

From: (b)(6)
Sent: Tue, 8 Jun 2021 17:09:13 -0700
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (PRESERVE AND EXPAND STRONG CONSTITUTIONAL PROTECTIONS FOR THE ACCUSED)

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(Please do not publish my name or email address)

I reprint below the text of my original comment from Feb 2019 and encourage the Department to:

1. PRESERVE STRONG CONSTITUTIONAL PROTECTIONS FOR THE ACCUSED
2. PRESERVE DUE PROCESS CONFRONTATION CROSS EXAMINATION AND PRESUMPTION OF INNOCENCE
3. STRIKE EMERGENCY REMOVAL POWER 106.44(c)
4. STRIKE SUPPORTIVE MEASURES 106.44(e)(4)
5. STRIKE RESTRICTIONS ON ADVISOR OR ATTORNEY PARTICIPATION ON BEHALF OF THE ACCUSED

FULL TEXT COMMENT SUBMITTED FEB 15 2019 published April

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1. First let me applaud that the regulations protect fundamental notions of fairness, due process, presumption of innocence, confrontation and impartial decision making that are the hallmarks of our legal system.

In

particular the Grievance Procedures and Investigation require:

- a. that complainants and respondents be treated equitably
- b. an objective evaluation
- c. presumption of innocence
- d. due process before discipline
- e. live hearing with cross examination

f. credibility determinations without prejudice to status as complainant or respondent

g. no single investigator model

h. decisionmakers without conflict of interest or bias

i. no sex stereotypes

j. impartial investigators

k. exculpatory evidence

PLEASE

PRESERVE THESE PROTECTIONS

2. Who is deprived of access to the education or activity?

Title IX states generally that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance,

20 U.S.C. 1681(a)"

It was my experience that the only person who is deprived

of access to the education or activity is the male respondent himself. I would hazard to guess that it is the rare case indeed where the sexual encounters complained about by the women rise to the level of severity contemplated by the cases or regulations-

i.e. so severe pervasive or offensive so as to deny her access to the educational program or activity. Yet in just about every case where sanctions are imposed on the male, the resulting stigma and injury to reputation, education, career opportunities , housing

and standing in the community is permanent, extreme, injurious and life lasting. The deprivation of access to the education occurs as the very result of these kinds of proceedings being brought against him by the feminist bureaucracy in the universities. Many

times the male is railroaded out of school, as I was, not only by the female's complaint but also by a pre compliant period of extreme anti male bullying and harassment. So one wonders who the Title IX complainant should be?

the regulations acknowledge as much when they say, at pp44:

“a respondent can be unjustifiably separated from his or her education on the basis of sex, in violation of Title IX, if the recipient does not investigate and adjudicate using fair procedures before imposing discipline”

And "because the resulting sanctions against the respondent could include a complete loss of access to the education program or activity of the recipient, an equitable grievance procedure will only reach such a conclusion following a process that seriously considers any contrary arguments or evidence the respondent might have, including by providing the respondent with all of the specific due process protections outlined in the rest of the proposed regulations"

PLEASE

PRESERVE THESE PROECTIONS FOR THE ACCUSED

3. REQUISITE SEVERITY : The current definitions of sexual harassment employed on campuses are so broad and poorly defined so as to encompass just about any trivial discomfort, regret or irrational fear felt by the complainant. The destructive and incendiary power of sexual harassment complaints are easily employed as weapons of caprice, retaliation, revenge, and improper economic and political motive.

The regulations require the universities adhere to the

definition in Davis v. Monroe and cover only "harassment that is so severe and offensive that it effectively deprives the complainant of equal access to the school's education program or activity."

PLEASE CONTINUE TO RESTRICT THE DEFINITION OF SEXUAL HARASSMENT
AND REJECT ATTEMPTS TO EXPAND IT

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law school suspended me and sued me over a couple of phone calls with a female writing instructor that occurred on one evening off campus and which cannot in any reasonable sense be characterized as "severe" or "pervasive" or "long lasting" and had zero impact on the complaining female employee's access to education.

2. On the other hand, my counterclaims against the university

were about intense harassment of me by the law school community that spanned the second half of the first year of law school-I call it 1-L hazing ; it occurred on campus, inside the law school building during law school hours using law school equipment,

it was under the control and direction of the university and its agents was persistent invasive offensive and involved persistent shadowing, computer hacking, verbal abuse by university employees, denial of computer and typewriter services, taunting, military

style boot camp assault, bonding by fire and as they say in law school, "people bouncing off the walls". The phone calls to the instructor were a reaction to the provocations of this year long assault. The hazing I am describing is something most lawyers go

through like military recruits and never speak of again and deny if asked but I am forced to reveal it to you because it is very relevant to the definition the Supreme Court has given us in Davis and these regulations as to what is and what is not actionable

harassment. And it surely should be obvious that what I am describing as 1-L hazing does meet the definition of actionable harassment whereas a student -teacher off campus phone call on one evening does not.

4. . REQUEST TO STRIKE THE EMERGENCY REMOVAL POWER 106.44(c)

The most dangerous part of the enacted regulations is the Power of Emergency Removal " nothing precludes recipient from removing a respondent from the recipient education program or activity on an emergency basis."

In my case the University President invoked his emergency powers, and immediately suspended me from the law school without any university process whatsoever. The female complainant, supported by the Attorney General for the State, acting on behalf of the President of the University obtained an ex parte TRO (also chock full of due process, confrontation and hearsay violations) banning me from the law school. Emergency powers are the primary technique by which authoritarians and tyrants destroy basic civil liberties. It is almost a truism amongst historians of civil liberty that emergencies- mostly manufactured or contrived--are the basic technique authoritarians use to seize and consolidate power eradicate their political enemies and curtail and eliminate basic civil liberties

If you continue to give university administrators the power to preemptively-before due process-suspend and expel a student-- on the pretext of an emergency--any and every situation no matter how innocuous or banal will be deemed an emergency by a powerful enough or biased enough administrator seeking a result. The inflammatory nature of sexual allegations will be allowed to inflate any situation into a tempest to try and justify the invocation of emergency powers.

That is what happened to me and under the proposed regulations as written it could happen to any male respondent.

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HIGHLY RECOMMEND THAT YOU STRIKE THE EMERGENCY REMOVAL POWER 106.44(c)

5. STRIKE ABUSE OF SUPPORTIVE MEASURES 106.44(e)(4) The

schools can avoid a finding of deliberate indifference if they provide so called supportive measures

So called supportive measures include:

a. no contact orders b. counselling and c. relocation
of housing

on pp 46 the proposed regulations state that the recipient

must "prove the supportive measures are non punitive"-and there is a good reason for requiring this proof. Because each of these 3 "supportive measures" can be abused against a male as complainant or a male respondent under the proposed regulations as happened in my case:

a. a no contact order was issued denying my freedom to be on the grounds of the woman's place of employment which just happened to be the law school I was attending-thereby the order itself undermined the plain purpose of the statute by denying me access to the educational program. b. coercive counselling: the school required me and could require any male student under the proposed regulation to submit to forced counseling psychological treatment and consumption of toxic drugs as a requirement of returning to school .These requirements completely violate fundamental human rights and the basic legal rights to control medical decisions about oneself. Psychological labeling (just like sexual labeling) is libel per se and subjects the person so labeled to exclusion social aversion contempt and ridicule. Such labelling has no basis in science-the terms are poorly defined, vague, elastic, pejorative and subjective. Political medicine is a characteristic of totalitarian states and should not be countenanced or encouraged by the Department of Education. c. the school called my

landlords who threw my belongings out in the street and locked me out of my apartment--effecting a punitive housing relocation.

I am very concerned that a toxic combination of emergency powers and supportive measures can be abused to remove the male respondent from his educational program even when there is no sex, no physical contact, no threats, no allegations of threats and nothing even remotely approaching an imminent threat of physical harm--just irrational fear inflated into an invocation of emergency powers. And once the respondent has been removed from the educational program, the presumptions and inertial forces generated from the original decision to remove may ensure that he never sees the inside of a classroom again.

I HIGHLY RECOMMEND THAT YOU STRIKE SUPPORTIVE MEASURES
SUBJECT TO ABUSE 106.44(e)(4)

6. Continue to require : pp46 Recipient must prove supportive measures are non punitive pp 46 Continue to require Recipient may not punish accused person prior to determination of responsibility

7. Notice and Information: Continue to require proper notice and information of substance of complaint, alleged code violations and process; continue to require time to prepare a response; continue to require notice that determination is made at the conclusion of the process not at the outset

8. Investigation Continue to require if alleged conduct

does not meet definition of sex harassment or not part of school program or activity then terminate the grievance proceeding; Continue to require Live hearing with cross examination require exculpatory evidence; Continue to require Meaningful participation; Continue to require Time to prepare

REQUEST TO STRIKE Should not allow restrictions on advisor or attorney participation

CONTINUE TO REQUIRE Notwithstanding restrictions on advisor participation continue to require the recipient must allow cross examination by an advisor of choice and

EXCELLENT Continue TO REQUIRE that recipient must provide an advisor aligned with the party to conduct cross-exam

9.

Standard of evidence REQUIRE the highest standard of evidence possible :clear and convincing or even beyond a reasonable doubt--the consequences of these kinds of proceedings and allegations--which are cavalierly made-- have profoundly brutal lifelong consequences to the respondent--and should require the highest standards of proof

10. CONTINUE TO REQUIRE Written down Determination and Rationales Decisionmakers love to hide behind bald pronouncements without supportive rationales. Therefore, I am glad to see: written determination findings of fact conclusions of law rationale of decisions

11. Appeal REQUIRE RESPONDENTS RIGHT TO APPEAL NOT OPTIONAL

12. Constitutional Protections EXCELLENT CONTINUE TO ENFORCE

First Amendment Due Process Other Constitutional Rights and FERPA