

Prepared Statement of Ranking Member Richard Burr
Nomination of Catherine Lhamon, Assistant Secretary for Civil Rights,
Elizabeth Brown, General Council, and Roberto Rodriguez, Assistant
Secretary for Planning, Evaluation, and Policy Development

July 13, 2021

Good morning. Thank you Chair Murray for scheduling this hearing to examine these Department of Education nominees.

To our witnesses, congratulations on your nominations and welcome.

These are important education policy positions.

Today, I'm going to spend most of my time talking about the role Ms. Lhamon will play at the Office for Civil Rights and the serious concerns I have from the last time she had this job.

I have two chief concerns. First, if confirmed, it seems that Ms. Lhamon will charge ahead unraveling significant pieces of the previous Administration's Title IX rule.

Second, I am not convinced Ms. Lhamon understands, or at least appreciates, the limits of her authority.

When Secretary DeVos issued the Title IX rule on campus sexual assault, Ms. Lhamon tweeted about it saying, "Secretary DeVos presides over taking us back to the bad old days that predate my birth, when it was permissible to rape and

sexually harass students with impunity. Today's students deserve better, including fair protections consistent with law.”

That's just plain offensive. This type of over-heated rhetoric doesn't reflect the actual facts or ease partisan tensions on important and sensitive topics.

Ms. Lhamon admitted in her meeting with me and her interview with Committee staff that she agreed with many aspects of the rule; yet, by her tweet, no one would know it.

I imagine that she was taking aim at the due process protections in the rule — the opportunity for a hearing and cross-examination.

But those two provisions are rooted in federal court precedent.

For example, the 6th Circuit has said, “[t]he Due Process Clause mandates that a university provide accused students a hearing with the opportunity to conduct cross-examination....if a public university has to choose between competing narratives to resolve a case, 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.”

And the 3rd Circuit has said, “[t]he basic elements of federal procedural fairness in a Title IX sexual-misconduct proceeding include a real, meaningful hearing and, when credibility determinations are at issue, the opportunity for cross-examination of witnesses.”

And no greater authority on legal protections for women than the late Supreme Court Justice Ruth Bader Ginsberg echoed a similar position telling *The Atlantic* in 2018, “there’s been criticism of some college codes of conduct for not giving the accused person a fair opportunity to be heard, and that’s one of the basic tenets of our system, as you know, everyone deserves a fair hearing.”

But I have concerns Ms. Lhamon doesn’t share these views. The last time she had this job she issued guidance that allowed schools to forgo hearings and the due process rights of both parties to have a cross-examination.

Instead, the guidance allowed schools to use what is known as a single-investigator model, which vested in one person the power to be the judge, jury, and executioner.

So it seems to me instead of listening to Justice Ginsburg our nominee is listening to Lewis Carroll and has a sentence first, verdict afterwards mentality.

I don’t think due process protections or even the concept of cross examination warrant the level of vitriol aimed at the DeVos rule and I think Secretary DeVos deserves an apology.

And if Ms. Lhamon is confirmed, I think she will need to be very careful about any changes to this rule.

Federal courts will stand up for due process even if the Biden Administration won’t.

Ms. Lhamon also doesn't seem to appreciate the limits on the power of the Executive Branch.

For example, she has expressed a distorted view of the appropriate use of agency guidance, which, unlike regulations, do not go through a formal notice and comment process.

At a hearing before this Committee in 2014, Ms. Lhamon told the former Chairman of this Committee, Lamar Alexander, that she believes that guidance is binding on institutions of higher of education.

Yet, here is what the experts say on that. The Administrative Conference of the United States says that guidance documents are nonbinding statements of interpretation, policy, and advice about the implementation of statutes or regulations.

The Supreme Court has said that guidance is meant to advise the public and does not have the force and effect of law.

However, Ms. Lhamon bullied schools into complying with guidance by telling them that they could lose federal funding — the ultimate punishment that has rarely been used — if they did not abide by guidance documents, saying and this is a quote, “do not think it’s an empty threat.”

While Ms. Lhamon told me that her enforcement practices were enforcing the law, not guidance, her guidance laid out overly prescriptive requirements on

institutions like a specific standard of evidence and specific investigative practices not found anywhere in civil rights laws.

Courts have also criticized this enforcement posture of OCR under Ms. Lhamon's leadership.

The 7th Circuit pointed out that multiple circuit courts have considered that the guidance and accompanying pressure of a Department Education Title IX investigation gives an accused student a story about why an institution "might have been motivated to discriminate against males accused of sexual assault."

Even OCR employees during Ms. Lhamon's tenure recognized the pressure OCR put on universities. A lawyer who worked in OCR in both the Obama and Trump administrations, said in an interview that "[w]e did see some bad cases in the Obama era, cases where it basically didn't matter what evidence there was. The college was going to find against the defendant, the male defendant, no matter what. I think the schools felt pressure under the Obama guidance."

So colleges and universities are right to be confused if she's saying to them that following her guidance is mandatory and then she's telling Congress that she means something different.

That sort of pressure comes from the top, and Ms. Lhamon's history is deeply troubling if not outright disqualifying.

Lastly, I would like to submit six letters into the record representing over 100 professors, attorneys, Title IX experts, and other professionals opposing Ms. Lhamon's return to lead OCR at the Department of Education.

Next, I want to touch briefly on the general counsel position. The general counsel probably has the more difficult job of making sure Department officials follow the law the way we here in Congress wrote it.

So I hope that, as a lawyer, Ms. Brown, you will see that happens.

One of the big issues I am concerned about is that this Administration is going to take the position that they have the authority to issue mass student loan forgiveness.

The Department of Education is expected to issue a legal opinion on that issue. However, the Trump Administration determined that the Department did not have such authority and their legal argument is very convincing.

Ms. Brown you will likely play a role in formulating and signing off on the legal opinion for this Administration, so I am interested in hearing your thoughts on that.

In my view, nowhere in the law do I see that authority. To quote the Supreme Court, "Congress...does not, one might say, hide elephants in mouse holes."

To find that the federal government has had this authority and no one knew it until now would be a huge elephant so to speak.

Lastly, before I close, I want to mention an issue I'm having with this Administration when it comes to responses from nominees.

As part of the vetting process, I have been asking all nominees about their social media accounts. One, to tell me if they have them and what they have posted, and two, to tell me if they've ever deleted a post or an account.

For some reason, none of the nominees want to answer the second question. This is unacceptable and makes it seem like these nominees have something to hide. I've written to the White House about this and I hope we can get answers soon.

So to our witnesses again: welcome. I look forward to hearing from you and asking how you will do these very important jobs within the Department of Education.