



OFFICE FOR INSTITUTIONAL EQUITY

Doe v. Baum et al., Case No. 2:16-cv-13174 (September 7, 2018) -- “Cross Exam” Protocol
November 19, 2018

1. Why is CSU creating a process for cross examination in Title IX cases?

On September 7, 2018, the Sixth Circuit Court of Appeals held in *Doe v. Baum et al.*, Case No. 2:16-cv-13174, that, “if a public university has to choose between competing narratives to resolve a case [under Title IX of the Education Amendments Act of 1972, 20 USC 1681 (Title IX)] the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.” The Sixth Circuit is the federal court of appeals with jurisdiction that includes Ohio. As a result, the decision in *Doe v. Baum* impacts Cleveland State University and the investigations conducted by the Office for Institutional Equity (OIE). In particular, *Doe v. Baum* requires CSU to implement procedures that provide for an opportunity for a cross examination in the circumstances described in that legal decision. This Protocol describes those procedures.

2. Why is CSU creating a “protocol” rather than amending a policy or creating new procedures?

CSU’s *Policy Against Discrimination, Harassment, Sexual Violence and Retaliation* (the *Policy*) and the *Procedures of the Office for Institutional Equity for Investigating Discrimination, Harassment, Sexual Violence and Retaliation* (the *Procedures*) are impacted by the Sixth Circuit’s decision in *Doe v. Baum*. Although CSU could amend its *Policy* and the *OIE Procedures*, CSU has elected not to do that at this time. The reason is that CSU anticipates more changes in the near future that are likely to impact the *Policy* and the *Procedures*.

Specifically, in a draft dated August 25, 2018, the United States Department of Education indicated that it will be issuing new rules to “clarify and modify Title IX regulatory requirements pertaining to the availability of remedies for violations, the effect of Constitutional protections, the designation of a coordinator to address sex discrimination issues, the dissemination of a nondiscrimination policy, the adoption of grievance procedures, . . . how . . . institutions covered by Title IX must respond to incidents of sexual harassment consistent with Title IX’s prohibition against sex discrimination . . . to promote the purpose of Title IX by requiring recipients to address sexual harassment, assisting and protecting victims of sexual harassment and ensuring that due process protections are in place for individuals accused of sexual harassment.” In early November 2018, news reports surfaced that the Department of Education will be requiring a cross examination process in Title IX cases investigated and resolved on college and university campuses.

This Protocol is designed to ensure that OIE investigations are consistent with the requirements set out in the *Doe v. Baum* decision, while also waiting until the United States Department of Education issues new Title IX regulations, to amend the *Policy* and the *OIE Procedures*.

3. What if I don't want to participate in a cross examination?

If you are a victim, survivor or other person making an accusation who is being supported by OIE, you will receive and continue to receive that support whether or not you decide to participate in the cross examination process. Participating in that process is 100% voluntary on your part, it is your decision and it doesn't impact or lessen the ability of CSU to support you to the best of its ability. The impact of your decision not to participate in the cross examination process is limited to how the OIE investigation may impact the ability of the accused student to continue their education at CSU, the conditions of that student's attendance at CSU and the options for the outcome of the OIE investigation.

If you decide not to participate in the cross examination process, CSU won't be able to take action at the end of the OIE investigation process to prevent the accused student from attending CSU or which negatively impacts the conditions by which the accused student attends CSU. This means, for example, that CSU cannot put the accused student on suspension, probation or expel the student from CSU.

Not participating in the cross examination process also means that OIE will not be able to conclude at the end of the investigation that the accused student violated the *Policy*. As a result, once you inform OIE that you have decided not to participate in the cross examination process, OIE will close its investigation without finding that the accused student violated the *Policy*.

Even if you don't participate in a cross exam, CSU can still require that the accused student has no contact with you (and that you have no contact with that person), and CSU can and will continue to support you so long as you are a student.

4. Is this Protocol and participation in a cross examination part of every OIE investigation?

No. This Protocol only applies in cases in which a student is accused of gender discrimination (including sexual violence), the OIE Investigator must assess credibility on conflicting statements of the accused student and the person making the accusation to resolve the case, and the OIE Investigator may find that the accused student violated the *Policy* and/or may recommend sanctions against the accused student.

5. What is the new cross examination protocol?

As its new protocol, Section X (Investigation Process) of the *OIE Procedures for Investigating Discrimination, Harassment, Sexual Violence and Retaliation* is supplemented with the addition of a new paragraph D.5 (Procedures for assessing credibility when witnesses offer competing narratives), as follows:

1. This Protocol applies when an OIE investigation of alleged conduct by a student implicates Title IX, the outcome of the investigation depends on an assessment of credibility on conflicting statements of the accused student and the person making the accusation by the OIE Investigator, and the OIE Director or designee determines that the investigation may result in a finding of a violation of the *Policy* and/or a recommendation for sanctions against the accused student.

2. The OIE Director and/or designee will determine whether this Protocol applies to a particular investigation. Generally, this determination will be made after the OIE Investigator has interviewed the accused student and the person making the accusation. In all cases, this determination will occur before the OIE Investigator issues the University Investigator's Report.
3. The OIE Investigator will advise the accused student that this Protocol applies and identify the person(s) who will be invited to participate in a cross examination. The OIE Investigator will advise the accused student if the person making the accusation elects to participate in the cross examination or declines to do so. If the person making the accusation elects not to participate in the cross examination, OIE will close its investigation. OIE may reopen the investigation if the person making the accusation later elects to participate in the cross examination.
4. The OIE Investigator will also advise the person reporting the accusation of the determination that this Protocol applies and that they also have an opportunity to cross examine the accused student. The accused student may elect not to participate in a cross examination, however, doing so will not cause OIE to close its investigation or prevent the OIE Investigator from finding that a violation occurred and recommending sanctions.
5. Either the person making the accusation or the accused student may advise the OIE Investigator that they do not want to be asked questions by the other and the reason(s) why. When that occurs, the OIE Director and/or designee may determine that a representative of the accused student or the person making the accusation, including an attorney, will ask questions during the cross examination.
 - a. The OIE Investigator will identify the factors which led to the decision that a person's representative will or will not question the other person.
 - b. If a person's representative will question a witness, the person has the right to be present with the person's representative during the cross examination.
 - c. While this Protocol permits an attorney to participate in the cross examination process as the representative of the accused student or the person making the accusation, this is the only capacity in any matter covered by the *Policy* and/or the *Procedures* in which an attorney may represent, as opposed to support, the accused student or the person reporting the accusation.
 - d. The accused student and the person reporting that accusation each have the option to engage an OIE Advisor to conduct the cross examination and/ or otherwise participate in the cross examination process.
 - e. In matters of sexual violence, the person reporting the accusation may engage a Campus Victim Specialist or other appropriate person from the Cleveland Rape Crisis Center to conduct the cross examination and/or otherwise participate in the cross examination process.
6. The subject of cross examination is limited to matters in which the accused student and a person making the accusation provide different versions of the same events and require OIE to assess credibility to determine whether a violation of the *Policy* has occurred and/or recommend appropriate sanctions.

- a. The OIE Director or designee is solely responsible for identifying such matters.
 - b. The OIE Investigator shall advise the accused student and the person reporting the accusation of the matters about which cross examination may occur.
 - c. The OIE Investigator will provide the accused student and the person reporting the accusation with sufficient advance notice of the subject matter(s) of cross examination to prepare such questions.
 - d. OIE will provide the same information to the accused student and the person reporting the accusation in advance of the cross examination.
7. Either party may request that the OIE Investigator permit questioning to occur via videoconference, such as Skype.
- a. The OIE Director or designee will identify the factors which led to a decision that questioning will occur through videoconference.
 - b. The OIE Director or designee may set reasonable conditions on the questioning via videoconference.
8. The OIE Investigator will record the cross examination for OIE's purposes. The accused student and the person making the accusation may each record the cross examination for their own purposes.
- a. OIE is not required to provide a transcript of the cross examination(s) to the accused student or the person making the accusation.
 - b. If OIE provides a transcript to one person, the same transcript will be provided to the other person.
9. Procedures pertinent to the cross examination are as follows:
- a. The OIE Director and/or designee may put reasonable time limits on the questioning of witnesses, and may determine that questions will be asked in one or multiple sessions.
 - b. The OIE Director and/or designee may require that all questions are presented in writing to the OIE Director and/or designee prior to being asked of the witness. The OIE Director and/or designee may disallow questions because they are not relevant, are harassing or abusive, and/or for other reasons.
 - c. During cross examination, persons being questioned or their representatives may object to certain questions. Objections may include lack of relevance, harassment or abuse of a witness, and/or abuse of the questioning process. The OIE Director and/or designee will respond to such objections by allowing or disallowing the question(s).
 - d. The OIE Director and/or designee may terminate questioning if the OIE Director and/or designee deems it necessary to do so to protect a witness from abuse, harassment or for other reasons.
 - e. If, during questioning, the witness desires a break, a break will be taken once the witness responds to the last pending question. The OIE Director or designee may put reasonable limits on the duration and frequency of such breaks.

- f. The Chief Student Affairs Officer (CSAO) and/or designee, or other appropriate administrator, may elect to attend and observe the cross examination session(s).
10. The OIE Investigator may use some or all of the information, and/or impressions as to credibility, arising from the cross examination in the University Investigator's Report. The CSAO may use some or all of the information, and/or impressions as to credibility, arising from the cross examination in the CSAO's decision, including sanctions.
11. The accused student and/or the person reporting the accusation may contest the implementation of this Protocol pursuant to the process in Section XII (Resolution of Student Matters) and Section XIII (Appeal), paragraph D.2 (Whether these Procedures were followed, and if not, whether the failure to follow these procedures had a materially adverse impact on the Investigator's Report) of the *OIE Procedures*.