

From: (b)(6)
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To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (Fairness for All: For Both Complainants and Respondents)
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Please read the attached statement. Thank you for your consideration.

June 11, 2021

Dear Department of Education/Office of Civil Rights:

We have been apprised that the Department of Education's Office of Civil Rights is currently holding hearings to discuss possible changes to the Title IX regulations modified under the previous administration. We write this letter as "Mr. and Mrs. Doe," parents of "John Doe," the plaintiff in *Doe v. Claremont McKenna Coll.* 25 Cal. App. 5th 1055, 236 Cal. Rptr. 3d 655 (Aug. 8, 2018), review denied, No. S251318, 2018 Cal. LEXIS 9212 (Cal. Nov. 20, 2018).

We are choosing to keep our identities anonymous in order to protect our son, whose mental state is broken beyond repair as a direct result of the corrupted Title IX process to which he was subjected as a freshman at Claremont McKenna College ("CMC"), located in Claremont, California.

After CMC unjustly found our then 19-year old son responsible for sexual assault in June 2015, our son was distraught. Our son had worked long and hard to gain admission to CMC, a highly regarded private liberal arts college. Suddenly the life he knew and loved had been shattered by a false allegation and a broken Title IX system.

Our son always believed that the truth would set him free and justice would ultimately be served, but that did not happen. To say he was shocked that he was found responsible for something horrible, that he did not do is an understatement.

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Our son had to wait a very long time for the truth to set him free and to see justice finally served, which required nearly 4 years of litigation. It was traumatic enough to be falsely accused as a 19 year old freshman, but it was CMC's complete denial of fairness that triggered (b)(6)

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(b)(6), which has left our son *not* even a shadow of his former self, (b)(6)

Here is the background: After CMC denied our son's appeal as the final step of the college's administrative proceedings, and our son was suspended for a year, we filed a Writ of Mandamus in the Los Angeles Superior Court in the fall of 2015. In November 2016, we lost at the trial court level, which further devastated our son's fragile mental state.

We chose to keep fighting for justice to prevail. Finally, on August 8, 2018, a panel composed of **3 female California Court of Appeal justices, ruled unanimously** in our son's favor, as John Doe, in a published opinion. The California Court of Appeal found that John Doe was denied a fair process since the CMC finders of fact had no opportunity to evaluate the credibility of the accuser, who chose to not attend the hearing in person or through Skype, or other technology. The court made it clear that in a "he said/she said" case, it is essential that the review panel be able to directly assess the credibility of the accuser through direct questioning.

In September 2018, CMC chose to file a Petition for Review with the California Supreme Court seeking to overturn the decision of the California Court of Appeal. On November 20, 2018, the California Supreme Court denied CMC's Petition for Review. The Appellate Court thus instructed the trial court to grant John Doe's Writ of Mandamus to vacate the findings and the sanctions (though at this point John had already served his one-year suspension).

We pursued litigation against CMC not just for our son (b)(6)

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(b)(6), but for all students falsely accused and/or denied a fair Title IX process at their respective colleges.

The false finding of responsibility issued by CMC against our son was a product of the federal guidelines set forth in the *Dear Colleague Letter* issued by the federal Department of Education's Office of Civil Rights in 2011—that were defective, destructive and in need of fundamental overhaul. We were relieved that changes were made to the regulations in favor of fairness through the proper approval channels under the previous administration.

NOTICE AND INVESTIGATION

CMC refused to give notice to John of the accusations against him before taking his testimony. In fact during John's first interview, he asked the investigator, an outside attorney hired by CMC, whether he could see a copy of the complaint, the investigator told him, "There was nothing to see."

At no time during the investigative process was John notified of any specific charges being asserted against him by the complainant. He had no way of knowing whether the complainant was claiming she had consented to none of their sexual activity, claiming she was incapacitated and could not provide consent, claiming she had consented but at some point had withdrawn her consent, claiming she had been forcibly raped, or was perhaps claiming something else.

Nearly 2 months after the complainant filed the Title IX complaint, John received a copy of the Preliminary Investigative Report ("PIR") that advised him for the first time the specific charges being asserted against him by the complainant. By that time, he had already submitted to three separate interviews by the investigator. But at no time, during any of these interviews or outside of them, did the investigator inform John that the basis for the complainant's claim of sexual assault was she allegedly withdrew her consent during the last few minutes of a 2-hour session of otherwise fully consensual sexual relations.

Before the PIR was drafted and circulated by the investigator, all that John had been given was a letter notifying him that an unspecified and unexplained charge of generic "sexual assault" had been brought against him by the complainant and that an investigation of this unspecified and unexplained charge would ensue. CMC argued that

this letter, coupled with a link to CMC's conduct policy (which had buried within it an operating definition of the term "sexual assault"), sufficed to give John full and adequate notice of the charges sufficient to permit him to make a meaningful response. Of course, this was complete nonsense.

By keeping John in the dark about the specifics of the charges leveled against him, CMC was able to exploit John's ignorance about what was important to recall concerning his sexual encounter with the complainant over 5 months earlier (the complainant waited 5 months to file her complaint.) The majority of the review panel found John's inability to immediately recall the complainant's words was highly probative of the complainant's claim that she had revoked her consent at the very end. It did not matter to the review panel that John later recalled her specific words, where she gave him consent for the last few minutes. CMC's failure to provide notice of the specific allegation in the complainant's claim of sexual assault severely restricted John's ability to defend himself.

After John was found responsible for sexual assault (required a vote of 2 of the 3 review panel members), he appealed the decision to CMC. He pointed out that he had been denied fundamental due process, by among other things, not being notified of the allegations against him until after the investigator had completed her investigation and circulated the PIR. Although CMC denied his appeal, CMC made no attempt to contradict the fact that it had withheld from John any specific notification of the charges brought against him until after the PIR was complete.

In denying the appeal, CMC maintained that John was subjected to intensive questioning during his interviews, but acknowledged that he was never informed of the allegations being asserted against him until the investigation was complete when he was given a copy of the PIR. CMC excused its failure to advise John of the allegations made against him any earlier by asserting that due to "the administrative nature of an academic proceeding...[t]here are no indictment charges."

In CMC's Opposition Brief, CMC cites various case authorities in support of the principal that: "Generally, courts are satisfied that students have adequate notice if they are apprised of the charges such that they can meaningfully respond." In light of this, one must ask: What kind of "meaningful" response can possibly be made if the charges are not disclosed until after three separate interviews of the accused have been conducted and the PIR (which was nearly identical to the Final Investigative Report ["FIR"] ultimately submitted to the review panel) had been circulated?

CMC refused John's request for CMC to re-interview him after he had been apprised of the basis for the complaint through the PIR. John's ability to thereafter respond to those charges in his written submissions to the review panel does not make up for the serious denial of fairness and due process flowing from CMC's refusal to disclose the charges to him prior to his statements being taken and the investigation being completed.

LIVE HEARINGS and CROSS-EXAMINATION

CMC's grievance procedures provided an opportunity for the complainant and the respondent to deliver an oral presentation to the review panel soon after the Final Investigative Report was issued. The review panel was composed of the investigator (yes, the investigator) and two CMC professors. The meeting was overseen by CMC's Chief Civil Rights Officer/Title IX Coordinator.

John attended the meeting and delivered a closing statement to the review panel. The complainant chose to not attend, even when given the opportunity to attend via Skype.

During the "hearing," the review panel did not ask John a single question. And, of course, the review panel never asked the complainant a single question since she was not present. In fact, the review panel never met with or questioned the complainant at all. Only the investigator met with the complainant.

On August 8, 2018, in *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055, 236 Cal. Rptr. 3d 655 (Aug. 8, 2018), review denied, No. S251318, 2018 Cal. LEXIS 9212 (Cal. Nov. 20, 2018), the California Court of Appeal issued a very narrow ruling in the case. It held:

- 1) In a "he said/she said" case where serious sanctions are at risk (i.e. expulsion or suspension), the credibility of the parties must be assessed through direct questioning (essentially cross-examination). CMC argued that John was allowed to submit questions to the investigator after he had received the PIR, satisfying the requirement of direct questioning. However, CMC refused to ask the complainant *any of John's questions*. *The court acknowledged that the CMC review panel could not possibly have assessed the complainant's credibility because the complainant was never directly questioned at the hearing and none of John's questions were ever asked; and*
- 2) All members of the review panel must assess the credibility of the parties. Only the investigator met the complainant; the two CMC professors on the review panel never met the complainant or questioned her. The court rejected CMC's argument that the investigator could tell the other two review panel members that the complainant was credible.

SINGLE INVESTIGATOR MODEL

CMC's "...Grievance Process is designed to provide a fair, neutral and equitable process for investigating and resolving complaints of alleged Civil Rights policy violations." However, CMC's grievance process was anything but fair, neutral and equitable.

CMC characterized its Investigation and Review Committee (the "review panel") as "a neutral, three-person panel." But while the review panel did consist of three persons, it was hardly "neutral." One of the three panel members was an attorney hired by CMC to act as the investigator. But she did far more than just investigate. Not only did she determine which witnesses would be interviewed, she conducted all witness interviews and prepared summaries (not transcripts) of those interviews. She advocated for and provided emotional support to the complainant, determined what evidence would be taken into consideration, prepared findings in support of the charges brought against

John, and acted as the head of the three-person review panel assigned to assess and draw findings from the FIR which the investigator herself had prepared.

Beyond this, the investigator also authored the "Investigation Review and Findings Meeting Report" that issued from the review panel. No person can be called "neutral" who conducts the investigation, advocates for the complainant, heads the fact-finding review panel, is given one of the three deciding votes, and in the end prepares the findings of fact. Justice cannot be achieved if the investigator acts as the police, complainant's advocate, the prosecutor, the jury foreman and the judge.

The lack of neutrality led to bias. The investigator's bias infected the entire review panel.

Soon after CMC denied our son's appeal, CMC switched from the 3-person review panel to the *single investigator model*. The *single investigator model* is even more unfair than the process used in our son's grievance process, which itself was devoid of all fundamental fairness and due process.

The January 4, 2019 ruling by the California Court of Appeal (Second Appellate District) in *Doe vs Allee*, 30 Cal. App. 5th 1036 (2019) skillfully obliterated the *single investigator model* favored by so many colleges and universities throughout the country. ((Allee is the Title IX Investigator for University of Southern California.) This new ruling was made in reliance upon our case, *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055, 236 Cal. Rptr. 3d 655 (Aug. 8, 2018), review denied, No. S251318, 2018 Cal. LEXIS 9212 (Cal. Nov. 20, 2018).

BIAS, CONFLICTS OF INTEREST AND EQUITABLE TREATMENT

CMC's refused to conduct nearly all of the additional investigation steps requested by John after he first learned of the allegations against him through the PIR. This underscores and affirms CMC's denial to John of any meaningful opportunity to respond to the charges leveled against him. CMC's denial of John's right to present witnesses and evidence in his defense and CMC's overt bias in favor of the accuser throughout the process were all natural outcomes of the *Dear Colleague Letter*.

John received the PIR after CMC had substantially concluded its investigation. This was the first time he was apprised not only of what he was accused, but also the first time that he found out who were the witnesses providing testimony in support of the complainant's allegations -- who might know what the complainant said -- or when she may have said anything -- how she acted after she was with John.

The CMC grievance procedures allowed John to then request additional investigation steps he would like CMC to take. He was to provide a list of all witnesses to be interviewed or re-interviewed with the questions to be asked and the reasons why such questions needed to be asked. He was also allowed to request additional documentation or evidence to be provided.

John requested 20 additional investigation steps. CMC agreed to just two of them. And one of those two requests was effectively denied as well, as the complainant refused to turn over the requested document.

There was one person who was the single most important third-party witness. Yet, John did not even know she existed until the PIR was released. The PIR identified her using the fictitious name of "Jessica Baldwin." The PIR described the close relationship Jessica Baldwin had with the complainant (discernible from various other witnesses' testimony besides the complainant's), and the fact that she had been with the complainant immediately following the complainant leaving John's dorm room and for most of the following day. Remarkably, however, Jessica Baldwin, was not on the complainant's witness list and therefore was not interviewed by CMC. The fact that the complainant did not want Ms. Baldwin to be interviewed speaks volumes about the damage she feared Ms. Baldwin might cause to her claims. No witness interviewed by CMC could have the knowledge of Jessica Baldwin -- the single most important third-party witness.

Even though the investigator was well aware of Ms. Baldwin, the investigator and the CMC Chief Civil Rights Officer/Title IX Coordinator chose to not interview her to avoid having her testimony in the PIR. When John requested Ms. Baldwin be interviewed, CMC flatly refused to do so. CMC's refusal to interview this key witness and include her testimony in the written report presented to the review panel is convincing evidence of the prejudicial bias by both the investigator and CMC's Chief Civil Rights Officer/Title IX Coordinator. It clearly shows CMC's desire to do nothing, which might have permitted the complainant's claims to be exposed as false. CMC's refusal to interview Jessica Baldwin was an atrocious denial of common law due process and fundamental fairness to the accused.

In stark contrast to how CMC treated John and in contravention of CMC's own Grievance Procedures, CMC allowed the complainant to submit 8 pages with her "corrections and clarifications" to the testimony previously provided by various third-party witnesses. In response to the PIR, the complainant stated, "I am not requesting any additional witnesses. Listed below are the corrections and clarifications I wanted to make based on the report, including some additional information." She was allowed to freely and openly attack and explain the testimony of any and all of the witnesses. She had no need for additional follow-up questions since she spoon-fed her version of events/information she wanted the investigator and Title IX Coordinator to accept.

John, on the other hand, followed the rules. John submitted his Request for Additional Investigation Steps, outlining his request for new witnesses to be interviewed and why they should be interviewed, and his request for follow-up interviews of previous witnesses and why they should be further interviewed. He did not try to control the situation with commentary and/or judgment. CMC further revealed its bias in favor of the complainant by including in its Final Investigative Report ("FIR") all 8 pages submitted by the complainant.

Yet, John's legitimate requests for clarification of existing testimony and interviews of additional witnesses (all expressly permitted by CMC's Grievance Procedures) fell on deaf ears. Not surprisingly, the FIR was virtually identical to the PIR given CMC's refusal to conduct 95% of the additional investigation steps requested by John. This is just another example of CMC's extreme bias in favor of the complainant, which resulted in an unfair process against John.

In court, CMC misstated that it fulfilled two of the 20 requests made by John. CMC represented falsely that it agreed to clarify the testimony of one witness, when in fact, CMC denied this request to clarify the testimony of a previous witness. CMC agreed to interview only 1 new witness, period. And this new witness was not the most important witness, Jessica Baldwin. CMC's misstatement deceived the trial court judge who adopted it as true that CMC had interviewed one new witness and clarified the testimony of a previous witness in her ruling in favor of CMC.

Actual bias on the part of the CMC investigator is strongly shown by the summaries of her interviews of the complainant, which demonstrate that the investigator repeatedly revealed to the complainant the substance of the testimony given by John. This then gave the complainant the opportunity to modify her own testimony to better refute John's statements. The complainant's story was constantly changing, and it appeared that she was being coached by the investigator of how to change her story to make it more believable. Meanwhile, the investigator steadfastly refused to reveal to John throughout the investigative process any of the allegations that the complainant had brought against him. The investigator kept John completely in the dark.

The summaries of the 4 separate interviews of the complainant prepared by the investigator show that the investigator repeatedly advised the complainant of the testimony that John had given. In one instance (John's second interview), a mere 23 minutes later, the investigator was advising the complainant of John's testimony, essentially *inviting her to change and tailor her testimony to counteract John's testimony*. Without going into fine details of each and every instance of where the investigator gave to the complainant's the specifics of John's testimony, suffice it to say that there was a drastic imbalance in the way John and the complainant were treated. There is plenty of evidence of bias and non-neutrality by CMC.

But perhaps the most dramatic and significant evidence of CMC's bias against John is displayed by the single-page complainant's Response to Appeal in response to John's appeal to the findings. This document was submitted to the CMC Title IX office 2 days after the deadline for its submittal. It did not materialize until John asked CMC whether the complainant had filed a response to his appeal.

Despite missing the deadline by 2 days, CMC accepted the Response anyway. But it is no wonder that CMC accepted it. Upon inspection, it was obvious that CMC wrote it for the complainant!

Strikingly, the style, language and syntax used in this document bear no resemblance to that of any writings previously submitted by the complainant. A computer program, using the Fleish-Kincaid Index, which compares two documents, showed almost identical index numbers, indicating that both the Response to Appeal and the Appeal Decision were written by the same person at CMC. It further showed that the Response to Appeal was not written by the complainant when comparing the Response to Appeal to previous submissions made by the complainant.

Appalling as it seems, personnel from the CMC Title IX office chose to actively controvert John's position and to surreptitiously act as an advocate for the complainant by ghost-writing a counterfeit Response to Appeal on her behalf, perhaps without her knowledge or consent. We later learned that the complainant was traveling around Europe and blogging about her experiences at the time the Response was filed by CMC. This is the most blatant display of bias imaginable.

Actual bias is also shown by CMC's acceptance, without hesitation, of a sanctions statement written and submitted by the Title IX coordinator at Scripps College on the complainant's behalf. This statement was used by the CMC Dean of Students to help determine what sanctions John would face. This further demonstrated CMC's disturbing non-neutrality.

Needless to say, a sanctions statement written by an administrator at the complainant's college was not permitted under CMC's procedures. But the CMC Title IX office permitted this to bolster its efforts the imposition of sanctions against John beyond those warranted by the evidence.

CONCLUSION

CMC's disciplinary action violated California statute that requires fairness in administrative hearings, such as the Title IX process. CMC violated the required fairness and provided no due process to our son, first and foremost, by concealing from John the factual basis of the charges against him until *after* all three of his interviews. John had specifically requested in his first interview an explanation of what he had allegedly done wrong but CMC refused to tell him. CMC can offer no justification for this concealment, especially when it forced John to guess what he had supposedly done wrong, and then held his incorrect guess against him.

Likewise, even though the case presented a paradigmatic "he said/she said" credibility contest—as CMC admitted—CMC failed to give the review panel any opportunity to gauge the complainant's credibility, another fatal flaw.

Overwhelming evidence negated the complainant's claim of sexual assault based on an alleged withdrawal of consent. No reasonable trier of fact could have found in favor of the complainant based on the record as a whole. And had CMC not denied John a fair hearing and basic due process, the record would even more strongly have demonstrated the baselessness of the complainant's claims. Subsequent regret about engaging in sex is not the same thing as withdrawal of consent during sex.

Finally in an attempt to minimize John's need for relief from by the California Court of Appeal, CMC claimed in its brief that John had served his suspension and thus was eligible to receive a degree from CMC in Spring 2019. This assertion was not based on anything in the record. But more importantly, CMC knew it was false.

Although John did return to CMC after his one-year suspension, he was forced to take a medical leave of absence in March 2017 (b)(6) — a leave of absence acknowledged and approved by CMC itself. John's (b)(6) issues, which his treating doctors have attributed directly to the trauma he suffered as a result of CMC's patently unfair and biased grievance process, have prevented John from ever resuming his education.

The revised regulations, approved during the prior administration, righted a horrific wrong and provided guidelines where justice can finally prevail. We spoke out in favor of those revised regulations, including addressing the Department of Education in September 2017, to shed light on how the falsely accused were found responsible through corrupted proceedings in which fundamental fairness and due process had been routinely and callously ignored. We wanted the DOE to understand how those found responsible under kangaroo court-type proceedings suffer greatly and are victims in the truest sense of the word.

Due process should not be a partisan issue. It is an American issue. Due process protects all—the accused as well as the accuser. If applied properly, it should reveal the truth—the real truth and not the contrived truth. Ultimately justice is what is needed to support both the victims of sexual assault as well as those falsely accused/found responsible.

If the revised regulations put in place by the prior administration had been in effect in 2015 when our son was falsely accused of sexual assault as a freshman at CMC, his life may well have been spared. The due process protections outlined in the regulations currently in place help guard the mental health of falsely accused students. The revisions to the regulations came too late for our son. Let's not go backwards by compromising fairness provided for in the current regulations. The regulations must provide protections of fairness for both complainants and respondents, not just complainants.

With appreciation,

Mr. and Mrs. Doe

"Mr. and Mrs. Doe," parents of John Doe, the plaintiff in *Doe vs Claremont McKenna College*

January 30, 2019

(b)(6)