DFI Defense of Freedom Institute

November 26, 2025

Mr. Dan Greenspahn
Team Leader, Team 1
District of Columbia Office
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-1100
Via Email to dan.greenspahn@ed.gov

Re: Supplemental Title IX Complaint Against American University

Dear Mr. Greenspahn:

On October 2, 2025, the Defense of Freedom Institute for Policy Studies ("DFI") filed with the U.S. Department of Education's ("Department") Office for Civil Rights ("OCR") a complaint ("Complaint")[1] against American University ("AU") in Washington, DC, 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").[2] DFI filed the Complaint on behalf of a former AU student—referred to as "KB"—to request that OCR investigate AU's failure to abide by Title IX and its implementing regulations with regard to its response to allegations of sexual harassment in its education program.

We write now to supplement the Complaint with information regarding additional violations of Title IX and its implementing regulations by AU, specifically with regard to its duty to conduct a live hearing to determine responsibility for the allegations of sexual harassment described in the Complaint. We believe this information is yet further evidence of unlawful bias and discrimination on the basis of sex that will assist you as you determine whether to open an investigation of AU's compliance with federal civil rights law throughout the grievance process described in the Complaint. AU's actions also constitute new, flagrant violations of Title IX and its implementing regulations in their own right. Thus, we ask OCR to consider this new evidence of Title IX violations and investigate AU's actions in this matter.

[1] DFI has included its October 2 complaint against American University as Appendix A.
[2] 20 U.S.C. §§ 1681 *et seq*.

Additional Developments

AU's Initial Proposal of a Biased Hearing Panel Member

In October 2025, AU identified individuals for the hearing panel that would evaluate allegations of sexual harassment filed by an AU student—to whom we refer as "LO"—against KB and KB's allegations of sexual harassment against LO. One of the individuals was Marissa Abraham, an investigator who works in the Office of Equity and Title IX ("OETIX") at AU. In an email dated October 15,[3] KB objected to Ms. Abraham's inclusion on the panel and pointed to a raft of reasons why she would be biased in determining responsibility for the alleged sexual harassment in his and LO's complaints. For instance, Ms. Abraham has posted to a blog, *Shattering the Ceiling*, which features the image of a woman's fist punching through rubble with the words "Title IX" and "Title 7" tattooed on the upraised arm. That blog includes a quote asserting that "the world is not yet equal," so women "must take initiative and be better than any male."[4] KB's October 15 email also highlighted another quote by Ms. Abraham on the blog, asserting that "there is a presumption that white men know what they are doing while women have to prove themselves."[5] Ms. Abraham has also written about the need for "powerful activists" because women are oppressed, recycling the quotation "Well behaved women seldom make history."[6]

In another post, Ms. Abraham criticized a court panel because it was "made up of three men" and did not find for a woman despite Ms. Abraham's acknowledgment that scientific evidence in the case clearly disproved the woman's claims.[7]

Ms. Abraham also wrote a blog post called "Mad Men Values," in which she wrote, "The good news: This summer, women took a majority of seats on the Austin City Council for the first time ever. The bad news: The City felt the need to 'prepare' staff to work with women by putting on a training conducted by tone deaf speakers propounding culturally incompetent and antiquated gender stereotypes."[8] Ms. Abraham complained that the training "unfortunately" was not "to

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[3] *See* Appendix B.
[4] Marissa Abraham, *Q&A with Altomease Kennedy: "To Do As Well, You Must Do Better,"* SHATTERING THE CEILING (Jan. 23, 2015), https://www.shatteringtheceiling.com/qa-with-altomease-kennedy-to-do-as-well-you-must-do-better/.
[5] *Id.*
[6] Marissa Abraham, *Rabbit Rabbit*, SHATTERING THE CEILING (Oct. 1, 2015), https://www.shatteringtheceiling.com/rabbit-rabbit/.
[7] Marissa Abraham, *The "Men Can Lactate Too" Defense*, SHATTERING THE CEILING (Feb. 6, 2015), https://www.shatteringtheceiling.com/the-men-can-lactate-too-defense/.
[8] Marissa Abraham, *"Mad Men" Values Return to Austin City Council*, SHATTERING THE CEILING (Oct. 12, 2015), https://www.shatteringtheceiling.com/mad-men-values-return-to-austin-city-council/.

applaud women for overcoming the institutional barriers that are in place but rather to deal with the new foreigners at the table."[9]

On the blog, Ms. Abraham promoted a website that only allows posts by women about the workplace culture at their companies,[10] cherry-picking companies for criticism while, as KB pointed out to OETIX in his October 15 email, providing flawed statistics that do not align with her source data.[11]

KB also pointed out in his October 15 email that, as a member of OETIX staff, Ms. Abraham has been under the direction of multiple Title IX Coordinators who have exhibited biased behavior against him, as outlined in the Complaint. KB thus noted that Ms. Abraham, as their employee, would likely be affected by the biases exhibited by her supervisors and subject to bias due to the fact that her office is the subject of the Complaint we have filed on his behalf with OCR.

Ultimately, in light of KB's objections to her inclusion on the hearing panel, AU withdrew Ms. Abraham from its list of proposed panelists.

AU's Selection of Biased Hearing Panel Members

On October 27, 2025, KB contacted OETIX to object to the selection of a different proposed member of the hearing panel that would evaluate his and LO's allegations of sexual harassment.[12] As KB pointed out in his email to OETIX, that proposed panel member, Regina Curran, was formerly the Title IX Coordinator at AU who quit after being named in a lawsuit filed against AU by the law firm of KB's lawyer advisor.[13] During Ms. Curran's time as a Title IX Coordinator, AU was subject to five open investigations of civil-rights complaints by OCR—more than any college or university in the country.[14]

Early in her tenure as AU's Title IX Coordinator, Ms. Curran presided over the university's shift from a "hearing response protocol" to an "investigative model," in which an investigator

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[9] *Id*.
[10] Marissa Abraham, *Inhersight: Holding Companies Accountable*, SHATTERING THE CEILING (May 1, 2015), https://www.shatteringtheceiling.com/inhersight-holding-companies-accountable/.
[11] *KPMG*, INHERSIGHT, https://www.inhersight.com/company/kpmg (last visited Nov. 10, 2025).
[12] *See* Appendix C.
[13] *See Doe v. Am. Univ.*, No. 19-cv-03097, 2020 U.S. Dist. LEXIS. 171086 (D.D.C. Sep. 18, 2020). KB's lawyer advisor is employed at Dillon PLLC, which was part of KaiserDillon PLLC at the time that law firm sued AU and Ms. Curran.
[14] Abe Asher & Liam McMahon, *New Title IX Coordinator Faces Questions over Record*, MAC WEEKLY (Feb. 27, 2020), https://themacweekly.com/77622/news/new-title-ix-coordinator-faces-questions-over-record/.

determines whether a respondent has committed sexual harassment without providing a hearing.[15] Ms. Curran stated that she "would view the investigator model as successful . . . . The process seems less daunting. We have seen an increase in reports. I think we are better able to resource students through the process."[16] After a brief stint at another university, Ms. Curran returned to AU, where she now serves as the university's Director of Privacy & Cyber Policy.[17]

Ms. Curran has publicly opposed the Department's 2020 amendments to its Title IX implementing regulations ("2020 Rule"), which installed key procedural safeguards for parties to Title IX sexual harassment complaints. In a 2018 interview referenced in KB's October 27 email to OETIX, she expressed her preference for the Department's previous Title IX regime governed by interpretations set out in Dear Colleague Letters, asserting that these interpretations "took important steps toward securing protections for sexual assault survivors across universities."[18] KB's email also linked to a 2021 public comment signed by Ms. Curran urging the Department to eliminate due process requirements imposed by the 2020 Rule. Among other reasons for disposing of these protections, the letter from Ms. Curran and others argued that the regulations are too "burdensome" in requiring that those who carry out the grievance process not have a conflict of interest with the parties; the regulatory requirement that Title IX Coordinators oversee the investigatory and adjudicatory process "takes precious time away from their ability to offer programs and activities designed to prevent sexual assault and harassment"; "requirements related to the live hearing process" result in "barriers" to community members' access to education and in the inability of the parties to "receive an equitable outcome"; and the "adversarial nature of the hearing process limits access and impacts the educational nature of the Title IX process."[19] The letter ultimately calls on the Department to eliminate the live-hearing requirement for Title IX sexual harassment proceedings.[20]

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[15] *Id.*
[16] *Id.*
[17] *Regina Curran*, AM. UNIV., https://www.american.edu/profiles/staff/recurran.cfm (last visited Nov. 19, 2025).
[18] Karissa Waddick, *Title in Turmoil*, AWOL (Jan. 2, 2018), https://awolau.org/2342/print/politics/title-in-turmoil/.
[19] Letter from Ann E. Merchlewitz, Senior Vice President & General Counsel, Saint Mary's University of Minn., et al. to Secretary Miguel Cardona, U.S. Dep't of Educ. 2–3 (June 11, 2021), https://ocrcas.ed.gov/sites/default/files/storage/correspondence/202106-titleix-publichearing-comments/mpcc.pdf.
[20] *Id.* at 4 ("We strongly support moving back to regulations that allow schools to pick the resolution process most suited to their communities. Full hearings may be appropriate at large public institutions, while adjudication processes using review of paper files that parties have reviewed and commented on may be more appropriate for other institutions. Some small institutions may even benefit from processes that utilize restorative justice practices.").

KB also flagged for OETIX Ms. Curran's concerning, publicly reported comment regarding the mandates imposed by the 2020 Rule: "With all new regulations, there's the letter of what it says and then there's the myriad of ways people interpret that."[21] KB reasonably interpreted this statement to imply that Ms. Curran believes that Title IX Coordinators and others carrying out the rule's sexual harassment grievance process could use their "discretion" to undercut the regulations' clearly delineated procedural safeguards.

KB's email to OETIX explained that Ms. Curran has demonstrated that she is biased against respondents in Title IX sexual harassment proceedings and thus would not be qualified under the 2020 Rule to serve on his hearing panel. As KB noted in his email to OETIX, Ms. Curran "was the former Title IX Coordinator at AU[,] and . . . it is inappropriate for someone from the enforcement arm of the Title IX Office to sit on my panel, especially given that Ms. Curran was literally the head of the office. That would be like having a former judge sit on a jury. All of the jurors—or here, the other panelists—will undoubtedly defer to the former judge's beliefs. That cannot be an unbiased panel."

KB's email to OETIX cited various statements Ms. Curran made on her Linkedin public profile. Sometime after he sent this email and before the hearing, Ms. Curran deactivated her Linkedin account.

In his October 27 email to OETIX, KB also objected to the inclusion of Lindsay Northup-Moore, currently Senior Director of Disability Support Services at AU's Office of Undergraduate Education and Academic Student Services ("UEAS"), on his hearing panel. In his email, KB reported that, when he served in student government during his time enrolled at AU, he had managed a resolution demanding changes in Ms. Northup-Moore's office, leading to a tense meeting regarding the hiring of a coordinator for Section 504 of the Rehabilitation Act of 1973 and students' difficulty in obtaining accommodations from the office. KB recalled that his meeting with Ms. Northup-Moore's colleagues was "very strained" and featured staff "saying that I shouldn't be 'demanding' anything and rather should be 'requesting.'" On the basis of this interaction with her close colleagues, KB is reasonably concerned that Ms. Northup-Moore developed a bias against him and cannot serve as an impartial hearing officer in his case.

On October 29, AU notified KB that it had dismissed his objections to Ms. Curran and Ms. Northup-Moore as hearing panel members and that both would serve on the panel at his hearing on November 10.[22] Regarding his objections, OETIX only noted that it "has determined that the

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[21] *Quoted in* Brianna Crummy, *How the Department of Education's Proposed Changes to Title IX Policy Could Affect AU*, THE EAGLE (Jan. 23, 2019), https://www.theeagleonline.com/article/2019/01/how-department-of-educations-proposed-changes-to-title-ix-policy-could-affect-au.

[22] *See* Appendix D.

information you provided does not establish that a conflict exists or that any bias exists regarding these two panelists." OETIX selected Ms. Curran as the chair of the hearing panel.

AU's Concealment of the Identity of LO's Advisor

Prior to the November 10 live hearing, OETIX declined to provide to KB the name of the advisor who would represent LO at the hearing. At the hearing, KB discovered that LO's advisor, appointed by AU, is Stephanie Fell, an ADA/504 Coordinator at AU whose office works closely with the office of one of the hearing panelists, Ms. Northup-Moore.

AU's Final Investigative Report

OETIX provided the final investigative report to KB in October 2025. The appendix to that report included notes from LO's Title IX formal complaint intake meeting in January 2025 stating that LO said everyone in the room during the interaction at issue had told LO that she was "into it"—and thus not unconscious at the time. Later, LO and the witnesses changed their stories. OETIX had never before shared this evidence with KB and did not point out to KB the fact that it had included this new evidence in the appendix.

AU's Limitation of Questioning and Refusal of OCR Technical Assistance

On November 4, AU held a pre-hearing meeting with KB to discuss the procedure for the November 10 live hearing regarding LO's and KB's formal complaints of sexual harassment. At the meeting, AU informed KB and his advisor for the first time that, during the live hearing, it would limit his advisor's cross-examination of LO to one hour, limit questioning of other witnesses to 30 minutes each, and prohibit KB and his advisor from posing follow-up questions to any witness after cross-examination.

On November 5, in response to KB and his advisor's objections to these limitations on the ability to question LO and witnesses during the live hearing, AU's Associate General Counsel responded by citing a provision of the 2020 Rule permitting recipients conducting a live hearing to adopt "provisions, rules, or practices other than those required by this section," so long as they are applied equally to each party.[23] The Associate General Counsel also characterized the regulatory preamble's permission to federal funding recipients to "place reasonable time limitations on a hearing and so forth" to allow OETIX to impose time limits on party and witness questioning.[24] While apparently acknowledging that the 2020 Rule does not permit recipients to prohibit follow-

[23] *See* Appendix E (quoting 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, 30,575 (May 19, 2020) (hereinafter "2020 Rule") (codifying the requirement at 34 C.F.R. § 106.45(b))).

[24] Quoting 2020 Rule, *supra* note 23, at 30,361 (preamble).

up questions of witnesses, the Associate General Counsel asserted that it only requires cross-examination (not follow-up questioning) to be conducted "directly, orally, and in real time,"[25] so institutions may require that such questions be submitted to the hearing panel to be asked on behalf of the party.

On November 6, a partner at the law firm of KB's advisor forwarded to AU's Title IX Coordinator and Office of General Counsel an email from the Education Department's Acting General Counsel ("Acting GC") addressing whether the Department could provide technical assistance ("TA") to AU relating to its decision to limit cross-examination and questioning of LO and witnesses and to prohibit follow-up questions at the November 10 live hearing.[26] In her email, the Acting GC explained that, though the Department had paused its TA work due to the federal government shutdown, AU's interpretation of the Title IX regulations to permit such limitations on questioning at a live hearing "appears to me to be precisely the kind of matter that OCR TA could address with the parties with the goal of assisting the parties in avoiding appealable error and potential OCR investigation." She wrote:

> A situation like this seems to present a combination of legal interpretation (eg, whether preamble language controls regulatory provisions) as well as fact-specific application of the Title IX Rule to material issues under Section 106.45 (eg, whether a time limit in a hearing procedure is precluding the requirement to permit parties to present all relevant evidence).

The Department's Acting GC then explained that, when the federal government reopened, "OCR could move expeditiously to schedule TA with you and the university," and asked the law firm to contact her to arrange such TA "[i]f the parties here agree to postpone the hearing to consult with OCR for TA until such time as the government shutdown has ended . . . ." In its email to AU's Title IX Coordinator and Office of General Counsel, the attorney representing KB thus formally requested that AU postpone the November 10 hearing until the government had reopened and AU could obtain TA from OCR on Title IX requirements regarding questioning witnesses. In doing so, he pointed out that "[i]n a case where the complainant waited almost a year and a half to file and the respondent has permanently withdrawn from [AU], it is hard to see what the rush could possibly be." The email also noted that AU was jeopardizing the results of all of its Title IX sexual harassment hearings if it refused to seek timely TA from OCR.

On November 7, AU's Associate General Counsel sent an email ignoring this offer of TA from the Education Department, stating only that "[t]he University maintains that it is permittable [sic] under the regulations to establish reasonable timeframes for the cross-examination of parties and

[25] *Id.* at 30,577 (codifying this language at 34 C.F.R. § 106.45(b)(6)(i)).
[26] *See* Appendix E.

witnesses."[27] She then claimed that "[t]he timeframes do not . . . abridge the parties' opportunity to present relevant evidence during their hearing" and directed KB to contact the Title IX Coordinator that day "to address additional time that is needed to present relevant evidence during the hearing." The Associate General Counsel then stated that "advisors will be provided with the opportunity to conduct cross-examination and follow-up questions during the hearing."

Also on November 7, AU's Title IX Coordinator informed KB that OETIX would allow him to submit follow-up questions to the panel to ask witnesses after cross-examination.

Also on November 7, KB's advisor emailed AU's Title IX Coordinator requesting 3.5 hours to cross-examine LO and one hour to cross-examine each witness. The Title IX Coordinator responded that she would allow 1.5 hours to cross-examine LO and 30 minutes to cross-examine each witness.

AU's Redactions of Content from KB's Response to Investigative Report

KB submitted his response to the final investigative report prepared by the OETIX investigator on October 31. On Friday, November 7, at 4:17 pm—three days before the Monday morning hearing—the Deputy Title IX Coordinator sent KB an email stating that her office had made redactions to his response to the investigative report and that he had until Monday at 8:00 am to object to the redactions.

On November 8, KB's advisor sent an email to AU's Title IX Coordinator and Office of General Counsel objecting to the sundry redactions of arguments and relevant evidence OETIX made to KB's response to the office's final investigative report.[28] As KB's advisor explained, these redactions included the removal of the following information from the response:

- KB's statement about the impact of the case on him, including his suicide attempts;
- KB's arguments about why the investigator's credibility analysis is incorrect;
- KB's arguments about why the evidence does not support a finding of responsibility under AU's policy;
- KB's arguments about why the evidence shows that LO had improperly influenced certain eyewitnesses;

[27] *See id.*
[28] *See id.*

- KB's arguments about why the evidence shows that the eyewitnesses could not see what was happening between him and LO in bed; and

- KB's arguments that the investigator did not meet her burden in gathering evidence.

Many of the redactions OETIX made to the response simply removed KB's assertions concerning evidence contained in the investigative report—the primary purpose of allowing a party to respond to an investigative report. For instance, OETIX redacted the following statement by KB from his response: "So between the witness statements and [LO's] own statements, there is literally not one piece of evidence that shows she struggled to get into bed." It also redacted the following: "Furthermore, the witnesses from the room that night support a finding that [LO] was not unconscious or incapacitated." And the following: "As discussed, there is no evidence that [LO] was unconscious or that we were together for hours. And there is also no evidence that I removed her shirt or groped her breasts." These are only a few examples of over 50 instances in which OETIX concealed KB's responses to the investigative report from hearing panelists.

On November 10, approximately one hour prior to the start of the live hearing, the Title IX Coordinator sent an email to KB's advisor claiming that the redactions to KB's response to the final investigative report were due to the fact that "it contained information that was found to be not relevant to the hearing, including concerns related to how the investigation was conducted."[29] Incredibly in light of the onerous redactions, OETIX stated that it had "attempted to leave as much information as possible in the document to allow for permissible relevant evidence." It then stated that it would permit KB (but not his advisor) "the ability to provide to the Hearing Panel Chair a rationale for why additional information is relevant in his response and should be considered by the Hearing Panel" prior to the start of the hearing, which was scheduled to begin in approximately one hour, with the panel then deciding the relevance of the redacted material.

Fifty minutes after OETIX sent this email, and 23 minutes before the start of the hearing, it sent another email stating that the Title IX Coordinator had "learned that [KB] submitted an email to [OETIX] 'seconding' the position" of his advisor "regarding the relevance of the redacted materials."[30] It then stated that it would "accept that information as [KB's] position regarding the matter and he does not need to present this information to the Panel. The information will be presented to the Hearing Panel, who [sic] will make a determination regarding relevance."

After it read KB's objections to the redaction of his response to the final investigative report, the hearing panel determined that some of the information was relevant and permissible for it to review to determine responsibility for the Title IX sexual harassment allegations, but the hearing panel chair stated that KB's "conclusions" about the evidence would still be redacted. The resulting, "re-

[29] *See id.*
[30] *See id.*

redacted" document still contained a massive number of redactions, including of KB's responses pointing to evidence that is clearly relevant to his and LO's allegations of sexual harassment.

The Live Hearing

At the hearing on November 10, the hearing panel chair, Ms. Curran, restated the Title IX Coordinator's decision to allow KB to submit follow-up questions for the hearing panel to ask witnesses. KB's advisor made decisions regarding what questions she asked during cross-examination of LO on the basis of this understanding, provided both by the Title IX Coordinator and the hearing panel chair. When KB and his advisor submitted follow-up questions after the cross-examination of LO, however, Ms. Curran responded that she had been mistaken about the process and that there would be no opportunity for KB and his advisor to submit follow-up questions.

During the live hearing, the panel did not question LO and KB equally regarding their allegations of sexual harassment. The hearing panel subjected KB to many more questions than it asked LO, and the questions for KB went into far more specific detail than the questions it posed to LO. The panel pressed KB on supposed inconsistencies in his responses but did not ask LO about nearly identical inconsistencies in her own responses. For instance, the panel asked KB about why he claimed to remember so much about what happened in bed but could not remember other aspects of the night, but it did not press LO on these details.

When KB's advisor cross-examined LO about inconsistencies in her previous statement, the hearing panel chair cut off her questions without making clear her reasoning; however, the panel allowed KB's advisor to present similar previous inconsistent statements to a male witness.

KB had emailed his witness list to OETIX on November 4; the list indicated that he intended to call the investigator as a witness. On November 10, KB's advisor emailed the Equity and Title IX Administrative Coordinator asking whether AU asked the investigator to attend and she refused or whether AU never asked her. The coordinator never responded. The investigator did not attend the hearing, and it is unclear whether AU asked her to attend and she refused or whether it never asked her to attend.

The Law

As discussed in the Complaint, the 2020 Rule sets out the basic standards for a grievance process that recipients of federal funds must follow in their educational programs and activities before subjecting any student or employee to discipline for alleged sexual harassment.[31] Relevant to this supplemental complaint, the 2020 Rule requires that recipients treat complainants and respondents

[31] 2020 Rule, *supra* note 23, at 30,030 (summary of the major provisions of the 2020 Rule).

"equitably" in the grievance process to investigate and evaluate a formal complaint of sexual harassment[32] 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."[33] 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.[34]

The 2020 Rule requires "an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence."[35] The recipient must "[e]nsure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties . . . ."[36] The investigator of the allegations in the formal complaint must "[p]rovide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint . . . so that each party can meaningfully respond to the evidence prior to conclusion of the investigation."[37] Parties must have 10 days to review and respond to such evidence, and "the investigator will consider [that response] prior to completion of the investigative report."[38] The investigator must send the final investigative report, which "fairly summarizes relevant evidence," to each party and the party's advisor at least 10 days prior to any hearing for their review and written response.[39]

The 2020 Rule requires postsecondary institutions like AU to conduct live hearings to evaluate formal complaints of sexual harassment prohibited under Title IX.[40] At that hearing, the 2020 Rule requires the decision-makers charged with evaluating responsibility for the alleged sexual harassment to "permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility."[41] "Such cross-examination," states the rule, "must be conducted directly, orally, and in real time by the party's advisor of choice . . . ."[42] The 2020 Rule requires the decision-maker to "explain any decision to exclude a question as not relevant."[43]

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[32] *Id.* at 30,575 (codifying this requirement at 34 C.F.R. § 106.45(b)(1)(i)).
[33] *Id.* (codifying this requirement at 34 C.F.R. § 106.45(b)(1)(iii)).
[34] *Id.* (codifying this requirement at 34 C.F.R. § 106.45(b)(1)(iv)).
[35] *Id.* (codifying this requirement at 34 C.F.R. § 106.45(b)(1)(ii)).
[36] *Id.* at 30,576 (codifying this requirement at 34 C.F.R. § 106.45(b)(5)(i)).
[37] *Id.* (codifying this requirement at 34 C.F.R. § 106.45(b)(5)(vi)).
[38] *Id.*
[39] *Id.* at 30,576–77 (codifying this requirement at 34 C.F.R. § 106.45(b)(5)(vii)).
[40] *Id.* at 30,577 (codifying this requirement at 34 C.F.R. § 106.45(b)(6)(i)).
[41] *Id.*
[42] *Id.*
[43] *Id.*

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.[44]

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."[45]

AU's Title IX Sexual Harassment Grievance Procedures

AU's Title IX Sexual Harassment Policy requires that a hearing panel selected to determine responsibility for formal complaints of sexual harassment "must be impartial and free from bias or conflict of interest."[46] The policy makes the hearing panel chair "responsible for final decisions on all procedural issues" and authorizes the chair "to exclude questions due to relevancy."[47]

The policy provides that, prior to the completion of a final investigative report, parties to a Title IX sexual harassment grievance process must have 10 calendar days to "(1) provide written comment or feedback; (2) submit additional information; (3) identify additional witnesses; and/or (4) request the collection of other information by the Investigator."[48] The policy then charges the investigator with deciding "the appropriateness of additional investigative steps and the relevance of additional information."[49] "Any information gathered through additional investigation steps will be shared with both parties, and, as appropriate, each party will have the opportunity for further response. Each party will have three (3) calendar days to review any additional substantive information."[50]

The policy states that "[t]he hearing will be live, with all questioning conducted in real time."[51] It grants to the hearing panel chair "general authority and wide discretion over the conduct of the hearing," including the purported authority to "set time frames for witness testimony."[52] Like the

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[44] *Id.* at 30,578 (codifying this prohibition at 34 C.F.R. § 106.71(a)).
[45] *Id.* (codifying this provision at 34 C.F.R. § 106.45(a)).
[46] AM. UNIV., UNIVERSITY POLICY: TITLE IX SEXUAL HARASSMENT POLICY 18 (last revised Oct. 25, 2021), *available at* https://www.american.edu/policies/au-community/upload/title-ix-sexual-harassment-policy-revision-10-26-2021-web.pdf.
[47] *Id.*
[48] *Id.* at 16.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 19.
[52] *Id.*

2020 Rule, AU's policy requires the hearing panel chair to determine whether questions posed of parties or witnesses are relevant "and explain any decision to exclude a question as not relevant."[53]

According to the policy, "[d]uring the hearing, the Hearing Panel must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those questions challenging credibility."[54]

After the live hearing, the policy requires the hearing panel to "consider all of the evidence" in its determination of whether the respondent committed sexual harassment prohibited under Title IX.[55]

Like the 2020 Rule, the AU policy "prohibits retaliation against a member of the AU Community for reporting and/or filing a Formal Complaint of Title IX Sexual Harassment," defining retaliation as "an adverse action or other form of negative treatment, including, but not limited to, intimidation, threats, coercion, discrimination or harassment, carried out in response to a good-faith reporting of, or opposition to, discrimination, harassment, or related misconduct . . . ."[56]

Analysis

AU's Violation of KB's Right to Respond to Evidence and the Investigative Report

As described above,[57] a federal funding recipient must allow parties to a Title IX sexual harassment grievance process to access and respond to all evidence directly related to the allegations prior to the conclusion of the investigation, and the investigator must consider the parties' written responses to this evidence in the completion of the final investigative report summarizing the evidence. The AU policy specifically requires the investigator to consider a party's response to such evidence in determining "the appropriateness of additional investigative steps and the relevance of additional information."[58] Parties must have 10 days to respond to the evidence and, according to AU policy, three days to examine additional substantive information collected prior to finalizing the investigative report.[59]

Rather than follow the timeline required by the 2020 Rule and by AU's grievance process, OETIX concealed exculpatory evidence from KB that its notes from LO's intake meeting indicated everyone who witnessed the interaction at issue had told her that she was "into it" and later changed their stories until it had already produced the final investigative report, offering KB no opportunity

[53] *Id.* at 20.
[54] *Id.*
[55] *Id.*
[56] *Id.* at 3.
[57] *See supra* notes 37, 38, and accompanying text.
[58] *Supra* note 49.
[59] *Supra* notes 38, 48, 50, and accompanying text.

to review or respond to that information before the report was finalized. Had KB had the opportunity to provide such a written response to this new evidence in line with both the 2020 Rule and AU's policy, he would have had the opportunity to request that AU, which maintains the burden of proof and of collecting evidence sufficient to reach a responsibility determination,[60] engage in additional investigative steps and gather more information directly related to the allegations, such as information regarding why the witnesses' stories shifted so dramatically since the night of the alleged sexual harassment. AU offered him no such opportunity and thus violated the 2020 Rule and its policy.

AU's grievance process for addressing allegations of sexual harassment under Title IX must include the investigator's production of an investigative report that "fairly summarizes relevant evidence" and an opportunity for the parties to produce a written response to that report. As common sense would suggest, and as the preamble to the 2020 Rule confirms, that response is intended to go before the decision-maker to help contribute to the evaluation of responsibility for the allegations. According to the preamble, "the final regulations seek to provide strong, clear procedural protections to complainants and respondents, including apprising both parties of the evidence the investigator has determined to be relevant, in order to adequately prepare for a hearing . . . and to submit responses about the investigative report *for the decision-maker to consider* . . . ."[61] The Department intended this provision to offer parties the opportunity to "meaningfully respond and put forward their perspectives about the case"[62] and to help decision-makers reach "informed determinations regarding responsibility," whether or not the recipient offers a live hearing to evaluate the allegations of sexual harassment.[63]

The plain language of the rule and the confirmatory preamble language make clear that it does not grant discretion on the part of federal funding recipients to redact information a party provides in his or her response to an investigative report—much less the removal of a significant share of the text, including material that "put[s] forward [KB's] perspectives about" relevant evidence regarding the allegations. Thus, the investigator's redaction of much of KB's response to her investigative report and the hearing panel's subsequent decision to modify but not eliminate the investigator's redactions violate the 2020 Rule's requirement that recipients allow parties to respond to the investigative report. As discussed below, these actions also add weight to the argument that AU officials simply wished to shield decision-makers from characterizations of the evidence with which they did not agree to avoid a finding that KB was not responsible for the sexual harassment alleged by LO.

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[60] *Supra* note 36 and accompanying text.
[61] 2020 Rule, *supra* note 23, at 30,309 (emphasis added).
[62] *Id.* at 30,310.
[63] *Id.* at 30,309.

AU's Unlawful Restrictions on Questioning of Parties and Witnesses

As set out previously,[64] the 2020 Rule requires recipients to "permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." AU clearly violated this requirement. Not only did the institution refuse to allow KB's advisor to ask LO or any witnesses *any* follow-up questions, it sharply restricted the questioning of the parties to 1.5 hours each and the witnesses to 30 minutes each. This was in flat contradiction to the rule's requirement that "all relevant questions and follow-up questions" be permitted. It also contradicts the provision of AU's policy requiring the hearing panel to "permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those questions challenging credibility."[65]

As an initial matter, it is beyond dispute that AU violated the 2020 Rule and its own policy by not allowing KB's advisor to pose, even through the hearing panel, relevant follow-up questions to LO and other witnesses during the live hearing. While AU signaled prior to the hearing that it would allow KB to submit such follow-up questions to the panel to pose to LO and other witnesses, it capriciously stripped that ability from KB once his advisor had already completed her (already cabined) cross-examination of LO. This abrupt change to the rules of the hearing once it had already begun violates the 2020 Rule and represents the kind of "kangaroo court" tactics that the rule was designed to stop.

With regard to the time limits for questioning LO and witnesses, AU's Associate General Counsel argued, unpersuasively, that the 2020 Rule's requirement that all relevant questions be permitted is circumscribed by the rule's separate grant of discretion for institutions to adopt "provisions, rules, or practices other than those required by this section," so long as they are applied equally to each party. This argument fails, first, because AU's arbitrary exercise of power over the proceedings in this matter is not a "provision, rule, or practice" and in fact runs directly against AU's policy allowing all such questions. But the very language of the provision of the 2020 Rule that AU cites defeats AU's reliance on it to restrict relevant questions and follow-up questions by the parties' advisors in this proceeding, as it only applies to institutional provisions and rules "other than those required by" the regulatory framework. That is, because the regulations explicitly require that federal funding recipients permit all relevant questioning of parties and witnesses in live hearings, there is already a specific rule on this matter that the "other provisions, rules, or practices" regulation gives AU no discretion to ignore.

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[64] *See supra* note 41 and accompanying text.

[65] *Supra* note 54. That the policy separately permits the hearing panel chair to "set time frames for witness testimony," *supra* note 52, cannot override the 2020 Rule's requirement that institutions allow parties, through their advisors, to ask any relevant questions of other parties and witnesses.

Likely recognizing the weakness of this argument, AU's Associate General Counsel identifies vague language in the 2020 Rule's preamble that she says supports the institution's draconian limits on questions. That language interprets the provision allowing institutions to adopt "provisions, rules, or practices other than those required by this section" to allow "reasonable time limitations on a hearing and so forth." Of course, when a regulation is unambiguous, the matter of its interpretation is at an end, and there is no need to look to a rule's preamble to understand its plain terms.[66] But it simply makes no sense to read this preamble language as eschewing a procedural *requirement* set out in the 2020 Rule for the purpose of institutional convenience, which would directly contradict the primary purpose of the 2020 Rule in requiring institutions to offer parties "strong, clear procedural rights in a fair, truth-seeking grievance process."[67] The language certainly says nothing whatsoever on the subject of restricting the time for parties to ask relevant questions, which, again, finds no basis in the 2020 Rule.

Additionally, even if, contrary to the regulatory text, the institution can apply the time limitations referenced in the preamble to restrict party advisors from posing relevant questions to parties and witnesses, a mere 1.5 hours for the cross-examination of each party and a mere 30 minutes for the questioning of each witness are not "reasonable time limitations" because they stymie the parties (through their advisors) from drawing out relevant evidence from the parties and witnesses and deny them a reasonable opportunity to test credibility.

We are confident that, had AU chosen to postpone its live hearing until OCR's TA operations resumed and it had opined on this issue in the manner described by the Education Department's Acting GC, OCR would have agreed with our interpretation of the 2020 Rule and could have saved AU and the parties the time and expense required to host a live hearing that blatantly violated the 2020 Rule. Instead, evidencing its bias against KB and perhaps other respondents in Title IX sexual harassment grievance processes, AU barreled ahead with its flawed process and opted to subject itself to OCR's enforcement authority rather than supportive TA.

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[66] *See, e.g.*, *AT&T Corp. v. FCC*, 970 F.3d 344, 350 (D.C. Cir. 2020) ("But '[b]ecause the regulation itself is clear, we need not evaluate' either the regulatory 'preamble' or any other document that 'itself lacks the force and effect of law.'") (quoting *Saint Francis Med. Ctr. v. Azar*, 894 F.3d 290, 297 (D.C. Cir. 2018)); *National Wildlife Federation v. E.P.A.*, 286 F.3d 554, 569–70 (D.C. Cir. 2002) ("The preamble to a rule is not more binding than a preamble to a statute. 'A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers.'") (quoting *Ass'n of American R.Rs. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)); *Costle*, 562 F.2d at 1316 ("Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble.").

[67] 2020 Rule, *supra* note 23, at 30,511.

Additionally, as described above,[68] the hearing panel chair further violated the parties' ability to ask all questions of parties and witnesses, "including those challenging credibility," by cutting off questions from KB's advisor to LO relating to her prior inconsistent statements, which are the epitome of questions "challenging credibility." Both the 2020 Rule and AU's Title IX Sexual Harassment Policy make clear that "relevance" is the only basis on which a decision-maker is permitted to exclude a question, and upon excluding a question, the decision-maker must explain why it is not relevant.[69] The hearing panel chair went far beyond her limited discretion by excluding questions that were relevant, including those that tested credibility, and violated the rule by failing to explain why the questions she excluded were not relevant.

By restricting KB's advisor from asking these specific questions, imposing unreasonable time limits on questioning, and forbidding any follow-up questions, AU personnel not only denied KB the ability as set out in the 2020 Rule to ask relevant questions and follow-up questions, but also violated the 2020 Rule's requirement that decision-makers engage in "an objective evaluation of *all* relevant evidence—including both inculpatory and exculpatory evidence."[70]

AU's Ongoing Discrimination and Bias Against KB

As described in the Complaint and in this supplemental filing, throughout the grievance process regarding his and LO's formal complaints of sexual harassment, AU officials have subjected KB to widespread and persistent misconduct that demonstrates unmistakable bias on the part of the institution and its staff, whether against KB specifically or against respondents in sexual harassment grievance processes generally. Because LO filed a formal complaint against KB in January 2025, AU officials have engaged in what can only be described as a pressure campaign against KB that led to his withdrawal from the university and ultimately to the "show trial" described in this supplement. During this entire controversy, AU has demonstrated its biased presumption that KB committed the conduct alleged by LO, in blatant violation of its duty to presume that KB is not responsible for that conduct until an adverse finding at the conclusion of a grievance process that complies with the 2020 Rule.

AU's process of selecting the panel to evaluate the allegations in KB's and LO's formal complaints places its bias on full display. Initially, AU proposed a panel member, Ms. Abraham, whose extensive writings on sexism and workplace harassment should have made eminently clear that she was an inappropriate selection for a hearing panel. Based on her published opinions, her worldview is based on the perspective that there is "a presumption that white men know what they are doing while women have to prove themselves" and that women are oppressed members of society subject to "institutional barriers." She has criticized a court panel for deciding a case

[68] *See supra* page 10.
[69] *See supra* notes 41, 43, 53, and accompanying text.
[70] *Supra* note 35 (emphasis added).

against a woman, in spite of knowing of the scientific evidence against her, due to the fact that the panel was made up of men. The fact that AU put forward her name for a panel position in the first place, forcing KB to object to her inclusion, is evidence of anti-respondent and anti-male bias on the part of the institution.

AU did select Ms. Curran to be the chair of the hearing panel and Ms. Northup-Moore as a member of the panel, despite the many reasonable objections KB offered regarding their inclusion. Ms. Curran, for instance, had published her views on the unfairness of the 2020 Rule that she would be required to implement as the hearing panel chair and, as its Title IX Coordinator, had presided over AU's shift toward an investigative model that deprived individuals accused of Title IX sexual harassment of a live hearing before they were disciplined—a model for which she expressed her support at the time. She later made a concerning comment regarding the 2020 Rule, differentiating between "the letter of what it says" and "the myriad of ways people interpret that," causing KB reasonably to be concerned about how she would interpret her discretion in applying the regulations to his hearing. As AU's former Title IX Coordinator who had faced a record number of OCR complaints while she held the office (including a complaint from the law firm representing KB), she was a particularly inappropriate choice to serve on KB's hearing panel. As KB also highlighted for OETIX, her bias against KB and respondents generally was likely to filter through the panel, which would likely defer to her views on whether the conduct alleged by KB and LO constituted prohibited sexual harassment.

KB also submitted valid concerns regarding the inclusion of Ms. Northup-Moore on the hearing panel, due to his negative interactions with her office while he served in AU student government. After the hearing began, he learned that he had cause to be more concerned about her inclusion on the panel because LO's advisor came from an AU office that works closely with Ms. Northup-Moore's office, raising questions regarding whether Ms. Northup-Moore could remain impartial in evaluating responsibility for KB's and LO's allegations.

Rather than take these reasonable objections seriously and offer new members of the panel, AU simply dismissed KB's concerns and charged ahead with the inclusion of these two panel members.

In our Complaint, we pointed out a litany of 2020 Rule violations and failures that demonstrated a pattern of bias and discrimination on the part of AU directed against KB. As described throughout this supplemental complaint, this pattern of bias and discrimination has shown no signs of relenting. Recent examples include:

- AU's proposal and selection of biased hearing panel members, as discussed immediately above;

- AU's concealment of the identity of LO's advisor until the day of the hearing, when it became clear that her position could present a conflict of interest for or induce bias in one of the hearing panel members;

- AU's prohibition of follow-up questions and unreasonable limitations imposed on questioning by KB's advisor of LO and other witnesses in the face of contrary language in the 2020 Rule;

- AU's refusal to postpone the live hearing in order to permit OCR to provide TA regarding the requirements of the 2020 Rule with regard to the institution's unlawful limitation of questioning, despite receiving a statement from the Department's Acting General Counsel that such limitation "appears to me to be precisely the kind of matter that OCR TA could address with the parties with the goal of assisting the parties in avoiding appealable error and potential OCR investigation";

- AU's concealment from KB of important exculpatory evidence indicating that witnesses to the interaction at issue in the allegations had all told LO that she was "into it," and that they had changed their stories since that time, until it was too late for KB to request additional investigation of this evidence, in violation of both the 2020 Rule and AU's Title IX Sexual Harassment Policy;

- AU's removal, first through its investigator and then through its hearing panel, of substantial content from KB's response to the office's final investigative report, despite having no discretion to do so under the 2020 Rule and the fact that a large proportion of the redacted content presented KB's arguments about relevant evidence that the 2020 Rule makes clear should be considered by the decision-maker in his grievance process;

- AU's "offer," made approximately one hour prior to the start of the live hearing (and promptly reversed in light of the valid objections of KB and his advisor), to reconsider the redactions in KB's response to the final investigative report only if he (and not his advisor) presented his arguments about why the redactions should not have been made before the hearing panel chair;

- the abrupt reversal, announced by the hearing panel chair, of AU's decision to allow KB to submit follow-up questions to LO and witnesses *after* KB's advisor had already cross-examined LO;

- the hearing panel's unequal questioning of LO and KB regarding their allegations of sexual harassment in terms of number and content of the questions posed; and

- the hearing panel chair's suppression of questions by KB's advisor to LO pointing out previous inconsistent statements, while allowing similar questions to be posed to a male witness.

Adding these violations of the protections of the 2020 Rule to those presented in our Complaint, AU's biased and discriminatory approach to the participation in the grievance process by KB—who is not even enrolled at AU, resides in a different state, and poses no obstacle to LO's ability to access equal educational opportunities at the university—has clearly caused the institution's officials to take the grievance process in this matter wholly off the rails. Whether AU is discriminating against KB because he is male or exhibiting bias against him as an individual or a respondent, OETIX has subjected him to such gross violations of the law and basic decency that it is difficult to conclude other than it wished him to leave the university and is determined to hold him responsible for the sexual harassment alleged by LO.

This behavior is wildly biased and discriminatory, appears driven by institutional animus, and is in clear disregard of the 2020 Rule. It reeks of retaliation against KB in response to his filing of a formal complaint, in violation of both the 2020 Rule and AU's Title IX Sexual Harassment Policy, which prohibit discriminatory behavior toward an individual for attempting to exercise his or her rights under Title IX.[71]

Conclusion

In our Complaint, we noted that no live hearing had yet occurred to evaluate KB's or LO's formal complaints but expressed our lack of confidence that any such hearing would be fair and impartial in compliance with the 2020 Rule. Now that the live hearing has taken place, our concerns have been confirmed and even magnified. Consequently, KB sees no recourse within AU's institution to obtain the fair and unbiased outcome to which he is entitled under Title IX. Therefore, we reiterate our request that OCR intervene to force AU to correct the numerous deficiencies with regard to its treatment of KB and any other parties to grievance processes against whom AU has discriminated, 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. Failing this, we urge the Education Department to begin an enforcement action to suspend any and all federal funding for AU's education programs and activities.

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

[71] *Supra* notes 44, 56.

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*
Martha A. Astor
Counsel, Litigation

cc: Mr. Justin Dillon
Dillon PLLC

Ms. Kimberly Blasey
Dillon PLLC