

From: (b)(6)
Sent: Fri, 11 Jun 2021 16:00:03 -0400
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (college misconduct)

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We are writing on behalf of all students, both accused and accusers. Our university is a small liberal arts college that has had a very checkered history of Title IX compliance — based on our own experience and numerous newspaper accounts of mishandled investigations and hearings. We believe that this checkered history — involving lawsuits by both accused and accusing students — is due to two significant failures in the current rules: 1) the current rules allow the senior executives of a college to take a “hands off” approach to Title IX matters, and 2) students do not have the right to appeal based on unlawful acts of the college.

We believe it is essential to fair treatment of all students that the OCR makes clear to college executives — specifically, the President and General Counsel — that they are responsible for ensuring that the college complies with all OCR rules. By omitting senior executives from this individual onus under Title IX, the current system places the compliance burden too heavily on TIXCs, which creates significant risks: Not all TIXCs are fully versed in all Title IX rules, and not all TIXCs are the neutral actors that OCR rules envision.

We also believe that it is essential that students have the right to appeal decisions based solely on failure of the college to comply with DOE rules. This right is essential because currently there is no avenue for a student to raise his or her hand and say “my college is violating DOE rules”. As things stand now, the DOE is only made aware of a small fraction of misconduct by college officials — only that small fraction that is represented by students who learn of the OCR’s 180 day discrimination appeal in time, who are able to articulate that the college’s violation is somehow discriminatory, and who are willing to file despite the risk of retaliation and cost of legal assistance. Unless you add this new appeal right, the only students who have any hope of holding college officials accountable for misconduct are those whose families are willing to pay the tens of thousands of dollars to sue the college. This is not right.

To aid in understanding our comments, we offer these examples from our own experience:

* Our college issues “summary findings”. By this, we mean that the FOLs state that “based on all of the evidence, the following findings are made”. There is no review or listing of evidence, no discussion of how the evidence was weighted, and no discussion of how the balance of the evidence supported that the burden of proof was met.

We believe that the reason that the TIXC handles findings in this manner is to avoid the painstaking and difficult evidentiary-based analysis that DOE rules actually require. It’s simply easier for the TIXC to make summary findings and thereby avoid dealing with the lack of evidence or any inconsistent evidence. In our case, we do not even know if our hearing panel was even aware of exculpatory evidence because the FOL was silent.

* Our college allows unlisted sanctions to be imposed on students. We believe that the OCR has been very clear in numerous publications that a university may only impose sanctions that are listed in its SMP. In our case, sanctions that were not listed in the SMP were imposed. Even though we presented the rules that make clear that only listed sanctions may be imposed, the TIXC, the President, and the General Counsel have permitted the unlisted sanctions to be enforced. There is no doubt here, the sanctions are not listed and were not lawful.

* Our college’s SMP bars all use of sexual history of the accusing and accused students. While we agree with the general concept, we also know that sexual history between the accused and the accuser as a couple is treated differently by the DOE. The DOE has made it very clear that both prior and subsequent sexual history between the accuser and accused is germane to the issue of consent. In our case, the accuser and our son were in a long term relationship, which included sexual activity as a couple both before and after the alleged incident. The college nonetheless did not allow this evidence to be considered by the hearing panel even though the only issue in the case was the issue of consent. The college’s SMP simply bars all sexual history even when it is between the couple. How is this permissible given DOE rules?

* Our college makes findings of Sexual Harassment without making any finding that a “hostile environment” exists. The TIXC mistakenly believes that any violation of Title IX by a student automatically means that a finding of Sexual Harassment is also automatically warranted. Even when we presented OCR publications that make clear

that “hostile environment” is an essential element that must be shown to exist before any finding of Sexual Harassment can be made, the President, the General Counsel and the the TIXC have allowed the finding to stand. Again, this is a very clear error. No finding of “hostile environment” was made, nor were any of the factors to be considered in making such a finding even mentioned at the hearing or in the FOL.

As these instances show, our college has knowingly violated DOE rules, and we believe that the college continues to do so since the President, General Counsel and TIXC remain in office. These violations of DOE rules are not minor matters of course, they go to essential Title IX matters: what evidence should be considered, how findings are to be made, how the burden of proof will be shown to be met, and what sanctions may be imposed. Yet, there is no appeal right under the DOE rules for any of this misconduct by our college. And, no appeal right under the college’s rules. How is this fair?

How is it possible that the DOE has not adopted a process so that students can shine light on college misconduct?

**** submitted anonymously ****