

FACE STRONGLY OPPOSES CATHERINE LHAMON'S RETURN TO THE DEPARTMENT OF EDUCATION'S OFFICE FOR CIVIL RIGHTS

President Biden has nominated Catherine Lhamon as Assistant Secretary for Civil Rights at the U.S. Department of Education's Office for Civil Rights (OCR). FACE believes Lhamon's nomination is imprudent, disregards the opinions of countless Title IX experts, attorneys, and others, and is an affront to the thousands of students and families who have suffered significantly as a result of policies enforced by Ms. Lhamon.

Having formerly served as OCR's Assistant Secretary from 2013 to 2017, Lhamon was instrumental in forcing Title IX offices to prioritize complainants' rights over the already minimal due process owed respondents.¹ Though Lhamon did not author OCR's infamous *2011 Dear Colleague Letter* (2011 DCL), she doggedly enforced it and other OCR 'guidance' documents addressing sexual misconduct without regard to their disastrous repercussions and heightened "risk for wrongful findings in sexual assault adjudications."²

According to journalist Emily Yoffe, although the intent of Lhamon's policies may have been "noble and necessary," they "left a mess of a system," had "many unintended consequences,"³ and "ultimately undermine[d] the legitimacy of the fight against sexual violence."⁴

Lhamon also exceeded her executive authority when it was convenient. In a memorable 2014 exchange with then-Senator Lamar Alexander regarding Lhamon's authority to impose non-regulatory mandates on schools, Lhamon argued that, in confirming her, the Senate had given her the authority to withdraw funding for schools' noncompliance with those mandates.⁵ Lhamon insisted this was true, even though OCR had not sought comments about its 2011 DCL from those with relevant expertise, nor had it even attempted to conduct the notice-and-comment process required by the Administrative Procedure Act.⁶

Just over a year later, another OCR official confirmed Lhamon's claim of authority to withdraw funding for noncompliance with mere guidance was false.⁷

¹ U.S. Dept. of Edu., Office for Civil Rights, *2011 Dear Colleague Letter (Rescinded)* (Apr. 4, 2011) ("schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.") <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

² Samantha Harris & KC Johnson, *Campus Courts In Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 111, pp. 62-63 (2019) (explaining schools "too often lack the tools to gather the evidence necessary to reach the truth," and that "university self-interest can distort fairness in campus proceedings") <https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf>.

³ Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, The Atlantic (Sept. 6, 2017) ("At many schools, the rules intended to protect victims of sexual assault mean students have lost their right to due process—and an accusation of wrongdoing can derail a person's entire college education.") <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/>.

⁴ *Id.*

⁵ Senate HELP Comm. hearing testimony of Catherine Lhamon @00:27:00, *Sexual Assault on Campus: Working to Ensure Student Safety* (June 26, 2014), <https://www.help.senate.gov/hearings/sexual-assault-on-campus-working-to-ensure-student-safety>.

⁶ *Id.* OCR had invited comments only for its 1997 guidance on sexual harassment, and not on "the wisdom of its mandate, but only "on whether the Guidance is clear and complete." [<https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>] However, no public hearings were held and only 80 comments were received. R. Shep Melnick, *The Transformation of Title IX: Regulating Gender Equality in Education*, The Brookings Inst. Press (2018) Chapters 10 and 11, pp. 187-188, Kindle Ed.

⁷ In a subsequent Senate hearing, OCR's Deputy Asst. Sec'y of Ed. Amy McIntosh confirmed Lhamon did not have the authority

Frustrated and Bullied Title IX Professionals

In 2015, former Wheaton College Vice President of Student Affairs and Dean of Students Lee Burdette Williams courageously published an article in which she described her frustration at OCR's failure to consult Title IX professionals before issuing the 2011 DCL.⁸ According to Williams, "It felt like a group of well-intended but misinformed interlopers had shown up to tell me how to do a job I had done for years. Absent any input from people in jobs like mine."⁹ In the end, Williams asked, "*Didn't our judgment, our input, count for anything?*"¹⁰

As it turned out, Williams was not alone: she later described how at a Title IX conference hundreds of student affairs professionals from schools across the country stood and applauded her for having written about the failure of OCR to consult student affairs professionals and the considerable difficulties they were experiencing implementing the 2011 DCL and other guidance.¹¹

Terry W. Hartle, Senior Vice President for Government and Public Affairs at the American Council on Education, also noted "a growing concern among colleges about how the Education Department enforces such regulations."¹² Hartle reported, "Many universities that have found themselves in a conflict with OCR believe that this agency does not act in good faith and that it's little more than a bully with enforcement powers."¹³

As a consequence of what Hartle called OCR's 'bullying' enforcement of non-regulatory guidance, Title IX professionals became concerned that if they did not police the sex lives of their students they would risk losing federal funding.¹⁴ Indeed, OCR's creation of a *list of shame* publicly naming schools when OCR had merely opened a case,¹⁵ and forcing some of those schools to endure prohibitively expensive investigations going back years,¹⁶ caused school officials to feel as though they had no choice but to do what OCR demanded, even if it were "technically a suggestion and not a command."¹⁷

to enforce compliance with the 2011 DCL by withdrawing funding or otherwise. Senate Homeland Security and Gov't Affairs Comm., *Examining the Use of Agency Regulatory Guidance* (Sept. 23, 2015) <https://www.youtube.com/watch?v=dliXuv-Oirw>.

⁸ Lee Burdette Williams, *The Dean of Sexual Assault*, Inside Higher Ed (August 7, 2015) ("Williams explains why the well-intended but misguided push to compel campuses to better protect victims of sexual assault helped drive her from her job.") (emphasis added) <https://www.insidehighered.com/views/2015/08/07/how-sexual-assault-campaign-drove-one-student-affairs-administrator-her-job-essay>.

⁹ *Id.*

¹⁰ *Id.* (emphasis added).

¹¹ Lee Burdette Williams, *About FACE: A Former Dean of Students Rethinks Sexual Assault Response*, Medium (May 2021) <https://leeburdettewilliams.medium.com/about-face-a-former-dean-of-students-rethinks-sexual-assault-response-ee08542ddd2e>.

¹² Michael Stratford, *Standoff on Sexual Assaults; As Obama administration unveils new guidance for combating sexual assault on campus, dispute between Tufts and federal officials underscores tensions*, Inside Higher Ed (Apr. 29, 2014) <https://www.insidehighered.com/news/2014/04/29/us-finds-tufts-violating-rules-sexual-assault-amid-larger-crackdown>.

¹³ *Id.* (emphasis added).

¹⁴ Jacob Gersen & Jeannie Suk (Gersen), *The Sex Bureaucracy*, 104 Calif. Law Rev., Vol. 104, No. 4 (Aug. 2016), pp. 908-909, <https://29qish1lqx5q2k5d7b491joo-wpengine.netdna-ssl.com/wp-content/uploads/2016/09/Gersen-and-Suk-37-FINAL.pdf>.

¹⁵ From 2014 until 2017 under Lhamon's watch, OCR's list of allegedly recalcitrant schools increased from 55 to 304, and schools were added whether or not an investigation had been opened. Nick Anderson, *At first, 55 schools faced sexual violence investigations. Now the list has quadrupled*, The Washington Post (Jan. 18, 2007) <https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/at-first-55-schools-faced-sexual-violence-investigations-now-the-list-has-quadrupled/>.

¹⁶ Harris & Johnson, *Campus Courts In Court*, *supra*, note 2, at p. 61; see also, Andrew Kreighbaum, *As Civil Rights Office Gets More Money, It Limits Investigations*, Inside Higher Ed (Mar. 30, 2018) ("OCR investigations have in recent years been extremely broad and extremely burdensome for institutions") <https://www.insidehighered.com/news/2018/03/30/more-money-civil-rights-office-comes-it-narrows-its-investigative-work>; Nick Anderson, *At first, 55 schools faced sexual violence investigations*, *supra*, note 15 ("There were long, arduous negotiations at several big-name schools to resolve investigations.")

¹⁷ Emma Brown, *Senator: Education Dept. overstepped authority on sexual assault complaints*, Washington Post (Jan. 7, 2016) <https://www.washingtonpost.com/news/education/wp/2016/01/07/u-s-senator-education-department-overstepped-authority-on-sexual-assault-complaints/>; see also, Sen. James Lankford, *Letter to Acting Secretary of the Dept. of Edu. John B. King* (Jan. 7, 2016)

Meanwhile, the resulting cause célèbre prompted Brett Sokolow of the Association of Title IX Administrators to criticize schools' micromanagement of students' sex lives, noting “[s]ome pockets in higher education have twisted the [2011 DCL] and Title IX into a license to subvert due process and to become the sex police.”¹⁸

OCR's 'bullying' also created a Catch-22 for Title IX professionals' decision-making, undoubtedly causing some of Lee Burdette Williams' colleagues to err on the side of finding an accused student guilty.¹⁹ The pressure on school officials to err on the side of guilt is aptly illustrated by a case at Pennsylvania State University. There the decision-makers were told “[i]f the panel believes that the information provided indicates that it is more likely than not that a violation occurred, then [it] should find the student responsible for the violation, even if the panel . . . ‘ha[s] considera[ble] reservation.’”²⁰ The Pennsylvania State message was clear: even if the panel was far from confident of the respondent's guilt, the technical evidence threshold of 50.001% could still be met.²¹

Williams, faced with this and other no-win OCR policies, said she “walked away from a role and a title that I had worked years to achieve,” because of “my frustration and sadness over how we had been drafted against our will into a dirty war.”²² Williams decided “I no longer wished to be a soldier.”²³

Across-the-Board Criticism

OCR's mandates and enforcement methods have been criticized by hundreds if not thousands of experts from across all political and professional spectrums. They've characterized the 2011 DCL as an illegal and unauthorized de facto law that denied due process and jettisoned justice. These well-respected experts and organizations have included the Foundation for Individual Rights in Education (FIRE),²⁴ twenty-eight Harvard Law²⁵ and sixteen University of Pennsylvania Law²⁶ professors, the American Association of University

<https://www.lankford.senate.gov/imo/media/doc/Sen.%20Lankford%20letter%20to%20Dept.%20of%20Education%2017.16.pdf>.

¹⁸ Assoc. of Title IX Administrators (ATIXA), *2017 Whitepaper: Due Process and the Sex Police* (2017) (the statement continues, “The ATIXA Playbook and this Whitepaper push back strongly against both of those trends in terms of best practices.”) <https://www.ncherm.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf>.

¹⁹ Harris & Johnson, *Campus Courts In Court*, *supra*, note 2, at pp. 62-63 (“If you find against [a complainant], you will see yourself on 60 Minutes or in an OCR investigation where your funding is at risk. If you find for her, no one is likely to complain,” *quoting*, Nancy Gertner, *Sex, Lies, and Justice*, AM. PROSPECT (Jan. 12, 2015), <https://prospect.org/article/sex-lies-and-justice>).

²⁰ *Doe v. The Penn. State Univ. (III)*, 336 F. Supp. 3d 441, 444 (M.D. Pa. Aug. 21, 2018) (emphasis added).

²¹ This is also consistent with author Cynthia P. Garrett's experience on an American Bar Assn. task force during which victim advocates insisted both a “no finding” and a “not responsible” finding was the equivalent of a conclusion the complainant was lying. American Bar Assn. Crim. Justice Sec. (ABA), *Task Force on College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Sexual Misconduct* (June 2017) https://www.americanbar.org/groups/criminal_justice/committees/campus/.

²² Williams, *About FACE*, *supra*, note 11 (“OCR had created a process that made it impossible to put out the fire.”)

²³ *Id.* (emphasis added).

²⁴ FIRE Letter to Office for Civil Rights Asst. Sec'y for Civil Rights Russlynn Ali (May 5, 2011) <https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/>.

²⁵ Opinion; *Rethink Harvard's sexual harassment policy*, Boston Globe (Oct. 14, 2014) <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>.

²⁶ See Jacob Gershman, *Penn Law Professors Blast University's Sexual-Misconduct Policy*, Wall St. J. Lawblog (Feb. 18, 2015) <https://www.wsj.com/articles/BL-LB-50632>; *Open Letter From Members Of The Penn Law School Faculty; Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, Wall Street Journal (Feb. 18, 2015) http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf.

Professors (AAUP),²⁷ the American Council on Education (ACE),²⁸ the American Bar Association's Criminal Justice Section,²⁹ the American College of Trial Lawyers (ACTL),³⁰ and many more.

Tragically, while OCR officials continued to pontificate about the “epidemic” of campus sexual assault and assured each other how their methods were the correct way to change social norms on sexuality,³¹ on the ground, schools were conducting *To Kill a Mockingbird*-style trials that often targeted and most severely impacted minorities, as well as foreign, first-generation, and disabled college students.³²

The palette of injudicious practices in these *Kafkaesque* proceedings included interrogating respondents without informing them of the details of the complaint against them, denying them access to or silencing their counsel, restricting or eliminating their ability to question their accusers, and refusing them access to the very evidence used to find them guilty.³³ Each of these practices severely constrained a respondent's ability to defend him or herself.³⁴

Likelihood of Erroneous Decision-Making

OCR also demanded or encouraged schools to employ other procedures that increased the likelihood of guilty decisions. For example, OCR required schools to decide cases on a more-likely-than-not basis, a standard a UCLA professor estimated to have a 30% likelihood of error.³⁵ OCR additionally promoted schools' use of an investigatory method in which one official both investigated and decided a respondent's fate,³⁶ raising the distinct possibility of confirmation bias.³⁷

²⁷ Comm. on Women in the Acad. Profession, Am. Ass'n Univ. Professors, *Campus Sexual Assault: Suggested Policies and Procedures*, Reports & Publications, p. 371 (2012) (“The AAUP advocates the continued use of ‘clear and convincing evidence’ in . . . discipline cases as a necessary safeguard of due process and shared governance.”) <https://www.aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures>.

²⁸ Stratford, *Standoff on Sexual Assaults*, *supra*, notes 12 and 13 and accompanying text.

²⁹ ABA *Task Force on College Due Process Rights and Victim Protections*, *supra*, note 21. FACE Co-President Cynthia Garrett was a member of the ABA panel, a diverse group that also included victim advocates and campus administrators, all of whom were able to reach a consensus.

³⁰ American Coll. of Trial Lawyers, *Position Statement Regarding Campus Sexual Assault Investigations* (Mar. 2017) https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/task_force_allegations_of_sexual_violence_white_paper_final.pdf?sfvrsn=22.

³¹ Janet Halley, *The Move to Affirmative Consent*, Signs; Journal of Women in Cultural Society (2015), at pdf p. 8 (“They are seeking social control through punitive and repressive deployments of state power.”) <https://www.journals.uchicago.edu/doi/pdf/10.1086/686904>.

³² Erika Sanzi, *Black Men, Title IX, and the Disparate Impact of Discipline Policies*, Real Clear Education (Jan. 21, 2019) https://www.realcleareducation.com/articles/2019/01/21/black_men_title_nine_and_the_disparate_impact_of_discipline_policies_110308.html; see also, Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases*, The Atlantic (Sept. 11, 2017) <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/>; Jeannie Suk Gerson, *Shutting Down Conversations of Rape at Harvard*, The New Yorker (Dec. 11, 2015) (“The dynamics of racially disproportionate impact affect minority men in the pattern of campus sexual-misconduct accusations”) <https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school>.

³³ These are just a few of the policies that resulted in wrongful decisions, some of which also negatively impacted complainants. See, Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, Tex. Law Review, Vol. 96:15, at p. 18 on (2017) <https://texaslawreview.org/wp-content/uploads/2017/11/Rubenfeld.pdf>. See, for example, *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016); *Doe v. Regents of Univ. of California (UCSB)*, 28 Cal. App. 5th 44, 60, Oct. 9, 2018 (“The accused must be permitted to see the evidence against him. Need we say more?”)

³⁴ FACE's 2000+ respondents also include women and LGBTQ+ students, though men are the majority.

³⁵ John Villasenor, *A probabilistic framework for modeling false Title IX 'convictions' under the preponderance of the evidence standard*, Law, Probability and Risk, Volume 15, Issue 4, pp. 223–237 (Oct. 14, 2016) <https://academic.oup.com/lpr/article/15/4/223/2549058>.

³⁶ Harris & Johnson, *Campus Courts In Court*, *supra*, note 2, at p. 60, footnote 60 (“A 2014 Obama administration report hailed the ‘very positive results’ of this model.”).

³⁷ Linda and Charlie Bloom, *Beware of the Perils of Confirmation Bias*, Psychology Today (July 9, 2018)

These procedures, when combined with OCR policies rooted in a believe-the-victim mantra³⁸ and trauma-informed theories which evoke a presumption of the respondent's guilt,³⁹ caused innocent accused students to be blindsided by findings that they had, though unintentionally, committed sexual assault.

OCR Policies Complicated by Alcohol

Due to OCR's broad definitions of sexual misconduct and schools' eagerness to avoid the ire of OCR officials, the 78% of Title IX cases involving intoxication⁴⁰ became convenient fodder for schools to suspend or expel primarily male accused students. In response to the frequency of school decisions finding only the male guilty when both students were intoxicated, Title IX expert Brett Sokolow warned schools: "Surely, every drunken sexual hook-up is not a punishable offense" . . . "there has to be something more than an intent to have sex to make this an offense."⁴¹

Unfortunately, despite the parties' mutual intoxication, the proliferation of affirmative consent policies and outdated stereotypes about how men and women interact⁴² resulted in schools most often penalizing the accused male as the perpetrator, while assuming the female accuser was a "victim".⁴³ Increasing the chances of a wrongful finding in these cases, were OCR-sanctioned trauma-informed policies that caused Title IX officials to rely on a complainant's distorted, faulty, and – in cases where a complainant claimed to have blacked out – even the complainant's *nonexistent* memories.⁴⁴

In a recent interview, Brett Sokolow warned that on campus up to "40 or 50% of allegations of sexual assault" could be "baseless," particularly when alcohol was involved.⁴⁵ Sokolow also cautioned schools not to take

<https://www.psychologytoday.com/us/blog/stronger-the-broken-places/201807/beware-the-perils-confirmation-bias>; See, for example, *Doe v. Brandeis Univ.* 177 F. Supp. 3d 561, 606 (D. Mass. Mar. 31, 2016) ("The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions."); *Doe v. Miami Univ.*, 882 F.3d 579, 605 (6th Cir. 2018) ("although an individual's dual roles do not per se disqualify him or her from being an impartial arbiter, here John has alleged sufficient facts plausibly indicating that Vaughn's ability to be impartial 'had been manifestly compromised.'"); *Doe v. The Penn State Univ. (III)*, 336 F. Supp. 3d 441, 450-51 (M.D. Pa. Aug. 21, 2018) ("the Investigative Model's virtual embargo on the panel's ability to assess that credibility raises constitutional concerns.").

³⁸ Of this mantra, a former campus administrator said recently "The problem with 'believe the woman' . . . is that it places all women into one utterly credible bucket of complainants, and their respondents into another absolutely despicable bucket of violators." Williams, *About FACE*, *supra*, note 11.

³⁹ Cynthia P Garrett, *Trauma-Informed Theories Disguised as Evidence*, pp. 5-6, 8-9 (May 2, 2019) <https://static1.squarespace.com/static/5941656f2e69c9fdb5210aa/t/5ccbd3c153450a492767c70d/1556861890771/Trauma-Informed+Theories+Disguised+as+Evidence+5-2.pdf>, citing and quoting, Lee H, Roh S, Kim DJ., *Alcohol-Induced Blackout*, *International Journal of Environmental Research and Public Health*. 2009; 6(11): 2783-2792, 2785, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2800062/>; and White, Aaron M. Ph.D., *What Happened? Alcohol, Memory Blackouts, and the Brain*, Published by NIH; National Inst. on Alcohol Abuse and Alcoholism (2003) <https://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm>.

⁴⁰ *Confronting Campus Sexual Assault*, p. 6, EduRiskSolutions.org (2015) http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf.

⁴¹ Brett A. Sokolow, J.D., ATIXA Executive Director, *ATIXA Tip of the Week Newsletter SEX AND BOOZE* (Apr. 24, 2014) deleted from the original source but available here: <https://www.dropbox.com/s/ie1b0dg0bh0kvff/ATIXA%202014-Tip-of-the-Week-%20Sex%20and%20Booze.pdf?dl=0>.

⁴² See Harvard Law professor Janet Halley's discussion of the problematic interaction between intoxication and affirmative consent policies, Janet Halley, *The Move to Affirmative Consent*, *supra*, note 31, at pp. 17-18.

⁴³ For example, in *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016), the investigator "approached the Relationship as if John was the Dominant Male Aggressor and J.C. was the Submissive Female Victim, stereotypes derived from heterosexual culture. Those stereotypes would be inappropriate in any sexual misconduct investigation . . ."

⁴⁴ Garrett, *Trauma-Informed Theories*, *supra*, note 39, at pp. 5-6, 8-9.

⁴⁵ Richard Bernstein, *Legal experts say Biden's pushing ahead to the Obama past on campus rape could be a mistake*, *Real Clear Wire* (Dec. 16, 2020) https://www.thecentersquare.com/national/legal-experts-say-bidens-pushing-ahead-to-the-obama-past-on-campus-rape-could-be/article_184d1e3a-3fc0-11eb-956d-87947675f52c.html.

complainant claims of inability to consent at face value: “[t]here are a lot of cases where someone says they were incapacitated, but the evidence doesn’t support that they weren’t able to make a decision.”⁴⁶ Sadly, Sokolow’s admonitions in this context have come too late for hundreds of FACE students.

No Relief for the Innocent

Though often discounted, the emotional repercussions of a wrongful accusation of sexual misconduct, even if the student is found not responsible, can be debilitating. University of Chicago Law School Professor Geoffrey Stone expressed his concern that “severe sanctions are being imposed without the necessary protections for the accused.”⁴⁷ According to Professor Stone, “For a college or university to expel a student for sexual assault is a matter of grave consequence both for the institution and for the student. Such an expulsion will haunt the student for the rest of his days, especially in the world of the Internet. Indeed, it may well destroy his chosen career prospects.”⁴⁸

We have seen Professor Stone’s fears materialize. The majority of the two thousand wrongfully accused students who have come to FACE admit to having considered suicide, demoralized that anyone, much less the school they love, would believe they would commit such a vile offense. At a minimum, many wrongfully accused students suffer from PTSD, and all are horrified by the realization that it does not always matter if they “do the right thing” – *life can be cruel and their life ruined through no fault of their own*. Regrettably, *there is no ‘ban the box’ for innocent students found ‘responsible’ on campus.*

No, Lhamon Was Not Interested in Due Process

Though Catherine Lhamon has since claimed to have supported the due process rights of respondents as well as complainants in Title IX complaints submitted to OCR, in only two cases were there any concerns expressed about respondents’ rights. In one – against Minot State University⁴⁹ – the ‘concern’ expressed had nothing to do with the end result. In the second case against Wesley College, the facts were so egregious that even Lhamon could not ignore them.⁵⁰

Though Lhamon has claimed there were other decisions in favor of accused students during her previous reign, she has failed to identify them.

⁴⁶ *Id.*

⁴⁷ Yoffe, *The Uncomfortable Truth*, *supra*, note 3.

⁴⁸ *Id.*

⁴⁹ Out of over 17,000 words, the Minot State decision used fewer than 100 discussing respondent rights, none of which were relevant to OCR’s final decision. *U.S. Education Department Settles Sexual Assault Case with Minot State University, N.D. (Archived)*, U.S. Department of Education’s Office for Civil Rights (July 7, 2016) <https://www.ed.gov/news/press-releases/us-education-department-settles-sexual-assault-case-minot-state-university-nd>.

⁵⁰ U.S. Department of Education’s OCR, *U.S. Education Department Settles Sexual Assault Case with Wesley College*, pp. 2, 20-22 (Oct. 12, 2016) (numerous issues, including denying the accused “procedural protections to which he was entitled under Title IX” and the school’s “written procedures”; expelling him even though the complainant said he was not involved; failure to provide him with the correct policy; not informing him of witness names or given investigation report before the hearing; and no opportunity to explain his side of the events or respond to testimony against him.) <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf>.

Lhamon Is Exactly the Wrong Choice

Recently, Laura Dunn, a victim rights' attorney and nationally recognized Title IX expert, criticized President Biden's decision to nominate Catherine Lhamon to the position of Assistant Secretary of Civil Rights, saying she "did not want to go back to the Obama-era guidance."⁵¹ Dunn added, "*I really hoped the administration would try to find someone that can please both sides of the aisle and try to settle the issue, so that we don't have a political football being thrown about every couple years.*"⁵²

Now that the number of lawsuits from accused students has exceeded 700,⁵³ and both lower and appellate courts throughout the country have found school Title IX disciplinary procedures severely lacking in basic fairness, it is disheartening to those of us at FACE, who've seen the devastation suffered by our over two thousand wrongfully accused students, that President Biden would choose Lhamon to again lead OCR.

Questions? Please contact:

Cynthia P Garrett and Alison Scott, Co-Presidents

Families Advocating for Campus Equality

CPGarrett@FACECampusEquality.org

<https://www.facecampusequality.org>

@FaceCampusEqual

⁵¹ Jeremy Bauer-Wolf, *Biden's pick of Catherine Lhamon as civil rights head could mean a return to Obama-era policies*, Higher Ed Dive (May 13, 2021) <https://www.highereddive.com/news/bidens-pick-of-catherine-lhamon-as-civil-rights-headcould-mean-a-return-t/600159/>.

⁵² *Id.* (emphasis added).

⁵³ Jonathan Taylor, *Milestone: 700+ Title IX / Due Process Lawsuits by Accused Students*, Title IX for All (May 11, 2021) <https://titleixforall.com/milestone-700-title-ix-due-process-lawsuits-by-accused-students/>