efforts in this area, there is still work to be done and additional federal resources to support these efforts would be welcome.

CONCLUSION

Thank you for inviting me to testify on this important topic. I would be happy to answer any questions you have.