

October 2, 2025

Via Email to [OCR@ed.gov](mailto:OCR@ed.gov)  
U.S. Department of Education  
Office for Civil Rights  
400 Maryland Avenue, SW  
Washington, DC 20202-1100

**Re: Complaint Concerning American University's Violations of Title IX in Carrying out a Grievance Process for Allegations of Sexual Harassment**

To Whom It May Concern:

Pursuant to the discrimination complaint resolution procedures of the U.S. Department of Education's ("Department") Office for Civil Rights ("OCR"), the Defense of Freedom Institute for Policy Studies ("DFI") files this complaint against American University ("AU") for discrimination on the basis of sex in education programs or activities that receive federal financial assistance in violation of Title IX of the Education Amendments of 1972 ("Title IX").<sup>1</sup> DFI submits this complaint on behalf of KB,<sup>2</sup> who was enrolled as a student at AU until June 2025, when he withdrew from the university due to discriminatory and deliberately indifferent treatment by AU personnel in carrying out the institution's grievance process with respect to allegations of sexual harassment, as outlined in this complaint.

DFI is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker, and to protecting the civil and constitutional rights of Americans at school and in the workplace. Such rights include the right not to be excluded from equal opportunities in federally funded education programs or activities due to prohibited discrimination on the basis of sex and the right of all parties to an equitable, unbiased grievance process in response to the filing of a formal complaint alleging sexual harassment in such programs or activities.

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<sup>1</sup> 20 U.S.C. §§ 1681 *et seq.*

<sup>2</sup> To protect the privacy of this individual, we do not disclose his name in this formal complaint. For more information, OCR may reach out to the undersigned.



We ask OCR to investigate the actions of AU, its employees, and its agents described below, consider potential sanctions against the university as authorized under Title IX,<sup>3</sup> and place AU on clear notice that failure to comply with the law in carrying out its grievance process with respect to formal complaints of sexual harassment will result in the suspension or termination of federal funding.

## Facts

AU, which enrolls approximately 12,343 graduate, undergraduate, and law students, has students from all 50 states and more than 100 countries.<sup>4</sup> Chartered by Congress in 1893,<sup>5</sup> it is a private institution of higher education that receives federal funding<sup>6</sup> and is thus bound by Title IX's prohibition against discrimination on the basis of sex.<sup>7</sup>

On August 23, 2023, during KB's freshman orientation week at AU, a fellow matriculating freshman student (identified for the purposes of this complaint as "LO") and her roommate invited KB to their dorm room after spending the previous days with him at orientation events. They had a "pregame" there and also visited a nightclub, where KB consumed a considerable amount of alcohol. After returning to LO's room and drinking more liquor there, and in the presence of LO's roommate and four other students, KB lay in bed with LO while they kissed. LO pushed her legs between his, stroked his groin, and placed her hands under his shirt. LO pushed KB to have sex with her and persisted in doing so despite KB's repeated refusals and explanation that he was too drunk to do so. KB noticed that his shirt was fully unbuttoned and, due to his incomplete memories of the evening as a result of his intoxicated state, does not remember how or when it came open. When LO's roommate approached the bed and told KB that LO "might be a little drunk," KB left

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<sup>3</sup> See 20 U.S.C. § 1682 (authorizing federal departments and agencies empowered to extend federal financial assistance to education programs or activities to effect compliance with Title IX "by the termination of or refusal to grant or to continue [such] assistance" or "by any other means authorized by law").

<sup>4</sup> *Our Academic Profile*, AMERICAN UNIVERSITY, WASHINGTON DC, <https://www.american.edu/about/academic-profile.cfm> (last visited Sep. 2, 2025).

<sup>5</sup> *Charter*, AMERICAN UNIVERSITY, WASHINGTON, DC (last amended Sep. 9, 1996), *available at* <https://www.american.edu/trustees/charter.cfm>.

<sup>6</sup> *Office of Equity and Title IX, Frequently Asked Questions*, AMERICAN UNIVERSITY, WASHINGTON, DC, <https://www.american.edu/equity-titleix/faq.cfm> (last visited Sep. 12, 2025) ("As a recipient of federal funds, AU is obligated to follow the regulations and guidance issued by the US Department of Education.").

<sup>7</sup> See 20 U.S.C. § 1681; 34 C.F.R. § 106.2 (defining a "recipient" to include "any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof [or] any public or private agency, institution, or organization . . . to whom Federal financial assistance is extended . . . and which operates an education program or activity which receives such assistance"); 34 C.F.R. § 106.31(a)(1) (generally prohibiting discrimination on the basis of sex in education programs and activities operated by recipients).



the bed and rejoined the group of students, who had remained in the dorm room throughout the interaction.

In a text LO sent to KB days later, she accused KB of violating her “boundaries” in the interaction, declared that she “never gave clear consent to any of what happened,” and told KB that she did not wish to speak to him or have him around. In response, KB avoided contacting LO and promptly left any location where he saw her.

In January 2025, LO filed with AU a formal complaint alleging that KB had sexually harassed her during their interaction nearly 18 months earlier. In her formal complaint, LO claimed that KB had coerced her to drink alcohol, joined her as she struggled into bed, and, while she was moving in and out of consciousness, kissed her, exposed her chest, and touched her breasts for hours without her consent. In an email to the investigator on June 4, 2025, LO wrote that she has been using the terms “asleep” and “blacked out” due to alcohol interchangeably and she did not know if she was ever actually asleep or simply in a blackout state. In the same email, she stated that she felt encouraging someone to drink was synonymous with coercing them.

On January 27, 2025, AU’s Office of Equity & Title IX (“OETIX”) notified KB that OETIX was initiating an investigation of the allegations in LO’s formal complaint to determine whether KB had violated AU’s Title IX Sexual Harassment Policy.

Soon after receiving this notice of the formal complaint, KB wrote a suicide note and went to the woods for the purpose of killing himself. After mutilating his body with a knife, KB called a suicide hotline, whose staff persuaded him not to kill himself.

On February 19, KB filed a document labeled “Formal Complaint” in which he described the sexual harassment to which LO had subjected him, explaining that LO had kissed him, kissed his neck, touched his chest beneath his shirt, stroked his groin, and repeatedly pressured him to have sex with her while he was incapacitated by alcohol and after he had told her that he was too drunk to do so. He explained in the formal complaint that, although he “did not originally want to file a complaint” against LO, he felt he needed to do so to ensure that AU reviewed the matter fairly “and investigate[d] *everything* that happened that night, including what happened to me.”

On February 20, OETIX contacted KB to offer an intake meeting for what it referred to as his “report” of sexual harassment—misidentifying what KB had clearly labeled a “Formal Complaint.” On February 24, OETIX denied KB’s request to have an advisor at his intake meeting. When KB pointed out that AU’s Title IX Sexual Harassment Policy and the Department’s Title IX regulations explicitly allow him to bring an advisor to his intake meeting, OETIX replied that this language in the policy was in error and that advisors are not able to attend such meetings and stated that it would alter this language on its website. Subsequently, OETIX canceled the intake meeting, explaining that it did not need his input to assess his complaint.



During this time, beyond attaching a boilerplate document listing resources such as counseling to its email responding to his formal complaint, OETIX did not discuss with KB any supportive measures that he could access as a result of the conduct set forth in that complaint.

On March 13, OETIX notified KB that it had initiated an investigation only of his allegation that LO's stroking of his groin had violated its Title IX Sexual Harassment Policy and that it had dismissed all of his other allegations—*i.e.*, that LO had kissed his lips and neck, touched his chest beneath his shirt, and repeatedly pressured him to have sex with her despite his consistent refusal. OETIX explained that it had dismissed most of his complaint because the other allegations did not constitute “severe, pervasive, and objectively offensive” harassment and did not constitute fondling of a private body part under AU's Title IX Sexual Harassment Policy.

On March 19, KB appealed the dismissal of most of his formal complaint on the grounds of procedural irregularity and a conflict of interest or bias against KB on the part of the Title IX Coordinator, both of which affected the complaint's outcome.

On April 1, KB informed OETIX that the investigator of his complaint had denied as “duplicative” his request that she interview six witnesses about his allegations and had directed him to identify only two witnesses. In the email, KB described in detail the distinct information and perspectives each witness could offer the investigation, particularly with regard to KB's recollection of and statements about the events of August 23, 2023. He also explained that the questions the investigator posed in his interview regarding LO's complaint strongly suggested that LO had been permitted to submit more than two witnesses for interviews. Nevertheless, KB agreed to remove one witness from his list because that witness no longer attended AU and would offer evidence of the same conversation as other witnesses.

On April 2, OETIX responded that it would direct the investigator to interview only three of the witnesses KB requested be interviewed for his formal complaint. OETIX eventually, and after multiple requests for KB, agreed that the investigator would interview the five witnesses on KB's list.

On April 17, LO filed a police report with the American University Police Department (“AUPD”). She stated the purpose of her police report was “to add to her current Title IX report.” She falsely stated that she further wanted to make the report because she “currently has classes” with KB. They shared no classes. Instead of opening an investigation, AUPD provided LO counseling resources and resources on how to file for a protective order.

On April 18, OETIX sent an email to KB instructing him to tell his attorney-advisor to stop communicating with witnesses he proposed to the investigator with regard to his formal complaint, asserting that “this is not the role of an advisor in the Title IX process and inappropriate conduct.”



On April 22, LO obtained a Temporary Protection Order (“TPO”) from the Superior Court of the District of Columbia requiring that KB stay 20 feet away from LO on campus and 100 yards away from her at all other times. She sought the TPO based on her claims that KB had sexually assaulted her and that, as a result, she was suffering from Post-Traumatic Stress Disorder (“PTSD”). The TPO also prohibited KB from contacting LO “in any manner.” LO requested in the TPO that KB receive counseling for domestic violence. Due to his desire to put the matter behind him, the cost of defending himself, the ease with which TPOs are granted, and the lack of any interest in contacting LO, KB consented to the TPO without making any admissions of fault (known as a “consent without admissions”).

On April 28, AU’s Dean of Students notified KB that he had affirmed the dismissal of the majority of allegations in KB’s complaint, summarily finding no procedural irregularity or bias in OETIX’s handling of his complaint in spite of the asymmetrical dismissal of portions of his complaint that mirrored exactly the allegations of LO—*i.e.*, kissing, touching beneath her shirt, and exposure of her chest—that OETIX had agreed to investigate.

On April 29, KB received the “evidence review” and saw that OETIX had failed to engage in any investigation whatsoever of KB’s formal complaint, *even the allegation that LO had stroked his groin while he was incapacitated*; however, as of that date, OETIX had produced a preliminary investigative report regarding LO’s formal complaint. That report omitted key evidence that would shed light on the determination of responsibility for LO’s complaint. For instance, the preliminary investigative report omitted evidence from witnesses about LO’s alleged incapacitation on the night of the interaction, the allegation that KB pressured her to drink, and any campus security footage that could have assisted in verifying her allegations.

On June 14, in light of the restraints imposed by the TPO, the dire mental-health impacts and severe reputational harm KB continued to suffer due to LO’s complaint, AU’s biased and procedurally defective investigation of the 2023 incident, and OETIX’s communication to KB that it would have the discretion to dismiss LO’s formal complaint against him once he was no longer enrolled at AU, KB withdrew from AU and notified OETIX that he had done so. **KB also met with the Title IX Coordinator and explained that he had attempted to commit suicide as a result of the stress of the case.**

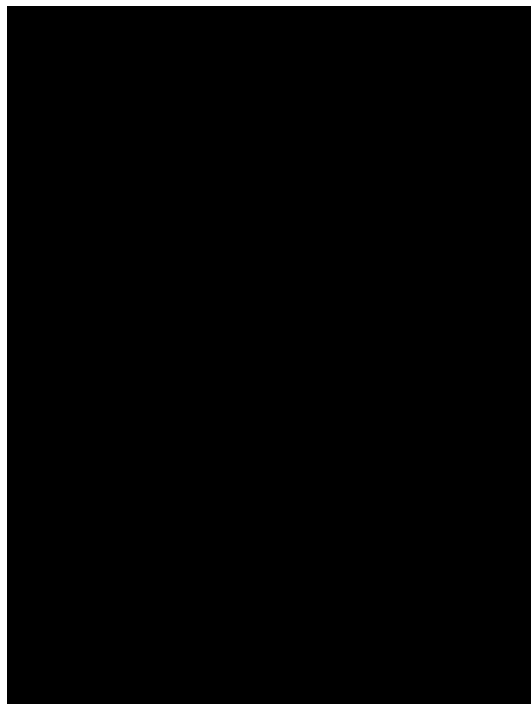
On June 25, OETIX informed KB that, in spite of his withdrawal from the university and the mental-health and reputational impacts of the investigation, it had decided to continue the university grievance process with respect to LO’s and KB’s complaints. In an email on July 21, OETIX informed KB that it did not use any “permissible dismissal” process to evaluate his request to dismiss LO’s complaint in light of his withdrawal from the university.

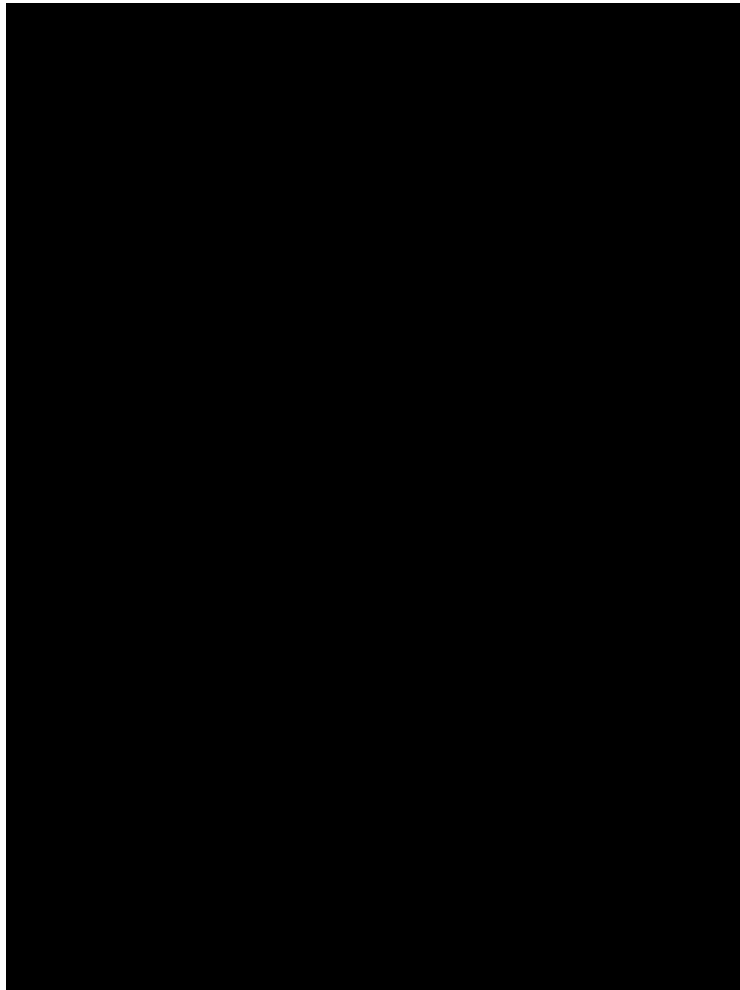


On or around June 24, KB received the second “evidence review” and saw that the investigator of KB’s formal complaint still had not interviewed LO about the allegations contained in KB’s complaint. The investigator also denied as irrelevant KB’s request to investigate text messages directly related to the interaction—apparently relying on LO’s assertion that she usually did not “drunk text” and that her friends were in a different time zone—or security footage from the AU campus on the night of the incident. Based on the evidence review, the investigator also did not request any records to confirm LO’s PTSD diagnosis, which she had raised in the investigation of her formal complaint. KB also pointed out on June 26 that the investigator had failed to correct a mistake in the preliminary investigation report that misquoted KB regarding LO’s alleged incapacitation on the night of the incident—a correction that KB requested be made over a month earlier—that could have had detrimental impacts on the decision-making process. OETIX has offered no explanation to KB regarding its investigator’s substantial delay in completing an investigation of both formal complaints.

The investigator of KB’s formal complaint has not provided to KB LO’s correspondence with OETIX regarding her formal complaint, including emails concerning the complaint, intake meeting notes, Facebook and LinkedIn posts, as well as a clinician’s assessment she provided to the investigator.

On September 16, in a second request to OETIX to dismiss LO’s formal complaint against him now that he was no longer enrolled as a student at AU, KB provided to OETIX photographs of the suicide note he wrote after receiving notice of LO’s complaint on January 27 and of the wounds he had inflicted on his body. The photos of KB’s self-inflicted wounds follow:





On September 17, KB and his family spoke by remote video with the Title IX Coordinator. During the video conference, they cried and asked her to dismiss LO's formal complaint against KB in light of the evidence shared the previous day regarding his intent earlier that year to kill himself and his self-mutilation, the mental-health and reputational impacts he had suffered from the allegations in the complaint, the inequitable process to which he had been subjected with regard to his and LO's complaint, and his permanent withdrawal from AU.

In that September 17 conversation, the Title IX Coordinator stated that she had not reviewed the photos of KB's suicide note and self-harm that he had emailed to her because she wished to maintain an independent position with regard to the complaints and that looking at such photos would affect what she could do later in the process. She also asserted (falsely) that she did not even have the discretion to revisit the previous OETIX decision to dismiss the complaint, and suggested that "federal law" required AU continue to investigate LO's formal complaint even after KB's withdrawal from the university. The Title IX Coordinator admitted that the investigative process had lasted longer than it should have and told KB and his family that she would meet with the



investigator to discuss next steps and how to resolve the investigation. When KB and his family raised the failure of the investigator to gather key evidence from LO, including with regard to his formal complaint against LO, the Title IX Coordinator asked them if they were aware that they could ask any questions that are relevant to the allegations at the live hearing concerning those formal complaints.

On September 22, the Title IX Coordinator sent KB an email indicating that she had considered the evidence he had provided of his suicide note and self-mutilation as a basis for his request for the dismissal of the complaint against him and had “determined that this complaint will not be dismissed and the University will move forward with the Title IX process.” The Title IX Coordinator offered no reasons for this decision.

## The Law

Title IX provides: “No person in the United States 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,” subject to certain statutory exceptions.<sup>8</sup> Since the Department’s predecessor—the Department of Health, Education, and Welfare—issued its first regulations implementing Title IX in 1975, these regulations have required recipients of federal funding to establish and publish grievance procedures for the “prompt and equitable resolution of student and employee complaints” regarding prohibited discriminatory conduct.<sup>9</sup> Since the 1980s, the Department has considered sexual harassment to be a form of sex discrimination prohibited by Title IX.<sup>10</sup>

In 2020, the Department promulgated amendments to its regulations implementing Title IX (the “2020 Rule”).<sup>11</sup> For the first time as a matter of regulation, the 2020 Rule recognized that federally funded educational institutions must address sexual harassment in their programs and activities, codified a definition of sexual harassment that generally tracks Supreme Court caselaw but encompasses single instances of sexual assault and similar conduct, and set out the basic standards for a grievance process that federally funded educational institutions must follow before subjecting

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<sup>8</sup> 20 U.S.C. § 1681(a).

<sup>9</sup> U.S. Dep’t of Educ., *Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 40 Fed. Reg. 24,128, 24,139 (June 4, 1975) (codified at 45 C.F.R. § 86.8(b)). The Department of Education, created by Congress in 1979, issued the same rule with respect to grievance procedures in its regulations implementing Title IX; that language appears at 34 C.F.R. § 106.8.

<sup>10</sup> See U.S. Dep’t of Educ., Office for Civil Rights, Policy Mem., Antonio J. Califa, Director for Litigation Enforcement and Policy Services (Aug. 31, 1981).

<sup>11</sup> U.S. Dep’t of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020) (codified at 34 C.F.R. pt. 106).



any student or employee to discipline for alleged sexual harassment.<sup>12</sup> These obligations, which reflect core American values of due process and fundamental fairness, require that all parties have “strong, clear procedural rights in a fair, truth-seeking grievance process.”<sup>13</sup> The Department focused on the importance of ensuring that institutions subject to the requirements of Title IX use equitable and reliable procedures to resolve complaints of sexual harassment in their programs and activities to “avoid intentional or unintentional injection of sex-based biases and stereotypes into proceedings that too often have been biased for or against parties on the basis of sex, mostly because the underlying allegations at issue involve issues of sex-based conduct.”<sup>14</sup>

The 2020 Rule defines as a category of “sexual harassment” to be addressed by federally funded institutions “[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”<sup>15</sup> Its “sexual harassment” definition also includes sexual assault, dating violence, domestic violence, and stalking as defined elsewhere in federal law.<sup>16</sup>

The 2020 Rule requires that recipients of federal funding with “actual knowledge” of such sexual harassment in their program or activity “respond promptly in a manner that is not deliberately indifferent.”<sup>17</sup> Such a response is only deliberately indifferent if it “is clearly unreasonable in light of the known circumstances.”<sup>18</sup> The term “education program or activity” includes “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs . . . .”<sup>19</sup>

A recipient that has actual knowledge of such harassment in its program or activity must require its Title IX Coordinator to “promptly contact the complainant to discuss the availability of supportive measures” and “consider the complainant’s wishes with respect to supportive measures . . . .”<sup>20</sup> The 2020 Rule defines “supportive measures” as “non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge” that “are designed to restore or preserve equal access to the recipient’s education program or

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<sup>12</sup> *Id.* at 30,030 (summary of the major provisions of the 2020 Rule).

<sup>13</sup> *Id.* at 30,511.

<sup>14</sup> *Id.* at 30,053.

<sup>15</sup> *Id.* at 30,574 (codifying this definition at 34 C.F.R. § 106.30). As noted *infra*, the 2020 Rule applies to the conduct described in this complaint. Because the Code of Federal Regulations still reflects the Department’s 2024 amendments to its regulations implementing Title IX, this complaint cites the amendments published in the *Federal Register* on May 19, 2020, and effective as of August 14, 2020. *Id.* at 30,026.

<sup>16</sup> *Id.* at 30,574 (codifying this definition at 34 C.F.R. § 106.30).

<sup>17</sup> *Id.* at 30,574 (codifying this requirement at 34 C.F.R. § 106.44(a)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 30,574–75.



activity without unreasonably burdening the other party.”<sup>21</sup> Such a recipient also must follow a grievance process that complies with the 2020 Rule before imposing any discipline on a respondent for engaging in sexual harassment under Title IX,<sup>22</sup> and it must initiate such a grievance process in response to a formal complaint of sexual harassment signed by a complainant and filed with the recipient’s Title IX Coordinator.<sup>23</sup>

Importantly, the 2020 Rule requires that recipients treat complainants and respondents “equitably” in the grievance process to investigate and evaluate a formal complaint of sexual harassment<sup>24</sup> and ensure that Title IX Coordinators, investigators, decisionmakers, or any others designated to facilitate the process “not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.”<sup>25</sup> The recipient must presume that a respondent is not responsible for the conduct alleged in the formal complaint until a final determination on responsibility is made at the completion of the grievance process,<sup>26</sup> which must be subject to “reasonably prompt time frames.”<sup>27</sup>

A recipient must dismiss a formal complaint with regard to alleged conduct that, even if proved, would not constitute sexual harassment.<sup>28</sup> A recipient may dismiss a formal complaint or any allegations contained in that complaint when the respondent is no longer enrolled or employed by the recipient.<sup>29</sup> In the case of the dismissal of a formal complaint, the 2020 Rule requires the recipient to “promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.”<sup>30</sup>

The 2020 Rule requires “an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence.”<sup>31</sup> As part of the investigation of the formal complaint, the recipient assumes “the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility” and must ensure that these responsibilities do not fall to the complainant or respondent.<sup>32</sup> The recipient must provide an equal opportunity for all parties to

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<sup>21</sup> *Id.* at 30,574 (codifying this definition at 34 C.F.R. § 106.30).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (codifying the definition of a “formal complaint” at 34 C.F.R. § 106.30); *id.* at 30,575 (codifying the requirement to initiate a grievance process in response to a formal complaint at 34 C.F.R. § 106.44(b)(1)).

<sup>24</sup> *Id.* at 30,575 (codifying this requirement at 34 C.F.R. § 106.45(b)(1)(i)).

<sup>25</sup> *Id.* (codifying this requirement at 34 C.F.R. § 106.45(b)(1)(iii)).

<sup>26</sup> *Id.* (codifying this requirement at 34 C.F.R. § 106.45(b)(1)(iv)).

<sup>27</sup> *Id.* (codifying this requirement at 34 C.F.R. § 106.5(b)(1)(v)).

<sup>28</sup> *Id.* at 30,576 (codifying this requirement at 34 C.F.R. § 106.45(b)(3)(i)).

<sup>29</sup> *Id.* (codifying this provision at 34 C.F.R. § 106.45(b)(3)(ii)).

<sup>30</sup> *Id.* (codifying this requirement at 34 C.F.R. § 106.45(b)(3)(iii)).

<sup>31</sup> *Id.* at 30,575 (codifying this requirement at 34 C.F.R. § 106.45(b)(1)(ii)).

<sup>32</sup> *Id.* at 30,576 (codifying this requirement at 34 C.F.R. 106.45(b)(5)(i)).



present witnesses and evidence,<sup>33</sup> and parties must have an equal opportunity to inspect and review evidence obtained in the investigation that is “directly related” to the allegations raised in the formal complaint.<sup>34</sup>

The 2020 Rule prohibits the recipient from restricting the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.<sup>35</sup> Recipients must allow each party to a grievance process the opportunity to be accompanied to any meeting or proceeding related to the process by an advisor of that party’s choice, who may be an attorney.<sup>36</sup>

The investigator of the allegations in the formal complaint must produce an investigative report “that fairly summarizes relevant evidence” and send it to each party and the party’s advisor at least 10 days prior to any hearing for their review and written response.<sup>37</sup>

The 2020 Rule prohibits retaliation against any individual for the exercise of Title IX rights, declaring that “[n]o recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by” Title IX or its implementing regulations.<sup>38</sup>

The 2020 Rule provides that a recipient’s treatment of a complainant or respondent in response to a formal complaint “may constitute discrimination on the basis of sex under title IX.”<sup>39</sup>

## **AU Policies Relating to Sexual Harassment**

AU’s Title IX Sexual Harassment Policy defines “sexual harassment” to include the “severe, pervasive, and objectively offensive” conduct to which recipients must respond pursuant to the 2020 Rule,<sup>40</sup> in addition to sexual assault, which the policy defines in accordance with federal law as “any sexual act directed against another person, without consent of the person, including instances in which the person is incapable of giving consent.”<sup>41</sup> The policy identifies as a form of sexual assault “fondling,” which it defines as “the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the person, including

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<sup>33</sup> *Id.* (codifying this requirement at 34 C.F.R. § 106.45(b)(5)(iv)).

<sup>34</sup> *Id.* (codifying this requirement at 34 C.F.R. § 106.45(b)(5)(vi)).

<sup>35</sup> *Id.* (codifying this requirement at 34 C.F.R. § 106.45(b)(5)(iii)).

<sup>36</sup> *Id.* (codifying this requirement at 34 C.F.R. § 106.45(b)(5)(iv)).

<sup>37</sup> *Id.* at 30,576–77 (codifying this requirement at 34 C.F.R. § 106.45(b)(5)(vii)).

<sup>38</sup> *Id.* at 30,578 (codifying this prohibition at 34 C.F.R. § 106.71(a)).

<sup>39</sup> *Id.* (codifying this provision at 34 C.F.R. § 106.45(a)).

<sup>40</sup> AMERICAN UNIVERSITY, UNIVERSITY POLICY: TITLE IX SEXUAL HARASSMENT POLICY 5 (2021) (hereinafter “AU TITLE IX SEXUAL HARASSMENT POLICY”), available at <https://www.american.edu/policies/au-community/title-ix-sexual-harassment-policy.cfm>.

<sup>41</sup> *Id.* at 6.



instances where the person is incapable of giving consent . . . because of his/her temporary or permanent mental incapacity.”<sup>42</sup>

AU’s Title IX Sexual Harassment Policy defines “consent” as “words or conduct indicating a freely given agreement to have sexual intercourse or to participate in sexual activities.”<sup>43</sup> According to the policy, “[s]exual contact will be considered ‘without consent’ if no clear consent, verbal or non-verbal, is given; if inflicted through force, threat of force, or coercion; or if inflicted upon a person who is unconscious or who otherwise reasonably appears to be without the mental or physical capacity to consent.”<sup>44</sup> As defined by the policy, “[c]oerce is to force one to act based on fear of harm to self or others,” including through “pressure, expressed or implied threats, intimidation, or the threat or use of physical force.”<sup>45</sup> Incapacitation is “a temporary or permanent state in which an individual is unable to give consent to sexual contact due to mental, developmental, or physical impairment, to include incapacitation, voluntarily or involuntarily, from alcohol or drug use.”<sup>46</sup>

AU’s Title IX Sexual Harassment Policy explicitly permits parties to a formal complaint of sexual harassment under Title IX to “be accompanied by an advisor of their choice during any meeting or proceeding related to the Formal Complaint.”<sup>47</sup>

The policy also states that the university “strives to complete resolution of Formal Complaints within 94 calendar days from when the University has notice of the Formal Complaint,”<sup>48</sup> and, with respect to the complaint investigation, it specifies that “[t]he Investigator will provide periodic updates to the parties about the status of the investigation, with a goal to complete the investigation within approximately 69 calendar days after the receipt of the Formal Complaint.”<sup>49</sup>

Like the 2020 Rule, AU’s Title IX Sexual Harassment Policy permits the Title IX Coordinator or her staff to dismiss a formal complaint or any of its allegations “if, at any time during the grievance process: . . . the Respondent is not enrolled or employed by the University . . . .”<sup>50</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 4.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 15.

<sup>48</sup> *Id.* at 11.

<sup>49</sup> *Id.* at 17.

<sup>50</sup> *Id.* at 13.



## Analysis

As an initial matter, the interaction that gave rise to both LO's and KB's formal complaints occurred in August 2023—after the effective date of the 2020 Rule.<sup>51</sup> The interaction at issue in the formal complaints occurred in a campus dormitory, where AU undeniably exercised substantial control over both students and the conduct that allegedly occurred. Therefore, AU was bound by the provisions of the 2020 Rule in its obligations to respond to the sexual harassment alleged in the formal complaints and to offer the prompt and equitable grievance procedures required by the 2020 Rule in addressing these complaints.

### *AU's Inappropriate Dismissal of Allegations in KB's Formal Complaint*

KB's formal complaint against LO alleged that LO had kissed his lips and neck, put her hand underneath his shirt, stroked his groin area, and repeatedly pushed him to have sex with her despite his refusing to do so because he was too drunk. OETIX dismissed all of these allegations except one—that LO had stroked his groin. This inappropriate dismissal of allegations regarding LO's conduct toward KB violates the 2020 Rule.

The 2020 Rule requires AU to respond to a formal complaint of sexual harassment in its program or activity by initiating its grievance procedures and investigating the complaint. The university is only required to dismiss a complaint, where relevant here, if the conduct alleged, even if proved, would not constitute sexual harassment. Here, OETIX improperly cherry-picked one aspect of KB's complaint to investigate—the allegation that LO stroked his groin—while tossing out all other allegations of conduct that, as a whole, contributed to LO's misconduct. Instead, in line with the 2020 Rule, OETIX should have initiated an investigation of all of LO's conduct described in the complaint as a single interaction—that is, OETIX should have considered whether LO's kissing of KB and fondling of his chest and groin, plus her repeated insistence on having sex with him, in front of five people in a dorm room while KB was incapacitated due to his consumption of

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<sup>51</sup> 85 Fed. Reg. at 30,026. On April 29, 2024, the Department finalized amendments to its Title IX regulations that redefined recipients' obligations regarding complaints of sexual harassment, including with regard to grievance procedures for the resolution of such complaints. U.S. Dep't of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (Apr. 29, 2024). Those amendments are inapposite here because the Department explicitly declined to enforce them retroactively and stated that they “apply only to sex discrimination that allegedly occurred on or after August 1, 2024.” *Id.* at 33,841. In any event, two district courts ultimately vacated those regulations in early 2025, *Tennessee v. Cardona*, No. 2:24-cv-00072-DCR-CJS, at 4–7 (E.D. Ky. Jan. 9, 2025); *Carroll Indep. Sch. Dist. v. Dep't of Educ.*, No. 4:24-cv-00461-O, at 5, 8 (N.D. Tex. Feb. 19, 2025), and the Department has disavowed them. Craig Trainor, Acting Assistant Sec'y for C.R., U.S. Dep't of Educ., Dear Colleague Letter 1 (Feb. 4, 2025), available at <https://www.ed.gov/media/document/title-ix-enforcement-directive-dcl> (footnotes omitted).



alcohol, considered together, rose to the level of “severe, pervasive, and objectively offensive” conduct or sexual assault as defined in Title IX and AU’s Title IX Sexual Harassment Code.

Indeed, the preamble to the 2020 Rule is decisive on this issue. In one passage, it clearly contemplates behavior like that of LO as a form of sexual harassment:

Importantly, the final regulations continue the 1997 Guidance and 2001 Guidance approach of including as sexual harassment *unwelcome sexual advances*, requests for sexual favors, and other verbal, nonverbal, or *physical conduct of a sexual nature* by an employee, by another student, or by a third party.<sup>52</sup>

Furthermore, the Department in issuing the 2020 Rule counseled a “common-sense” approach in evaluating the interaction from the perspective of a “reasonable person” in the shoes of the complainant:

The Department does not believe that recipients will “screen out” situations that should be addressed due to lack of guidance on how to apply the “severe or pervasive” elements; the Department is confident that recipients’ desire to provide students with a safe, non-discriminatory learning environment will lead recipients to evaluate sexual harassment incidents using common sense and taking circumstances into consideration . . . .<sup>53</sup>

The Title IX Coordinator in this matter failed to take such a common-sense approach in evaluating whether a reasonable person in the shoes of KB would consider LO’s full range of conduct—kissing, groping the groin and under the shirt, and repeated pressure for sex with multiple other people in the room while KB told her he was too drunk—to be “severe, pervasive, and objectively offensive.” OETIX should have investigated all of KB’s allegations with respect to the interaction and left to the ultimate decision-maker the question whether LO was responsible for the harassment.

Relatedly, OETIX’s dismissal of KB’s allegations that LO touched him under his shirt and repeatedly pressured him for sex while he was extremely intoxicated violates the 2020 Rule and AU’s own policies defining “sexual assault” and “consent.”<sup>54</sup> As noted *supra*, AU defines “sexual assault” to include “fondling,” which is “the touching of the private body parts of another person

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<sup>52</sup> 85 Fed. Reg. at 30,036 (emphases added).

<sup>53</sup> *Id.* at 30,150.

<sup>54</sup> The 2020 Rule specifies that it “will not require recipients to adopt a particular definition of consent with respect to sexual assault . . . .” *Id.* at 30,574 (codifying this provision at 34 C.F.R. § 106.30). Thus, one must look to AU’s policies to evaluate whether the parties were capable of giving consent to the conduct that occurred in the interaction at issue.



for the purpose of sexual gratification, without the consent of the person.”<sup>55</sup> It should go without saying that men’s chests, like women’s, are private body parts when it comes to sexual contact. Men’s shirts have a particular use—in concealing a man’s chest from public view—and reaching beneath a man’s or boy’s shirt and touching his chest is certainly not the same as patting him on the head or steering him by the arm. It takes no effort to dispose of OETIX’s view on this issue.

Beyond this obvious error in OETIX’s reasoning, we must evaluate the behavior in light of AU’s definition of “consent,” since AU’s policies provide that sexual contact is sexual assault when the subject of the contact does not consent to it. Here, KB alleges that LO groped his chest and that KB “reasonably appear[ed] to be without the mental or physical capacity to consent” because he was “incapacitated,” as defined in AU policy, from alcohol use.<sup>56</sup> LO in fact knew that KB was incapable of consent to sexual activity because he *told her* that he was “too drunk,” yet she continued to kiss him, groped his chest and groin and, as a form of “coercion” defined in AU’s policy,<sup>57</sup> repeatedly pressured him to have sex with her in spite of this information and his consistent refusals. Rather than summarily dismissing these allegations, OETIX should have initiated an investigation of this behavior and left it to a decision-maker to determine whether LO was responsible for the alleged sexual assault.

One can only speculate regarding the reasons for OETIX’s dismissal of these clear allegations of sexual harassment, including sexual assault, that formed much of the basis of KB’s formal complaint against LO. That is because OETIX did not include with its dismissal of these allegations in KB’s complaint the reasons for this dismissal; it summarily concluded that the conduct described was not “severe, pervasive, or objectively offensive,” and that it did not involve the touching of a private body part. Because it simply states the counterfactual and does nothing to explain why OETIX came to these summary conclusions, this notification fails utterly to explain to KB why these allegations were dismissed and is certainly not the kind of reasoning required by the 2020 Rule in case of the dismissal of a formal complaint or the allegations therein. Rather, it is the kind of “screening out” of allegations that the 2020 Rule disapproved for purposes of Title IX enforcement.

In sum, OETIX’s dismissal of all allegations save one in KB’s formal complaint violates the 2020 Rule’s requirement that it investigate the allegations of formal complaints of sexual harassment, and its failure to explain the dismissal to one or both of the parties violates the 2020 Rule’s requirement that the recipient provide the reasons for the dismissal of allegations in a formal complaint.

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<sup>55</sup> *Supra* note 42.

<sup>56</sup> *See supra* notes 44, 46.

<sup>57</sup> *Supra* note 45.



### ***AU's Deliberate Indifference to Sexual Harassment and Failure to Offer Supportive Measures***

Beyond the summary dismissal of the bulk of KB's formal complaint, AU violated the 2020 Rule through its deliberate indifference with regard to the sexual harassment he reported to OETIX. OETIX's only response to KB's formal complaint of sexual harassment was to schedule an intake meeting at which KB would discuss the sexual harassment he suffered with the Title IX Coordinator, but OETIX canceled that meeting in light of KB's request that he bring an advisor to that meeting—which, as discussed *infra*, is clearly required by the 2020 Rule and by AU policies.

For months after he filed his complaint, OETIX engaged in a pattern of deliberate indifference with regard to its actual knowledge of the sexual harassment that was the subject of KB's formal complaint that was “clearly unreasonable in light of the known circumstances.”<sup>58</sup> For instance, as of May 12—approximately three months following KB's filing of his formal complaint—it does not appear that OETIX had taken *any* steps to investigate KB's allegations that LO had fondled his groin without his consent, much less investigate the allegations that it wrongly dismissed regarding her kissing him, touching his chest, and repeatedly pressuring him to have sex with her when he told her that he was too drunk to do so. Based on the evidence review, KB believes that the investigator took nearly seven months to ask LO questions about the allegations of his formal complaint. It is important to note that AU policy indicates that it strives to resolve sexual-harassment allegations within 94 days of the filing of the formal complaint, and its goal is to finish investigations within 69 days after the filing. In the case of KB's formal complaint, AU had not even interviewed the respondent about KB's allegations against her until 140 days after its filing.

As discussed *supra*, OETIX canceled KB's intake meeting for his formal complaint. It initially limited the number of witnesses he could offer to the investigator to two, then three, and only interviewed five of those six witnesses in response to repeated requests from KB. It failed to perform due diligence with regard to KB's requests for the investigator to gather information, like surveillance footage and text messages, directly related to the allegations in KB's formal complaint.

Each of these shortcomings amounts to violations of the 2020 Rule; all of them combined paint an unmistakable picture of deliberate indifference with respect to actual knowledge of the sexual harassment KB suffered in AU's education program.

In the same vein, the 2020 Rule requires that the recipient “promptly contact the complainant to discuss the availability of supportive measures” and “consider the complainant's wishes with respect to supportive measures . . . .”<sup>59</sup> Because OETIX canceled the intake meeting for KB's formal complaint, it could not use that meeting to discuss supportive measures with him in detail

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<sup>58</sup> See *supra* notes 17, 18.

<sup>59</sup> *Supra* note 20.



since he had filed his formal complaint or consider his wishes with respect to such supportive measures. Thus, far from restoring or preserving KB's equal access to AU's education program, OETIX's deliberate indifference actually contributed to his decision to withdraw from AU. The range of measures AU might have offered to KB at that meeting that could have restored his equal access to its education program include counseling, extensions of deadlines or other course-related adjustments, modifications of his work or class schedule, and a leave of absence.<sup>60</sup> But, beyond a cursory listing of resources in an attachment to its response to his formal complaint, it offered none of these things in any reasonable time period following KB's filing of his formal complaint. Thus, AU violated the 2020 Rule by failing to discuss such supportive measures and by failing to consider his wishes with respect to such supportive measures.

### ***AU's Failure to Abide by the Time Frame for Grievance Processes Listed in Its Policies***

As noted *supra*, the 2020 Rule requires federally funded educational institutions to set out "reasonably prompt time frames for conclusion of the grievance process . . . ."<sup>61</sup> Accordingly, AU represents in its Title IX Sexual Harassment Policy that it "strives to complete resolution of Formal Complaints within 94 calendar days from when the University has notice of the Formal Complaint,"<sup>62</sup> and that the institutional goal with regard to completing an investigation is within 69 calendar days following the filing of the formal complaint.<sup>63</sup>

LO filed her formal complaint against KB prior to January 27, 2025. KB filed his formal complaint against LO on February 19, 2025. As of the filing of the present complaint with OCR, upon KB's information and belief, neither investigation has concluded, and AU has held no live hearing to determine responsibility for either formal complaint. At least 248 days have passed since LO filed her formal complaint; 225 days have passed since KB filed his formal complaint. There is no indication that AU has "strived" to complete the investigation within 69 calendar days or the entire grievance process within 94 calendar days. In fact, there is evidence that the investigator refused to ask LO basic questions proposed by KB about her complaint and failed to ask LO *any* questions about KB's complaint until 140 days after it was filed.

The stark impacts of the delayed resolution of this inequitable process on KB include severe harm to his mental health and reputation, and it has contributed to his decision to withdraw permanently from AU. Additionally, KB has been hampered in his ability to transfer to another university without a formal conclusion to this pending investigation. Meanwhile, AU has communicated no reason for these delays, and in her call with KB and his family on September 17, the Title IX Coordinator appeared to be mystified by the delays in resolving the matter. In addition to constituting clear evidence of AU's deliberate indifference toward KB's report of sexual

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<sup>60</sup> AU TITLE IX SEXUAL HARASSMENT POLICY, *supra* note 40, at 9.

<sup>61</sup> *Supra* note 27.

<sup>62</sup> *Supra* note 48.

<sup>63</sup> *Supra* note 49.



harassment, these inexcusable and unexplained delays also violate the terms of AU's Title IX Sexual Harassment Policy with regard to what constitutes a "reasonably prompt" time frame for the conclusion of its grievance process.

### ***AU's Refusal to Allow KB's Advisor to Attend His Intake Meeting and Retaliation Against KB***

The 2020 Rule requires recipients to allow parties to a Title IX sexual-harassment grievance process to be accompanied to any meeting or proceeding related to the process by an advisor of that party's choice.<sup>64</sup> AU's policies provide the same, and specifically contemplate that an advisor may attend *any* meeting related to a formal complaint.<sup>65</sup> Yet, OETIX refused to allow KB to attend the intake meeting regarding his formal complaint of sexual harassment with an advisor of his choice. When he pointed out to OETIX that the 2020 Rule and AU policies entitle him to bring an advisor to the meeting, OETIX informed him that the policy was incorrect, indicated that it would rewrite the policy on its website, and ultimately canceled the intake meeting. Beyond evidencing deliberate indifference to KB's formal complaint, OETIX's denial of KB's request to bring an advisor with him to his intake meeting violates both the 2020 Rule and AU policy.

Moreover, OETIX's cancellation of the intake meeting for KB's formal complaint constitutes retaliation against KB, prohibited by the 2020 Rule, in response to his attempt to exercise his right under Title IX and its implementing regulations to have an advisor present at this meeting related to the grievance process. In canceling the meeting because he wanted to include his advisor, OETIX denied to KB the ability to discuss the allegations of his complaint along with supportive measures that could have helped preserve his equal access to AU's program. Thus, one drastic consequence of the retaliatory intake meeting cancellation, resulting directly from KB's insistence on the presence of his advisor in line with the 2020 Rule's requirements, was his inability to continue in AU's programs and his decision to withdraw from the school.

### ***AU's Failure to Investigate KB's Formal Complaint and Assume the Burden of Gathering Evidence***

The 2020 Rule states that the burden of gathering evidence sufficient to reach a determination of responsibility with regard to a formal complaint of sexual harassment is on the recipient, *not* on the parties. Yet, OETIX and the investigator failed at every turn to gather evidence directly related to the allegations at issue in both KB's and LO's formal complaint, in many cases required repeated pleas from KB to gather such evidence, and even then in some cases simply ignored KB's requests to gather relevant evidence.

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<sup>64</sup> *Supra* note 36.

<sup>65</sup> *Supra* note 47.



The preliminary investigative report regarding LO's formal complaint against KB, provided to KB in May, failed to include broad swathes of evidence that would have helped a decision-maker determine responsibility for the allegations raised in the complaint. For instance, the report did not contain sufficient information from witnesses about LO's alleged incapacitation, KB's lack of culpability in pressuring her to drink, LO's difficulties getting into bed, or campus security footage from the night of the interaction. In June and July, the investigator denied as irrelevant KB's request to investigate LO's text messages related to the incident and campus security footage; apparently, the investigator simply asked LO whether she thought she may have sent text messages regarding the incident and what might appear on surveillance footage and blindly accepted her answers rather than engaging in the due diligence required under the 2020 Rule and asking to see either the messages or the footage. It also does not appear that the investigator requested any proof of LO's PTSD diagnosis, though she volunteered the fact of that diagnosis in the course of the investigation. As discussed *infra*, the investigator and, subsequently, OETIX denied KB's request for the investigator to interview multiple witnesses and ultimately required him to select only three witnesses in connection with the investigation. After many pleas, they finally interviewed five of his witnesses.

Remarkably, as noted above, the investigator only asked LO about the allegations of KB's formal complaint 140 days after it was filed, and after KB submitted two formal written responses to the preliminary investigative report asking that she and other witnesses be interviewed regarding his complaint.

The investigator's initial failure to gather the evidence identified by KB and subsequent refusal to gather some of this evidence, which is all directly related to the allegations at issue in LO's and KB's formal complaints, are in themselves blatant violations of AU's responsibility, pursuant to the 2020 Rule and AU policies, to assume the burden of proof and gather evidence sufficient to support a determination with regard to both formal complaints. Combining these failures with its apparent initial refusal to ask LO questions about the allegations in KB's formal complaint, it is clear that AU's investigator is abdicating her role as impartial fact-gatherer in the grievance process.

In her discussion with KB and his family on September 17, the Title IX Coordinator brushed aside KB's concerns about the inadequacy of the investigation, pointing out that he could ask LO and witnesses any relevant questions during the live hearing to evaluate the formal complaints. This statement represents an alarming misunderstanding of the investigator's role in the Title IX sexual harassment grievance process. The fact that parties are permitted to ask questions during the live hearing does not absolve AU of the responsibility, set out in the 2020 Rule, to assume the burden of proof and burden of gathering sufficient evidence to determine responsibility for the alleged conduct. This fact certainly does not allow AU to simply wash its hands of investigating the complaint. AU must ensure that the investigator uncovers facts "sufficient to determine" whether KB is responsible for the conduct LO has alleged and whether LO is responsible for the conduct



KB has alleged.<sup>66</sup> The investigator has not done this and, apparently with the Title IX Coordinator's blessing, has foisted this responsibility on KB—a violation of the 2020 Rule.

### ***AU's Failure to Grant Equal Access to the Evidence***

In his correspondence with OETIX, KB has indicated that the investigator did not include in her investigative reports (1) any notes from LO's intake meeting with regard to her formal complaint against KB, (2) written questions and answers between LO and OETIX, and (3) attachments to one email that the investigator included in the report. Because LO knows what was discussed at the intake meeting and in this correspondence, which is certainly directly related to the allegations she raised in her formal complaint against KB, AU violated the 2020 Rule when it denied KB access to this evidence. The Education Department's regulations plainly require recipients to provide equal access by both parties to evidence that is directly related to the allegations of formal complaints of sexual harassment.

### ***AU's Denial of an Equal Opportunity to Present Witnesses and Evidence***

The 2020 Rule requires the recipient to provide parties an equal opportunity to present witnesses and exculpatory and inculpatory evidence. KB requested that the investigator interview six witnesses who would offer evidence that is directly related to the allegations of his and LO's formal complaints—specifically with regard to how he described the interaction at the center of these complaints at various times after it occurred. The investigator summarily rejected this list as duplicative and, (showing no interest in gathering as much evidence as possible that may help a decision-maker determine responsibility with regard to each formal complaint) limited KB to just two witnesses. OETIX subsequently directed the investigator to allow KB to select three witnesses, thus slicing his witness list in half. After many pleas, the investigator ultimately interviewed five of KB's proposed witnesses.

Based on his interview with the investigator about LO's allegations against him, as well as the evidence review and preliminary investigative report, KB believes that OETIX and the investigator permitted LO to identify more than three witnesses for the investigator to interview with respect to the allegations in her formal complaint. If so, AU violated the 2020 Rule with its initial refusal to interview the witnesses he proposed by failing to provide the parties with an equal opportunity to present witnesses and evidence to the investigator.

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<sup>66</sup> See *supra* note 32.



### ***AU's Violation of KB's Right to Gather Evidence***

The 2020 Rule prohibits schools from restricting any party to a sexual-harassment grievance process from speaking about the allegations and gathering evidence.<sup>67</sup> Yet, when OETIX learned that KB's attorney-advisor was speaking to witnesses about the allegations on his behalf, it directed him to tell his attorney-advisor to stop. This intervention directly interferes with KB's ability, protected by the 2020 Rule, to gather evidence related to the allegations of his and LO's formal complaints. KB's attorney-advisor, acting on behalf of KB, was carrying out his wishes in gathering evidence to help prove his formal complaint and show that he was not responsible for the conduct alleged in LO's formal complaint. OETIX may not hamstring KB's gathering of evidence by prohibiting his attorney-advisor from asking questions of witnesses, and doing so violates his right to gather evidence as guaranteed in the 2020 Rule.

### ***AU's Discrimination and Bias Against KB***

Every one of the deficiencies described above constitutes a violation by AU of its responsibilities under Title IX and the 2020 Rule. Considering these violations together reveals a punitively grotesque discriminatory treatment of, and bias against, KB. To wit:

Both KB and LO alleged that they were intoxicated on the night of the interaction. Both claimed that they were not able to consent to sexual contact due to incapacitation. Both claimed that the other inappropriately touched their chests, leaving the other's chest exposed. Both claimed that the other kissed them. Yet, AU initiated an investigation into KB regarding all of these allegations from LO's formal complaint while dismissing KB's identical allegations regarding LO. In addition, AU refused to investigate KB's allegation that LO coerced him to have sex with her despite his consistent refusal and explanation that he was too drunk, in clear violation of AU's definitions of sexual assault and consent.

Upon KB's information and belief, AU allowed LO to present more than three witnesses regarding the allegations in her formal complaint and promptly interviewed these witnesses; by contrast, the investigator and OETIX constrained KB's ability to present witnesses and took several months to interview any of these witnesses with regard to his formal complaint.

OETIX canceled KB's intake meeting with respect to his formal complaint in retaliation for his attempt to include an advisor in the meeting but, upon KB's information and belief, held an intake meeting with respect to LO's formal complaint. Absent such an intake meeting, OETIX never discussed or considered supportive measures that could have preserved KB's equal access to AU's education program in light of his complaint against LO, potentially resulting in his withdrawal from the program.

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<sup>67</sup> *Supra* note 35.



OETIX denied KB the ability, through an attorney acting on his behalf, to speak about his and LO's formal complaints and gather evidence from witnesses regarding those complaints. Despite the fact that OETIX had no authority to prevent this attorney from asking questions related to his formal complaint on his behalf, it chose to hinder KB's ability to gather this evidence and has harmed his opportunity to present evidence in the grievance process.

The investigator of LO's and KB's formal complaints ignored significant evidence that would have been relevant to a decision-maker's determination of responsibility for the allegations in both complaints and, in response to KB's identification of these lapses, deemed clearly relevant evidence such as text messages and campus security footage to be irrelevant to the allegations at issue. The investigator also did not include in the investigative report evidence regarding communications (such as intake-meeting notes, emails, and attachments) among LO, OETIX, and the investigator. The investigator also brazenly mischaracterized her summary of the allegations in the preliminary investigative report to make it appear as if KB admitted culpability—a mistake that she did not immediately correct after KB identified it.

Vexatiously, even after KB withdrew from AU in light of his dire mental-health struggles and reputational harm due to LO's complaint, OETIX communicated that it would continue its investigation of his alleged sexual harassment of LO. Had OETIX's employees fairly deliberated about whether to dismiss LO's complaint in light of KB's withdrawal, they may have understood that KB's absence from campus and his pledge never to return would resolve any alleged inability by LO to access equal educational opportunities in his presence. But, as OETIX openly admitted to KB, it merely "considered the option" of dismissing the complaint, not using any "permissible dismissal process" to do so (and not identifying for KB any of the standards it considered), and thus chose to carry on with the biased procedures that continue to harm KB. Later, when KB submitted photos of his suicide note and self-harm in a second request for dismissal, OETIX first balked at reviewing the evidence, explaining that the office needed to maintain an independent position in the matter—even though OETIX has the discretion to dismiss the complaint at any time since KB withdrew from the university and to consider new facts that come to light in making that decision.

When OETIX reversed course and did review the evidence, it decided to continue the Title IX sexual-harassment grievance procedure, apparently based on the mistaken understanding—as the Title IX Coordinator suggested in her September 17 discussion with KB and his family—that even though AU policy permits OETIX to dismiss such a complaint, "federal law" does not. This assertion is simply incorrect. Under federal law, OETIX may dismiss a formal complaint at any time if the respondent is no longer enrolled at AU.<sup>68</sup> The Title IX Coordinator's misstatement of the law shows, at the very least, that OETIX is not interested in seriously considering its discretion

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<sup>68</sup> *Supra* note 29.



to dismiss the complaint under the 2020 Rule and would prefer to carry on with the inequitable grievance process that has caused demonstrably severe harm to KB, even though he no longer has anything to do with AU or its student community.

Title IX requires AU to ensure that its Title IX Coordinator, investigator, or anyone charged with carrying out its grievance process with regard to formal complaints of sexual harassment not have a bias against complainants or respondents generally, or any particular complainant or respondent.<sup>69</sup> The litany of Title IX violations and failures described in this complaint make clear that the individuals who work for AU in carrying out the grievance process with regard to these formal complaints are biased against KB, whether as a respondent or a complainant, have subjected him to treatment that is starkly different from the treatment they have offered LO in this matter, and appear to have determined that he is responsible for the conduct alleged by LO without having offered the parties a live hearing or, for that matter, even finished the investigation. These individuals dismissed KB's allegations of the very same conduct they investigated when alleged by his accuser, denied his opportunity to discuss his allegations and supportive measures, retaliated against him for exercising his statutory rights, failed promptly to investigate his allegations of sexual misconduct, ignored evidence related to the allegations at issue, denied his attempts to proffer witnesses to shed light on his allegations, denied his ability to be represented by an attorney who could join him at meetings and represent him in gathering evidence, and summarily decided to continue the grievance process after he withdrew from the university, among other evidence of bias. All of these factors constitute evidence that AU is biased against KB, is engaging in discriminatory treatment against him on the basis of sex, and has presumed his responsibility for the allegations before finishing the grievance process—all violations of Title IX and its implementing regulations.

## Conclusion

KB has been subject to these biased grievance procedures and suffering from their impacts since he received a notice of LO's formal complaint on January 27, and although over eight months have passed and he has withdrawn from AU in an attempt to put the matter behind him and recover from the grievous harms it has inflicted on him, AU has held no hearing regarding his or LO's formal complaints. Given the biased and discriminatory behavior to which AU has subjected KB throughout this process, we have no confidence that such a hearing will resemble anything close to what the 2020 Rule envisions to be a "fair, truth-seeking grievance process."<sup>70</sup>

Therefore, we ask that OCR intervene now to force AU to correct the numerous deficiencies of its grievance process to date, require AU to acknowledge these deficiencies with regard to its treatment of KB and any other parties to grievance processes against whom AU has discriminated,

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<sup>69</sup> *Supra* note 25.

<sup>70</sup> *See supra* note 13.



require AU to dismiss LO's formal complaint against KB and issue an apology to KB, require AU to comply in the future with Title IX's nondiscrimination guarantee, and provide other appropriate relief.

Thank you for your prompt assistance. Please feel free to contact us with any questions related to this request.

Sincerely,

/s/ Donald A. Daugherty, Jr.

Donald A. Daugherty, Jr.

Senior Counsel, Litigation

/s/ Paul F. Zimmerman

Paul F. Zimmerman

Senior Counsel, Policy & Regulatory

/s/ Martha A. Astor

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