From: Chuck Sevilla
Sent: Mon, 7 Jun 2021 10:19:19 -0700
To: T9PublicHearing
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On June 7, 2021, I signed a letter with hundreds of other professionals informing the Office for Civil Rights that we support the retention of the 2020 Title IX regulations. The regulations addressed the wildly chaotic, unregulated , and unfair campus disciplinary processes that prevailed after 2011. At the height of that chaos, I wrote about it giving several examples of what was going on. See attached. We cannot return to those pre-due process days. Please retain the regulations. Thank you.

Sincerely,

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Campus Sexual Assault Allegations, Adjudications, and Title IX

The Number IX

In recent months, a number of lawyers have represented students accused by a university of sexual assault. As they recounted the bizarre campus adjudication process, I found it almost unbelievable. But as Oliver Wendell Holmes said, "[u]pon this point a page of history is worth a volume of logic."[1]

This history is quite recent and focuses on "Title IX" and its mandates for colleges and universities to seriously address campus sexual assault accusations. As will be discussed, the school reaction is a process in which human rights are often sacrificed by collegiate bureaucrats. Campus sexual assaults are a serious issue deserving of appropriate investigation and adjudication, but institutions of higher learning should not implement Alice-in-Wonderland techniques. Adopting such methods may save the colleges their grants of federal and state money. They may also be politically correct in weighting the investigative and administrative adjudicative process heavily against the accused. But they are very wrong. Cases challenging administrative expulsions from school are now percolating into state and federal courts, and as they do, the courts are finding the treatment of the accused appalling.

Most people know Title IX in the context of providing equal opportunities for women on campus.[2] Remedying the very real deficiencies it addressed (sexual discrimination against women) provided funding opportunities that propelled American women to excel over the last 40 years. The most obvious area of excellence has been the prominence of American women on the world sports scene.

But another aspect of Title IX has recently attracted attention. Sexual discrimination on the basis of sex includes sexual harassment and assault. This too is a very real problem. Each university receiving federal funds may be legally responsible (i.e., lose state and federal funding) if it ignores or improperly deals with allegations of sexual harassment or assault.

The mandate to take sexual assaults seriously received heightened university and college attention when the U.S. Department of Civil Rights within the Department of Education sent out the famous "Dear Colleague" letter on April 4, 2011.[3] The letter mandates that schools set up adjudication systems to administratively handle sexual assaults and harassment. Recipients of federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations. Specifically, a recipient must do the following: (a) disseminate a notice of nondiscrimination; (b) designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX (the Compliance Officer); and (c) adopt and publish griev-

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ance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints. Failure to comply may lead to loss of funding as well as lawsuits against the school. The Department has a 53-page handbook on Title IX implementation.[4] The Dear Colleague letter and Title IX handbook are required reading for attorneys handling these cases.

Title IX requires immediate action upon notice of a sexual assault or harassment. School investigation is required independent of any law enforcement investigation, and law enforcement activity does not relieve the school of its independent Title IX obligation to investigate and adjudicate. Schools have been left to their own devices in coming up with procedures to comply. When they do, the accused student should seek the help of defense counsel.

The Reality of Implementation

In San Diego and elsewhere, recent experiences reveal a shocking lack of "process," to say nothing of due process, in the way some universities are handling sexual assault complaints. In these cases the university did not provide proper notice of hearing procedure; did not conduct an impartial, reliable investigation; and did not allow the presentation of witnesses and other evidence. Attorneys were not allowed to speak in the hearings (they were rendered the proverbial "potted plant"), and therefore the proceeding pitted the accused young man against the adult administrative prosecutor.

For example, during the past 18 months, San Diego defense attorney Domenic Lombardo represented F.S., a former San Diego State University (SDSU) student who was accused of sexual assault. Had it not been for the tenacious advocacy of Lombardo, F.S.'s life would have been ruined. As soon as SDSU received notice of the complaining witness's sexual assault allegation, it sent an email blast across the campus warning of the threat he posed — naming him in the more than 20,000 emails. The school apparently did this under the compulsion of the Clery Act,[5] which requires immediate notification of the campus community upon confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees.[6] The problem was that the school did nothing to confirm the allegation before sending out the notice to the campus.

Upon notice his client was accused by the school, Lombardo sought discovery of the identity of the accuser and the specifics of her accusation. Denied. He sought witness statements. Denied. Nevertheless, the school required F.S. to attend a hearing to explain himself against unspecified charges.

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Lombardo and the client figured out the identity of the probable accuser and quickly checked social media and cellphones to recover evidence of communications, written and photographic, before and after the alleged assault. Early on, this evidence was sufficient to turn law enforcement off the case, but SDSU continued its proceedings and kicked F.S. off campus. Suspension is an enormous event for a college kid and may well haunt the student forever. It may preclude the student from attendance at other schools. What school would accept someone suspended as a sexual predator? Yet despite the SDSU punishment via the email blast and the suspension, there had been no adjudication of guilt or formal expulsion within the school's Title IX administrative process.

Lombardo submitted the evidence he collected demonstrating his client's innocence to the SDSU compliance officer. He unsuccessfully sued the school in superior court. He continually demanded fair play for his client. Finally, after months of wrangling and stonewalling, SDSU relented and sent a letter of exoneration. *After that*, they provided file discovery of exactly what the case was about! As of mid-September 2015, no retraction of the original email blast had been sent to the campus notifying persons of the exoneration.

This Alice-in-Wonderland approach to resolving the issue — "first the sentence, then the trial" — makes it hard to believe these schools are advised by attorneys. Lombardo's client was lucky. Most students or their parents cannot afford to hire knowledgeable counsel to defend against such a bizarre and arbitrary adjudicatory system. When students do hire counsel, however, and counsel requests that courts intervene, judges learn of the unfair school process.

This is an issue manifesting itself all over the country. Even at the most prestigious universities where one would expect the most respectful, due process compliant procedures, the problem exists. "Last fall, 28 Harvard Law School faculty members wrote an article criticizing their campus procedures on sexual assault cases as lacking 'the most basic elements of fairness and due process' and 'overwhelmingly stacked against the accused.'"[7]

On July 15, 2015, San Diego Superior Court Judge Joel Pressman made an important ruling in one of these cases, this time against the University of California at San Diego. A woman accused a male student of improper touching, but he had evidence that he and the woman had sex both before and just after the alleged offensive touching. That evidence was not allowed to be considered at the administrative hearing! The complaining witness even admitted that she and the student had sex before and after the touching. Yet the accused student was found guilty and punished with a suspension of one semester.

The accused student appealed. At the first level of review, the university upheld the guilt finding, and without explanation, increased the sanction to one year. The student appealed again, this time to the highest administrative level. Again, the guilt finding and sanctions were upheld. But there was more: The school increased the suspension again, this time to a year and a half. Again, without explanation.

Judge Pressman overturned it all.[8] He said the university failed to hold a fair trial and denied basic confrontation rights. First, at the misconduct hearing, the university asked the accuser only nine of 32 questions the accused student requested the university to ask. There were no follow-up questions asked after the answers were given. A university compliance officer prepared "findings." The school used these findings as evidence without

introducing the report as evidence or allowing the accused to confront the compliance officer — who did not attend the hearing. Further, the student was not given access to any statements by 14 witnesses or even the accuser's own interview statements. Judge Pressman found the university abused its discretion in this as well as by increasing sanctions against the student on his appeals without explanation.[9]

Academia should be a place where commonsense fairness prevails as a matter of routine. Fairness is not rocket science. Yet, these experiences lead one to wonder if college and university administrators and their lawyers ever had a civics lesson. Hopefully, judicial rulings will teach these educators a valuable lesson.

Defense lawyers are fighting to bring due process to this area. It is essential that lawyers handling these cases visit the "A Voice for Male Students" website and view the section of the site titled "Database: Lawsuits Against Colleges and Universities Alleging Due Process and Other Violations in Adjudicating Sexual Assault." The site contains data on scores of lawsuits by young men accused and sanctioned by their colleges. Most helpfully, the site includes pleadings. It describes the current Orwellian college adjudication system:

> On April 4, 2011, the Department of Education issued its disastrous "Dear Colleague" letter to colleges and universities across the United States, requiring administrators who had neither the investigative nor prosecutorial prowess of the criminal justice system to determine the guilt and innocence of students accused of felony sexual assault, and to reach their conclusions independent of whatever the police and courts decide.
>
> Worse — the Department of Education demanded these schools determine guilt via a radically low standard of evidence for sex assault cases: the "preponderance of evidence" standard. Under this model if an administrator feels that there might be a 50.01 percent chance that the alleged crime occurred, the administrator must find the student guilty ("responsible") for sexual assault. This is further complicated by the lack of numerous other procedural safeguards and methods of evidentiary examination.[10]

Any student accused of a sexual assault on campus faces a difficult path. First, there will likely be a simultaneous law enforcement investigation. But there, at least, law enforcement usually understands the due process model and entertains the accused's side of the story. For F.S., Lombardo met the prosecution threat early by making a presentation of the evidence the defense had assembled. No prosecution ensued. Despite the favorable outcome with law enforcement, SDSU continued its "prosecution" for months thereafter and issued serious sanctions. Finally, it relented to the barrage of defense exculpatory information provided, saw the writing on the wall (and in the cellphone photos and messages), and exonerated the student. Now SDSU awaits a civil suit for its mistreatment.

Yes Means Yes

The problem for the accused has become exacerbated by the passage of "yes means yes" laws. California and New York[11] have passed state laws adopting the rule, and individual campuses have adopted similar measures as well. What this means is that for sex to be deemed consensual, the parties must have made mutual affirmative indications of consent before sex occurs. But what does that mean? How must consent be communicated? California passed new Education Code Section 67386 in late 2014:[12]

> An *affirmative consent* standard in the determination of whether consent was given by both parties to sexual activity. "Affirmative consent" means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. *Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time.* The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.[13]

This law controls all California campus adjudications. It is vague enough to fuel a thousand lawsuits. For example, what if the accused male believes the female was affirmatively consenting to have sex with him? This is likely not a defense, yet it is almost always going to be the issue in the campus adjudication hearing. Under the statute, it "shall not be a valid excuse to alleged lack of affirmative consent that the accused believed that the complainant affirmatively consented to the sexual activity" if the belief arose from "intoxication or recklessness of the accused," or *if the "accused did not take reasonable steps to ascertain whether the complainant affirmatively consented."*[14]

The latter clause mandates that the male take "reasonable steps" to have the female indicate her unconditional consent before and during sex. That places the burden of proof on him to show he took steps to reasonably believe he obtained consent. To avoid a later "he said, she said" contest at an expulsion hearing and have corroboration, he may need to record the consent or get a notary to memorialize it in writing. Obviously, that type of record-making is a ridiculous expectation, but, believe it or not, there is an "app" now available to record both parties giving explicit verbal consent before having sex.[15] It is unlikely technology will solve the problem of unwanted sex because campus sex is often engaged in impulsively by drunken young people acting in the heat of the moment.

These new laws inject huge areas of ambiguity into the determination of what constitutes "affirmative consent."[16] The requirement of "affirmative, conscious, and voluntary agreement to engage in sexual activity" appears to require a verbal affirmation before engagement, although that is not explicitly stated in the law. While the standard of proof requires the school to show the truth of the accusation by a preponderance of evidence, how does that relate to the accused's defense that reasonable belief consent was given? Does the accused have to prove affirmative consent by his sex partner? In other

words, does he have to prove himself innocent? In California, the answer appears to be "yes."

If so, that rule may not last long in the courts. In a recent Tennessee case, the two students were drunk and the alleged victim of unwanted sex was unable to remember whether she gave verbal consent to have sex. The accused said she gave consent, albeit nonverbally. Tried under the "yes means yes" consent standard, the hearing officer found against the accused and the University of Tennessee at Chattanooga expelled him. In overruling that decision as a denial of due process, a Nashville court found that the school's requirement that the accused prove he had obtained verbal consent in advance of sexual intercourse was untenable. In part, this was due to the campus code of conduct that defined consent not just as verbal messages but "acts that are unmistakable in their meaning." In effect, the school required the accused to prove himself innocent by showing he had obtained "unmistakable" affirmative consent.[17]

What if the accused mounts a persuasive case via text messages and social media that the accuser is lying? Will she be subject to discipline? Highly unlikely. In California, the new "yes means yes" statute provides a form of immunity worded as requiring "egregious" misconduct by the accuser before any school discipline can be imposed. Accusers "will not be subject to disciplinary sanctions for a violation of the institution's student conduct policy at or near the time of the incident, unless the institution determines that the violation was egregious, including, but not limited to, an action that places the health or safety of any other person at risk or involves plagiarism, cheating, or academic dishonesty."[18]

Money Makes the World Go Round

Money fuels much of this problem. Schools fear they will lose their state and federal funding without compliance with Title IX. Last year, the federal government announced that 55 colleges and universities were under investigation concerning Title IX compliance.[19] The new California "yes means yes" law, as described above, makes explicit the monetary threat. Four of its major subsections begin with the proviso, "In order to receive state funds for student financial assistance. ..."[20]

The Department of Education's Office of Civil Rights has been condemned for the way it "exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness."[21] Colleges and universities are already strapped for funding. The force of such statutory language about funding, the pressures exerted by the state and federal governments, and the unilateral focus on "victim" rights creates hydraulic pressure on schools to satisfy their funding masters. The resulting conviction-producing machinery is a sad contradiction to the due process tradition of individualized justice.

How colleges are to satisfy the federal and state governmental expectations is by no means clear. It is no secret that the funding threats have produced the kind of administrative overreaction and unfairness seen in the recent San Diego cases. Laws like "yes means yes" only heighten the problem. But going overboard by implementing speedy unfair procedures to adjudicate alleged sexual assaults may backfire. Schools trying to satisfy the governmental paymasters may wind up being hit with monetary court sanctions for inflicting harm to the innocent accused student.

It cannot be denied that campus sexual assault is a serious problem.[22] The time-proven formula for on-campus sexual trouble is student immaturity compounded by drug and alcohol use, peer pressure, and libidos gone wild. When all of this takes place in an alleged "date rape" context with two intoxicated partying participants, deciding the issue of consent is exceedingly difficult. It is often a "he said, she said" contest. So far, college administrations have not proven reliable providers of just procedures in the adjudicatory hearings. Indeed, recent cases show colleges have no idea how to fairly implement Title IX, and instead have created made-up, arbitrary procedures without due process guarantees of timely notice, confrontation, and a fair hearing. As these campus cases continue to move into the state and federal courts, schools will learn the way, but at the expense of how many falsely branded young people?

Notes

1. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

2. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.

3. http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

4. http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

5. 20 U.S.C. § 1092.

6. See page 97 of the U.S. Dept. of Education handbook on implementing the Clery Act (20 U.S.C. § 1092) found at http://www2.ed.gov/admins/lead/safety/handbook.pdf.

7. Quoted in L.A. Times, Teresa Watanabe, *Ruling in Favor of UC Student Accused of Sex Assault Could Ripple Across U.S.*, July 15, 2015, *available at* http://www.latimes.com/local/education/la-me-ucsd-male-student-20150715-story.html#page=1.

8. Case No: 37-2015-00010549-cu-wm-ctl Case Init.date: 03/25/2015, *Doe v. Regents of the University of California San Diego.* The unreported six-page order of July 10, 2015, can be found at http://www.nacua.org/documents/Doe_v_RegentsUCASanDiego.pdf. It is essential reading for anyone handling these cases. Early in the administrative process, this order should be sent to the campus Title IX compliance officer counsel is dealing with in the case. UCSD is now appealing the order.

9. The order has made the rounds nationally because it is one of the first to deal with the collegiate overreaction to the federal government pressures starting with the 2011 "Dear Colleague" letter. *See* Watanabe, L.A. Times, *supra* note 7.

10. Visit the following URL: http://www.avoiceformalestudents.com/list-of-lawsuits-against-colleges-and-universitiesalleging-due-process-violations-in-adjudicating-sexual-assault/. Another group working against false allegations is SAVE which seeks legal reform in part to end false allegations of abuse. See www.saveservices.org.

11. New York passed its version of the law in 2014 and applied it to public universities. In 2015, it expanded its coverage to private schools as well. Associated Press, *NY Expands 'Yes Means Yes' Policy to Private Colleges*, N.Y. Times, July 7, 2015, *available at* http://www.nytimes.com/aponline/2015/07/07/us/ap-us-yes-means-yes.html?_r=0.a.

12. Senate Bill No. 967, Ch. 748, added section 67386 to the Education Code, and was approved by Gov. Jerry Brown on Sept. 28, 2014.

13. Calif. Education Code Section 67386(a)(1) (emphasis added).

14. Compare the rule in criminal cases as stated in *People v. Mayberry*, 15 Cal.3d 144, 155 (1975) ("If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent" to commit rape.).

15. *See* Lizzy Crocker, *Download This App or Don't Have Sex*, Daily Beast, July 15, 2015. She writes that this "new app records both parties giving explicit verbal consent before having sex. Will it change the way controversial assault cases are prosecuted?" David Rudovsky, a criminal defense attorney and professor at the University of Pennsylvania Law School, comments that this app marks "the absurd nature of where affirmative consent is going."

16. One of the bill's co-authors, Democratic Assemblywoman Bonnie Lowenthal, told a California newspaper that the affirmative consent standard means a person must say "yes." "In addition to creating a vaguely and subjectively defined offense of nonconsensual sex, the bill also explicitly places the burden of proof on the accused, who must demonstrate that he (or she) took 'reasonable steps … to ascertain whether the complainant affirmatively consented.' When the *San Gabriel Valley Tribune* asked Lowenthal how an innocent person could prove consent under such a standard, she replied, 'Your guess is as good as mine.'" Cathy Young, *Campus Rape: The Problem With 'Yes Means Yes,'* Time.com (August 29, 2014), *available at* http://time.com/3222176/campus-rape-the-problem-with-yes-means-yes/?xid=emailshare.

17. David French, *Yet Another High-Profile Campus Rape Case Falls Apart*, National Review, Aug. 10, 2015, *available at* http://www.nationalreview.com/corner/422332/yet-another-high-profile-campus-rape-case-falls-apart-david-french. Another campus prosecution recently fell apart in Michigan after the accused filed suit in federal court. See Emily Yoffe, *A Campus Rape Ruling, Reversed*, Sept. 15, 2015, http://www.slate.com/articles/double_x/doublex/2015/09/drew_sterrett_and_university_of_michigan_the_school_vacates_its_findings.html.

18. Education Code Section 67386, subsection (b)(10).) That this is a completely one-sided bill is made unmistakable by the following: "In order to receive state funds for student financial assistance … institutions shall adopt detailed and victim-centered policies and protocols regarding sexual assault. ..." Section 67386(b) (emphasis added). The only possible reference to assuring a fair investigation and adjudication process in the entire statute is the vague statement that any adopted "policies must comport with best practices and current professional standards." Ibid. Further, the assumption that each complaining witness is deemed a "victim" — before investigation and adjudication — is a telling feature of the statute.

19. *See* http://time.com/84329/colleges-sexual-assault-investigations/.

20. *See* Calif. Education Code sections 67386(a), (b), (c), and (d).

21. Robin Wilson, *Should Colleges Be Judging Rape?* The Chronicle of Higher Education, April 12, 2015, *available at* http://chronicle.com/article/Should-Colleges-Be-Judging/229263/.

22. On the other side of this debate is Jon Krakauer's recent book, *Missoula*, which is a discussion of the issue of campus sexual assaults at the University of Montana. The first and last cases in the book describe rape cases involving the school's star quarterback and running back. One theme is that the football players acted with a sense of entitlement to do as they pleased and were aided by a football-loving community, sympathetic cops, and prosecutors. Krakauer has a definite anti-defense attorney slant. He advocates less defense advocacy, more from the prosecution, and a mandatory belief by police in the truth of the complaining witness's accusation unless otherwise proven false. He is also satisfied with a Title IX adjudication process devoid of lawyers and decided under a preponderance of evidence standard. While giving brief acknowledgment of the existence of false rape charges (citing the Duke lacrosse team and Brian Banks disasters), these concessions are buried in continual assertions that almost all sexual assault complaints are true and that the university and criminal law systems have not taken such charges seriously. ■

About the Author

Before entering private practice, Charles

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