

COMMENT ON PROPOSED TITLE IX REGULATION

# 175 Judicial Decisions Affirm the 2020 Title IX Regulation

Submitted by SAVE

This Comment, along with the Attachment, is to be included as part of the Administrative Record

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The Fourteenth Amendment to the U.S. Constitution states,

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>1</sup>

Prior to 2011, the specific due process rights that applied in the higher education context were not well delineated. But in 2011, the U.S. Department of Education issued a “Dear Colleague Letter” on campus sexual violence.<sup>2</sup> The effect of the Dear Colleague Letter was to remove a number of due process protections, and to pressure colleges and universities to take a more aggressive approach to the adjudication of allegations of sexual misconduct.

As a result, many students, mostly men, were suspended or expelled. Many of these men filed lawsuits against their former schools. Beginning in 2013, judges began to issue rulings favorable to the accused student. To date, 237 judicial decisions favorable to the accused student have been issued,<sup>3</sup> representing a substantive body of case law. These decisions were an important reason for the Department of Education issuing its Title IX regulation in 2020.<sup>4</sup>

In most of these decisions, the judge elaborated on the legal basis and reasoning behind the decision. SAVE has conducted a detailed review of these 175 decisions (SAVE provided an earlier version of this document to the Department of Education during its Public Hearing in June, 2021<sup>5</sup>).

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<sup>1</sup> <https://constitution.congress.gov/browse/amendment-14/#:~:text=No%20State%20shall%20make%20or,equal%20protection%20of%20the%20laws.>

<sup>2</sup> <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>

<sup>3</sup> [https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV\\_BBv5NAA5z9cv178Fjk3o/edit#gid=0](https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV_BBv5NAA5z9cv178Fjk3o/edit#gid=0)

<sup>4</sup> <https://www.saveservices.org/2020/05/new-title-ix-regulatory-text-34-cfr-106/>

<sup>5</sup> <https://www.saveservices.org/wp-content/uploads/2021/06/5.-Elements-of-Due-Process-Attachment-A-6.11.2021.pdf>

SAVE then identified the judicial language that pertains to each of the following 27 major regulatory provisions contained in the 2020 Title IX regulation:

1. Equitable Grievance Procedures — Section 106.8(b)
2. Institutional Sex Bias — Section 106.45
3. Definition of Sexual Harassment — Section 160.30
4. Formal Complaint — Section 160.30
5. Supportive Measures — Section 160.44(a)
6. Emergency Removals — Section 160.44(c)
7. Impartial Investigations — Section 106.45 (b)(1)
8. Evidence Evaluation — Section 160.45(b)(1)(ii)
9. Credibility Assessment — Section 106.45 (b)(1)(ii)
10. Bias Towards Complainant — Section 160.45(b)(1)(iii)
11. Standard of Evidence — Section 160.45(b)(1)(vii)
12. Appeals — Section 160.45(b)(1)(viii)
13. Notice — Sections 106.45(b)(2)(i)(A), 106.45(b)(2)(i)(B), and 106.45(b)(5)(v)
14. Burden of Proof and Evidence Collection — Section 160.45(b)(5)(i)
15. Access to Evidence — Section 160.45(b)(5)(iii)
16. Participation of Advisors — Section 106.45(b)(5)(iv)
17. Live Hearings — Section 106.45(b)(6)(i)
18. Cross Examination — Section 106.45(b)(6)(i)
19. Conflict of Interest – Single Investigation Model — Section 106.45(b)(7)(i)
20. Informal Resolution — Section 160.45(b)(9)
21. Training Materials — Section 106.45(b)(10)(i)(D)
22. Recordkeeping — Section 160.45(b)(10)(i)
23. Consent — 106.30(a)
24. Geographical/Programmatic Scope — Section 106.44(a)
25. Presumption of Innocence — Section 106.45(b)(1)(iv)
26. Equal Opportunity for Parties to Present Evidence — Section 106.45(b)(5)(ii)
27. Materially False Statements Made in Bad Faith — Section 106.71(b)(2)

The “Analysis of Judicial Decisions Affirming the 2020 Title IX Regulation”,<sup>6</sup> attached, concludes that each of the 27 major 2020 regulatory provisions is consistent with at least one judicial decision. As of January 1, 2022, the following seven provisions from the 2020 regulation had been affirmed by 25 or more court decisions:

1. Impartial Investigations (Section 106.45(b)(1)): 48 decisions
2. Bias Towards Complainant or Respondent (Section 106.45(b)(1)(iii)): 45 decisions
3. Institutional Sex Bias (Section 106.45): 43 decisions
4. Notice (Sections 106.45(b)(2)(i)(A), 106.45(b)(2)(i)(B), and 106.45(b)(5)(v)): 39 decisions

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<sup>6</sup> <https://www.saveservices.org/wp-content/uploads/2022/04/Analysis-of-Title-IX-Regulation-3.24.2022.pdf>

5. Cross Examination (Section 106.45(b)(6)(i)): 38 decisions
6. Evidence Evaluation (Section 106.45(b)(1)(ii)): 33 decisions
7. Access to Evidence (Sections 106.45(b)(5)(iii) and 106.45(b)(5)(vii)): 27 decisions

In most cases, the decisions did not turn on subtle interpretations of nuanced legal precepts. Rather, they were based on judicial recognition that colleges are failing to observe the most fundamental notions of fairness, often so gross as to suggest that sex bias was the motivating factor.

Further analysis of the 175 cases reveals the legal bases for these decisions were the following (27% of the decisions cited two or more legal bases):

- Title IX statutory law: 50%
- Constitutional law (due process or equal protection): 32%
- Contractual: 20%
- Fundamental fairness: 10%
- State law: 9%
- Other legal basis: 8%

Judges now view constitutionally based due process protections as requisite to sexual misconduct proceedings in public schools. As Judge Robert Jonker noted in *Munoz v. Michigan State University*, “Everyone agrees that procedural due process is implicated when a public university imposes a suspension of this magnitude.”<sup>7</sup>

In addition, 12 states have enacted campus due process legislation:<sup>8</sup>

1. Arizona
2. Arkansas
3. California
4. Florida
5. Georgia
6. Kentucky
7. Louisiana
8. Maryland
9. New York
10. North Carolina
11. North Dakota
12. Ohio

A review of these laws reveals they are generally consistent with the requirements of the 2020 Title IX regulation.

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<sup>7</sup> D. Mich. June 23, 2021

<sup>8</sup> <https://www.saveservices.org/title-ix-regulation/state-laws/>

SAVE’s review of the Preamble of the recently proposed Title IX regulation<sup>9</sup> fails to locate adequate justification for negating any of the 175 judicial decisions cited in our “Analysis of Judicial Decisions Affirming the 2020 Title IX Regulation,” especially those opinions that are expressly based on constitutional considerations.

SAVE believes the Department of Education has exceeded its legal authority by proposing regulations that would have the effect of overturning numerous trial and appellate court decisions, especially ones that cite Fourteenth Amendment considerations.

We therefore urge the Department of Education to retain the 2020 Title IX regulation in its current version.

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<sup>9</sup> <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf>