

# Ten Considerations in the Campus Fairness Debate<sup>1</sup>

## Introduction

Fairness is the bedrock of the American legal system. Principles of fairness and due process exist to negate bias and presumption, to insist that facts govern over passion, to protect those who cannot protect themselves, and to prevent abuse of the disfavored. As Judge Dennis Saylor stated in 2016,

“Put simply, a fair determination of the facts requires a fair process, not tilted to favor a particular outcome, and a fair and neutral fact-finder, not predisposed to reach a particular conclusion.”<sup>2</sup>

The Fifth and Fourteenth Amendments to the U.S. Constitution provide that no person may “be deprived of life, liberty, or property, without due process of law.” At schools, 34 CFR 106.8(b) requires that, “A recipient shall adopt and publish grievance procedures providing for prompt and *equitable* resolution of student and employee complaints alleging any action which would be prohibited by this part.” [emphasis added]

In its 2001 guidance, the Department of Education Office for Civil Rights (OCR) interpreted the word “equitable” to mean procedures that provide for “Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.” The OCR also has explained, “The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding”<sup>3</sup>

In 2011, the Office for Civil Rights released its Dear Colleague Letter (DCL) on sexual violence.<sup>4</sup> Although well-intentioned, hindsight reveals the document had a number of shortcomings:

- Did not benefit from a public review-and-comment process
- Lacked sufficient detail to assure consistency and fairness
- Did not have the force of law
- Did not pay sufficient attention to the need for fundamental fairness in campus adjudications

In addition, the debate on campus sexual assault became polarized, further undermining the legitimacy of the Dear Colleague Letter. For example, proponents of the DCL did not highlight the fact that men are victimized by sexual violence at nearly identical rates as women.

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<sup>1</sup> Submitted to the Office for Civil Rights on June 10, 2021.

<sup>2</sup> *Doe v. Brandeis University*, 177 F. Supp. 3d 561 (D. Mass. 2016).

<sup>3</sup> Department of Education (Jan. 19, 2001), *Office for Civil Rights, Revised Guidance on Sexual Harassment: Harassment of Students by School Employees, Other Students, or Third Parties*. At 20 and 22. As part of OCR’s efforts to ground its policies on regulatory law, the 2001 Guidance was rescinded in 2020.

<sup>4</sup> Department of Education (Apr. 4, 2011), *Dear Colleague Letter*.

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> Hereinafter referred to as the 2011 DCL.

According to the CDC National Intimate Partner and Sexual Violence Survey, each year 1.270 million women are raped and 1.267 million men are “made to sexually penetrate” by their female partners.<sup>5</sup>

Campus fairness is not a zero-sum issue. In the words of Know Your IX, a leading survivor-rights organization,<sup>6</sup>

“As longtime advocates for student survivors, we know all too well that inadequate procedural protections such as untrained or biased decision-makers, rushed investigations, and opaque, unclear campus policies harm survivors and accused students alike. *Accordingly, we reject the notion that justice for survivors is in tension with fair procedural protections for accused students.* Campus responses to gender-based violence will only succeed if they are perceived as — and, in fact, are — legitimate, consistent, and fair to all parties.” [emphasis added]

The Know Your IX page goes on to list 12 procedural rights for both parties. A review of these rights reveals they are almost entirely consistent with the requirements of the Title IX regulation.<sup>7</sup>

To succeed in the quest to curb campus sexual assault, policy discussions need to be based on scientific fact. For example, some have claimed that the prevalence of false allegations is between 2% and 10%.<sup>8</sup> But the actual number of unfounded sexual assault accusations is much higher.<sup>9</sup> According to Brett Sokolow, head of the Association of Title IX Administrators, “Probably 40 or 50% of allegations of sexual assault are baseless. There 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.”<sup>10</sup>

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<sup>5</sup> Lara Stemple & Ilan Meyer (June, 2014), *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*. American Journal of Public Health. <https://ajph.aphapublications.org/doi/10.2105/AJPH.2014.301946>

<sup>6</sup> Know Your IX. *Fair Process in Campus Discipline*. <https://www.knowyourix.org/issues/fair-process-campus-discipline/>. Accessed June 5, 2021.

<sup>7</sup> Dept. of Education (Aug. 14, 2020), *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*. <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf>

<sup>8</sup> David Lisak, Lori Gardiner, Sarah Nicksa, and Ashley Cote (2010). *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*. Violence Against Women. 16 (12): 1318–1334. <https://cdn.atixa.org/website-media/atixa.org/wp-content/uploads/2016/03/12193336/Lisak-False-Allegations-16-VAW-1318-2010.pdf>

<sup>9</sup> SAVE (May 11, 2021), *40-50% of Campus Sexual Assault Allegations Are Unfounded, Revealing Need for Strong Protections of the Innocent*. <https://www.saveservices.org/2021/05/pr-40-50-of-campus-sexual-assault-allegations-are-unfounded-revealing-need-for-strong-protections-of-the-innocent/>

<sup>10</sup> Quoted in Richard Bernstein (Dec. 16, 2020). *Legal experts say Biden’s pushing ahead to the Obama past on campus rape could be a mistake*. The Center Square. [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](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)

The high incidence of unfounded allegations underscores the need for campus proceedings to reach reliable and accurate findings.

### *Overview of This Written Comment*

This Written Comment examines the campus fairness issue from 10 perspectives:

1. Strong Due Process Protections Are Essential for the Protection of LGBT and Other Vulnerable Campus Groups
2. Campus Due Process Enjoys Strong Support from the Public At Large
3. Lawmakers, Newspapers, Organizations, and individuals – Both Liberal and Conservative -- Support Campus Due Process
4. Impartial Investigations Are the Foundation of Equitable Proceedings
5. School Policies Established Under the 2011 DCL Violated the Due Process Rights of Accused Students
6. Appellate Courts Have Issued 24 Decisions Upholding the Due Process Rights of the Accused
7. Complainants Frequently Were Mistreated by School Policies Established Under the 2011 DCL
8. 2011 DCL Did Not Succeed in Improving the Reporting or Reducing the Prevalence of Sexual Assault
9. Faculty Members Have Seen Their Free Speech and Due Process Rights Eroded
10. Recent Experience Reveals Improvements in Campus Proceedings Under the Title IX Regulation

The concluding section presents SAVE's regulatory recommendations to the Office for Civil Rights.

## **1. Strong Due Process Protections Are Essential for the Protection of LGBT and Other Vulnerable Campus Groups**

Due process protections are especially important to assure the rights of vulnerable groups such as LGBT persons, racial minorities, disabled students, and immigrants:<sup>11</sup>

### *LGBT Groups*

Former James Madison University faculty member and speech coach Alyssa Reid was accused by her former female partner of a “non-consensual relationship.” Reid eventually was held responsible for violating the university’s Title IX policy. Reid recounted movingly,<sup>12</sup>

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<sup>11</sup> Raul Jauregui (June 2, 2021), *Title IX Needs to Protect Every Student Present in the US, Including Dreamers*. <https://www.saveservices.org/2021/06/title-ix-needs-to-protect-every-student-present-in-the-us-including-dreamers/>

<sup>12</sup> New Civil Liberties Alliance, *Alyssa Reid v. James Madison University, et al.* <https://nclalegal.org/alyssa-reid-v-james-madison-university-et-al/>

“When you’re accused of sexual misconduct, it’s fundamentally different. It’s something that critiques the nature of who you are to your core, that sticks with you forever....JMU did not provide me with due process. It provided me with the illusion of due process....This hearing has ruined my life. This hearing ruined my dream. I have helped students find their place in the world. And the irony now is that I’m lost.”

Reid recently filed a lawsuit against James Madison University alleging multiple due process violations.<sup>13</sup>

In a second case, a male student at Brandeis University filed a complaint against his former male partner, alleging non-consensual sexual interactions. Even though the men had been in a long-term relationship, the campus investigator treated each sexual incident as if the men were strangers to each other, leading to a campus finding of “responsibility.” In a milestone decision, Judge Dennis Saylor vindicated the accused student, opining,<sup>14</sup>

“If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself, and an impartial arbiter to make that decision.”

Saylor also noted that Brandeis had forced the accused student to:

“defend himself in what was essentially an inquisitorial proceeding that plausibly failed to provide him with a fair and reasonable opportunity to be informed of the charges and to present an adequate defense.”

### *African-Americans*

During a 2015 Senate hearing on campus sexual assault, Harvard Law Professor Janet Halley made the observation that in her experience, “male students of color are accused and punished at ‘unreasonably high rates’ in campus sexual misconduct investigations.”<sup>15</sup> Two years later, journalist Emily Yoffe posed this question in *The Atlantic*: “Is the system biased against men of color?” explaining, “black men make up only about 6 percent of college undergraduates, yet are vastly overrepresented in the cases I’ve tracked.”<sup>16</sup>

Black faculty members also have been targeted in campus Title IX proceedings. The nation’s first elected black governor, former Virginia Governor L. Douglas Wilder, penned a scathing letter

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<sup>13</sup> New Civil Liberties Alliance, *Alyssa Reid v. James Madison University, et al.* <https://nclalegal.org/alyssa-reid-v-james-madison-university-et-al/>

<sup>14</sup> *Doe v. Brandeis University*, 177 F. Supp. 3d 561 (D. Mass. 2016). <https://casetext.com/case/doe-v-brandeis-univ>

<sup>15</sup> G. Piper (Aug. 4, 2015). *Shut out of sexual-assault hearing, critics of pro-accuser legislation flood Senate committee with testimony.* <https://www.thecollegefix.com/shut-out-of-sexual-assault-hearing-critics-of-pro-accuser-legislation-flood-senate-committee-with-testimony/>

<sup>16</sup> Emily Yoffe (Sept. 11, 2017). *The Question of Race in Campus Sexual-Assault Cases.* The Atlantic. <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/>

regarding his “unimaginable nightmare at Virginia Commonwealth University” after he was erroneously accused of sexual misconduct.<sup>17</sup>

In 2017, the Office for Civil Rights investigated Colgate University for potential race discrimination in its sexual assault adjudication processes. During the course of the investigation, the institution had to reveal the fact that “black male students were accused of 50% of the sexual violations reported to the university,”<sup>18</sup> even though black students represent only 5.2% of all undergraduate students.

More recently, Title IX For All analyzed demographic data from the approximately 650 lawsuits filed against institutions of higher education since 2011. Among the 30% of cases in which the race of the accused student was known, black students are four times as likely as white students to file lawsuits alleging their rights were violated in Title IX disciplinary proceedings.<sup>19</sup>

### *Learning Disabled Students*

Because learning disabled students may have a more difficult time navigating social relationships, students with autism and other learning disabilities are at greater risk of accusations of sexual misconduct.<sup>20,21,22,23,24</sup> These articles reveal a pressing need for policy guidance to clarify the interface between Title IX and the Americans with Disabilities Act.

Following is an illustrative case from New York:

Jason Doherty, a student at the State University of New York, Purchase had been diagnosed with Asperger Syndrome and was classified as a disabled student. During freshman orientation, Doherty had a contentious interaction with three female students, resulting in a no-contact order being issued against the man. As a result,

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<sup>17</sup> L. Douglas Wilder (June 3, 2020). *Secretary DeVos Right to Restore Due Process on Campus*. The Roanoke Times. [https://www.roanoke.com/opinion/commentary/wilder-secretary-devos-right-to-restore-due-process-on-campus/article\\_dfac7ff4-7d4d-5109-9657-2532a0816f1d.html](https://www.roanoke.com/opinion/commentary/wilder-secretary-devos-right-to-restore-due-process-on-campus/article_dfac7ff4-7d4d-5109-9657-2532a0816f1d.html)

<sup>18</sup> Soave, Robby (Sept. 14, 2017). *We Need to Talk About Black Students Being Accused of Rape Under Title IX*. Reason. <https://reason.com/2017/09/14/we-need-to-talk-about-black-students-bei/>

<sup>19</sup> Title IX for All (July 6, 2020). *Plaintiff Demographics in Accused Student Lawsuits*. <https://www.titleixforall.com/wp-content/uploads/2020/07/Plaintiff-Demographics-by-Race-and-Sex-Title-IX-Lawsuits-2020-7-6.pdf>

<sup>20</sup> William Russell (Jan. 1, 2017). *Sexual Misconduct on Campus: A Brief Introduction to Title IX Guidelines and Policies for Parents and Caregivers*. Autism Spectrum News. <https://autismspectrumnews.org/sexual-misconduct-on-campus-a-brief-introduction-to-title-ix-guidelines-and-policies-for-parents-and-caregivers/>

<sup>21</sup> Lee Burdette Williams (Feb. 8, 2018), *The Nexus of Autism and Title IX*. Inside Higher Ed. <https://www.insidehighered.com/views/2018/02/08/colleges-should-understand-special-issues-related-autism-and-title-ix-opinion>

<sup>22</sup> Susan Stone & Kristina Supler (July 12, 2018), *‘I Don’t Get It:’ Why College Students with Autism are Vulnerable to Charges of Sexual Misconduct*. <https://studentdefense.kjk.com/2018/07/02/i-dont-get-it-why-college-students-with-autism-are-vulnerable-to-charges-of-sexual-misconduct/>

<sup>23</sup> Michael Allen (Dec. 20, 2018), *Disability Rights and Title IX*. <https://allen-lawfirm.com/2018/12/20/disability-rights-and-title-ix/>

<sup>24</sup> Golub, David (May 9, 2021), *How Will Title IX Policies Affect Autistic Students?* SAVE. <https://www.saveservices.org/2021/05/how-will-title-ix-policies-affect-autistic-students/>

Doherty alleged that the order interfered with his academic success, and that he suffered from anxiety and depression as a result.

In his lawsuit against the institution, Doherty alleged that, “Defendants did not take into account [Plaintiff’s] disability when issuing the no contact orders, nor did they consider whether the no contact orders were being requested in an effort to tease and bully [Plaintiff] because of his disability.”<sup>25</sup> The judge ruled that Doherty’s allegations of failure to accommodate were sufficient to sustain the ADA claim.

In the words of Acting Assistant Secretary for Civil Rights Suzanne B. Goldberg, “Our nation’s civil rights laws require fair and nondiscriminatory school discipline practices, yet we have data that show concerning disparities based on race, sex, and disability in the administration of discipline.”<sup>26</sup> To end this wave of discrimination, the due process rights of vulnerable groups on campus need to be affirmed, protected, and vigorously defended.

## **2. Campus Due Process Enjoys Strong Support from the Public At Large**

From 2015 to 2020, five national public opinion polls were conducted to gauge the level of public support for campus due process. Following is a summary of these polls, in reverse chronological order:

1. A YouGov poll commissioned by SAVE surveyed a representative sample of 2,806 persons on November 12-16, 2020:<sup>27</sup>

Percent of respondents who agreed:

- Students accused of crimes on college campuses should receive the same civil liberties protections from their colleges that they receive in the court system: 68%
- Students accused of sexual assault on college campuses should be punished only if there is clear and convincing evidence that they are guilty of a crime: 75%
- Students accused of sexual assault on college campuses should have the right to know the charges against them before being called to defend themselves: 80%
- Allegations of sexual assault on campus should be primarily handled by the state or local police: 68%

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<sup>25</sup> *Doherty v. Bice*, No. 18-CV-10898 (NSR), 2020 WL 5548790, \*8 (S.D.N.Y. Sept. 16, 2020)

<sup>26</sup> Department of Education (June 4, 2021), *U.S. Department of Education’s Office for Civil Rights Seeks Information on the Nondiscriminatory Administration of School Discipline*. <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-seeks-information-nondiscriminatory-administration-school-discipline#:~:text=22Our%20nation's%20civil%20rights%20laws,in%20the%20administration%20of%20discipline>.

<sup>27</sup> SAVE (Nov. 16, 2020), *YouGov Poll on Campus Due Process*. <https://www.saveservices.org/wp-content/uploads/2020/11/YouGov-Poll-on-Campus-Due-Process-11.16.2020.xlsx>

A secondary analysis according to party affiliation revealed similar levels of support among Democrats and Republicans.<sup>28</sup> The survey used the same questions and methods as the 2017 poll conducted for the Bucknell Institute for Public Policy — see 5. below.

2. A national survey conducted May 20-25, 2020 by a Fairleigh Dickinson University Poll of 1,003 adults asked, “Assume you or someone you loved reported being sexually assaulted while attending a college or university. Please tell me if you would favor or oppose each of the following:”<sup>29</sup>

- “A live court-room style hearing for the accused and accuser to meet and cross examine each other and any witnesses with the assistance of attorneys.” 62% of respondents favored, 31% opposed, 7% didn’t know
- “The opportunity for the accused and accuser to cross examine each other and any witnesses remotely with the assistance of attorneys so that they would not have to be face to face.” 67% of respondents favored, 28% opposed, 5% didn’t know, 1% refused.

3. A 2018 survey of 2,225 undergraduate students sponsored by the Foundation for Individual Rights in Education found widespread support for due process in sexual assault cases:<sup>30</sup>

- 80% support the presumption of innocence
- 68% support cross-examination
- 72% support a unanimous decision required for expulsion

4. A Rasmussen poll conducted in September, 2017 found that 73% of American adults agreed with the statement, “Every survivor of sexual misconduct must be taken seriously. Every student accused of sexual misconduct must know that guilt is not predetermined.” Six percent disagreed, and 20% were not sure how they felt about the statement.<sup>31</sup>

5. A poll by the Bucknell Institute for Public Policy conducted July 25-August 1, 2017 of 1,200 persons reported these results:<sup>32</sup> Percent of respondents who agreed:

- Students accused of crimes on college campuses should receive the same civil liberties protections from their colleges that they receive in the court system: 67%

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<sup>28</sup> SAVE (Nov. 18, 2020), *YouGov Poll with Political Party Identification*. <https://www.saveservices.org/wp-content/uploads/2020/11/YouGov-Poll-with-political-party-identification-11.18.2020.xlsx>

<sup>29</sup> Fairleigh Dickinson University (June 29, 2020), *Americans Unsure About Title IX Changes to Colleges and Universities but Support Fairness and Consistency*. <https://view2.fdu.edu/publicmind/2019/200629/index.html>

<sup>30</sup> FIRE (June 2018), *Proceeding Accordingly: What Students Think about Due Process on Campus*. <https://www.thefire.org/research/publications/student-surveys/student-attitudes-due-process-survey/>

<sup>31</sup> Rasmussen Reports (Sept. 13, 2017), *Most Americans Agree With DeVos on Sexual Misconduct on Campuses*. [https://www.rasmussenreports.com/public\\_content/politics/current\\_events/social\\_issues/most\\_americans\\_agree\\_with\\_devos\\_on\\_sexual\\_misconduct\\_on\\_campuses](https://www.rasmussenreports.com/public_content/politics/current_events/social_issues/most_americans_agree_with_devos_on_sexual_misconduct_on_campuses)

<sup>32</sup> Bucknell Institute for Public Policy (Sept. 2017), *Perceptions of Higher Education Survey – Topline Results*. <http://bipp.blogs.bucknell.edu/files/2017/09/BIPP-Higher-Ed-Toplines.pdf>

- Students accused of sexual assault on college campuses should have the right to cross-examine their accusers: 61%
- Students accused of sexual assault on college campuses should be punished only if there is clear and convincing evidence that they are guilty of a crime: 71%
- Students accused of sexual assault on college campuses should have the right to know the charges against them before being called to defend themselves: 81%
- Allegations of sexual assault on campus should be primarily handled by the state or local police: 69%

In conclusion, due process and fairness are not partisan issues. They are quintessentially American values.

### **3. Lawmakers, Newspapers, Organizations, and Individual Commentators – Both Liberal and Conservative -- Support Campus Fairness**

Consistent with the opinion polls cited above, lawmakers, newspaper editorial boards, organizations, and individual commentators -- representing both liberal and conservative perspectives -- have expressed strong support in recent months for campus due process. For example, one analysis of reader comments to an article published in the liberal-leaning *New York Times* revealed the vast majority of readers were supportive of campus fairness.<sup>33</sup>

*Lawmakers:*

1. Michael Bloomberg: Bring Better Justice to U.S. Universities<sup>34</sup>
2. Sen. Richard Burr and Rep. Virginia Foxx: Letter to Department of Education Miguel Cardona<sup>35</sup>
3. Virginia Lt. Gov. Justin Fairfax: Statement of April 7<sup>36</sup>

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<sup>33</sup> SAVE (Mar. 16, 2021). *Vast Majority of NY Times Readers Support Campus Due Process*. <https://www.saveservices.org/2021/03/most-ny-times-readers-support-campus-due-process/>

<sup>34</sup> Bloomberg, Michael R. (Mar. 25, 2021), *Bring Better Justice to U.S. Universities: How President Biden can reform Title IX*. <https://www.bloomberg.com/opinion/articles/2021-03-25/title-ix-biden-should-bring-better-justice-to-u-s-universities>

<sup>35</sup> Sen. Richard Burr & Rep. Virginia Foxx (Mar. 23, 2021). *Letter to Department of Education Miguel Cardona* [https://republicans-edlabor.house.gov/uploadedfiles/burr\\_and\\_foxx\\_to\\_cardona\\_title\\_ix\\_3.23.21.pdf](https://republicans-edlabor.house.gov/uploadedfiles/burr_and_foxx_to_cardona_title_ix_3.23.21.pdf)

<sup>36</sup> Lt. Gov. Justin Fairfax on Getting No Due Process from McAuliffe, Other Dems (Apr. 7, 2021). <https://www.youtube.com/watch?v=yVAsQwTyWws>



### Newspaper Editorial Boards:

1. *Detroit News*: Keep Title IX sex assault rules constitutional<sup>37</sup>
2. *Los Angeles Times*: Betsy DeVos's campus sex-assault rules need a tweak, not an overhaul<sup>38</sup>
3. *New York Daily News*: Fairness for accusers & accused: Biden shouldn't mess with Title IX improvements on sexual misconduct<sup>39</sup>
4. *Washington Post*: Biden has a chance to restore balance to the rules on campus sexual assault<sup>40</sup>
5. *Wall Street Journal*: Here Comes the Due Process Rollback<sup>41</sup>

### Organizations:

1. Eugene/Springfield, Oregon Chapter of the NAACP<sup>42</sup>
2. SAVE: 115 Lawmakers Call for Return to Failed Campus Policy<sup>43</sup>
3. National Association of Scholars: Rolling Back Title IX Due Process Protections is Wrong<sup>44</sup>
4. Independent Women's Forum: IWF and Independent Women's Law Center Urge Biden Administration to Maintain Due Process Protections<sup>45</sup>
5. FIRE: More than 100 members of Congress to new Education Secretary: Abandon Title IX rules.<sup>46</sup>

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<sup>37</sup> The Detroit News (May 10, 2021), *Opinion: Keep Title IX sex assault rules constitutional*. <https://www.yourdailyjournal.com/opinion/100732/opinion-keep-title-ix-sex-assault-rules-constitutional>

<sup>38</sup> The (Los Angeles) Times Editorial Board (Mar. 22, 2021), *Editorial: Betsy DeVos's campus sex-assault rules need a tweak, not an overhaul*. <https://news.yahoo.com/editorial-betsy-devoss-campus-sex-100019802.html>

<sup>39</sup> Daily News Editorial Board (Mar. 10, 2021), *Fairness for accusers & accused: Biden shouldn't mess with Title IX improvements on sexual misconduct*. <https://www.nydailynews.com/opinion/ny-edit-biden-title-ix-changes-20210310-hn6wmbuwgfflnld72aj24qclse-story.html>

<sup>40</sup> The Washington Post Editorial Board (Mar. 28, 2021), *Opinion: Biden has a chance to restore balance to the rules on campus sexual assault*. [https://www.washingtonpost.com/opinions/biden-has-a-chance-to-restore-balance-to-the-rules-on-campus-sexual-assault/2021/03/28/cc4416fc-8767-11eb-8a8b-5cf82c3dffe4\\_story.html](https://www.washingtonpost.com/opinions/biden-has-a-chance-to-restore-balance-to-the-rules-on-campus-sexual-assault/2021/03/28/cc4416fc-8767-11eb-8a8b-5cf82c3dffe4_story.html)

<sup>41</sup> WSJ Editorial Board (Mar. 4, 2021), *Here Comes the Due Process Rollback, House Democrats want Biden to repeal campus protections in sexual misconduct cases*. <https://www.wsj.com/articles/here-comes-the-due-process-rollback-11614902297>

<sup>42</sup> SAVE (May 11, 2021), *Eugene/Springfield, Oregon NAACP Endorses New Title IX Regulation*. <https://www.saveservices.org/2021/05/eugene-springfield-oregon-naacp-endorses-new-title-ix-regulation/>

<sup>43</sup> SAVE (Mar. 8, 2021), *115 Lawmakers Call for Return to Failed Campus Policy*. <https://www.saveservices.org/2021/03/115-lawmakers-call-for-return-to-failed-campus-policy/>

<sup>44</sup> National Association of Scholars (Mar. 8, 2021), *Rolling Back Title IX Due Process Protection is Wrong*. [https://www.nas.org/blogs/press\\_release/a-return-to-railroading-students-wont-fix-title-ix](https://www.nas.org/blogs/press_release/a-return-to-railroading-students-wont-fix-title-ix)

<sup>45</sup> Independent Women's Forum (Mar. 9, 2021), *Independent Women's Forum And Independent Women's Law Center Urge Biden Administration To Maintain Due Process Protections On Campus*. <https://www.iwf.org/2021/03/09/independent-womens-forum-and-independent-womens-law-center-urge-biden-administration-to-maintain-due-process-protections-on-campus/>

<sup>46</sup> Coward, Tyler (Mar. 5, 2021), *More than 100 members of Congress to new Education Secretary: Abandon Title IX rules*. [https://www.thefire.org/more-than-100-members-of-congress-to-new-education-secretary-abandon-title-ix-rules/?fbclid=IwAR163GDxUogXnG9WXnpca1zPm3Z4TeqK3lvNAVm\\_CkgYGTvhwUCltdcfs](https://www.thefire.org/more-than-100-members-of-congress-to-new-education-secretary-abandon-title-ix-rules/?fbclid=IwAR163GDxUogXnG9WXnpca1zPm3Z4TeqK3lvNAVm_CkgYGTvhwUCltdcfs)

*Individual Commentators:*

1. Lindsay McKasson: I'm Afraid to Send My Son to School: How Title IX is Hurting the Next Generation of Men<sup>47</sup>
2. Philip A. Byler: *Doe v. Purdue*: Lodestar Decision on Due Process and Sex Discrimination<sup>48</sup>
3. KC Johnson: Will Biden Bring Back the Campus Star Chambers?<sup>49</sup>
4. Tristan Justice: Biden Aims to Rehire Obama Title IX Enforcer Opposed To Due Process<sup>50</sup>
5. Robert Shibley: Brace for a Title IX train wreck: Biden is courting disaster as he reverts to bad old rules on campus sexual misconduct allegations<sup>51</sup>
6. Richard Reeves: Don't Roll Back Due Process on Campus<sup>52</sup>
7. Andrew Miltenberg and Kristen Mohr: Princeton University's sexual misconduct policies must not confuse justice with vengeance<sup>53</sup>
8. Christopher Ferguson: Campus sexual-assault investigations must be fair to accuser and accused<sup>54</sup>

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<sup>47</sup> McKasson, Lindsay R. (May 27, 2021), *I'm Afraid to Send My Son to School: How Title IX is Hurting The Next Generation of Men*. <https://www.saveservices.org/2021/05/im-afraid-to-send-my-son-to-school-how-title-ix-is-hurting-the-next-generation-of-men/>

<sup>48</sup> Byler, Philip A. (May 21, 2021), *Doe v. Purdue: Lodestar Decision on Due Process and Sex Discrimination*. <https://www.saveservices.org/2021/05/doe-v-purdue-lodestar-decision-on-due-process-and-sex-discrimination/>

<sup>49</sup> Johnson, KC (June 2021), *Will Biden Bring Back the Campus Star Chambers?* <https://www.commentarymagazine.com/articles/kc-johnson/will-biden-resurrect-obama-era-title-ix-procedures/>

<sup>50</sup> Justice, Tristan (May 20, 2021), *Biden Aims to Rehire Obama Title IX Enforcer Opposed To Due Process*. <https://thefederalist.com/2021/05/20/biden-aims-to-rehire-obama-title-ix-enforcer-opposed-to-due-process/>

<sup>51</sup> Shibley, Robert (May 18, 2021), *Brace for a Title IX train wreck: Biden is courting disaster as he reverts to bad old rules on campus sexual misconduct allegations*. <https://www.nydailynews.com/opinion/ny-oped-brace-for-a-title-ix-train-wreck-20210518-crq56qwnq5cyvf26x2kbgupnd4-story.html>

<sup>52</sup> Reeves, Richard V. (May 19, 2021), *Don't Roll Back Due Process on Campus*. [https://www.persuasion.community/p/dont-roll-back-due-process-on-campus?token=eyJ1c2VyX2lkIjoxMTk5MTkxOCwicG9zdF9pZCI6MzY1NjEyMTIsIl8iOiJpMEVGSiIsImhhdCI6MTYyMTQyMTc1MywiZXhwIjoxNjIxNDI1MzUzLCJpc3MiOiJwdWltNjE1NzkiLCJzdWIiOiJwb3N0LXJlYWN0aW9uIn0.vXm7zg4uAD0J\\_fGxY1J4kHoOLmDf7EsPrAgVI9Vc5PQ](https://www.persuasion.community/p/dont-roll-back-due-process-on-campus?token=eyJ1c2VyX2lkIjoxMTk5MTkxOCwicG9zdF9pZCI6MzY1NjEyMTIsIl8iOiJpMEVGSiIsImhhdCI6MTYyMTQyMTc1MywiZXhwIjoxNjIxNDI1MzUzLCJpc3MiOiJwdWltNjE1NzkiLCJzdWIiOiJwb3N0LXJlYWN0aW9uIn0.vXm7zg4uAD0J_fGxY1J4kHoOLmDf7EsPrAgVI9Vc5PQ)

<sup>53</sup> Miltenberg, Andrew & Mohr, Kristen (May 14, 2021), *Princeton University's sexual misconduct policies must not confuse justice with vengeance*. <https://www.nj.com/opinion/2021/05/princeton-universitys-sexual-misconduct-policies-must-not-confuse-justice-with-vengeance-opinion.html>

<sup>54</sup> Ferguson, Christopher J. (May 15, 2021), *Campus sexual-assault investigations must be fair to accuser and accused*. <https://www.orlandosentinel.com/opinion/guest-commentary/os-op-college-sexual-assaults-victims-rights-20210515-z4ui2paifvailboqdkxw2yorme-story.html>

9. Larry Mertes: Live Hearing with Cross-Examination at UC-Boulder Reveals Major Improvements Under New Title IX Regulation<sup>55</sup>
10. Lee Burdette Williams: About FACE: A Former Dean of Students Rethinks Sexual Assault Response<sup>56</sup>
11. Joseph Roberts: If Black Lives Matter, Due Process Must Matter<sup>57</sup>
12. David Golub: How Will Title IX Policies Affect Autistic Students?<sup>58</sup>
13. Raul Jauregui: Removing or Weakening the Presumption of Innocence in Title IX Proceedings Would Institutionalize 'Cancel Culture'<sup>59</sup>
14. Wendy McElroy: Due Process on Campus Keeps Justice on the Streets<sup>60</sup>
15. Andrew Miltenberg and Kristen Mohr: Princeton must consider due process in sexual misconduct policies<sup>61</sup>
16. Natanya DeWeese: Guilty Until Proven Innocent: The Devastating Impact of the Pre-2020 Title IX Regulations on College Students Accused of Title IX Violations.<sup>62</sup>
17. Doe v. Purchase College: OCR Review of Title IX Regulation Needs to Stop 'Victim-Centered' Abuses<sup>63</sup>
18. Edward Bartlett and Linda Chavez: The Future of Title IX Implementation<sup>64</sup> (podcast)

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<sup>55</sup> Mertes, Larry (May 14, 2021), *Live Hearing with Cross-Examination at UC-Boulder Reveals Major Improvements Under New Title IX Regulation*. <https://www.saveservices.org/2021/05/live-hearing-with-cross-examination-at-uc-boulder-reveals-major-improvements-under-new-title-ix-regulation/>

<sup>56</sup> Williams, Lee Burdette (May 13, 2021), *About FACE: A Former Dean of Students Rethinks Sexual Assault Response*. <https://leeburdettewilliams.medium.com/about-face-a-former-dean-of-students-rethinks-sexual-assault-response-ee08542ddd2e>

<sup>57</sup> Roberts, Joseph (May 12, 2021), *If black lives matter, due process must matter*. <https://www.washingtonexaminer.com/opinion/op-eds/if-black-lives-matter-due-process-must-matter>

<sup>58</sup> Golub, David (May 9, 2021), *How Will Title IX Policies Affect Autistic Students?* <https://www.saveservices.org/2021/05/how-will-title-ix-policies-affect-autistic-students/>

<sup>59</sup> Jauregui, Raul (May 5, 2021), *Removing or Weakening the Presumption of Innocence in Title IX Proceedings Would Institutionalize 'Cancel Culture.'* <https://www.saveservices.org/2021/05/removing-or-weakening-the-presumption-of-innocence-in-title-ix-proceedings-would-institutionalize-cancel-culture/>

<sup>60</sup> McElroy, Wendy (May 7, 2021), *Due Process on Campus Keeps Justice on the Streets*. <https://mises.org/wire/due-process-campus-keeps-justice-streets>

<sup>61</sup> Miltenberg, Andrew & Mohr, Kristen (May 2, 2021), *Title IX attorneys: Princeton must consider due process in sexual misconduct policies*. <https://www.dailyprincetonian.com/article/2021/05/princeton-university-due-process-sexual-misconduct-op-ed>

<sup>62</sup> DeWeese, Natanya (May 2021), *Guilty Until Proven Innocent: The Devastating Impact of the Pre-2020 Title IX Regulations on College Students Accused of Title IX Violations*. <https://www.saveservices.org/2021/04/guilty-until-proven-innocent-the-devastating-impact-of-the-pre-2020-title-ix-regulations-on-college-students-accused-of-title-ix-violations/>

<sup>63</sup> SAVE (Apr. 21, 2021), *Doe V. Purchase College: OCR Review of Title IX Regulation Needs to Stop 'Victim-Centered' Abuses*. <https://www.saveservices.org/2021/04/doe-v-purchase-college-ocr-review-of-title-ix-regulation-needs-to-stop-victim-centered-abuses/>

<sup>64</sup> Regulatory Transparency Project (May 1, 2021). *The Future of Title IX Implementation* [https://www.spreaker.com/episode/44578968?utm\\_medium=widget&utm\\_term=episode\\_title&utm\\_source=user%3A10041072](https://www.spreaker.com/episode/44578968?utm_medium=widget&utm_term=episode_title&utm_source=user%3A10041072)

19. Buddy Ullman: Biden’s Enigmatic Executive Order on Sex Discrimination<sup>65</sup>
20. Jennifer Braceras: Attempts to Roll Back Due Process On Campus Hurt Students<sup>66</sup> (radio interview)
21. James Baresel: Biden, Title IX, and the Dangers Behind “Vague Positives”<sup>67</sup>
22. KC Johnson: On Title IX, Dems Move to Restore Obama-Era Unfairness<sup>68</sup>
23. Andrew Sullivan: Emily Yoffe On Due Process and Campus Rape<sup>69</sup>
24. Just the News: Biden’s plans for campus sexual misconduct regulations leave lawyers puzzled<sup>70</sup>
25. Justin Dillon and Candice Jackson: Why Does Joe Biden Hate Due Process?<sup>71</sup>
26. Paul Falanga: Title IX: A Professor’s Premonition Becomes a Disastrous Reality<sup>72</sup>
27. Jacob Sullum: Biden Threatens to Revive Kangaroo Courts in College Sexual Assault Cases<sup>73</sup>
28. Cynthia Ward: New Title IX regulations restored fair process — why try to overturn them?<sup>74</sup>
29. James Baresel: Biden Title IX Revisions Would Destroy Due Process, Create Legal Quagmires, and Not Solve Real Problems<sup>75</sup>

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<sup>65</sup> Ullman, Buddy (Apr. 29, 2021), *Biden’s Enigmatic Executive Order on Sex Discrimination*. <https://www.saveservices.org/2021/04/bidens-enigmatic-executive-order-on-sex-discrimination/>

<sup>66</sup> Braceras, Jennifer C. (Apr. 23, 2021), *Attempts To Roll Back Due Process On Campus Hurts Students*. <https://www.iwf.org/2021/04/23/attempts-to-roll-back-due-process-on-campus-hurt-students/>

<sup>67</sup> Baresel, James (Mar. 30, 2021), *Biden, Title IX and the Threat to Justice Behind “Vague Positives.”* <https://intellectualconservative.com/articles/biden-title-ix-and-the-dangers-behind-vague-positives>

<sup>68</sup> Johnson, KC (Apr. 9, 2021), *On Title IX, Dems Move to Restore Obama-Era Unfairness*. [https://www.realclearpolitics.com/articles/2021/04/09/on\\_title\\_ix\\_dems\\_move\\_to\\_restore\\_obama-era\\_unfairness\\_145553.html?fbclid=IwAR2Yq57E5AULULnI7E12acDJTnRYUqdiddHTrGBx0eC1b1EJtieYZDvZMUw](https://www.realclearpolitics.com/articles/2021/04/09/on_title_ix_dems_move_to_restore_obama-era_unfairness_145553.html?fbclid=IwAR2Yq57E5AULULnI7E12acDJTnRYUqdiddHTrGBx0eC1b1EJtieYZDvZMUw)

<sup>69</sup> Sullivan, Andrew (Apr. 2, 2021), *Emily Yoffe on Due Process and Campus Rape*. <https://andrewsullivan.substack.com/p/emily-yoffe-on-due-process-and-campus?fbclid=IwAR2SeEMiIDj21D3KQAKMkIdSs62mFSExaTL6wMP6HASheyInCFhaR27bt90>

<sup>70</sup> Piper, Greg (Mar. 30, 2021), *Biden’s plans for campus sexual misconduct regulations leave lawyers puzzled*. <https://justthenews.com/politics-policy/education/bidens-proposed-policy-campus-sexual-misconduct-leaves-lawyers-puzzled>

<sup>71</sup> Dillon, Justin & Jackson, Candice (Mar. 25, 2021), *Why Does Joe Biden Hate Due Process?* <https://www.nationalreview.com/2021/03/why-does-joe-biden-hate-due-process/>

<sup>72</sup> Falanga, Paul (Mar. 26, 2021), *Title IX: A Professor’s Premonition Becomes a Disastrous Reality*. <https://www.saveservices.org/2021/03/title-ix-a-professors-premonition-becomes-a-disastrous-reality/>

<sup>73</sup> Sullum, Jacob (Mar. 24, 2021), *Biden Threatens to Revive Kangaroo Courts in College Sexual Assault Cases: The President Has Ordered the Education Department to Consider Rescinding Due Process Reforms*. <https://www.creators.com/read/jacob-sullum/03/21/biden-threatens-to-revive-kangaroo-courts-in-college-sexual-assault-cases-the-president-has-ordered-the-education-department-to-consider-rescinding-due-process-reforms>

<sup>74</sup> Ward, Cynthia V. (Mar. 16, 2021), *New Title IX regulations restored fair process – why try to overturn them?* <https://thehill.com/opinion/education/542996-new-title-ix-regulations-restored-fair-process-why-try-to-overturn-them>

<sup>75</sup> Baresel, James (Mar. 16, 2021), *Biden Title IX Revisions Would Destroy Due Process, Create Legal Quagmires, and Not Solve Real Problems*. <https://www.saveservices.org/2021/03/biden-title-ix-revisions-would-destroy-due-process-create-legal-quagmires-and-not-solve-real-problems/>

30. Alison Somin: Biden executive order will lead to due process deficits on campus<sup>76</sup>
31. Ashe Schow: Everyone Loses When Due Process Is Rolled Back<sup>77</sup> (TV interview)
32. Teresa Manning: Biden Title IX bid to ‘believe all women’ will meet its match on campuses<sup>78</sup>
33. David Harsanyi: Biden Prepares to Strip College Students of Due-Process Rights<sup>79</sup>
34. Campus Reform: Biden signs executive order in move toward revoking rule aimed at preserving due process<sup>80</sup>
35. Washington Examiner: A conversation with Brooklyn College professor KC Johnson<sup>81</sup>

The above-listed editorials and statements were published after March 1, 2021. Previously, thousands of other editorials were published calling for campus fairness, which are listed in a separate SAVE Written Comment to the Office for Civil Rights.<sup>82</sup>

#### **4. Impartial Investigations Are the Foundation of Equitable Proceedings for Complainants and Respondents**

An impartial and fair investigation is the foundation of an equitable adjudication. In a recent guidance, the Office for Civil Rights reaffirmed, “The school must conduct an adequate, reliable, and impartial investigation that provides the parties with an equal opportunity to present witnesses and other evidence.”<sup>83</sup>

Because the investigative process is subject to less oversight than the adjudication, investigative bias can be difficult to discern. Unfortunately, biased investigative philosophies known as

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<sup>76</sup> Somin, Alison (Mar. 15, 2021), *Biden executive order will lead to due process deficits on campus*. <https://thehill.com/opinion/education/543062-biden-executive-order-will-lead-to-due-process-deficits-on-campus>

<sup>77</sup> The Daily Wire (Mar. 11, 2021), *Schow On Fox: Everyone Loses When Due Process Is Rolled Back*. <https://www.dailywire.com/news/schow-on-fox-everyone-loses-when-due-process-is-rolled-back?fbclid=IwAR2HOvUDzb5BAyPJs0R9uKy3p8CWmSZsBBqt436bxB-bcRcoVYKJkzfFoo>

<sup>78</sup> Manning, Teresa R. (Mar. 13, 2021), *Biden Title IX bid to ‘believe all women’ will meet its match on campuses*. <https://nypost.com/2021/03/13/biden-bid-to-believe-all-women-will-meet-its-match-on-campuses/>

<sup>79</sup> Harsanyi, David (Mar. 9, 2021), *Biden Prepares to Strip College Students of Due-Process Rights*. [https://news.yahoo.com/biden-prepares-strip-college-students-170137921.html?soc\\_src=social-sh&soc\\_trk=tw&src=twtr](https://news.yahoo.com/biden-prepares-strip-college-students-170137921.html?soc_src=social-sh&soc_trk=tw&src=twtr)

<sup>80</sup> Morabito, Angela (Mar. 9, 2021), *Biden signs executive order in move toward revoking rule aimed at preserving due process*. [https://www.campusreform.org/article?id=16995&fbclid=IwAR1BEHMncCR2sqRVKF4pgOKw6hOumcv6yAxNSZy\\_asFtaeMLavsGSX-Tjq0](https://www.campusreform.org/article?id=16995&fbclid=IwAR1BEHMncCR2sqRVKF4pgOKw6hOumcv6yAxNSZy_asFtaeMLavsGSX-Tjq0)

<sup>81</sup> Washington Examiner (Mar. 11, 2021): *A conversation with Brooklyn College professor KC Johnson* [https://www.washingtonexaminer.com/videos/breaking-down-bidens-title-ix-changes-a-conversation-with-brooklyn-college-professor-kc-johnson?fbclid=IwAR0yWd3HJvSYZX\\_Rbk6nQenyfp1tIDDQIERNzwdHSnvNd0InVjOKUuUxJlc](https://www.washingtonexaminer.com/videos/breaking-down-bidens-title-ix-changes-a-conversation-with-brooklyn-college-professor-kc-johnson?fbclid=IwAR0yWd3HJvSYZX_Rbk6nQenyfp1tIDDQIERNzwdHSnvNd0InVjOKUuUxJlc)

<sup>82</sup> SAVE (June 9, 2021), *Key Documents Detailing the Elements of Campus Due Process*. <https://www.saveservices.org/wp-content/uploads/2021/06/3.-Key-Documents-Attachment-6.9.2021.pdf>

<sup>83</sup> Office for Civil Rights Question (May 13, 2021). *Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment*. Question 26. <https://www2.ed.gov/about/offices/list/ocr/docs/ga-reopening-202105.pdf>

“victim-centered,”<sup>84</sup> “trauma-informed,”<sup>85</sup> or “Start By Believing”<sup>86</sup> are believed to be commonly utilized in campus investigations. These conviction-oriented philosophies presume the guilt of the respondent and engender confirmation bias.<sup>87</sup>

Trauma-informed concepts, in particular, have been derided as circular and unscientific:

- Title IX: The Big Mess on Campus<sup>88</sup>
- Title IX and “Trauma-Focused” Investigations: The Good, the Bad, and the Ugly<sup>89</sup>
- Best-Practice Interviewing Spans Many Contexts<sup>90</sup>
- Title IX Investigations: The Importance of Training Investigators in Evidence-Based Approaches to Interviewing<sup>91</sup>

Flawed campus investigations have shortchanged both complainants and the accused. At Baylor University in Texas, for example, complainants reported alleged assaults to the athletic coaches of the accused harassers, but those claims were ignored and not investigated.<sup>92</sup>

For these reasons, the 2020 Title IX regulation contains essential language about the need for truthful investigations:<sup>93</sup>

A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any persons who facilitate an informal resolution process, receive training on..... **how to serve impartially**, including **avoiding prejudgment of the facts at issue**, conflicts of interest, and bias... recipient also must ensure that investigators receive training on issues of relevance to create an **investigative report that fairly summarizes relevant evidence**. Any materials used to train

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<sup>84</sup> SAVE (2016), *Victim-Centered Investigations: New Liability Risk for Colleges and Universities*.

<https://www.saveservices.org/wp-content/uploads/Victim-Centered-Investigations-and-Liability-Risk.pdf>

<sup>85</sup> Center for Prosecutor Integrity, *Trauma-Informed: Junk Science*. <http://www.prosecutorintegrity.org/sa/trauma-informed/>

<sup>86</sup> Center for Prosecutor Integrity, *Start by Believing: Ideology of Bias*. <http://www.prosecutorintegrity.org/sa/start-by-believing/>

<sup>87</sup> Simply Psychology (2020). *Confirmation Bias*. <https://www.simplypsychology.org/confirmation-bias.html>

<sup>88</sup> Garry, Maryanne. *Title IX: The Big Mess on Campus*. *Journal of Applied Research in Memory and Cognition* (8, 2019): 411-412. <https://www.saveservices.org/wp-content/uploads/TitleIX-TheBigMessonCampus.pdf>

<sup>89</sup> Davis, Deborah & Loftus, Elizabeth. *Title IX and “Trauma-Focused” Investigations: The Good, The Bad, and the Ugly*. *Journal of Applied Research in Memory and Cognition* (8, 2019): 403-410. <https://www.saveservices.org/wp-content/uploads/TitleIXand%E2%80%9CTrauma-Focused%E2%80%9DInvestigations-TheGoodTheBadandtheUgly.pdf>

<sup>90</sup> Brubacher, Sonja P. & Powell, Martine B. *Best-Practice Interviewing Spans Many Contexts*. *Journal of Applied Research in Memory and Cognition* (8, 2019): 398-402. <https://www.saveservices.org/wp-content/uploads/Best-PracticeInterviewingSpansManyContexts.pdf>

<sup>91</sup> Meissner, Christian A. & Lyles, Adrienne M. *Title IX Investigations: The Importance of Training Investigators in Evidence-Based Approaches to Interviewing*. *Journal of Applied Research in Memory and Cognition* (8, 2019): 389-397. <https://www.saveservices.org/wp-content/uploads/TitleIXInvestigations-TheImportanceofTrainingInvestigatorsinEvidence-BasedApproachestoInterviewing.pdf>

<sup>92</sup> Lavigne, Paula (July 13, 2018), *Baylor University settles Title IX lawsuit in which gang rape by up to 8 football players was alleged*. [http://www.espn.com/college-football/story/\\_/id/24090683/baylor-university-settles-title-ix-lawsuit-which-gang-rape-8-football-players-was-alleged](http://www.espn.com/college-football/story/_/id/24090683/baylor-university-settles-title-ix-lawsuit-which-gang-rape-8-football-players-was-alleged)

<sup>93</sup> Section 106.45 (b)(1).

Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and **must promote impartial investigations** and adjudications of formal complaints of sexual harassment. [emphasis added]

In 2019, SAVE established an online petition devoted to the need for impartial campus investigations.<sup>94</sup> To date, 5,131 persons have signed the petition.<sup>95</sup> This petition is highlighted in a separate Written Comment submitted by SAVE.

SAVE urges the Office for Civil Rights to retain the existing language at Section 106.45 (b)(1), and to issue additional policy directives designed to rein in guilt-presuming “victim-centered” investigations.

## **5. School Policies Established Under the 2011 DCL Often Were Unfair to Accused Students**

Persons who are accused of sexual misconduct have a right to campus investigations and adjudications that are equitable and fair. The 2011 Dear Colleague Letter used the words “due process” only twice in the body of the document:<sup>96</sup>

“Public and state-supported schools must provide due process to the alleged perpetrator. However, 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.”

Unfortunately, the document did not specify which due process rights schools needed to follow. In addition, the document incorrectly stated that due process is applicable only to the extent that it does not “restrict or unnecessarily delay the Title IX protections for the complainant.”

A survey of 13 Title IX coordinators from large universities revealed that Title IX coordinators often conflated their advocacy and administrative roles. The study concluded:<sup>97</sup>

“In the very best light, during this time university compliance with Title IX was highly inconsistent and largely ineffective...The results are Title IX processes that are less than consistent, reliable, and impartial.” [The Title IX coordinators] “did not consistently comply with requirements requiring mandatory reporting, did not consistently provide

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<sup>94</sup> SAVE, *'One of the worst days of my life:' Stop sham 'Start By Believing' investigations*.

<https://www.change.org/p/congress-stop-sham-believe-the-victim-investigations> . Accessed June 3, 2021.

<sup>95</sup> <https://www.saveservices.org/wp-content/uploads/2021/06/2.-Petition-signatures-Attachment-B-6.6.2021.pdf>

<sup>96</sup> U.S. Department of Education (Apr. 4, 2011), *Dear Colleague Letter*. <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>

<sup>97</sup> Brian Pappas (2016). *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Assault*. <https://core.ac.uk/download/pdf/232687125.pdf>

notice to respondents, and often departed from the investigation, documentation, and reporting requirements” of the Department of Education.

These due process violations inspired four statements of concern by law school professors:

1. Harvard Law School<sup>98</sup>
2. University of Pennsylvania<sup>99</sup>
3. Cornell Law School<sup>100</sup>
4. Professors from other law schools<sup>101</sup>

Six national organizations issued similar statements:

1. American Bar Association Task Force for Promoting Fairness in Campus Sexual Misconduct Cases<sup>102</sup>
2. American College of Trial Lawyers: Position Statement Regarding Campus Sexual Assault Investigations<sup>103</sup>
3. SAVE: Six-Year Experiment in Campus Jurisprudence Fails to Make the Grade<sup>104</sup>
4. Heritage Foundation: Campus Sexual Assault: Understanding the Problem and How to Fix It<sup>105</sup>
5. National Association of Scholars: OCR’s New Sexual Harassment Guidelines Threaten Academic Freedom, Due Process<sup>106</sup>
6. Federalist Society’s Regulatory Transparency Project<sup>107</sup>

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<sup>98</sup> *Rethink Harvard’s sexual harassment policy*. (Oct. 14, 2014). The Boston Globe. <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZn7nU2UwuUuWMnqbM/story.html>

<sup>99</sup> Open letter from members of the Penn Law School Faculty. *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*. (Feb. 18, 2015). <http://media.philly.com/documents/OpenLetter.pdf>

<sup>100</sup> *John Doe v. Cornell* - Motion of 23 Cornell Law Professors to File Amicus Brief in Support of Student. (2018). <https://www.scribd.com/document/375274931/John-Doe-v-Cornell-Motion-of-23-Cornell-Law-Professors-to-File-Amicus-Brief-in-Support-of-Student>

<sup>101</sup> *Law Professors’ Open Letter Regarding Campus Free Speech and Sexual Assault*. SAVE. <http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf>

<sup>102</sup> Cassens Weiss, Debra (June 27, 2017). *ABA task force recommends due process protections in campus sexual assault investigations*. ABA. [http://www.abajournal.com/news/article/aba\\_task\\_force\\_recommends\\_due\\_process\\_protections\\_in\\_campus\\_sexual\\_assault](http://www.abajournal.com/news/article/aba_task_force_recommends_due_process_protections_in_campus_sexual_assault)

<sup>103</sup> [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](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)

<sup>104</sup> <http://www.saveservices.org/wp-content/uploads/Six-Year-Experiment-Fails-to-Make-the-Grade.pdf>

<sup>105</sup> von Spakovsky, Hans (July 25, 2017). *Campus Sexual Assault: Understanding the Problem and How to Fix It*. The Heritage Foundation, Legal Memorandum. [http://www.heritage.org/sites/default/files/2017-07/LM-211\\_0.pdf](http://www.heritage.org/sites/default/files/2017-07/LM-211_0.pdf)

<sup>106</sup> Ricketts, Glenn (Sept. 28, 2011). *OCR’s New Sexual Harassment Guidelines Threaten Academic Freedom, Due Process*. [http://www.nas.org/articles/OCRs\\_New\\_Sexual\\_Harassment\\_Guidelines\\_Threaten\\_Academic\\_Freedom\\_Due\\_Process](http://www.nas.org/articles/OCRs_New_Sexual_Harassment_Guidelines_Threaten_Academic_Freedom_Due_Process)

<sup>107</sup> <https://regproject.org/wp-content/uploads/RTP-Race-Sex-Working-Group-Paper-Campus-Misconduct-Proceedings.pdf>



## 6. Appellate Courts Have Issued 24 Decisions Upholding the Importance of Campus Due Process

To date, over 700 lawsuits have been filed by accused students against their colleges.<sup>108</sup> In a majority of cases, judges have ruled in favor of the accused student.<sup>109</sup> Twenty-four of these lawsuits resulted in federal and state appellate court decisions favorable to the accused student:

No.	Case Name, Decision Year	Due Process Violations
1	I.F. v. Administrators of the Tulane Educational Fund (2013) <sup>110</sup>	Insufficient hearing process; Insufficient notice
2	John Doe v. University of Southern California (2016) <sup>111</sup>	Insufficient hearing process; Insufficient notice; Inadequate credibility assessment
3	John Doe v. Columbia University (2016) <sup>112</sup>	Improper use or exclusion of witness testimony; Potential sex bias
4	Abdullatif Arishi v. Washington State University (2016) <sup>113</sup>	Insufficient hearing process
5	In the Matter of John Doe v. Skidmore College (2017) <sup>114</sup>	Insufficient notice; Inadequate investigation; Improper use or exclusion of witness testimony
6	John Doe v. University of Cincinnati (2017) <sup>115</sup>	Insufficient hearing process; Insufficient notice; Lack of cross-examination; Inadequate credibility assessment
7	Matthew Jacobson v. Butterfly Blaise (SUNY Plattsburgh) (2018) <sup>116</sup>	Insufficient hearing process; Misuse of affirmative consent policy

<sup>108</sup> Title IX for All. <https://titleixforall.com/> Accessed May 27, 2021.

<sup>109</sup> Samantha Harris & KC Johnson (2019), *Campus Courts in Court: The Rise in Judicial involvement in Campus Sexual Misconduct Adjudication*. New York University Journal of Legislation and Public Policy. <https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf>

<sup>110</sup> *I.F. v. Adm'rs of Tulane Educ. Fund*, 131 So.3d 491 (La. App. 4th Cir. 2013).

<sup>111</sup> *Doe v. Univ. of S. Cal.*, 246 Cal. App. 4th 221 (2016).

<sup>112</sup> *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016)

<sup>113</sup> *Arishi v. Wash. State Univ.*, 385 P.3d 251 (2016).

<sup>114</sup> *Matter of Doe v. Skidmore Coll.*, 152 A.D.3d 932 (3rd Dep't 2017).

<sup>115</sup> *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017).

<sup>116</sup> *Matter of Jacobson v. Blaise*, 164 A.D.3d. 1072 (3d Dep't 2018).

8	John Doe v. University of Miami (OH) (2018) <sup>117</sup>	Insufficient hearing process; Insufficient notice; Inadequate investigation; Conflicting roles of college officials; Potential sex bias; Misuse of affirmative consent policy
9	In the Matter of Ryan West v. SUNY at Buffalo (2018) <sup>118</sup>	Insufficient hearing process; Inadequate credibility assessment
10	John Doe v. Boston College, et. al. (2018) <sup>119</sup>	Insufficient hearing process; Conflicting roles of college officials
11	John Doe v. Claremont McKenna College (2018) <sup>120</sup>	Lack of cross examination; Inadequate credibility assessment
12	John Doe v. David H Baum, et al. (University of Michigan) (2018) <sup>121</sup>	Lack of cross examination; Inadequate credibility assessment; Potential sex bias
13	John Doe v. The Regents of the University of California, et al. (2018) <sup>122</sup>	Insufficient hearing process; Inadequate investigation; Lack of cross-examination
14	John Doe v. University of Southern California (2018) <sup>123</sup>	Insufficient hearing process; Inadequate investigation; Conflicting roles of college officials; Lack of cross-examination; Inadequate credibility assessment; Improper use or exclusion of witness testimony
15	John Doe v. Kegan Allee et al. (2019, USC) (2019) <sup>124</sup>	Lack of cross examination; Single investigator model
16	John Doe v. Ainsley Carry et al. (USC) (2019) <sup>125</sup>	Lack of cross examination; Single investigator model; Improper review of appeal
17	John Doe v. Westmont College, et al. (2019) <sup>126</sup>	Inadequate credibility assessment; Withholding evidence from accused; Inability to question witnesses

<sup>117</sup> *Doe v. Miami Univ.*, 822 F.3d 579 (6th Cir. 2018).

<sup>118</sup> *Matter of West v. State Univ. of N.Y. at Buffalo*, TP 17-00481 (4th Dep't 2018)

<sup>119</sup> *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67 (1st Cir. 2018).

<sup>120</sup> *Doe v. Claremont Mckenna Coll.*, 25 Cal. App. 5th 1055 (2018).

<sup>121</sup> *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

<sup>122</sup> *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44 (2018).

<sup>123</sup> *Doe v. Univ. of S. Cal.*, No. B271834, 2018 WL 6499696 (2018)

<sup>124</sup> *Doe v. Allee*, 242 Cal. Rptr. 3d 109 (Cal. App. 2d Dist. 2019)

<sup>125</sup> *Doe v. Carry*, B282164, 2019 WL 155998 (Cal. App. 2d Dist. Jan. 8, 2019)

<sup>126</sup> *Doe v. Westmont College*, 246 Cal. Rptr. 3d 369 (Cal. App. 2d Dist. 2019), *reh'g denied* (May 17, 2019)

18	Matter of Bursch v. Purchase Coll. of the State Univ. of N.Y. (2019) <sup>127</sup>	University refused to allow student’s attorney to attend disciplinary hearing
19	John Doe v. Purdue University et al. (2019) <sup>128</sup>	University withheld evidence from accused; Inaccurate investigative report; Hearing panel did not read investigative report
20	John Doe v. University of the Sciences (2020) <sup>129</sup>	Selective enforcement of sexual misconduct policy; Lack of live hearing with cross examination
21	John Doe v. Oberlin College (2020) <sup>130</sup>	“inexplicable” decision to discipline plaintiff; University’s failure to follow own policy or meet its own deadlines
22	David Schwake v. Arizona Board of Regents (2020) <sup>131</sup>	Initial refusal to allow appeal; Open hostility to accused; Appeals panel only credited female testimony
23	John Doe v. University of Arkansas – Fayetteville (2020) <sup>132</sup>	“Unexplained” finding of female student’s incapacitation; External pressure from OCR and state legislature; Student protests
24	John Doe, et al. v. Regents of the University of Minnesota (2021) <sup>133</sup>	Sex discrimination; pro-complainant bias

These appellate decisions were the focus of a recent SAVE Special Report.<sup>134</sup>

SAVE is submitting a separate Written Comment to the Office for Civil Rights that details the findings of these appellate court decisions, as well as dozens of trial court decisions.

## **7. Complainants Often Were Mistreated by School Policies Established Under the 2011 DCL**

Sexual assault complainants have a right to campus investigations and adjudications that are fair and equitable. Given these shortcomings, it’s no surprise that complainants eventually filed

<sup>127</sup> *Bursch v. Purchase College of State U. of New York*, 125 N.E.3d 830 (N.Y. 2019)

<sup>128</sup> *Doe v. Purdue U.*, 928 F.3d 652 (7th Cir. 2019) (Barrett, J.)

<sup>129</sup> *Doe v. U. of Scis.*, 961 F.3d 203 (3d Cir. 2020)

<sup>130</sup> *Doe v. Oberlin College*, 963 F.3d 580 (6th Cir. 2020)

<sup>131</sup> *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940 (9th Cir. 2020)

<sup>132</sup> *Doe v. U. of Arkansas - Fayetteville*, 974 F.3d 858 (8th Cir. 2020)

<sup>133</sup> *John Doe, et al. v. Regents of the University of Minnesota*, (8<sup>th</sup> Cir. 2021)

<sup>134</sup> SAVE (2021), *Appellate Court Decisions for Allegations of Campus Due Process Violations, 2013-2020*.

hundreds of grievances against their schools, both with the Office of Civil Rights and in the courts. The most common reasons for the grievances were:<sup>135</sup>

1. Schools acting with deliberate indifference
2. Lack of advisor assistance
3. Lack of timely response

#### *Deliberate Indifference*

In some cases, institutions have acted with “deliberate indifference” to complaints:

- University of Southern California<sup>136</sup>
- Michigan State University<sup>137</sup>
- Chicago Public School System<sup>138</sup>

#### *Lack of Advisor Assistance*

In the past, sexual assault complainants seldom received professional advice during the resolution of their complaints. They seldom brought an advisor to the hearing. They were often alone, in a separate location and appeared by conference call. They had no experience in developing appropriate questions to ask of the person they had accused of sexual misconduct.

#### *Lack of Timely Response*

Lack of timely response is yet another complaint identified by complainants.<sup>139</sup> For example, the University of Alaska system, after a three-year OCR investigation, was found in many cases to have “failed to provide prompt and equitable investigations in response to reports of sexual harassment, including sexual violence.”<sup>140</sup>

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<sup>135</sup> SAVE (2017), *Six-Year Experiment in Campus Jurisprudence*. <https://www.saveservices.org/wp-content/uploads/Six-Year-Experiment-Fails-to-Make-the-Grade.pdf>

<sup>136</sup> U.S. Department of Education. *Secretary DeVos Requires Sweeping Changes at USC*. <https://www.ed.gov/news/press-releases/secretary-devos-requires-sweeping-changes-usc-after-title-ix-investigation-finds-university-failed-years-protect-students-sexual-abuse>

<sup>137</sup> Jesse, David (Sept. 5, 2019), *MSU to pay record \$4.5M fine in Larry Nassar sexual assault scandal*. <https://www.freep.com/story/news/education/2019/09/05/msu-fine-larry-nassar-betsy-devos/2219781001/>

<sup>138</sup> Hansen, Claire (Nov. 29, 2018), *More Than 600 Cases of Sex Abuse Reported To Chicago Public Schools*. <https://www.usnews.com/news/education-news/articles/2018-11-29/more-than-600-cases-of-sex-abuse-reported-to-chicago-public-schools>

<sup>139</sup> Fox5 Washington, D.C. Staff (Nov. 2, 2016), *Two victims of sexual assault file federal complaint against UMD*. <https://www.fox5dc.com/news/two-victims-of-sexual-assault-file-federal-complaint-against-umd>

<sup>140</sup> Cameron Mackintosh (Feb. 23, 2017), *Federal review accuses UA system of Title IX violations*. <https://www.alaskanewssource.com/content/news/Title-IX-compliance-review-accuses-UA-system-of-violations-414680503.html>

In a recent California case, the Title IX coordinator fabricated evidence against the complainant:<sup>141</sup>

“To illustrate, we recently represented a student who was the unfortunate victim of sexual assault at her university. She retained us after she attended an interview alone with the university’s two Title IX co-investigators. During the private interview, which was not audio or video recorded (the interviews never are), one of the investigators made an insensitive comment to the student, which was reported to Human Resources....

Perhaps in retaliation, or because university Title IX personnel (even at private universities) are generally insulated from liability and their decisions are afforded deference by the courts, the investigator fabricated evidence [regarding the amount of alcohol she had consumed], seeking to undermine the complainant’s credibility.”

SAVE has compiled dozens of cases in which complainants were mistreated by campus disciplinary procedures.<sup>142</sup>

## **8. 2011 DCL Did Not Improve Reporting or Reduce the Incidence of Sexual Assault**

The 2011 Dear Colleague Letter was issued with the explicit aim of increasing the reporting of incidents and reducing the number of campus sexual assaults. Unfortunately, there is no evidence that either of these policy goals were achieved.

The American Association of Universities conducted surveys at the same colleges in 2015 and 2019, allowing direct comparisons of the effects of the DCL policies over time.<sup>143</sup> The AAU surveys documented *increases* in nonconsensual sexual victimization among undergraduate students:

- Men: 1.4% increase
- Women: 3.0% increase

Similarly, the American Association of University Women reported that 89% of American colleges received *zero* reports of rape incidents in 2016.<sup>144</sup>

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<sup>141</sup> Mark Hathaway & Jenna Parker (June 4, 2021), *In university Title IX proceedings, fairness is not the enemy*. OC Register. <https://www.ocregister.com/2021/06/04/in-university-title-ix-proceedings-fairness-is-not-the-enemy/>

<sup>142</sup> SAVE, Victims Deserve Fairness and Due Process. <https://www.saveservices.org/sexual-assault/victims-deserve-better/>

<sup>143</sup> Association of American Universities (Oct. 15, 2019), *AAU Releases 2019 Survey on Sexual Assault and Misconduct*. <https://www.aau.edu/newsroom/press-releases/aau-releases-2019-survey-sexual-assault-and-misconduct>

<sup>144</sup> American Association of University Women (May 10, 2017), *89 Percent of Colleges Reported Zero Incidents of Rape in 2015*. <http://www.saveservices.org/2020/04/89-percent-of-colleges-reported-zero-incidents-of-rape-in-2015-2/>

In addition, violations involving sexual abuse committed by university employees were reported to officials at three institutions. Apparently, the universities had become so focused on *student-on-student* abuse that they ignored the claims of *employee-on-student* abuse:

1. Michigan State University<sup>145</sup>
2. University of Southern California<sup>146</sup>
3. UCLA<sup>147</sup>

### *So What Went Wrong?*

First and foremost, many Title IX coordinators came to view themselves as advocates, not impartial administrators. As a consequence:

- They may manipulate the investigative process by downplaying the existence of exculpatory evidence.<sup>148</sup>
- Some coordinators utilize a tactic known as the “ambush,” in which an investigation is initiated and the respondent is confronted at a later date with a series of “confirmed” allegations.<sup>149</sup>
- In extreme cases, the Title IX coordinator colludes with the complainant to alter the testimony<sup>150</sup> fabricate evidence,<sup>151</sup> or engage in other Kafkaesque tactics that came to light during subsequent litigation.<sup>152</sup>

Second, the 2011 Dear Colleague Letter did not specify the adjudication procedures to be followed. A survey of 692 Title IX coordinators revealed a lack of consistency in institutional adjudication procedures:<sup>153</sup>

“If a Title IX complaint required adjudication, the majority (37%) of decisions are made by the Title IX coordinator, while 14% are made by hearing panels (made up of students,

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<sup>145</sup> Bauman, Dan (May 16, 2018), *Michigan State Just Agreed to Pay \$500 Million to Settle Sexual-Abuse Claims. Where Will It Find the Money?* <https://www.chronicle.com/article/michigan-state-just-agreed-to-pay-500-million-to-settle-sexual-abuse-claims-where-will-it-find-the-money/>

<sup>146</sup> Ellis, Lindsay (Oct. 19, 2018), *U. of Southern California Settles With Patients of Gynecologist Accused of Abuses for \$215 Million.* <https://www.chronicle.com/article/u-of-southern-california-settles-with-patients-of-gynecologist-accused-of-abuses-for-215-million/>

<sup>147</sup> Malone, Patrick & Associates P.C. (Nov. 30, 2020), *UC offers \$73-million settlement in class-action suit over abusive gynecologist.* <https://www.jdsupra.com/legalnews/uc-offers-73-million-settlement-in-34466/>

<sup>148</sup> SAVE, *Fallacies of Victim-Centered Methods.* <https://www.saveservices.org/sexual-assault/investigations/>

<sup>149</sup> Brian Pappas (2016). *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Assault.* <https://core.ac.uk/download/pdf/232687125.pdf>

<sup>150</sup> Alyssa Reid v. James Madison University (May 3, 2021). <https://nclalegal.org/wp-content/uploads/2021/05/Complaint-and-Jury-Demand.pdf>

<sup>151</sup> Robert Gavin (Nov. 30, 2020), *Former prosecutor in middle of UAlbany legal battle.* *Times-Union.* <https://www.timesunion.com/news/article/Law-Beat-Former-prosecutor-in-middle-of-UAlbany-15758673.php>

<sup>152</sup> SAVE (2021), *Analysis of Title IX Regulation According to Appellate and Trial Court Decisions.* [www.saveservices.org](https://www.saveservices.org)

<sup>153</sup> Jacquelyn D. Wiersma-Mosley & James DiLoreto (2018). *The Role of Title IX Coordinators on College and University Campuses.* *Behavioral Science.* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5946097/>

faculty, staff, and administrators), 7% by the investigator, 5% by the hearing officer, and 17% reported “other” (such as a deputy or various other entities on campus).”

A recent analysis of Title IX offices reaches this singular conclusion:

“Most Title IX offices are exclusively female, ardently feminist, and have no one on staff with courtroom experience, even though they are running a parallel quasi legal system on campus. Given the prevalence of feminist and gender ideology in Title IX offices, alongside their lack of relevant legal experience, it is no wonder that so many students accused of sexual misconduct are not getting due process in campus Title IX cases.”<sup>154</sup>

From the perspective of campus administrators, the policies engendered by the Dear Colleague Letter were viewed as difficult to implement, expensive, often unfair, and placing colleges at greater liability risk.<sup>155</sup>

As a result, the campus adjudication committees lost their semblance of credibility, coming to be referred to as “Kangaroo Courts.”<sup>156</sup> In the end, only 11% of sexual assaults were reported to campus police, because only 45% of victims believed that school officials were “very likely” or “extremely likely” to take their report seriously.<sup>157</sup>

## **9. Faculty Members Have Seen Their Free Speech and Due Process Rights Eroded**

Faculty members have been subjected to policies arising from the 2011 DCL that have restricted their free speech and due process rights, as discussed below.

### *Free Speech*

Over the years, the American Association of University Professors issued several statements about Title IX and the Office for Civil Rights’ interpretations of “sexual harassment.” Over time, the AAUP warnings became increasingly detailed:

- Department of Academic Freedom, Tenure, and Governance, 2011: “Since charges of sexual harassment against faculty members often lead to disciplinary sanctions, including dismissal, a preponderance of the evidence standard could result in a faculty

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<sup>154</sup> National Association of Scholars (Oct. 29, 2020), Report Finds Title IX Offices are Sex Monitors, not Education Monitors. [https://www.nas.org/blogs/press\\_release/report-finds-title-ix-offices-are-sex-monitors-not-education-monitors](https://www.nas.org/blogs/press_release/report-finds-title-ix-offices-are-sex-monitors-not-education-monitors)

<sup>155</sup> SAVE. *College Administrators Speak Out*. <https://www.saveservices.org/sexual-assault/college-administrators/>

<sup>156</sup> Shaun Ossei Owusu (Feb. 20, 2021), *Kangaroo Courts*. Harvard Law Review. <https://harvardlawreview.org/2021/02/kangaroo-courts/>

<sup>157</sup> Association of American Universities (Oct. 15, 2019), *AAU Releases 2019 Survey on Sexual Assault and Misconduct*. <https://www.aau.edu/newsroom/press-releases/aau-releases-2019-survey-sexual-assault-and-misconduct>

member's being dismissed for cause based on a lower standard of proof than what we consider necessary to protect academic freedom and tenure."<sup>158</sup>

- Committee on Women in the Academic Profession, 2013: "We are deeply concerned, however, that the redefinition of sexual harassment proposed therein— 'unwelcome conduct of a sexual nature [that] can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence'—eliminates the critical standard of "reasonable speech," and, in so doing, may pose a threat to academic freedom in the classroom."<sup>159</sup>

In 2016, the AAUP Council adopted a report, "The History, Uses, and Abuses of Title IX," which highlights that as a result of OCR over-reach, free speech considerations "have been relegated to the background or ignored altogether."<sup>160</sup> The well-researched AAUP report identified two major problems with the interpretation and enforcement of Title IX:

1. Overly broad definitions of "hostile environment"
2. Inadequate protection of due process and academic governance

Nadine Strossen, Professor of Law, Emerita at New York Law School and former president of the American Civil Liberties Union, lamented how free expression on campus has become "an endangered species."<sup>161</sup>

### *Due Process*

In the following cases, faculty members were subjected to Title IX sexual harassment proceedings that lacked fundamental notions of fairness:<sup>162</sup>

1. Arizona State University: Marta Tecedor<sup>163</sup>
2. Baylor University: Trent Dougherty<sup>164</sup>
3. Baylor University: John Doe<sup>165</sup>

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<sup>158</sup> FIRE. <https://d28htnjz2elwuj.cloudfront.net/pdfs/7ea041e49156306ba76cb62a4f8c6c65.pdf> Accessed May 27, 2021.

<sup>159</sup> [http://www.aaup.org/file/AAUP\\_June\\_2013\\_Letter\\_to\\_DOJ\\_and\\_OCR.pdf](http://www.aaup.org/file/AAUP_June_2013_Letter_to_DOJ_and_OCR.pdf)

<sup>160</sup> American Association of University Professors (2013). <https://www.aaup.org/file/TitleIXreport.pdf>

<sup>161</sup> McCoy, Nilagia (Oct. 19, 2015), *Nadine Strossen: "Free Expression: An Endangered Species on Campus?"* <https://shorensteincenter.org/nadine-strossen-free-expression-an-endangered-species-on-campus/>

<sup>162</sup> SAVE, *Faculty Members Unfairly Treated by Title IX*. <https://www.saveservices.org/sexual-assault/faculty-members/>

<sup>163</sup> Soave, Robby (Mar. 18, 2020), *A Crazy Academic Weaponized Title IX Against a Rival Professor Whose Job He Wanted*. <https://reason.com/2020/03/18/title-ix-arizona-state-university-viren-tecedor/>

<sup>164</sup> Witherspoon, Tommy (Sept. 28, 2018), *Baylor professor resigns after Title IX complaints*. [https://www.wacotrib.com/news/higher\\_education/baylor-professor-resigns-after-title-ix-complaints/article\\_dc760928-2fb5-5fe4-b902-20484ebd90c6.html](https://www.wacotrib.com/news/higher_education/baylor-professor-resigns-after-title-ix-complaints/article_dc760928-2fb5-5fe4-b902-20484ebd90c6.html)

<sup>165</sup> Bauer-Wolf, Jeremy, *An Overcorrection?* Inside Higher Ed. (Sept. 16, 2019), <https://www.insidehighered.com/news/2019/09/16/former-baylor-professor-sues-accusing-university-biased-title-ix-investigation>



4. Cornell University: Mukund Vengalattore<sup>166</sup>
5. George Washington University: Catherine Woytowicz<sup>167</sup>
6. Goodwin College: Laura Jean Champagne<sup>168</sup>
7. Harvard University: Bruce Hay<sup>169</sup>
8. Howard University: Reginald Robinson<sup>170</sup>
9. James Madison University: Alyssa Reid<sup>171</sup>
10. Louisiana State University: Teresa Buchanan<sup>172</sup>
11. Massachusetts College of Art and Design: Saul Levine<sup>173</sup>
12. Oregon Health and Science University: Buddy Ullman<sup>174</sup>
13. New York University: Avital Ronnell<sup>175</sup>
14. Northwestern University: Laura Kipnis<sup>176</sup>
15. Northwestern University: Alec Klein<sup>177</sup>
16. Pacific University: Richard Paxton<sup>178</sup>
17. Plymouth State University: Michael Fischler<sup>179</sup>

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<sup>166</sup> NCLA Second Circuit Brief Rebutts Cornell and Dept. of Educ. Efforts to Deny Title IX Hearing Rights, (Jan. 5, 2021), New Civil Liberties Alliance. <https://www.globenewswire.com/news-release/2021/01/06/2153888/0/en/NCLA-Second-Circuit-Brief-Rebutts-Cornell-and-Dept-of-Educ-Efforts-to-Deny-Title-IX-Hearing-Rights.html>

<sup>167</sup> Nolan-Brown, Elizabeth (Jan. 9, 2018), *Exchanging Dirty Jokes is Now a 'Sexual Relationship' at George Washington University*. <https://reason.com/2018/01/09/woytowicz-sues-gwu-over-title-ix-farce/>

<sup>168</sup> <https://www.insidehighered.com/news/2019/10/22/professor-says-she-was-fired-refusing-disclose-victims-name>

<sup>169</sup> Flaherty, Colleen (Oct. 22, 2019), *Between a Rock and Title IX*. <https://reason.com/2019/07/24/bruce-hay-harvard-scam-title-ix-paternity/>

<sup>170</sup> Kruth, Susan (Dec. 19, 2017), *Law professor still subject to sanctions from Howard University for Brazilian wax hypothetical on quiz*. <https://www.thefire.org/law-professor-still-subject-to-sanctions-from-howard-university-for-brazilian-wax-hypothetical-on-quiz/>

<sup>171</sup> Reid v. James Madison U., et al. (2021). <https://nclalegal.org/wp-content/uploads/2021/05/Complaint-and-Jury-Demand.pdf>

<sup>172</sup> Goldberg, Michelle (July 2, 2015), *This Professor Was Fired for Saying 'Fuck No' in Class*. <https://www.thenation.com/article/archive/this-professor-was-fired-for-saying-fuck-no-in-class/>

<sup>173</sup> Soave, Robby (Apr. 4, 2018), *Students Watched an Art Professor's Experimental Film. Then They Accused Him of Sexual Harassment*. <https://reason.com/2018/04/04/mass-art-saul-levine-film-sex/>

<sup>174</sup> Ullman, Buddy. *The Weaponization of Title IX at Oregon Health and Science University*. SAVE <https://www.saveservices.org/2020/03/the-weaponization-of-title-ix-at-oregon-health-and-science-university/>

<sup>175</sup> Soave, Robby (Aug. 14, 2018), *Feminists Rally to Defense of Female Professor Accused of Sexual Harassment by Male Student*. <https://reason.com/2018/08/14/avital-ronnell-nyu-me-too-harassment/>

<sup>176</sup> Gersen, Jeannie Suk (Sept. 20, 2017), *Laura Kipnis's Endless Trial by Title IX*. <https://www.newyorker.com/news/news-desk/laura-kipniss-endless-trial-by-title-ix>

<sup>177</sup> Kennedy, Dana (Dec. 26, 2020), *Northwestern professor Alec Klein: 'Unfounded #MeToo accusations destroyed my life'*. <https://nypost.com/2020/12/26/alec-klein-unfounded-metoo-accusations-destroyed-my-life/>

<sup>178</sup> Flaherty, Colleen (Feb. 22, 2021), *When Title IX is a Threat*. <https://www.insidehighered.com/news/2021/02/22/pacific-u-professor-says-administrators-threatened-him-title-ix>

<sup>179</sup> Soave, Robby (Sept. 18, 2018), *Professor Defends a Woman Accused of a Sex Crime, University Forces Him to Undergo Sexual Harassment Training*. <https://reason.com/2018/09/18/plymouth-state-title-ix-sex-fischler/>

18. Princeton University: Sergio Verdu<sup>180</sup>
19. Syracuse University: William Peace<sup>181</sup>
20. University of Colorado at Boulder: Patricia Adler<sup>182</sup>
21. University of Illinois: Joseph Petry<sup>183</sup>
22. University of Michigan: Pamela Smock<sup>184</sup>
23. University of North Texas: Robert Frodeman<sup>185</sup>
24. University of Rochester: Florian Jaeger<sup>186</sup>
25. University of Utah: Nicholas Wolfinger<sup>187</sup>
26. Virginia Commonwealth University: Douglas Wilder<sup>188</sup>

SAVE is submitting a separate Written Comment to the Office for Civil Rights, signed by over 300 professors and others, which concludes,<sup>189</sup>

“Therefore, the undersigned professors, attorneys, and other interested persons urge that the Department of Education’s review of the Title IX regulation affirm, preserve, and uphold all due process and free speech rights, protections, and services that are enshrined in the 2020 Title IX regulation.”

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<sup>180</sup> Verdu v. The Trustees of Princeton University, Mar. 30, 2021. <https://public.fastcase.com/WI%2B2t%2BeVuI35%2FN70vAMFZthU4DAstBsPBsAmWHrcUy5aDGhKfIkbe4poP8a3JQyGQ0I5x3OdIlgmrMFTF2aSVg%3D%3D>

<sup>181</sup> Bartlett, Tom (Aug. 26, 2015), *Star Scholar Resigns From Northwestern, Saying It Doesn’t Respect Academic Freedom*. <https://www.chronicle.com/article/Star-Scholar-Resigns-From/232601>

<sup>182</sup> Jaschik, Scott (Dec. 16, 2013), Too Risky for Boulder? <https://www.insidehighered.com/news/2013/12/16/tenured-professor-boulder-says-she-being-forced-out-over-lecture-prostitution>

<sup>183</sup> Schow, Ashe (Feb. 9, 2021), *Professor Falsely Accused by Serial Liar Of Providing Grades For Sex. He’s Suing School That Broke Contract to Investigate Him*. <https://www.dailywire.com/news/professor-falsely-accused-by-serial-liar-of-providing-grades-for-sex-hes-suing-school-that-broke-contract-to-investigate-him>

<sup>184</sup> Jacques, Ingrid (Nov. 29, 2018), *Jacques: Due process is for professors, too*. <https://www.detroitnews.com/story/opinion/columnists/ingrid-jacques/2018/11/30/jacques-due-process-professors-too/2142079002/>

<sup>185</sup> Frodeman, Robert (Aug. 13, 2020), *Ordeal by Title IX*. <https://quillette.com/author/robert-frodeman/>

<sup>186</sup> Soave, Robby (Jan. 23, 2018), *‘Sexually Promiscuous’ Professor at the University of Rochester Faces Censure Vote*. <https://reason.com/2018/01/23/sexually-promiscuous-professor-rochester/>

<sup>187</sup> Wolfinger, Nicholas (Nov. 17, 2017), *Pursuit of Injustice: Further Adventures Under Title IX*. <https://quillette.com/2017/11/17/pursuit-injustice-adventures-title-ix/>

<sup>188</sup> L. Douglas Wilder’s Statement in Support of the New Title IX Regulation Strengthening Due Process Protections. <https://www.saveservices.org/wp-content/uploads/Wilder-Statement-12.2.2019.pdf>

<sup>189</sup> Statement in Support of Due Process in Campus Disciplinary Proceedings (June 7, 2021). <https://www.saveservices.org/wp-content/uploads/2021/06/1.-Due-Process-Statement-Attachment-5.27.2021.pdf>

## 10. Recent Experience Reveals Improvements in Campus Proceedings Under the Title IX Regulation

Leading Title IX attorneys report significant improvements in campus procedures since August 14, 2020 for both complainants and respondents:

- “I have represented and advised dozens of individuals, both male and female, as complainants and respondents through the Title IX process. The new regulations, particularly the requirement for live hearings with cross-examination, allow for each party to elicit testimony that is absolutely critical to ascertaining the truth. I have advised complainants who have benefited from the live testimony and cross-examination of the respondent, as well as respondents who have been able to challenge credibility issues and elicit exculpatory testimony because of the new regulations. In addition, the ability to resolve allegations informally has been highly effective in protecting both the complainants and respondents that I have advised.”<sup>190</sup>
- “Our firm has represented dozens of students in live Title IX hearings that involved robust and highly impactful cross examination by both complainants and respondents. Therefore, it is incorrect to allege cross-examination favors respondents over complainants.”<sup>191</sup>
- “The experience of Nesenoff & Miltenberg LLP with the new Title IX regulations is that they make the disciplinary process fairer for both complainants and respondents. Most significantly, the new Title IX regulations require universities and colleges to (i) make available to respondents the investigation report and file, (ii) bear the burden of proof, and (iii) allow respondents to demonstrate that they are not responsible by having an advisor conduct cross-examination. As a result, we are seeing fewer “responsible” findings when the respondent was clearly innocent.”<sup>192</sup>
- “In California, the Second District Court of Appeal clarified in 2019 that live evidentiary hearings with cross-examination are fundamental to a fair process in student disciplinary proceedings to adjudicate allegations of sexual misconduct. Subsequently, when universities held live evidentiary hearings with cross-examination performed by a hearing officer, and the hearing officer acted impartially and asked the questions submitted by the parties as written, such proceedings have tended to remedy other procedural deficiencies encountered during pre-2019 Title IX adjudications (i.e., withholding and fabrication of evidence, inadequate notice, etc.), and curtailed efforts

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<sup>190</sup> Personal communication with Eric Long, June 1, 2021.

<sup>191</sup> Personal communication with Eric Rosenberg, May 28, 2021.

<sup>192</sup> Personal communication with Philip Byler, May 28, 2021.

of university administrators to place their thumb on the scale to control the outcome.”<sup>193</sup>

- One attorney praised the changes implemented at Colorado University at Boulder in a case involving a student accused of engaging in non-consensual intercourse. Larry Mertes writes, “Much like what makes civil litigation manageable in state and federal courts, the Office of Institutional Equity and Compliance at [University of Colorado at Boulder] (‘OIEC’) — which is charged with implementing both Title IX and UCB policy investigations — provided clear pre-hearing guidance and worked collaboratively with counsel for the complainant, respondent, and the assigned Judge to refine and, in certain instances, develop new procedures to create the circumstances for a hearing which embraced important aspects of constitutional Due Process.”<sup>194</sup>

As a result, the number of lawsuits has declined. According to historian KC Johnson, “Indeed, lawsuits involving post-August incidents have dropped to a trickle. Since the current regulations draw so closely from relevant court decisions, universities that implement them in good faith have little to fear.”<sup>195</sup>

## Conclusion

This analysis reveals the following seven points:

1. Campus due process is especially important to protect the rights of vulnerable campus populations such as LGBT groups, racial minorities, and disabled students.
2. Campus due process is strongly supported by liberals and conservatives, both in the public at large, as well as among lawmakers, newspaper editorial boards, organizations, and individual commentators.
3. Impartial investigations are one of the most fundamental requirements for equitable campus proceedings.
4. School policies established under the 2011 DCL shortchanged complainants and accused students, resulting in over 700 lawsuits.
5. The 2011 Dear Colleague Letter did not succeed in achieving its stated policy objectives of improving reporting or reducing the incidence of sexual assaults.
6. Constrained definitions of sexual harassment are essential to preserve free speech rights for faculty and students.
7. Campus procedures appear to have improved under the current regulation.

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<sup>193</sup> Personal communication with Jenna Parker, May 31, 2021.

<sup>194</sup> Mertes, Larry (May 14, 2021), *Live Hearing with Cross-Examination at UC-Boulder Reveals Major Improvements Under New Title IX Regulation*. <https://www.saveservices.org/2021/05/live-hearing-with-cross-examination-at-uc-boulder-reveals-major-improvements-under-new-title-ix-regulation/>

<sup>195</sup> Johnson, KC (June 8, 2021). Oral Testimony to the Office for Civil Rights. <https://kcjohnson.files.wordpress.com/2021/06/comment.pdf>

The 2020 Title IX regulation was drafted with the express purpose of improving fairness for both complainants and respondents. Commentator Wendy McElroy noted the importance of explicit definitions for complainants: “the new definition is clear and reasonable; sexual harassment is unwelcome conduct on the basis of sex that is so severe and objectively offensive as to effectively deny a person equal access to school benefits.”<sup>196</sup> Professor Meg Mott has commented on the “substantial powers the new rules grant to survivors” by allowing for mediation.<sup>197</sup> SAVE has compiled a listing of six ways the regulation is beneficial to complainants.<sup>198</sup>

Recognizing that a small number of regulatory provisions in the existing Title IX regulation require clarification,<sup>199</sup> this Ten Considerations in the Campus Fairness Debate confirms the necessity of affirming the importance of campus due process, and preserving the rights, protections, and services enumerated in the 2020 Title IX regulation.

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<sup>196</sup> Wendy McElroy (Jan. 3, 2019), *The new Title IX regulation helps women*. The Hill.

<https://thehill.com/opinion/civil-rights/423710-the-new-title-ix-regulation-helps-women>

<sup>197</sup> Meg Mott (Dec. 17, 2018), *The New Title IX Guidelines Benefit Survivors*. Inside Higher Ed.

<https://www.insidehighered.com/views/2018/12/17/new-title-ix-guidelines-help-survivors-well-accused-opinion>

<sup>198</sup> SAVE (Dec. 12, 2020), *How the New Title IX Regulation Benefits Sexual Assault Complainants*.

<https://www.saveservices.org/2020/12/how-the-new-title-ix-regulation-will-benefit-sexual-assault-complainants/>

<sup>199</sup> Comment on Proposed Title IX Rulemaking (June 6, 2021). <https://www.saveservices.org/wp-content/uploads/2021/06/Comment-on-Proposed-Title-IX-Rulemaking-6.6.2021.pdf>

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