

GROUP COMMENT

WRITTEN COMMENT FOR TITLE IX PUBLIC HEARING

June 11, 2021

Dear Office for Civil Rights:

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.”

The Department of Education Office for Civil Rights (OCR) has interpreted the word “equitable” to include 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”¹

This Group Comment analyzes the campus due process issue from 10 perspectives:

1. Strong Due Process Protections Are Essential for the Protection of LGBT and Other Vulnerable Campus Groups
2. Faculty Members Have Seen Their Free Speech and Due Process Rights Eroded
3. Five Public Opinion Polls Show Strong Bipartisan Support for Campus Due Process
4. Lawmakers, Newspapers, Organizations, and individuals – Both Liberal and Conservative -- Support Campus Due Process
5. 2011 DCL Did Not Succeed in Improving the Reporting or Reducing the Prevalence of Sexual Assault
6. Complainants Frequently Were Shortchanged by School Policies Established Under the 2011 DCL
7. School Policies Established Under the 2011 DCL Violated the Due Process Rights of Accused Students
8. Appellate Courts Have Issued 23 Decisions Upholding the Due Process Rights of the Accused
9. Impartial Investigations Are the Foundation of Equitable Proceedings

¹ U.S. 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 As part of OCR’s efforts to refocus its policies on regulatory law, the 2001 Guidance was rescinded in 2020.

10. Experience Reveals Improvements in Campus Proceedings Under the New Title IX Regulation²

To succeed in the quest to curb campus sexual assault, policy discussions need to be based on scientific fact. Unfortunately, two significant misrepresentations have permeated policy debates in recent years:

Unfounded Allegations

Psychologist David Lisak has claimed that “the prevalence of false allegations is between 2% and 10%.”³ But the actual number of unfounded sexual assault accusations is much higher. In the criminal setting, approximately one-third of such allegations are unfounded.⁴

On campus, the number is even higher.⁵ 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.”⁶

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

Male Victimization

According to the National Sexual Violence Resource Center, 24.8% of men experience some form of contact sexual violence in their lifetimes.⁷ This figure comes from the CDC’s National Intimate Partner and Sexual Violence Survey, which is considered the most reliable national survey on this topic.⁸ In the words of the CDC survey, these men were “made to penetrate”

² Dept. of Education (August 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-reg-unofficial.pdf>

³ 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>

⁴ SAVE (May 7, 2021), One-Third of Sexual Assault Allegations in Criminal Setting Are Unfounded. <https://www.saveservices.org/2021/05/one-third-of-sexual-assault-allegations-are-unfounded/>

⁵ 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/>

⁶ Quoted in Richard Bernstein (December 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

⁷ National Sexual Violence Resource Center. Statistics. <https://www.nsvrc.org/statistics> Accessed May 13, 2021.

⁸ Smith, SG, Zhang, X, Basile, KC, Merrick, MT, Wang, J, Kresnow, M, & Chen, J (2018). National Intimate Partner and Sexual Violence Survey: 2015 Data Brief – Updated Release. Centers for Disease Control and Prevention. <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf>

their female sexual partners. Thus, the number of men and women who are victimized by sexual violence each year is almost identical.⁹

Unfortunately, some groups have framed the problem of campus sexual assault as solely a male-on-female problem.

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

Due process exists 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. For these reasons, due process protections are especially important to assure the rights of vulnerable groups such as LGBT persons, racial minorities, disabled students, and immigrants:¹⁰

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 later recounted movingly,¹¹

“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.¹²

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,¹³

⁹ Lara Stemple and 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>

¹⁰ 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/>

¹¹ <https://nclalegal.org/alyssa-reid-v-james-madison-university-et-al/>

¹² Reid v. James Madison University. <https://nclalegal.org/alyssa-reid-v-james-madison-university-et-al/>

¹³ Doe v. Brandeis University, 177 F. Supp. 3d 561 (D. Mass. 2016). <https://casetext.com/case/doe-v-brandeis-univ>

“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 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.”¹⁴ 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.”¹⁵

Black faculty members also have been targeted in the campus Title IX proceedings. The nation’s first elected black governor, former Virginia Governor L. Douglas Wilder, penned a scathing letter regarding his “unimaginable nightmare at Virginia Commonwealth University” after he was erroneously accused of sexual misconduct.¹⁶

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,”¹⁷ 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

¹⁴ G. Piper (August 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/>

¹⁵ 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/>

¹⁶ L. Douglas Wilder (June 3, 2020). Secretary DeVos Right to Restore Due Process on Campus. https://www.roanoke.com/opinion/commentary/wilder-secretary-devos-right-to-restore-due-process-on-campus/article_dfac7ff4-7d4d-5109-9657-2532a0816f1d.html

¹⁷ 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/>

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.¹⁸

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.^{19,20,21,22,23} These articles suggest 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, 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.”²⁴ The judge ruled that Doherty’s allegations of failure to accommodate were sufficient to sustain the ADA claim.

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, which are discussed below.

¹⁸ 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>

¹⁹ 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/>

²⁰ 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>

²¹ Susan Stone and 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/>

²² Michael Allen (December 20, 2018), Disability Rights and Title IX. <https://allen-lawfirm.com/2018/12/20/disability-rights-and-title-ix/>

²³ David Golub, (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/>

²⁴ Doherty v. Bice, No. 18-CV-10898 (NSR), 2020 WL 5548790, *8 (S.D.N.Y. Sept. 16, 2020)

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 have become 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 member's being dismissed for cause based on a lower standard of proof than what we consider necessary to protect academic freedom and tenure."²⁵
- 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."²⁶

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."²⁷ 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."²⁸

Due Process

In the following cases, faculty members were subjected to Title IX/sexual harassment proceedings that lacked fundamental due process protections:²⁹

1. Arizona State University: Marta Tecedor³⁰

²⁵ FIRE. <https://d28htnjz2elwuj.cloudfront.net/pdfs/7ea041e49156306ba76cb62a4f8c6c65.pdf> Accessed May 27, 2021.

²⁶ http://www.aaup.org/file/AAUP_June_2013_Letter_to_DOJ_and_OCR.pdf

²⁷ American Association of University Professors (2013). <https://www.aaup.org/file/TitleIXreport.pdf>

²⁸ McCoy, Nilagia (October 19, 2015), Nadine Strossen: "Free Expression: An Endangered Species on Campus?" <https://shorensteincenter.org/nadine-strossen-free-expression-an-endangered-species-on-campus/>

²⁹ SAVE, Faculty Members Unfairly Treated by Title IX. <https://www.saveservices.org/sexual-assault/faculty-members/>

³⁰ <https://reason.com/2020/03/18/title-ix-arizona-state-university-viren-tecedor/>

2. Baylor University: Trent Dougherty³¹
3. Baylor University: John Doe³²
4. Cornell University: Mukund Vengalattore³³
5. George Washington University: Catherine Woytowicz³⁴
6. Goodwin College: Laura Jean Champagne³⁵
7. Harvard University: Bruce Hay³⁶
8. Howard University: Reginald Robinson³⁷
9. James Madison University: Alyssa Reid³⁸
10. Louisiana State University: Teresa Buchanan³⁹
11. Massachusetts College of Art and Design: Saul Levine⁴⁰
12. Oregon Health and Science University: Buddy Ullman⁴¹
13. New York University: Avital Ronnell⁴²
14. Northwestern University: Laura Kipnis⁴³
15. Northwestern University: Alec Klein⁴⁴
16. Pacific University: Richard Paxton⁴⁵
17. Plymouth State University: Michael Fischler⁴⁶
18. Princeton University: Sergio Verdu⁴⁷
19. Syracuse University: William Peace⁴⁸
20. University of Colorado at Boulder: Patricia Adler⁴⁹

³¹ https://www.wacotrib.com/news/higher_education/baylor-professor-resigns-after-title-ix-complaints/article_dc760928-2fb5-5fe4-b902-20484ebd90c6.html

³² <https://www.insidehighered.com/news/2019/09/16/former-baylor-professor-sues-accusing-university-biased-title-ix-investigation>

³³ <https://www.globenewswire.com/news-release/2021/01/06/2153888/0/en/NCLA-Second-Circuit-Brief-Rebuts-Cornell-and-Dept-of-Educ-Efforts-to-Deny-Title-IX-Hearing-Rights.html>

³⁴ <https://reason.com/2018/01/09/woytowicz-sues-gwu-over-title-ix-farce/>

³⁵ <https://www.insidehighered.com/news/2019/10/22/professor-says-she-was-fired-refusing-disclose-victims-name>

³⁶ <https://reason.com/2019/07/24/bruce-hay-harvard-scam-title-ix-paternity/>

³⁷ <https://www.thefire.org/law-professor-still-subject-to-sanctions-from-howard-university-for-brazilian-wax-hypothetical-on-quiz/>

³⁸ <https://nclalegal.org/wp-content/uploads/2021/05/Complaint-and-Jury-Demand.pdf>

³⁹ <https://www.thenation.com/article/archive/this-professor-was-fired-for-saying-fuck-no-in-class/>

⁴⁰ <https://reason.com/2018/04/04/mass-art-saul-levine-film-sex/>

⁴¹ <https://www.saveservices.org/2020/03/the-weaponization-of-title-ix-at-oregon-health-and-science-university/>

⁴² <https://reason.com/2018/08/14/avital-ronnell-nyu-me-too-harassment/>

⁴³ <https://www.newyorker.com/news/news-desk/laura-kipniss-endless-trial-by-title-ix>

⁴⁴ <https://nypost.com/2020/12/26/alec-klein-unfounded-metoo-accusations-destroyed-my-life/>

⁴⁵ <https://www.insidehighered.com/news/2021/02/22/pacific-u-professor-says-administrators-threatened-him-title-ix>

⁴⁶ <https://reason.com/2018/09/18/plymouth-state-title-ix-sex-fischler/>

⁴⁷ <https://public.fastcase.com/WI%2B2t%2BeVuI35%2FN70vAMFZthU4DAstBsPBsAmWHrcUy5aDGhKflkbe4poP8a3JQyGQ0I5x3OdIlgmrMFTF2aSVg%3D%3D>

⁴⁸ <https://www.chronicle.com/article/Star-Scholar-Resigns-From/232601>

⁴⁹ <https://www.insidehighered.com/news/2013/12/16/tenured-professor-boulder-says-she-being-forced-out-over-lecture-prostitution>

21. University of Illinois: Joseph Petry⁵⁰
22. University of Michigan: Pamela Smock⁵¹
23. University of North Texas: Robert Frodeman⁵²
24. University of Rochester: Florian Jaeger⁵³
25. University of Utah: Nicholas Wolfinger⁵⁴
26. Virginia Commonwealth University: Douglas Wilder⁵⁵

Five Public Opinion Polls Show Strong Bipartisan Support for Campus Due Process

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, 2020:⁵⁶

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 have the right to cross-examine their accusers: 49%
- 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%

⁵⁰ <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>

⁵¹ <https://www.detroitnews.com/story/opinion/columnists/ingrid-jacques/2018/11/30/jacques-due-process-professors-too/2142079002/>

⁵² <https://quillette.com/author/robert-frodeman/>

⁵³ <https://reason.com/2018/01/23/sexually-promiscuous-professor-rochester/>

⁵⁴ <https://quillette.com/2017/11/17/pursuit-injustice-adventures-title-ix/>

⁵⁵ <https://www.saveservices.org/wp-content/uploads/Wilder-Statement-12.2.2019.pdf>

⁵⁶ SAVE, (November 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.⁵⁷ The survey used the same questions and methods as the 2017 poll conducted for the Bucknell Institute for Public Policy — see below.

2. A national survey conducted May 20-25, 2020 by the Fairleigh Dickinson University Poll of 1,003 adults asked,⁵⁸

- “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:
- “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.⁵⁹

- 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.⁶⁰

5. A poll by the Bucknell Institute for Public Policy conducted July 25-August 1, 2017 of 1,200 persons reported these results:⁶¹

Percent of respondents who agreed:

⁵⁷ SAVE (November 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>

⁵⁸ 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>

⁵⁹ 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/>

⁶⁰ Rasmussen Reports (September 13, 2017), Most Americans Agree With DeVos on Sexual Misconduct on Campuses. http://www.rasmussenreports.com/public_content/politics/current_events/social_issues/most_americans_agreewith_devos_on_sexual_misconduct_on_campuses

⁶¹ Bucknell Institute for Public Policy (September 2017), Perceptions of Higher Education Survey – Topline Results. <http://bipp.blogs.bucknell.edu/files/2017/09/BIPP-Higher-Ed-Toplines.pdf>

- 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%
- 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%

Lawmakers, Newspapers, Organizations, and Individuals – Both Liberal and Conservative -- Support Campus Due Process

Consistent with the opinion polls cited above, lawmakers, newspaper editorial boards, organizations, and individuals -- 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.⁶²

Lawmakers:

1. Michael Bloomberg: Bring Better Justice to U.S. Universities⁶³
2. Sen. Richard Burr and Rep. Virginia Foxx: Letter to Department of Education Miguel Cardona⁶⁴
3. Virginia Lt. Gov. Justin Fairfax: Statement of April 7⁶⁵

Newspaper Editorial Boards:

1. *Detroit News*: Keep Title IX sex assault rules constitutional⁶⁶

⁶² SAVE (March 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/>

⁶³ Bloomberg, Michael R. (March 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>

⁶⁴ Sen. Richard Burr and Rep. Virginia Foxx (March 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

⁶⁵ Lt. Gov. Justin Fairfax on Getting No Due Process from McAuliffe, Other Dems (April 7, 2021). <https://www.youtube.com/watch?v=yVAsQwTyWws>

⁶⁶ 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>

2. *Los Angeles Times*: Betsy DeVos's campus sex-assault rules need a tweak, not an overhaul⁶⁷
3. *New York Daily News*: Fairness for accusers & accused: Biden shouldn't mess with Title IX improvements on sexual misconduct⁶⁸
4. *Washington Post*: Biden has a chance to restore balance to the rules on campus sexual assault⁶⁹
5. *Wall Street Journal*: Here Comes the Due Process Rollback⁷⁰

Organizations:

1. Eugene/Springfield, Oregon Chapter of the NAACP⁷¹
2. SAVE: 115 Lawmakers Call for Return to Failed Campus Policy⁷²
3. National Association of Scholars: Rolling Back Title IX Due Process Protections is Wrong⁷³
4. Independent Women's Forum: IWF and Independent Women's Law Center Urge Biden Administration to Maintain Due Process Protections⁷⁴
5. FIRE: More than 100 members of Congress to new Education Secretary: Abandon Title IX rules.⁷⁵

Individuals:

1. Lindsay McKasson: I'm Afraid to Send My Son to School: How Title IX is Hurting the Next Generation of Men⁷⁶

⁶⁷ The (Los Angeles) Times Editorial Board (March 22, 2021), Editorial: Betsy DeVos's campus sex-assault rules need a tweak, not an overhaul. <https://news.yahoo.com/editorial-betsy-devos-campus-sex-100019802.html>

⁶⁸ Daily News Editorial Board (March 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>

⁶⁹ The Washington Post Editorial Board (March 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

⁷⁰ WSJ Editorial Board (March 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>

⁷¹ 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/>

⁷² SAVE (March 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/>

⁷³ National Association of Scholars (March 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

⁷⁴ Independent Women's Forum (March 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/>

⁷⁵ Coward, Tyler (March 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_CkgYGTThewUCItcfs

⁷⁶ <https://www.saveservices.org/2021/05/im-afraid-to-send-my-son-to-school-how-title-ix-is-hurting-the-next-generation-of-men/>

13. Raul Jauregui: Removing or Weakening the Presumption of Innocence in Title IX Proceedings Would Institutionalize ‘Cancel Culture’⁸⁸
14. Wendy McElroy: Due Process on Campus Keeps Justice on the Streets⁸⁹
15. Andrew Miltenberg and Kristen Mohr: Princeton must consider due process in sexual misconduct policies⁹⁰
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.⁹¹
17. Doe v. Purchase College: OCR Review of Title IX Regulation Needs to Stop ‘Victim-Centered’ Abuses⁹²
18. Edward Bartlett and Linda Chavez: The Future of Title IX Implementation⁹³ (podcast)
19. Buddy Ullman: Biden’s Enigmatic Executive Order on Sex Discrimination⁹⁴
20. Jennifer Braceras: Attempts to Roll Back Due Process On Campus Hurt Students⁹⁵ (radio interview)
21. James Baresel: Biden, Title IX, and the Dangers Behind “Vague Positives”⁹⁶
22. KC Johnson: On Title IX, Dems Move to Restore Obama-Era Unfairness⁹⁷
23. Andrew Sullivan: Emily Yoffe On Due Process and Campus Rape⁹⁸

⁸⁸ 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/>

⁸⁹ McElroy, Wendy (May 7, 2021), Due Process on Campus Keeps Justice on the Streets. <https://mises.org/wire/due-process-campus-keeps-justice-streets>

⁹⁰ Miltenberg, Andrew and 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>

⁹¹ 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/>

⁹² SAVE (April 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/>

⁹³ Regulatory Transparency Project (May 1, 2021). The Future of Title IX Implementation https://www.speaker.com/episode/44578968?utm_medium=widget&utm_term=episode_title&utm_source=user%3A10041072

⁹⁴ Ullman, Buddy (April 29, 2021), Biden’s Enigmatic Executive Order on Sex Discrimination. <https://www.saveservices.org/2021/04/bidens-enigmatic-executive-order-on-sex-discrimination/>

⁹⁵ Braceras, Jennifer C. (April 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/>

⁹⁶ Baresel, James (March 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>

⁹⁷ Johnson, KC (April 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

⁹⁸ Sullivan, Andrew (April 2, 2021), Emily Yoffe On Due Process and Campus Rape. <https://andrewsullivan.substack.com/p/emily-yoffe-on-due-process-and-campus?fbclid=IwAR2SeEMiIDj21D3KQAKMkIdSs62mFSExaTL6wMP6HASheyInCFhAr27bt90>

24. Just the News: Biden's plans for campus sexual misconduct regulations leave lawyers puzzled⁹⁹
25. Justin Dillon and Candice Jackson: Why Does Joe Biden Hate Due Process?¹⁰⁰
26. Paul Falanga: Title IX: A Professor's Premonition Becomes a Disastrous Reality¹⁰¹
27. Jacob Sullum: Biden Threatens to Revive Kangaroo Courts in College Sexual Assault Cases¹⁰²
28. Cynthia Ward: New Title IX regulations restored fair process — why try to overturn them?¹⁰³
29. James Baresel: Biden Title IX Revisions Would Destroy Due Process, Create Legal Quagmires, and Not Solve Real Problems¹⁰⁴
30. Alison Somin: Biden executive order will lead to due process deficits on campus¹⁰⁵
31. Ashe Schow: Everyone Loses When Due Process Is Rolled Back¹⁰⁶ (TV interview)
32. Teresa Manning: Biden Title IX bid to 'believe all women' will meet its match on campuses¹⁰⁷
33. David Harsanyi: Biden Prepares to Strip College Students of Due-Process Rights¹⁰⁸
34. Campus Reform: Biden signs executive order in move toward revoking rule aimed at preserving due process¹⁰⁹

⁹⁹ Piper, Greg (March 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>

¹⁰⁰ Dillon, Justin and Jackson, Candice (March 25, 2021), Why Does Joe Biden Hate Due Process? <https://www.nationalreview.com/2021/03/why-does-joe-biden-hate-due-process/>

¹⁰¹ Falanga, Paul (March 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/>

¹⁰² Sullum, Jacob (March 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>

¹⁰³ Ward, Cynthia V. (March 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>

¹⁰⁴ Baresel, James (March 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/>

¹⁰⁵ Somin, Alison (March 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>

¹⁰⁶ The Daily Wire (March 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=IwAR2HOvUDzb5BAyPJsB0R9uKy3p8CWmSZsBBqt436bxB-bcRcoVYKJkzfF0o>

¹⁰⁷ Manning, Teresa R. (March 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/>

¹⁰⁸ Harsanyi, David (March 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&tsrc=twtr

¹⁰⁹ Morabito, Angela (March 9, 2021), Biden signs executive order in move toward revoking rule aimed at preserving due process. https://www.campusreform.org/article?id=16995&fbclid=IwAR1BEHMncCR2sqRVKF4pg0Kw6hOumcv6yAxNSZy_asFtaeMLavsGSX-Tjq0

35. Washington Examiner: A conversation with Brooklyn College professor KC Johnson¹¹⁰

2011 DCL Did Not Improve Reporting or Reduce the Incidence of Sexual Assault

The 2011 Dear Colleague Letter (DCL)¹¹¹ was issued with the 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 comparisons of the effects of the DCL policies over time.¹¹² The AAU surveys documented *increases* in nonconsensual sexual victimization among undergraduate students:

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

In 2019, only 11.2% of sexual assaults were reported to campus police, partly because only 45% of victims believed that school officials were “very likely” or “extremely likely” to take their report seriously.

Similarly, the American Association of University Women reported that 89% of American colleges received *zero* reports of rape incidents in 2016.¹¹³

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 University¹¹⁴
2. University of Southern California¹¹⁵

¹¹⁰ Washington Examiner (March 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

¹¹¹ Office of the Assistant Secretary (April 4, 2011). Dear Colleague Letter. <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> Hereinafter referred to as the 2011 DCL.

¹¹² Association of American Universities (October 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>

¹¹³ 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/>

¹¹⁴ 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/>

¹¹⁵ Ellis, Lindsay (October 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/>

3. UCLA¹¹⁶

In conclusion, the 2011 DCL policy did not succeed in achieving its stated goals of increasing the reporting of sexual assaults or reducing campus sexual assaults. Worse, the policy apparently served to distract administrators' attention away from the problem of staff-on-student sexual abuse, eventually resulting in multi-million dollar settlements against the institutions.

From the perspective of campus administrators, the policies engendered by the Dear Colleague Letter similarly were viewed as difficult to implement, unfair to the accused, expensive, and placing colleges at greater liability risk.¹¹⁷

Complainants Frequently Were Shortchanged by School Policies Established Under the 2011 DCL

Sexual assault complainants have a right to campus investigations and adjudications that are fair and equitable. The 2011 Dear Colleague Letter did not specify the procedures to be followed by schools. Not surprisingly, a survey of 692 Title IX coordinators revealed a lack of consistency in institutional responses to allegations of sexual misconduct:¹¹⁸

“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, 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).”

Of greater concern was a survey of 13 Title IX coordinators from large universities, which revealed that Title IX coordinators often conflated their advocacy and administrative roles. The student concluded:¹¹⁹

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

¹¹⁶ Malone, Patrick and Associates P.C. (November 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/>

¹¹⁷ SAVE. College Administrators Speak Out. <https://www.saveservices.org/sexual-assault/college-administrators/>

¹¹⁸ Jacquelyn D. Wiersma-Mosley and 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/>

¹¹⁹ 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>

Given these shortcomings, it's no surprise that complainants eventually filed 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:¹²⁰

1. Schools acting with "deliberate indifference"
2. Investigative failures
3. Lack of advisor assistance

Deliberate Indifference

In some cases, institutions have acted with "deliberate indifference" to complaints. These are three examples:

- University of Southern California¹²¹
- Michigan State University¹²²
- Chicago Public School System¹²³

Investigative Failures

At Baylor University in Texas, complainants reported alleged assaults to the athletic coaches of the accused harassers, but those claims were ignored and not investigated.¹²⁴ Lack of timely response is yet another complaint identified by complainants.¹²⁵ 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."¹²⁶

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

¹²⁰ SAVE (2017), Six-Year Experiment in Campus Jurisprudence. <https://www.saveservices.org/wp-content/uploads/Six-Year-Experiment-Fails-to-Make-the-Grade.pdf>

¹²¹ 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>

¹²² Jesse, David (September 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/>

¹²³ Hansen, Claire (November 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>

¹²⁴ 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

¹²⁵ Fox5 Washington, D.C. Staff (November 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>

¹²⁶ Cameron Mackintosh (Feb. 23, 2017), Federal review accuses UA system of Title IX violations. <https://www.alaskanewsresource.com/content/news/Title-IX-compliance-review-accuses-UA-system-of-violations-414680503.html>

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.

SAVE has documented dozens of individual cases in which complainants were mistreated by campus disciplinary procedures.¹²⁷

School Policies Established Under the 2011 DCL Violated the Due Process Rights of Accused Students

Persons who are accused of sexual misconduct have a right to campus investigations and adjudications that are fair and equitable. For the accused, these rights are rooted in Section One of the Fourteenth Amendment, which states, “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

The 2011 Dear Colleague Letter used the words “due process” only twice in the body of the document:¹²⁸

“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 be followed. 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.”

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

1. Harvard Law School¹²⁹
2. University of Pennsylvania¹³⁰
3. Cornell Law School¹³¹
4. Professors from other law schools¹³²

¹²⁷ SAVE, Victims Deserve Fairness and Due Process. <https://www.saveservices.org/sexual-assault/victims-deserve-better/>

¹²⁸ U.S. Department of Education (April 4, 2011), Dear Colleague Letter. <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>

¹²⁹ <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqBM/story.html>

¹³⁰ <http://media.philly.com/documents/OpenLetter.pdf>

¹³¹ <https://www.scribd.com/document/375274931/John-Doe-v-Cornell-Motion-of-23-Cornell-Law-Professors-to-File-Amicus-Brief-in-Support-of-Student>

¹³² <http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf>

Six national organizations issued similar statements:

1. American Bar Association Task Force for Promoting Fairness in Campus Sexual Misconduct Cases¹³³
2. American College of Trial Lawyers: Position Statement Regarding Campus Sexual Assault Investigations¹³⁴
3. SAVE: Six-Year Experiment in Campus Jurisprudence Fails to Make the Grade¹³⁵
4. Heritage Foundation: Campus Sexual Assault: Understanding the Problem and How to Fix It¹³⁶
5. National Association of Scholars: OCR's New Sexual Harassment Guidelines Threaten Academic Freedom, Due Process¹³⁷
6. Federalist Society's Regulatory Transparency Project¹³⁸

Appellate Courts Have Issued 23 Decisions Upholding the Due Process Rights of the Accused

To date, over 700 lawsuits have been filed by accused students against their colleges.¹³⁹ In a majority of cases, judges have ruled in favor of the accused student.¹⁴⁰ As of the end of 2020, 23 of these lawsuits resulted in appellate court decisions favorable to the accused student:¹⁴¹

No.	Case Name, Decision Year	Due Process Violations
1	I.F. v. Administrators of the Tulane Educational Fund (2013) ¹⁴²	Insufficient hearing process; Insufficient notice

¹³³http://www.abajournal.com/news/article/aba_task_force_recommends_due_process_protections_in_campus_sexual_assault

¹³⁴https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/task_force_allegations_of_sexual_violence_white_paper_final.pdf

¹³⁵<http://www.saveservices.org/wp-content/uploads/Six-Year-Experiment-Fails-to-Make-the-Grade.pdf>

¹³⁶http://www.heritage.org/sites/default/files/2017-07/LM-211_0.pdf

¹³⁷http://www.nas.org/articles/OCRs_New_Sexual_Harassment_Guidelines_Threaten_Academic_Freedom_Due_Process

¹³⁸<https://regproject.org/wp-content/uploads/RTP-Race-Sex-Working-Group-Paper-Campus-Misconduct-Proceedings.pdf>

¹³⁹ Title IX for All. <https://titleixforall.com/> Accessed May 27, 2021.

¹⁴⁰ Samantha Harris and 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>

¹⁴¹ SAVE (2021). Appellate Court Decisions for Allegations of Campus Due Process Violations, 2013-2020. <https://www.saveservices.org/wp-content/uploads/2021/04/Appellate-Court-Cases-2013-2020.pdf>

¹⁴² *I.F. v. Adm'rs of Tulane Educ. Fund*, 131 So.3d 491 (La. App. 4th Cir. 2013).

2	John Doe v. University of Southern California (2016) ¹⁴³	Insufficient hearing process; Insufficient notice; Inadequate credibility assessment
3	John Doe v. Columbia University (2016) ¹⁴⁴	Improper use or exclusion of witness testimony; Potential sex bias
4	Abdullatif Arishi v. Washington State University (2016) ¹⁴⁵	Insufficient hearing process
5	In the Matter of John Doe v. Skidmore College (2017) ¹⁴⁶	Insufficient notice; Inadequate investigation; Improper use or exclusion of witness testimony
6	John Doe v. University of Cincinnati (2017) ¹⁴⁷	Insufficient hearing process; Insufficient notice; Lack of cross-examination; Inadequate credibility assessment
7	Matthew Jacobson v. Butterfly Blaise (SUNY Plattsburgh) (2018) ¹⁴⁸	Insufficient hearing process; Misuse of affirmative consent policy
8	John Doe v. University of Miami (OH) (2018) ¹⁴⁹	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) ¹⁵⁰	Insufficient hearing process; Inadequate credibility assessment
10	John Doe v. Boston College, et. al. (2018) ¹⁵¹	Insufficient hearing process; Conflicting roles of college officials
11	John Doe v. Claremont McKenna College (2018) ¹⁵²	Lack of cross examination; Inadequate credibility assessment
12	John Doe v. David H Baum, et al. (University of Michigan) (2018) ¹⁵³	Lack of cross examination; Inadequate credibility assessment; Potential sex bias

¹⁴³ *Doe v. Univ. of S. Cal.*, 246 Cal. App. 4th 221 (2016).

¹⁴⁴ *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016)

¹⁴⁵ *Arishi v. Wash. State Univ.*, 385 P.3d 251 (2016).

¹⁴⁶ *Matter of Doe v. Skidmore Coll.*, 152 A.D.3d 932 (3rd Dep't 2017).

¹⁴⁷ *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017).

¹⁴⁸ *Matter of Jacobson v. Blaise*, 164 A.D.3d. 1072 (3d Dep't 2018).

¹⁴⁹ *Doe v. Miami Univ.*, 822 F.3d 579 (6th Cir. 2018).

¹⁵⁰ *Matter of West v. State Univ. of N.Y. at Buffalo*, TP 17-00481 (4th Dep't 2018)

¹⁵¹ *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67 (1st Cir. 2018).

¹⁵² *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055 (2018).

¹⁵³ *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

13	John Doe v. The Regents of the University of California, et al. (2018) ¹⁵⁴	Insufficient hearing process; Inadequate investigation; Lack of cross-examination
14	John Doe v. University of Southern California (2018) ¹⁵⁵	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) ¹⁵⁶	Lack of cross examination; Single investigator model
16	John Doe v. Ainsley Carry et al. (USC) (2019) ¹⁵⁷	Lack of cross examination; Single investigator model; Improper review of appeal
17	John Doe v. Westmont College, et al. (2019) ¹⁵⁸	Inadequate credibility assessment; Withholding evidence from accused; Inability to question witnesses
18	Matter of Bursch v. Purchase Coll. of the State Univ. of N.Y. (2019) ¹⁵⁹	University refused to allow student's attorney to attend disciplinary hearing
19	John Doe v. Purdue University et al. (2019) ¹⁶⁰	University withheld evidence from accused; Inaccurate investigative report; Hearing panel did not read investigative report
20	John Doe v. University of the Sciences (2020) ¹⁶¹	Selective enforcement of sexual misconduct policy; Lack of live hearing with cross examination
21	John Doe v. Oberlin College (2020) ¹⁶²	"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) ¹⁶³	Initial refusal to allow appeal; Open hostility to accused; Appeals panel only credited female testimony

¹⁵⁴ *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44 (2018).

¹⁵⁵ *Doe v. Univ. of S. Cal.*, No. B271834, 2018 WL 6499696 (2018)

¹⁵⁶ *Doe v. Allee*, 242 Cal. Rptr. 3d 109 (Cal. App. 2d Dist. 2019)

¹⁵⁷ *Doe v. Carry*, B282164, 2019 WL 155998 (Cal. App. 2d Dist. Jan. 8, 2019)

¹⁵⁸ *Doe v. Westmont College*, 246 Cal. Rptr. 3d 369 (Cal. App. 2d Dist. 2019), *reh'g denied* (May 17, 2019)

¹⁵⁹ *Bursch v. Purchase College of State U. of New York*, 125 N.E.3d 830 (N.Y. 2019)

¹⁶⁰ *Doe v. Purdue U.*, 928 F.3d 652 (7th Cir. 2019) (Barrett, J.)

¹⁶¹ *Doe v. U. of Scis.*, 961 F.3d 203 (3d Cir. 2020)

¹⁶² *Doe v. Oberlin College*, 963 F.3d 580 (6th Cir. 2020)

¹⁶³ *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940 (9th Cir. 2020)

23	John Doe v. University of Arkansas – Fayetteville (2020) ¹⁶⁴	“Unexplained” finding of female student’s incapacitation; External pressure from OCR and state legislature; Student protests
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Impartial Investigations Are the Foundation of Equitable Proceedings

An impartial and fair investigation is the foundation of an equitable adjudication. In a recent guidance, the Office for Civil Rights states, “The school must conduct an adequate, reliable, and impartial investigation that provides the parties with an equal opportunity to present witnesses and other evidence.”¹⁶⁵

Accordingly, the 2020 regulation contains explicitly worded language about the need for truthful investigations:¹⁶⁶

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. [emphasis added]

Because the investigative process is subject to less scrutiny than the adjudication, investigative bias can be difficult to discern. Unfortunately, certain biased investigative philosophies known as “victim-centered,”¹⁶⁷ “trauma-informed,”¹⁶⁸ or “Start By Believing”¹⁶⁹ are believed to be widely utilized in campus investigations. These conviction-oriented philosophies presume the guilt of the respondent and engender confirmation bias.¹⁷⁰

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

- Title IX: The Big Mess on Campus¹⁷¹

¹⁶⁴ *Doe v. U. of Arkansas - Fayetteville*, 974 F.3d 858 (8th Cir. 2020)

¹⁶⁵ 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/qa-reopening-202105.pdf>

¹⁶⁶ Section 106.45 (b)(1)

¹⁶⁷ 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>

¹⁶⁸ Center for Prosecutor Integrity, Trauma-Informed: Junk Science. <http://www.prosecutorintegrity.org/sa/trauma-informed/>

¹⁶⁹ Center for Prosecutor Integrity, Start By Believing: Ideology of Bias. <http://www.prosecutorintegrity.org/sa/start-by-believing/>

¹⁷⁰ Simply Psychology (2020). Confirmation Bias. <https://www.simplypsychology.org/confirmation-bias.html>

¹⁷¹ 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>

- Title IX and “Trauma-Focused” Investigations: The Good, the Bad, and the Ugly¹⁷²
- Best-Practice Interviewing Spans Many Contexts¹⁷³
- Title IX Investigations: The Importance of Training Investigators in Evidence-Based Approaches to Interviewing¹⁷⁴

Recognizing the importance of impartial campus investigations, SAVE established an online petition in 2019. The petition features the plight of Matt Rolph, a former student at Hobart College in Geneva, New York. Despite the fact that a jury had found him innocent of all sexual assault charges, the college mounted a “victim-centered” investigation of him that:

- Did not record any of the interviews.
- Failed to review innocence-proving text messages sent by Jane.
- Failed to get records supporting Jane’s claim of medical problems caused by the incident.
- Did not resolve inconsistencies among witness statements.

The former student subsequently filed a lawsuit against the College. Judge Elizabeth Wolford eventually ruled in favor of Rolph’s claims of investigative bias.¹⁷⁵ As of June 3, 2021, 5,015 persons had co-signed the petition demanding an end to “Start By Believing” investigations.¹⁷⁶

The name, location, and signature date of these 5,015 persons is attached to this Group Comment.

Attorneys Report Substantial Improvements in Campus Proceedings Under the New 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,

¹⁷² Davis, Deborah and 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%99CTrauma-Focused%E2%80%99DInvestigations-TheGoodTheBadandtheUgly.pdf>

¹⁷³ Brubacher, Sonja P. and 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>

¹⁷⁴ Meissner, Christian A. and 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>

¹⁷⁵ Rolph v. Hobart & William Smith Colls. <https://casetext.com/case/rolph-v-hobart-william-smith-colls>

¹⁷⁶ 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.

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.”¹⁷⁷

- “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.”¹⁷⁸
- “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.”¹⁷⁹
- “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 of university administrators to place their thumb on the scale to control the outcome.”¹⁸⁰

One Colorado attorney had high praise for the changes implemented at Colorado University at Boulder. The case involved a student who was accused of violating UCB’s Sexual Misconduct, Intimate Partner Violence, and Stalking Policy by engaging in non-consensual vaginal and oral intercourse. Larry Mertes writes,

¹⁷⁷ Personal communication with Eric Long, June 1, 2021.

¹⁷⁸ Personal communication with Eric Rosenberg, May 28, 2021.

¹⁷⁹ Personal communication with Philip Byler, May 28, 2021.

¹⁸⁰ Personal communication with Jenna Parker, May 31, 2021.

“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.”¹⁸¹

Conclusion

This analysis reveals the following:

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. Constrained definitions of sexual harassment are essential to preserve free speech rights for faculty and students.
3. 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.
4. The 2011 Dear Colleague Letter did not succeed in achieving its stated policy objectives.
5. School policies established under the 2011 DCL shortchanged complainants and accused students, resulting in hundreds of lawsuits.
6. Impartial investigations are one of the most fundamental requirements for equitable campus proceedings.
7. Campus procedures appear to have improved under the current regulation.

This analysis confirms the necessity of affirming the importance of campus due process, and to preserve the rights, protections, and services enumerated in the 2020 Title IX regulation.

Signed (affiliations listed for identification purposes only):

¹⁸¹ 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/>