

## **Allegations of Campus Sexual Misconduct:**

### **Appellate and Trial Courts Identify the Elements of Due Process**

Before someone is punished, they must be told what they are being accused of. They must be informed who their accuser is. They must have an opportunity to see the evidence, and be allowed to present their own evidence. They must be able to pose questions to their accuser. And they must be given a fair hearing.

In far too many cases, universities have failed to provide these most basic of procedural protections to students and faculty members. Instead, universities have subjected the accused to shadowy Title IX adjudications where neither party is allowed to ask the other questions, lawyers are not allowed to speak, and sometimes there is no hearing at all. As a consequence, life-altering sanctions are meted out, often with devastating effects for the falsely accused.

Those who have suffered such discipline frequently go to court, where judges often express shock and dismay over the actions of the so-called star chambers. The resulting judicial opinions serve to both recall and reaffirm fundamental Anglo-American conceptions of fairness. These judicial decisions provided much of the rationale for the various provisions codified in the 2020 Title IX Regulation.

This Written Comment is based on SAVE's analysis of all 24 appellate court decisions issued to date, as well as 133 trial court decisions. The following six regulatory provisions were upheld by 20 or more court decisions:

1. Section 160.45(b)(1)(iii): Bias Towards Complainant or Respondent – 30 decisions
2. Section 106.45(b)(6)(i): Cross Examination – 29 decisions
3. Section 106.45(b)(1): Impartial Investigations – 29 decisions
4. Section 106.45: Institutional Sex Bias – 24 decisions
5. Sections 106.45(b)(2)(i)(A), 106.45(b)(2)(i)(B), and 106.45(b)(5)(v): Notice – 23 decisions
6. Sections 160.45(b)(5)(iii) and 160.45(b)(5)(vii): Access to Evidence – 21 decisions

The most common legal bases for these decisions were, in descending order of frequency:

1. Title IX statutory law
2. Constitutional law: Due process and equal protection
3. Contract law
4. Other bases, such as "fundamental fairness" and the American Disability Act

The entire SAVE analysis is presented in Attachment B, "Analysis of Title IX Regulation According to Appellate and Trial Court Decisions."

For each Element of Due Process Identified by Appellate and Trial Courts, this document presents the regulatory language, a 1-2 sentence summary of the appellate and trial court decisions, and a recommendation regarding the forthcoming regulation.

### **Elements of Due Process Identified by Appellate and Trial Courts**

Courts have identified the following regulatory provisions as essential elements of campus due process:

#### *1. Institutional Sex Bias*

Section 106.45 states, “A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.”

Summary: Seven appellate decisions and 17 trial court decisions affirmed the necessity of avoiding sex bias in campus adjudications, relying upon Title IX statutory law to reach their conclusions.

Recommendation: The forthcoming regulation should retain the existing regulatory language at Section 106.45.

#### *2. Definition of Sexual Harassment*

Section 160.30: “sexual harassment must be so severe, pervasive, and objectively offensive so as to deny a student educational access.”

Summary: The current regulation’s definition of sexual harassment is based on language from the 1999 Supreme Court decision, *Davis v. Monroe*. This review did not identify any campus-specific appellate or trial court decisions pertaining to the definition of sexual harassment.

Recommendation: The forthcoming regulation should retain the existing language at Section 106.45.

#### *3. Formal Complaint*

Section 160.30: At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.... A complainant is “an individual who is alleged to be the victim of conduct that could constitute sexual harassment.”

Summary: Two trial court decisions recognized the danger inherent in a system that does not require a victim to make a formal complaint. The courts upheld accused students' statutory Title IX rights and common law rights.

Recommendation: The forthcoming regulation should retain the 2020 Regulation provision that impliedly requires that recipient schools first receive a complaint from the true victim before initiating the grievance process. The Office for Civil Rights should further state explicitly that a person must make a formal complaint before discipline is imposed.

#### *4. Supportive Measures*

Section 160.44(a): "The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures...; consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint."

Summary: Schools can violate Title IX by failing to provide supportive measures to complainants, including male complainants, as shown in one trial court case.

Recommendation: The forthcoming regulation should preserve Section 160.44(a)'s requirement for access to supportive measures.

#### *5. Emergency Removals*

Section 160.44(c): "Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis..." [provided that such removal does not violate the ADA or IDEA]

Summary: While emergency removals are permitted in Section 160.44(c), such removals cannot amount to summary expulsions from campus, as shown in two trial court opinions.

Recommendation: The forthcoming regulation should continue to allow recipients to remove respondents on an emergency basis, as provided for at Section 160.44(c), but clarify that such removals need to allow for the respondent to meaningfully contest the removal in a reasonably short period of time.

## 6. *Impartial Investigations*

Section 106.45 (b)(1):

“A recipient’s grievance process must—

- (i) Treat complainants and respondents equitably,
- (ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence,
- (iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, or decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

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 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;”

Summary: Five appellate court and 24 trial court decisions have articulated deficiencies in the conduct of impartial investigations, making this regulatory provision one of the most important in the eyes of the judiciary. The legal basis for most of the decisions was a violation of Title IX.

Recommendation: The forthcoming Title IX regulation needs to retain and strengthen the existing regulatory requirements at Section 106.45 (b)(1) for impartial investigations.

## 7. *Evidence Evaluation*

Section 160.45(b)(1)(ii): “Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence.”

Summary: Four appellate courts and 13 trial courts have strongly criticized and ruled against universities that refuse to either gather or consider “all pertinent evidence.” Failing to gather or consider relevant evidence raises an inference of sex discrimination in violation of Title IX.

Recommendation: The forthcoming regulation should affirm and preserve the requirement in Section 160.45(b)(1)(ii) to consider “all pertinent evidence.” It should further require recipient schools to also *gather* all pertinent evidence that is practically accessible to the school.

## *8. Credibility Assessment*

Section 106.45 (b)(1)(ii): "...and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;"

Summary: Six appellate courts and 10 trial courts have criticized situations in which it appears that the university was doing just that; instead of making credibility determinations based on the evidence, these universities made inexplicable credibility determinations that suggest complainant-bias or outright sex bias.

Recommendation: The forthcoming regulation needs to preserve Section 106.45 (b)(1)(ii)'s recognition that credibility determinations must be made on an evidentiary basis.

## *9. Bias Towards Complainant or Respondent*

Section 160.45(b)(1)(iii): "recipient officials must not have a bias towards complainants or respondents generally."

Summary: Three appellate courts and 27 trial courts have criticized universities that were found to be biased in favor of complainants, which is a violation of Section 160.45(b)(1)(iii). These courts have also found that such conduct can violate respondents constitutional due process rights, statutory Title IX rights, or common law contractual rights.

Recommendation: The forthcoming regulation needs to preserve and affirm the existing language at Section 160.45(b)(1)(iii).

## *10. Standard of Evidence*

Section 160.45(b)(1)(vii): "State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard; apply the same standard to both faculty and students..."

Summary: Three trial courts have discussed the standard of evidence in student conduct proceedings. Section 160.45(b)(1)(vii) allows for either the preponderance of the evidence standard or the clear and convincing standard. One court discussed the quasi-criminal penalties a disciplined student can suffer, including career destruction. A higher standard should be considered.

Recommendation: The Office for Civil Rights should consider amending Section 160.45(b)(1)(vii) to require the clear and convincing evidentiary standard in campus Title IX proceedings, as affirmed in trial court decisions.

## *11. Appeals*

Section 160.45(b)(1)(viii): “Include the procedures and permissible bases for the complainant and respondent to appeal.”

Summary: Three appellate courts and six trial courts have found that when a university employs a “rubber stamp” appeals process or one that makes inexplicable decisions, such a process can violate constitutional and statutory rights of the student.

Recommendation: Section 160.45(b)(1)(viii) provides only that a university must simply state the bases and procedures for appeal. The forthcoming regulation should amend this section to also include a provision that requires that the appeal process be “substantive and meaningful.”

## *12. Notice*

Section 106.45(b)(2)(i)(A): “[Recipient must provide] [n]otice of the recipient's grievance process.”

Section 106.45(b)(2)(i)(B): “Notice of the allegations of sexual harassment potentially constituting sexual harassment...” [including the parties and the conduct]

Section 106.45(b)(5)(v): “...to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.”

Summary: Three appellate courts and 20 trial courts have criticized universities that fail to meet this basic requirement. This failure can violate the constitutional due process rights and the statutory Title IX rights of the student.

Recommendation: The forthcoming regulation should affirm and preserve the requirements contained in Sections 106.45(b)(2)(i)(A), 106.45(b)(2)(i)(B), and 106.45(b)(5)(v).

## *13. Burden of Proof and Evidence Collection*

Section 160.45(b)(5)(i): “Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.”

Summary: One appellate court and one trial court have recognized the importance of the school retaining the burden of proof. Section 160.45(b)(5)(i) is essential because some universities will improperly shift the burden onto the students. In some cases, this burden shifting will occur by simple operation of an affirmative consent policy.

Recommendation: The forthcoming regulation should preserve the existing language at Section 160.45(b)(5)(i), preventing universities from inappropriately placing the burden of proof on the students. OCR should clarify that this Section prohibits substantive policies that would *de facto* shift the burden of proof onto the student, such as affirmative consent policies.

#### *14. Access to Evidence*

Section 160.45(b)(5)(iii): “Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.”

Section 160.45(b)(5)(vi): “Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.”

Section 160.45(b)(5)(vii): “Create an investigative report that fairly summarizes relevant evidence and... 10 days prior to a hearing sent to each party... the investigative report in an electronic format or a hard copy, for their review and written response.”

Summary: Seven appellate courts and 14 trial courts have found that when a university refuses to provide evidence to either party in the campus disciplinary setting, or fails to provide the parties with a fairly drafted investigative report, this violates the constitutional or statutory rights of the students.

Recommendation: The forthcoming regulation should affirm and preserve Sections 160.45(b)(5)(iii) and (vi)-(vii).

#### *15. Participation of Advisors*

Section 106.45(b)(5)(iv): “Provide the parties with the same opportunities to have... the advisor of their choice [be present during the proceedings]... however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.”

Summary: As these two appellate and 10 trial cases make clear, schools frequently fail to allow an advisor to play a meaningful role in the proceedings.

Recommendation: The forthcoming regulation should preserve Section 106.45(b)(5)(iv)'s requirement for an advisor of the student's choice. The forthcoming OCR regulation should remove the clause, “the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings.”

## *16. Live Hearings*

Section 106.45(b)(6)(i): “For postsecondary institutions, the recipient’s grievance process must provide for a live hearing.”

Summary: One appellate court and 13 trial courts affirmed the need for live hearings, mostly on constitutional due process and statutory grounds.

Recommendation: The forthcoming regulation should retain the provision for live hearings in Section 106.45(b)(6)(i).

## *17. Cross Examination*

Section 106.45(b)(6)(i): “...cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally.”

Summary: Nine appellate courts and 20 trial courts have recognized the vital importance of cross examination. Of the 27 regulatory provisions discussed in this Analysis, cross examination enjoys the strongest judicial support.

Recommendation: Due process requires cross examination. Therefore, OCR needs to preserve Section 106.45(b)(6)(i).

## *18. Conflict of Interest - Single Investigator Model*

Section 106.45(b)(7)(i): “The decision-maker(s)... cannot be the same person(s) as the Title IX Coordinator or the investigator(s).”

Summary: Four appellate courts and six trial courts have criticized the Single Investigator Model, an adjudicative model prohibited by Section 106.45(b)(7)(i).

Recommendation: The forthcoming regulation needs to retain Section 106.45(b)(7)(i)’s prohibition on the Single Investigator Model.

## *19. Informal Resolution*

Section 160.45(b)(9): “...at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process.”

Summary: Two trial courts recently held that a school’s failure to pursue informal resolution - when it promises in its handbook to do so - can support Title IX and breach of contract claims.



Recommendation: The forthcoming regulation should retain Section 160.45(b)(9)'s provision supporting elective informal resolution.

## *20. Training Materials*

Section 106.45(b)(10)(i)(D): "A recipient must make... training materials publicly available on its website, or if it does not have a website... must make them open to inspection by the public."

Summary: Four trial courts have shown the importance for Section 106.45(b)(10)(i)(D) and the importance of ensuring that the training materials themselves do not further discriminatory stereotypes.

Recommendation: The forthcoming regulation should retain Section 106.45(b)(10)(i)(D)'s requirement to publicly post training materials so that students can be assured that the persons who are adjudicating their cases are have not been subjected to archaic or biased stereotypes.

## *21. Recordkeeping*

Section 160.45(b)(10)(i): "recipient must maintain for a period of seven years records of [all sexual misconduct cases]"

Summary: Two trial courts have recognized the vital importance of universities' retaining records of Title IX proceedings, on Title IX grounds.

Recommendation: The forthcoming regulation should retain the existing language at Section 160.45(b)(10)(i).

## *22. Consent*

Section 106.30(a): "The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section."

Summary: Three appellate courts and five trial courts have criticized various consent policies drafted by universities, with the harsh criticism directed towards inconsistent applications of affirmative consent policies.

Recommendation: Consistent with Section 160.45(b)(5)(i), which places the burden of proof on the school, Section 106.30(a) should be amended to prohibit definitions of consent, e.g., so-called "affirmative consent," that improperly shift the burden of proof to the respondent.

### *23. Geographical/Programmatic Scope of the Regulation*

Section 106.44(a): “A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.”...“education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”

Summary: One appellate court and two trial courts discussed the geographical scope of jurisdiction of Title IX offices at universities. If a school acts outside of its jurisdiction, such action can violate fundamental fairness and Title IX rights.

Recommendation: The forthcoming regulation should retain the geographic restrictions in Section 160.44(a), because it is practicable and because such restriction tracks closely with the words of the Title IX statute.

### *24. Presumption of Innocence*

Section 106.45(b)(1)(iv): “The grievance process must “Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.”

Summary: The Sixth Circuit discussed a university’s placing a presumption of guilt upon the respondent and found that such conduct raised constitutional concerns as well as raised an inference of sex discrimination.

Recommendation: The forthcoming regulation should retain the presumption of innocence as stated at Section 160.45(b)(1)(iv).

### *25. Equal Opportunity for Parties to Present Evidence*

Section 106.45(b)(5)(ii): “The grievance process must “Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.”

Summary: Three appellate courts and four trial courts affirmed the importance of the parties’ equal opportunity to present evidence, finding that unequal opportunities can violate constitutional, statutory, and common law rights.

Recommendation: The forthcoming regulation should retain 106.45(b)(5)(ii), requiring that universities give both sides equal opportunities to present evidence.

## *26. Materially False Statements Made in Bad Faith*

Section 106.71(b)(2): “Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.”

Summary: Three trial courts analyzed situations in which accusers likely made materially false statements deliberately. Such manipulation of the Title IX system threatens the educational rights of all students and weaken the system for real victims of sexual violence.

Recommendation: The forthcoming regulation should retain Section 160.71(b)(2)’s provision that allows universities to take action against false accusers and others who misrepresent the facts during the Title IX process.