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Cc: Alison Scott
Subject: Written Comment: Title IX Public Hearing: FACE Written Comment; The Other Survivors
Attachments: FACE OCR WRITTEN COMMENT 6-11-21 FINAL.pdf

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To the Department of Education's Office for Civil Rights, Families Advocating for Campus Equality (FACE) submits the attached **Title IX Public Hearing: *FACE Written Comment; The Other Survivors*** in response to a request from the Department of Education's Office for Civil Rights (OCR) for input on its consideration and potential revision of the 2020 Title IX regulations (Final Rules). In submitting this comment, Families Advocating for Campus Equality, or FACE, hopes to illustrate how OCR's Final Rules are critically necessary to increase decision-making accuracy and restore basic fairness to Title IX campus proceedings for all students and faculty.

FACE is a nonpartisan, gender-neutral nonprofit founded and run primarily by women, many of whom are parents of daughters as well as sons. FACE advocates for and supports students and faculty wrongfully subjected to biased and unfair Title IX investigations. Since 2013 FACE has been contacted on behalf of over 2000 student respondents, and receives four to five, and sometimes as many as 20, desperate calls and emails from accused students, faculty, and their families every week. Our respondents range in age from grad students and faculty to kindergarteners.

In this **FACE Written Comment** we have chosen to counterbalance the disparity in awareness between survivors of sexual misconduct and wrongly accused students by offering OCR a unique opportunity to hear otherwise silent accused student voices. To this end, we include thirty-nine FACE family comments describing the emotional, professional, and financial impacts of wrongful allegations, and in Exhibit 1 provide thirteen detailed reports written by FACE parents and students concerning the processes they experienced.

FACE cannot, of course, begin to remedy this asymmetry in the public narrative, but it can at least make OCR aware there is an alternate, lesser-heard version of the Title IX equation. Thus, the thirty-nine FACE student and parent comments along with the thirteen detailed accounts in Exhibit 1, illustrate how and why FACE believes the majority of the Final Rules should be retained.

Respectfully submitted,

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Title IX Public Hearing: FACE Written Comment; The *Other* Survivors

Families Advocating for Campus Equality (FACE)¹ submits this comment in response to a request from the Department of Education's Office for Civil Rights (OCR) for input on its consideration and potential revision of the 2020 Title IX regulations (Final Rules).² In submitting this comment, FACE hopes to illustrate through family and student accounts how OCR's Final Rules are critically necessary to increase decision-making accuracy and restore basic fairness to Title IX campus proceedings for all students and faculty.

Who Are We?

FACE is a nonpartisan, gender-neutral nonprofit founded and run primarily by women, many of whom are parents of daughters as well as sons. FACE advocates for and supports students and faculty wrongfully subjected to biased and inequitable Title IX investigations. Since 2013, FACE has been contacted on behalf of over 2000 Title IX respondents, and receives four to five, and sometimes as many as 20, desperate calls and emails from accused students, faculty, and their families every week.³

Despite assumptions to the contrary, unfair Title IX proceedings are not only an issue at institutions of higher education, and privileged white men are not the only students accused of sexual offenses. FACE's 2000+ student respondents include many minorities, first-generation college students, as well as women, LGBTQ+, and other students ranging in age from kindergarteners to graduate students and faculty members.⁴

The increasing presence of young children among our numbers is concerning; since 2016 FACE has received distraught calls from over 100 families of K-12 students, some as young as six, in which the conduct of children engaged in "typical playground games" has "been recast as disturbing accusations of sexual misconduct."⁵ The damage to these young children's education and emotional stability is heartbreaking.

Similarly, FACE receives numerous calls from parents of disabled students accused of stalking, unwanted touching, or of simply being "creepy."⁶ Under school policies used before the Final Rules, disabled students were "subjected to processes they could not navigate" without assistance from trained advocates.⁷

At every level of education, the disabled, students of color, first-generation college students, and those without resources to retain legal assistance are all more likely to be disadvantaged by the impact of unfair school Title IX policies.

¹ <https://www.facecampusequality.org>.

² *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 FR 30026-30579 (May 19, 2020) (codified at 34 C.F.R. pt. 106) (Final Rules).

³ See *Exhibit 1*, at page 30, PDF p. 46, by FACE Vice President and Intake Director who responds to incoming calls from families of accused students and professors. These calls have declined since the Final Rules were enacted, which also could be due to campus closures during COVID. *Exhibit 1* was filed August 27, 2020, with a FACE amicus brief in *Victim Rights Law Center v. Elizabeth DeVos*, Mass. Dist. Court, No. 1:20-cv-11104, and also includes 13 detailed family and student accounts, <https://static1.squarespace.com/static/5941656f2e69cfcdb5210aa/t/5f601123dc9f13698fbf34f3/1600131364445/FACE+NY+AMICUS.pdf>

⁴ See, *Exhibit 2, Plaintiff Demographics in Accused Student Lawsuits* (Chart), Title IX for All, PDF at p. 51, <https://www.titleixforall.com/wp-content/uploads/2020/07/Plaintiff-Demographics-by-Race-and-Sex-Title-IX-Lawsuits-2020-7-6.pdf>, accessed Aug. 13, 2012, in Title IX for All Database, *Black students four times as likely to allege rights violations in Title IX proceedings*, <https://www.titleixforall.com/category/databases/>

⁵ *Exhibit 1*, *supra*, note 3, at p. 32, PDF p. 48.

⁶ *Id.*

⁷ *Id.*

The Final Rules.

The Final Rules' detailed and carefully considered requirements for Title IX disciplinary procedures are critical to increasing decision-making accuracy. The Rules clarify OCR's previously "vague and inconsistent" policies on how and when schools should respond to sexual harassment,⁸ specify the scope of conduct that falls under Title IX, and the methods schools must use to reach accurate resolutions of complaints.

The Final Rules appear to be working; according to the lawsuit database maintained by KC Johnson, "lawsuits involving post-August [2020] incidents have dropped to a trickle. Since the current regulations draw so closely from relevant court decisions, universities that implement them in good faith have little to fear."⁹

Pre-2017 OCR directives that discouraged cross-examination, such as those that minimized the need for due process for the accused,¹⁰ resulted in the denial of adequate notice, concealment or disregard of evidence, and the lack of sanctions for false statements, all contributed to the more than 700 respondent lawsuits against schools and the over 200 court decisions in their favor.

Though there are some Final Rules FACE would like to see amended,¹¹ requirements that respondents be informed of the details of the allegations against them; the disclosure of all relevant inculpatory and exculpatory evidence; investigations and live hearings that require a full and unbiased presentation and consideration of evidence; and advocate assistance for both parties in representing their interests and questioning witnesses; together will facilitate schools' ability to thoroughly probe the allegations, thereby increasing the likelihood of accurate findings of responsibility.

What Exactly Is "Truth"?

Most allegations of sexual misconduct¹² on campus and elsewhere undoubtedly are true. Unfortunately, attention to the issue of "wrongful" allegations of campus sexual misconduct has been overshadowed by arguments citing wildly diverging claims based on dubious statistics concerning false accusations, the allegedly miniscule likelihood any complainant would lie, and why anyone would fabricate such a traumatic experience.

Complicating the issue further is a tendency to conflate the likelihood of false or wrongful *criminal* allegations with false or wrongful *campus* allegations of sexual assault,¹³ although the statistics on this issue almost always address *criminal*, not campus allegations.

⁸ Jake New, *Must vs. Should: Colleges say the Department of Education's guidance on campus sexual assault is vague and inconsistent* (Feb. 25, 2016) Inside Higher Ed, <https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance>; see also Samantha Harris & KC Johnson, *Campus Courts In Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications* (2019) 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 111, pp. 62-3, <https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf>.

⁹ Citing Title IX Lawsuit Database, https://docs.google.com/spreadsheets/d/1ldNBm_ynP3P4Dp3S5Og2JXFk7Oml_MPwNPmNuPm_Kn0/edit#gid=0.

¹⁰ U.S. Dept. of Edu., Office for Civil Rights, *2011 Dear Colleague Letter (Rescinded)* (Apr. 4, 2011) ("schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.") <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

¹¹ The problematic rules include §106.45(b)(6)(i) (rejection of written statements when a witness doesn't appear), §106.45(b)(3)(i) (scope of a school's reach resulting in dual-track systems), and the need for clarification concerning retaliation under §106.45(b)(5)(iii). See, for example, Kimberly Lau, KC Johnson, Eric Rosenberg, *Written Comment: Title IX Public Hearing Regarding Potential Revisions to 34 C.F.R. §106* (June 2021) filed with OCR and signed by nearly 100 attorneys, professors, and other professionals, <https://kcjohnson.files.wordpress.com/2021/06/20210604-comment-on-proposed-title-ix-rulemaking-1.pdf>.

¹² Unless otherwise specified, 'sexual misconduct,' 'sexual harassment,' and sexual assault' are used interchangeably.

¹³ The distinction between a likelihood of criminal and campus wrongful allegations is impacted by procedures unavailable on campus that are normally used in courtroom and administrative hearings. These include discovery, various pretrial motions, rules of evidence, sanctions for perjury, and experienced attorneys and judges. Though the Final Rules provide for cross-

Whether 5% or 40% of allegations on campus are “wrongful”, and whether they are provably false, unfounded, or misremembered, no one doubts they exist. Our experience tells us that, whatever the percentage of wrongful allegations, there is a heightened risk on campus. In fact, Brett Sokolow, President of the Association of Title IX Administrators (ATIXA), acknowledged in a recent interview that up to “40 or 50% of allegations of sexual assault” on campus could be “baseless,” particularly when alcohol was involved.¹⁴

Even so, we believe many of Sokolow’s supposedly “baseless” allegations are not *knowingly* false, but instead are likely misremembered or otherwise distorted by intoxication, blackouts, peer pressure, and campus culture. For example, there are misperceptions and inconsistencies in the interpretation of behavior, such as that almost half of all college women believe their “nod in agreement” isn’t consent.¹⁵

Adding to the obviously distorting effects of alcohol on memory in the 78% of cases involving intoxication,¹⁶ memories are also easily contaminated by peer influence, social barometers, and attitudes.¹⁷ This is particularly so on today’s campuses, where powerful ideology infuses not only the disciplinary process but the entire campus belief system, unchecked by fear of reprisal for critical expression.¹⁸

FACE student cases also frequently involve recurring themes and motivations common to wrongful allegations, such as regret after a consensual hook-up, unmet expectations, unfaithfulness, discovery of the incident by a religious parent, boyfriend or friend, retribution for rejection, and sex while intoxicated or blacked-out.¹⁹ Reliable indications that an accused student is innocent are that the story follows one of these patterns, the process lacked fair procedures, and the decision was inconsistent with the weight of the evidence.

Whose Intoxication Matters?

OCR’s previously broad definitions of sexual misconduct (“unwanted touching of a sexual nature”)²⁰ and schools’ eagerness to avoid the ire of OCR officials, caused the 78% of Title IX cases involving intoxication²¹ to become convenient fodder for schools to suspend or expel primarily male accused students. Despite the parties’ mutual intoxication, the proliferation of affirmative consent policies and outdated stereotypes about how men and

examination and a live hearing, even those procedures are subject to restrictions that undermine their comparison with how those procedures are conducted in other settings. See R. Shep Melnick, *Analyzing the Department of Education’s Final Title IX Rules on sexual misconduct*, Brookings.edu (June 11, 2020) (“[T]hose conducting the hearing must screen each cross-examination question to ensure that it is both relevant and civilly presented”; Final Rules §106.45(b)(5) (iv) and (b)(6)(i).) <https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/>.

¹⁴ Richard Bernstein, *Legal experts say Biden’s pushing ahead to the Obama past on campus rape could be a mistake*, Real Clear Wire (Dec. 16, 2020) https://www.thecentersquare.com/national/legal-experts-say-bidens-pushing-ahead-to-the-obama-past-on-campus-rape-could-be/article_184d1e3a-3fc0-11eb-956d-87947675f52c.html.

¹⁵ *Washington Post & Kaiser Survey* (2015) <http://apps.washingtonpost.com/g/page/national/washington-post-kaiser-family-foundation-survey-of-college-students-on-sexual-assault/1726/>.

¹⁶ EduRisk, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (Feb. 2015) p. 6, EduRiskSolutions.org, http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf; Nash & Ost, *False and Distorted Memories (Current Issues in Memory)* (2017) Psych. Press (Kindle Ed.), at p. 55.

¹⁷ Nash & Ost, *False and Distorted Memories (Current Issues in Memory)* (2017) Psych. Press (Kindle Ed.), at p. 54-55.

¹⁸ Cynthia P. Garrett, *Trauma-Informed Theories Disguised as Evidence* (May 2, 2019) pp. 5, 10, <https://static1.squarespace.com/static/5941656f2e69cfcdb5210aa/t/5ccbd3c153450a492767c70d/1556861890771/Trauma-Informed+Theories+Disguised+as+Evidence+5-2.pdf>

¹⁹ Saunders, Candida L., *The Truth, The Half-Truth, and Nothing Like the Truth, Reconceptualizing False Allegations of Rape* (2012) *The British Journal of Criminology*, 52(6), 1152-1171 <http://bjc.oxfordjournals.org/content/52/6/1152.full.pdf>; John Erwin, *Missing The Mark; False Allegations in the U.S. Government* (August 8, 2014) *American Analyst*, p. 8, https://www.dropbox.com/s/5uod2nvqyg3z86w/Erwin_MISSING_THE_MARK_False_Allegations_in_the_U.S_Government.pdf?dl=0 [Recently deleted from original source: <https://www.scribd.com/doc/236235147/False-Allegations-in-the-U-S-Government>]

²⁰ Dept. of Ed. OCR, *Dear Colleague Letter* (Apr. 4, 2011) p. 3, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104_pg3.html

²¹ EduRisk, *supra*, note 16.

women interact²² also resulted in schools most often penalizing an accused male as the perpetrator, while assuming the female accuser was a “survivor”.²³

In response to the frequency of school decisions finding only the male student guilty when both students were intoxicated, Title IX expert Brett Sokolow warned schools: “Surely, every drunken sexual hook-up is not a punishable offense” . . . “there has to be something more than an intent to have sex to make this an offense.”²⁴

Schools’ repeated conflation of “intoxication” and “incapacitation,” also prompted Sokolow to caution them not to take complainant intoxication-based claims of inability to consent at face value: “[t]here are a lot of cases where someone says they were incapacitated, but the evidence doesn’t support that they weren’t able to make a decision.”²⁵

Finally, increasing further the odds of a wrongful finding guilt, pre-2017 OCR-sanctioned trauma-informed policies caused Title IX officials to rely on a complainant’s distorted, faulty, and – *in cases where a complainant claimed to have not remembered or blacked out during the event* – even the complainant’s *nonexistent* memories.²⁶

Men Targeted “no matter what”.

Many insist schools do not discriminate against men, but are simply targeting perpetrators. Attorney Jackie Gharapour Wernz, who worked at OCR in the Obama and Trump administrations, saw differently:

“We did see some bad cases in the Obama era, cases where it basically didn’t matter what evidence there was” . . . “The college was going to find against the defendant, the male defendant, no matter what. I think the schools felt pressure under the Obama guidance.”²⁷

On some campuses it was all but guaranteed decision-makers would unfairly target male respondents. This was the inevitable result of factors discussed in the sections above, combined with pre-2017 OCR directives that discouraged cross-examination, minimized the need for due process for the accused,²⁸ and seemed to encourage the denial of adequate notice, concealment or disregard of evidence, and the lack of sanctions for false statements.

The Other, Silent “Survivors”.

In this Comment we have chosen to counterbalance the disparity in awareness of the plight of wrongly accused students by offering OCR a unique opportunity to hear otherwise silent accused student voices. To this end,

²² See Harvard Law professor Janet Halley’s discussion of the problematic interaction between intoxication and affirmative consent policies, Janet Halley, *The Move to Affirmative Consent, Signs; Journalism of Women in Cultural Society* (2015) Currents: Feminist Key Concepts and Controversies, Univ. of Chicago Press Journals, p. 8 of the PDF, p. 264 of journal (“seeking social control through punitive and repressive deployments of state power.”) <https://www.journals.uchicago.edu/doi/pdf/10.1086/686904>.

²³ FACE has seen many cases in which only the male was suspended or expelled, though both parties were equally intoxicated. For example, in *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016), the investigator “approached the Relationship as if John was the Dominant Male Aggressor and J.C. was the Submissive Female Victim, stereotypes derived from heterosexual culture. Those stereotypes would be inappropriate in any sexual misconduct investigation . . .”

²⁴ Brett A. Sokolow, J.D., ATIXA Executive Director, *ATIXA Tip of the Week Newsletter SEX AND BOOZE* (Apr. 24, 2014) deleted from the original source but available here: <https://www.dropbox.com/s/ie1b0dg0bh0kvff/ATIXA%202014-Tip-of-the-Week-%20Sex%20and%20Booze.pdf?dl=0>.

²⁵ Richard Bernstein, *supra*, note 14.

²⁶ Garrett, *Trauma-Informed Theories*, *supra*, note 18, at pp. 5-6, 8-9.

²⁷ *Id.*

²⁸ U.S. Dept. of Edu., Office for Civil Rights, *2011 Dear Colleague Letter* (Rescinded) (Apr. 4, 2011) (“schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.”) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

thirty-nine FACE family comments describing the impact of wrongful allegations are listed immediately below,²⁹ and thirteen detailed reports by FACE parents and students are discussed and reproduced in Exhibit 1.³⁰

Sexual misconduct complainants appropriately and understandably have dominated the public narrative on campus sexual assault through accuser-focused movies like *The Hunting Ground*,³¹ national press coverage, and narratives on social media. Unlike the accused, there are unequivocal incentives for complainants to publicize their allegations. If complainants “win” their Title IX case, they are honored for their bravery in speaking out. If they lose, complainants can take to social media and claim victimhood by accusing the school of ignoring or discounting their trauma. There remain few disincentives for complainants to publicize their experiences.

While complainant narratives permeate the media, the vast majority of wrongfully accused students are silenced by humiliation, vilification, and trauma, often based merely on an *accusation* they’d engaged in sexual misconduct. Then, once found responsible, there is no benefit for these students to insist they were wrongfully accused - the accusation alone is accepted as sufficient proof of their guilt. Indeed, recently we’ve seen more and more accused students and faculty ‘outed’ on social media as “rapists”, often by name, whether or not they had been found responsible, their fear of publicity leaving them helpless to defend themselves.

Even if the accused were to cite a “not responsible” finding as evidence of their innocence, it will be said “they got off.” Because there is nothing to gain by telling anyone beyond family and close friends that one’s been falsely accused of such a heinous crime, the resulting isolation compounds the trauma of having been wrongfully labeled a sexual predator.

FACE cannot, of course, begin to remedy this asymmetry in the public narrative, but it can at least make OCR aware there is an alternate, lesser-heard version of the Title IX equation. Thus, the thirty-nine FACE student and family comments below along with the thirteen detailed accounts in Exhibit 1 illustrate how and why accused student stories are rarely heard.

FACE Family Comments: Repercussions of Wrongful Accusations

FACE is unique in its ability to put a human face to thousands of wrongfully accused students. For this reason, we focus first on comments written by parents of students impacted by wrongful Title IX allegations. These comments address the emotional, professional, and financial impacts of wrongful allegations on their children, families, and themselves.³²

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While it was clear in the end that she completely fabricated her claims, my son was left suicidal with severe mental illness. Two extensive hospitalizations, three lost semesters at school, \$90,000 in out of pocket losses and the complete loss of his hopes, dreams and possibilities.

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²⁹ These *Face Family Comments* originally were submitted as testimony to the California State Legislature on June 19, 2019, in opposition to CA SB-493, found at https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB493.

³⁰ FACE amicus brief, *supra* note 3, *Exhibit 1*. These 13 accounts originally were filed August 27, 2020, as an exhibit to the amicus brief filed by FACE in a lawsuit against the 2020 Final Rules.

³¹ The *Hunting Ground* has been severely criticized for twisting the truth, See, for example, Emily Yoffe, *How The Hunting Ground Blurs the Truth; The documentary is shaping the public debate around campus rape*. (June 1, 2015) Slate (“But a closer look at one of its central cases suggests the filmmakers put advocacy ahead of accuracy”) <https://slate.com/news-and-politics/2015/06/the-hunting-ground-a-closer-look-at-the-influential-documentary-reveals-the-filmmakers-put-advocacy-ahead-of-accuracy.html>; Stuart Taylor Jr., *A Smoking-Gun E-mail Exposes the Bias of The Hunting Ground* (November 16, 2015) National Review, <https://www.nationalreview.com/2015/11/hunting-ground-smoking-gun-e-mail-exposes-filmmaker-bias-against-accused/>.

³² *Face Family Comments*, *supra*, note 29.

The impact of this nightmare has changed our family and our son forever. We have spent nearly \$320,000 in legal expenses, doctors' bills, and medication and he was lucky to be found not responsible, *twice*.

My son's current mental health issues have been diagnosed as a direct result of the trauma imposed upon him by flawed processes, bullying by school and administrators and friends. Four and a half years later, acquaintances still call him a rapist.

Today, he suffers from PTSD with debilitating anxiety that prevents him from work and study. No doctor can help. Our son is one of the 20% of the population on who antidepressant medications do not work. We don't know how to help our son. There's not much left to be done. We are helpless.

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She kicked out her roommate so my son and her could be alone. One person walked in on them during the act. She was on top, moving on her own while my son was beneath her passed out with his arms by his side. She filed a sex assault claim 6 weeks later.

My son has no recollection of that night. Expelled. My question? *Who raped who?*

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My son's physician asked him how often he thinks of killing himself. My son replied, "Nearly every day." We left that appointment with a script for yet another antidepressant, hoping this one will keep him out of the dark hole he now lives in.

During the car ride home, my son told me he felt everything had been ripped from him. All his hopes and dreams were shattered the moment his college expelled him for a sexual assault he did not commit.

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For the university to expel my falsely accused son at graduation, after stalling the Title IX investigation for a full 9 months, was exceptionally cruel, erasing 5 years of his dedicated civil engineering dream. The deep emotional anguish and heavy financial student debt are not as easily erasable.

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A drunk girl became sexually aggressive and came onto our son. He said "NO". There was one witness who without a doubt could prove our son's innocence. That witness was never questioned by the Title IX investigator and was not allowed to attend the hearing. Our son was expelled.

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My son broke down crying and had no response when we asked him, "have you ever contemplated taking your life during the last months?" 13 months had passed since he was wrongfully accused. We thought he had turned a corner, but that was not to be the case.

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Our son spent 3 months in bed. Ended up getting an underage drinking charge. Spent 2 days naked in a jail cell without a phone call. He told the police to just kill him.

My god. Those were dark, horrible times.

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She told her roommates "the day after" about how cute he looked in his boxer shorts and what a good kisser he was and she tagged him in pictures on her social media account. Two days later she went to the campus student conduct office and claimed he sexually assaulted her.

Expelled.

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We had no idea, none, that this was possible. Anyway . . . this is such a dark time. When I can't reach my son, I fear for the worst. Someone mentioned suicides. How many?

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As a parent who lived this process, I saw my innocent son lose everything – his hopes, his dreams, any trust. We picked him up off the campus lawn in a crumble and vomiting after a meeting with the Dean. I didn't sleep for months, worried he would take his own life, pulling him from the depths of despair to see his future. This is reality. It's real. And in our case? There was no sex. He said 'no' when an aggressive drunk girl came onto him.

The nightmare of the campus process rocked our family, brought us to our knees. I pray for the day I can tell my story to Senators in a hearing. Only then will I feel heard.

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Eight months after a drunken hook-up, the girl claimed sexual assault, even though she wished him "happy birthday, Bro" on Facebook a month after the so-called assault. No police or campus security ever involved. Expelled.

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My son had consensual sex 4 times before he was accused by his "friend". He went through the humiliation of an intense psychosexual exam and had yet to be convicted of a crime! The accuser changed her story so much the university police declined to charge him. However a new prosecutor looking to make a name for herself went to 4 separate grand juries to get a charge against him.

He was a 4.2 student in a leadership program. He was expelled because he could not testify in his own behalf for fear of the criminal case. He attempted suicide but thankfully survived.

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I remember the pain. I remember crying while I vacuumed the living room, sobs, tears dripping on the carpet, trying to understand what was happening and mourning the loss of my son's dreams. All he had worked for. I didn't sleep as I was worried I would find him dead in the morning.

What happened to him was a nightmare and affected our entire family. It wasn't fair. It still hurts all the time. I felt like I couldn't keep any of my children safe. I wish I could make it all go away.

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My giant, offensive lineman son sobbing in my arms saying "Mom, I don't want to go to prison. I don't know why she's doing this to me". My heart grabbed, twisted and yanked out!

I will never forget his voice, his face, and his tears.

~~~~~

Our son became depressed, couldn't sleep, couldn't eat, lost 25 pounds in two months, and became suicidal. He would call me crying – I would answer the phone and hear breathing and sobs. I found him one day trying to hang himself.

There was no sex. He was innocent. His journey to healing, years later, continues on . . .

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What I remember most, is his smile. The pride beaming from his face, that first day at his dream college. He had worked so hard to get there.

What comes from Title IX? Suicide watch. Anxiety. Depression. PTSD. Who can he trust? Trying to pick himself up, figure out how to live again, trying to understand how this could be allowed to happen.

His life matters. Or it should.

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At first suicidal. Last two years in weekly therapy. Lost his community, his education, his trust and his happiness. Couldn't imagine that with her text message, "Let's get it on", he was the one expelled.

~~~~~



My son helped a girl crying at a party. They ended up talking and eventually kissing – clothes on. No sex. A week later, he is accused of sexual misconduct, but the girl doesn't want to participate. Doesn't matter. He's expelled on graduation day. Now repaying student loans and his mental health is not well, nor is ours.

~~~~~

The DA declined to prosecute my son, yet he is scared to return to a campus with a history of Title IX excesses. My son has anxiety and depression, is socially paralyzed and isolated now and cannot even trust the information he is being exposed to in the community college classes he is taking.

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Our son's attorney was told he could request "viewing time" appointments in two hour increments to review records. He said he'd need several. The T9 admin seemed surprised and asked why. When he told her he'd be writing extensive, verbatim notes, she said he couldn't as it was against the rules. When questioned as to which rule, she relied that it was an unwritten one. Ludicrous.

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As to how it feels at the time, it's very simple: it's a black hole. I didn't really feel any emotions, for any reason, for months. I didn't really get the righteous anger working for even longer. The fears I'd had beforehand disappeared; what's left to be afraid of when something this bad has actually happened? Emotions are very natural and primal. If you are in an accident or if someone hits you or if you get sick, there's a normal set of emotions that get triggered. But a false accusation is a pretty unnatural trigger; your reptilian brain probably has no idea what to do with it, so instead of a mix of emotions you get a vacuum.

In retrospect, I referred to the times after I found out what had happened quite unironically as "living death".

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My son was also suicidal and fortunately not successful thanks to alert friends who got him help. No thanks to school of course that did nothing to help him. I think there are probably quite a few stories like that.

~~~~~

"John" was put on suicide watch at College. John's friends were scared that he might hurt himself when College staff removed him from his dorm room at night and placed him in isolation elsewhere on campus. His friends called College 's suicide watch line, and for 24 hours John had guards outside his room.

~~~~~

Accused are treated as we all know very differently in the disciplinary process. An accused acting "defensive" is "attitude" - Umm maybe acting defensive because of a false accusation?

My son's adjudicator was very aggressive - bullied him and used intimidation tactics - he was seated and she came over, stood way too close hovering over him and aggressively questioned/raised doubt about everything he said. Accusing students are not subjected to that same treatment.

This was a school he loved and believed would be fair. He was treated like a criminal.

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Although I am not at liberty to give you any specific details, I have been personally contacted by a family whose college son committed suicide after being accused; He jumped out of a window. Knowing what he faced, this young man took his own life before he ever even contacted his family about the accusations.

At his funeral, the young female accuser approached the family to apologize and she admitted that it was all a misunderstanding and that she had been trying to make another young man jealous. It all "got out of hand" and went too far. I cannot give you any more details than this because this young man's family

is devastated.

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If a girl has a past of false accusations, schools may find that irrelevant. For example, the girl that accused my son had also falsely accused another guy earlier in the same academic year. The school deemed that irrelevant. We have heard that she also accused a boy in high school, but have been unable to confirm.

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A university instructor purchased alcohol for my underage freshman son, introduced him to his accuser, and then cheered them on to have sex. Six months after the accuser had graduated she accused my son of rape. My son passed two polygraph tests. Recordings of a university attorney reveal him telling my son to not waste his time trying to defend himself because *he had already been found guilty*, and another from a witness saying she was intimidated by the university to not testify on my son's behalf. He was suspended for three years. Hundreds of thousands of dollars in debt, and I eventually lost my job.

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While the accuser was offered sympathy, coddled and believed from day 1, our son was treated as guilty based only on her description of events. He was not told the charges against him for weeks. He was suspended from his sport team . . . Losing his spot on the team left him alone and isolated at a stressful and frightening time in his life. We worried that he might slip into a dangerous black hole of depression. He came close to that. He barely ate or slept for three months.

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The original administrator told him that a female student can change her mind about whether she really meant to have sex . . . months later regardless of how "things" had appeared at the time of sexual relations. I heard the administrator say this and almost fell out of my chair. This same administrator recommended our son be expelled based solely on the accuser's version of events. He did no investigation and collected no evidence despite our related requests.

Our son appealed and hired an attorney and was eventually found *not responsible*. Even so, long term his psyche, spirit and reputation have been damaged. We pray time will heal. I wonder - Will he ever be able to trust a woman again?

The accuser had no repercussions for making false claims - the university said she was emotionally distraught so they wouldn't hold her responsible.

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Our son had already transferred to a new school when his ex from the first school filed a claim a year later. The former school still pursued him, even though he wasn't a student. When we finally saw her statement months later, our lawyer said, "only a very biased panel could find him responsible." She claimed on that one night in the *middle* of their 5-6 month relationship, while having sex he asked if she was "OK?" She admitted nodding "yes," but claimed she was too afraid to tell him "no."

They found him responsible, ignoring extensive evidence that she was happy, including that she continued to have sex with him regularly for months after the alleged assault.

Sadly, we consider ourselves fortunate -- after spending \$70,000 in attorneys' fees we were able to settle with the school. What happens to students without our resources?

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In my son's case, we were allowed to briefly see a report that was written by his accuser. It was hand written and rambled on about how she had issues with her father and suffered from mental illness. By the time the report re-surfaced, it was typed and completely polished (the work of the school's SAFE coordinator). The original report disappeared.

In addition, after my son was expelled and our lawyers requested a copy of the tape of the hearing, and almost all of her testimony had somehow been mysteriously erased.

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At a FACE meeting I heard from countless parents on this subject. So many mentioned their sons had thought about suicide, were hospitalized, etc. I heard from the young men who attended the event about the struggles they faced when considering such a decision for themselves.

My reaction was sadness and heartbreak for each and every one of them, and I came to understand that thought of suicide is a common reaction to the trauma of false accusation.

Wow, how had we escaped?

Well, as it turns out we had not. Over dinner one night during that trip, "John" described to me for the first time in 2 ½ years how dark the days had been, and how dark they still can be. I learned my son also once considered the same horrible choice for himself, and we never knew.

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"Doe" was never at the level of any of these boys although he went through an ordeal that was horrific since it also included criminal prosecution. My other son said that when his brother was abandoned by the campus police all alone as they removed him from campus late at night just yards from a bridge over the X river that he might have jumped off.

We made that a big part of our discussions with College about how damn lucky they were that when they decided to go after the next so called sex offender on their campus that they did not target one who was vulnerable and so afraid and so helpless as he was accosted by the campus security and the entire sex assault industry on campus, and fearing jail that he would take his own life.

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My son was in his senior year at a prestigious private liberal arts college. He was set to graduate, then on to dental school. He excelled the previous 4 years, so much so that the school used his photo in advertising to attract high school applicants.

In his last semester a female student filed an accusation of non-consensual sex with the Title IX administrator. The incident happened 3 1/2 years earlier in their freshman year. There were no witnesses, no evidence, no police involvement.

After a superficial investigation by the school's law firm and faculty Title IX hearing, my son was suspended for the next 3 semesters, just 12 days before graduation. We appealed. The school denied our appeal and imposed additional penalties to the suspension.

His and our lives have forever been altered. As you know Title IX findings of guilt must be disclosed. My son has been unable to find an-other college to accept him. Unable to complete his degree, his dreams of dental school are over. He went from a bright future to seasonal part time work at a shipping company. He is on medication now for PTSD. We are in the process of suing the school just to get the degree he earned.

So far our legal costs have exceeded 100K. If you lack the financial means you have no legal re-course.

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Our son and his campus advocate (pre-Clery Act) were the only ones allowed to view the findings - our lawyer was not permitted - *and he was also told that he could only "jot down basic notes- no verbatim writing or picture taking"* and they watched him the entire time.

In addition, the times available were always during his class times so he had to miss class to prepare for his hearing without being able to give the professors a reason why (due to your other bullet point of being threatened with immediate expulsion if he spoke to anyone about the matter on campus.)"

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The "viewing time" requirement always hurts- only allowed to view documents in Dean's or Title IX office - very intimidating and not accommodating at all given the quick turn around of investigation findings and hearings in most cases (plus if using attorney can run into issues etc. ...)

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Something deep inside told me to go home. I packed up my work to finish later and headed out the door. As I drove, I felt panic well up inside of me, tears beginning to form. I knew something was wrong. I tried to talk myself out of it.

Once home, I went straight to the garage, opening the door, gazing up. I see fingers fumbling around a rope. What kind of rope? Where did he get that? I glance down, tennis shoes teetering on a large bucket. My face meets his – tears streaming down his face. He is broken. He is lost. I start to shake My voice cracks through my tears. "Honey, this isn't the way ... things will get better." Sobs. I help him down. Take the rope from his neck. Hold him tight as if to pull him from the depths.

I won't let go. I will fight. For all of us.

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### ***FACE Family & Student Testimony: Un-American Title IX Procedures***

*Exhibit 1* to this Comment provides thirteen FACE Family and Student Comments discussing in detail their experiences with Title IX disciplinary processes before the Final Rules went into effect.<sup>33</sup> These and other FACE stories typically include the following issues:

1. No timely notice of the allegations before assuming guilt;<sup>34</sup>
2. Exculpatory evidence ignored;<sup>35</sup>
3. Complainant's narrative not probed or questioned;<sup>36</sup>
4. Single investigator ignored complainant's inconsistencies and neglected to collect evidence;<sup>37</sup>
5. Evidence suppressed or not disclosed;<sup>38</sup>
6. Decisions inconsistent with the facts;<sup>39</sup>
7. School official refused to ask pre-submitted written questions;<sup>40</sup> and
8. Thousands, if not hundreds of thousands of dollars, were spent in court to vindicate rights;<sup>41</sup>

#### **The Title IX experience was "harrowing," and "abjectly un-American."**

It's common among FACE families to refer to their experiences with a Title IX proceedings as "a nightmare" and describe how they could not comprehend that such a process was permitted to occur in America. One parent wrote, "During the harrowing experience we consistently wondered out loud 'how could this happen in America?'"<sup>42</sup> Another called the process "abjectly un-American."<sup>43</sup>

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<sup>33</sup> *Exhibit 1* was filed August 27, 2020, as an exhibit to an Amicus Brief filed by FACE in *Victim Rights Law Center v. DeVos, et al.*, Mass. Dist. Court, No. 1:20-cv-11104,

<https://static1.squarespace.com/static/5941656f2e69cfcdb5210aa/t/5f601123dc9f13698fbf34f3/1600131364445/FACE+NY+AMICUS.pdf>.

<sup>34</sup> *Student 3*, p. 4, PDF p. 19; *Student 4*, pp. 6-7, PDF pp. 22-23; *Student 6*, p. 12, PDF p. 28.

<sup>35</sup> *Student 1*, p. 1, PDF p. 17; *Student 6*, p. 12, PDF p. 28; *Student 10* (DNA evidence ignored), p. 21 PDF p. 37.

<sup>36</sup> *Student 1*, p. 1, PDF p. 17; *Student 3*, p. 4, PDF p. 20; *Student 11*, p. 23 PDF p. 39.

<sup>37</sup> *Student 2*, pp. 2-3, PDF pp. 18-19; *Student 6*, p. 12, PDF p. 28; *Student 10*, p. 20, PDF p. 36; *Student 11*, p. 23, PDF p. 39.

<sup>38</sup> *Student 5*, p. 10, PDF p. 26; *Student 11*, p. 23 PDF p. 39.

<sup>39</sup> *Student 2*, pp. 2-3, PDF pp. 18-19.

<sup>40</sup> *Student 3*, p. 4, PDF p. 20.

<sup>41</sup> *Student 5*, p. 9, PDF p. 25; *Student 10*, p. 22, PDF p. 38; *Student 11*, p. 23 PDF p. 39.

<sup>42</sup> *Student 2*, p. 2, PDF p. 18.

<sup>43</sup> *Id.* at p. 3, PDF p. 19.



The frustration expressed in these accounts is palpable. For example, one can imagine *Student 2's* frustration at not being permitted to "speak for himself beyond what the investigator allowed during a short interview performed at the onset of the process," or in not being "allowed to present evidence that would refute the claims of the complainant . . ."<sup>44</sup> *Student 3* also was "not allowed to even question parts of my accuser's story."<sup>45</sup>

### **The truth did not "set me free."**

Most accused students begin the Title IX process with the assumption, expressed by *Student 5*, "that 'the truth would set me free.'"<sup>46</sup> *Student 5* explained he "was actually not overly concerned or worried about entering the investigative process," "naively" believing "innocence would protect me from harm . . ."<sup>47</sup>

I assumed that I was entering an adjudication process that was neutral, fair, and balanced. I assumed that the investigation would reveal that the allegation against me lacked merit, and that the case against me would eventually be dismissed.<sup>48</sup>

*Student 5* reported that "despite overwhelming evidence supporting my innocence, I was eventually found 'Responsible' for sexual assault and suspended from school for the rest of the year."<sup>49</sup> In the end, *Student 5* was fortunate to have the substantial resources to file the lawsuit through which he was finally vindicated.<sup>50</sup>

### **No details and "no one wants to hear your side."**

Before the Final Rules were issued, some schools routinely refused to provide accused students with details of the accusations that would enable them to defend themselves. In *Student 3's* case, "the university refused to provide any details of the accusation until after the investigation had concluded."<sup>51</sup> Similarly, *Student 4* "was told on a Thursday afternoon at 4:30pm he had to submit a statement no later than Monday" though he had been told "only the accusers name, date, place and that he was 'charged' with 'rape' and 'inappropriate touching.'"<sup>52</sup> *Student 4* described his confusion and frustration at being kept in the dark:

This was not the fair and equal process the college promised. Imagine how you would feel, your friends watching you be escorted away like a criminal. You don't even know why this is happening, you only know an accusation was made and no one wants to hear your side of the story.<sup>53</sup>

### **No questions, no time, and anonymous decision-makers.**

*Student 4* also received no hearing, none of his written or oral questions were ever asked, and he "was not allowed to know who was on his hearing panel."<sup>54</sup> *Student 4's* parent asked a question that never should have arisen:

How does a hearing panel make a life altering decision without ever meeting, talking, or interacting with the accused? They made a judgment based solely on information that the

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<sup>44</sup> *Id.*

<sup>45</sup> *Student 3*, p. 4, PDF p. 20.

<sup>46</sup> *Student 5*, p. 9, PDF p. 25.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Student 3*, p. 4, PDF p. 20.

<sup>52</sup> *Student 4*, pp. 6-7, PDF pp. 22-23.

<sup>53</sup> *Id.* at p. 5, PDF p. 21.

<sup>54</sup> *Id.* at pp. 7-8, PDF pp. 23-24.



college required be supportive of the complainant.<sup>55</sup>

For *Student 8*, at “the final ‘hearing,” he was stunned that panel members “had not even read the investigator’s report!”<sup>56</sup> *Student 10* similarly experienced school officials apparent disinterest in his position when the fact that “the panel still had questions” at the end of the hearing was considered unimportant: they inexplicably “were told they were out of time.”<sup>57</sup>

### **Financial, emotional, and career impacts, guilty or not.**

*Student 4’s* parent’s detailed description of the reasons for and manifestations an accused student’s trauma is both illuminating and distressing:

The effects and impact of being wrongly accused are real. The stigma and vilification of being labeled a “sex offender” cannot be underestimated. The inability to fully clear one’s name can cause extreme pain and embarrassment.

Being accused changes your ability to return trust and it is difficult to return to being the valued person you were before the accusations. There are definably changes in personality and social behavior due to the loss of a previously untainted reputation, a loss that cannot be repaired in the absence of clear exculpatory evidence of innocence.

Self-blame, suicidal thoughts, paranoia, anxiety, mistrust, social withdrawal and isolation are all commonly seen in many who have gone through similar “educational processes.”<sup>58</sup>

*Student 11* was also “suicidal, withdrawn, angry, sad, embarrassed, isolated, and shocked that a relationship turned sour could potentially ruin his life.”<sup>59</sup> His parents were “absolutely shocked and outraged with [the] entire process.”<sup>60</sup>

The experience of being wrongly accused affects an accused student’s entire family. As *Student 4’s* parent explained, it’s “not only the person accused that suffers, this is a life altering event for the whole family and even friends.”<sup>61</sup> *Student 8’s* parent also explained,

it didn’t just affect my son but included siblings, aunts, uncles, cousins and grandparents. It also included his friends, teammates both past and present and all of the parents who have been following him for years. This is a big deal and not just for our son.<sup>62</sup>

*Student 10’s* parent believes “the rush to believe” by both college officials and police “caused my son and my family to live the surreal experience of facing a criminal trial while concurrently dealing with a TIX kangaroo court.”<sup>63</sup>

*Student 12*, himself “a survivor of rape and a victim of sexual assault as a 12 year old,” describes his own heartbreaking experience after being alerted to a wrongful allegation against him,:

What followed were two weeks of personal hell. I was threatened, assaulted, cut off, and ostracized. My friends were stopped by people I hardly knew in the cafeteria, and still other

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<sup>55</sup> *Id.*

<sup>56</sup> *Student 8*, p. 16, PDF p. 32.

<sup>57</sup> *Student 10*, p. 21, PDF p. 37.

<sup>58</sup> *Student 4*, p. 8, PDF p. 24.

<sup>59</sup> *Student 11*, p. 24, PDF p. 40.

<sup>60</sup> *Id.*

<sup>61</sup> *Student 4*, p. 8, PDF p. 24.

<sup>62</sup> *Student 8*, p. 16, PDF p. 32.

<sup>63</sup> *Student 10*, p. 22, PDF p. 38.



friends refused to hang out with me in public, specifically citing fear of social retribution.

I left the school, and returned home, not out of guilt but out of a fear I have not experienced before or since. I have spent the past 10 months trying to bring my life back together. Despite the promise from the school that the process would only take 45 days max, it took eight months. Eight months of waiting, interviews, written statements, and a deep, lasting trauma. Trauma that drove me towards substance abuse, suicide, and an ingrained fear in my psyche.

I am no longer a fearless public speaker, nor is a masters' program likely on the table. Instead, everything I worked so hard for was destroyed the moment I left the school.<sup>64</sup>

Despite his horrendous experiences, *Student 12* still maintains "Title IX is one of the most important pieces of American legislation for equity in colleges ever introduced."<sup>65</sup> However, even though Title IX is important, *Student 12* believes "it is unacceptable to allow Title IX to continue the way it has."<sup>66</sup>

### **Neither time nor exoneration can heal the wounds.**

*Student 7's* parent explains that, though their "son was found not responsible . . . the effects of the process have been life altering for our entire family."<sup>67</sup> *Student 10*, found responsible but eventually exonerated after a harrowing two years, still, years later, "struggles dealing with the false accusation . . ."<sup>68</sup>

What my son went through, no one should have to go through, the depression caused by the process is heart wrenching. On Christmas Eve 2016 I held my son why he cried non-stop for 2 hours after he left work due to his anxiety, he lost his job a week later. He lived in fear while being on bond for 15 months. Fear of people finding out. He lost all his friends and his educational opportunities.<sup>69</sup>

*Student 5* and his family spent thousands of dollars and "five long years to clear my name. That's half a decade of total professional stagnation and unrelenting psychological turmoil."<sup>70</sup> Nevertheless, according to *Student 5*, "even after winning my lawsuit against my university, much of the damage to my reputation and spirit remained."<sup>71</sup> *Student 5* lamented that "[o]ne spurious allegation and a small handful of complicit university administrators was all that it took to irreparably alter my life trajectory."<sup>72</sup>

### **Conclusion**

In this Comment, we've provided only a very small percentage of accounts FACE accused students and their parents could tell of their trauma, disbelief, and disillusionment at the arbitrary and biased Title IX practices they experienced. Though there are thousands more of these accounts, the vast majority of accused students and their families are understandably reluctant to provide an account of their experiences, even anonymously, due to the chance their identities could be publicized.

Worse still, in many states and on many campuses, the Title IX bureaucracy is flexing its muscles to ensure it will never be forgotten that these young people were alleged to have committed sexual misconduct. With

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<sup>64</sup> *Student 12*, p. 25, PDF p. 41.

<sup>65</sup> *Id.* at p. 26, PDF p. 42.

<sup>66</sup> *Id.*

<sup>67</sup> *Student 7*, p. 15, PDF p. 31.

<sup>68</sup> *Student 10*, p. 22, PDF p. 38.

<sup>69</sup> *Id.*

<sup>70</sup> *Student 5*, p. 9, PDF p. 25.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*



what can only be described as an academic “sex offender registry”, state governments and some campuses now require transcripts of those found “responsible” to be forever imprinted with a sexual misconduct disciplinary notation.

For accused students deemed “responsible” *there will be no “ban the box,”* even though their alleged violations, if they occurred, were unlikely criminal, and their guilt was decided through a disciplinary “process” unaccompanied by many procedures meant to ensure decision-making accuracy, on the lowest possible standard of evidence, by administrators, professors, and other campus officials who claim these experiences are merely “educational.”

Tragically, the foundation on which these accused students have relied since childhood, the promise of a better future and their belief in the American sense of justice, has been destroyed. A realization that their life can be ruined through no fault of their own creates a deep-seated fear and perceived loss of control, prompting some to attempt suicide, a few successfully, lands many in the hospital, and causes nearly all to suffer some degree of lifelong trauma.

These men, women, LGBTQ+, minorities, first-generation, and other students, teenagers, young adults, and children barely out of diapers, have lost faith in our schools and justice systems. Not just students, but entire families are emotionally scarred and sometimes financially destroyed, their lives irrevocably changed because of a process with a 30% likelihood of error.<sup>73</sup>

And remember, the students who pay the highest price for these guilt-presuming procedures are underserved and minority populations whose families don’t have resources to obtain legal advice. Can this be what America now stands for? *Justice only if you can afford it?*

We ask that OCR *please* do not ignore or discount the experiences of these students who could be your sons, daughters, brothers or sisters – because, *as you must know*, “doing the right thing” no longer protects you in this ‘*accusation = guilt*’ world.

At FACE we firmly believe *it is possible* to balance the interests of Title IX complainants and respondents, and provide the equitable procedures both deserve. Ask us - we’ve seen such collaboration firsthand!<sup>74</sup>

**We CAN do better.**

Respectfully submitted,

Cynthia P. Garrett and Alison Scott,  
Co-Presidents

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<https://www.facecampusequality.org>

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<sup>73</sup> John Villasenor, *A probabilistic framework for modeling false Title IX ‘convictions’ under the preponderance of the evidence standard*, (Oct. 14, 2016) Law, Probability and Risk, Volume 15, Issue 4, pp. 223–237

<https://academic.oup.com/lpr/article/15/4/223/2549058>.

<sup>74</sup> For example, various stakeholders including victims’ advocates and campus administrators, as well as FACE Co-President Cynthia P. Garrett participated in an American Bar Association Criminal Justice Section Task Force, *Report on College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Sexual Misconduct* (June 2017) [https://www.americanbar.org/news/abanews/aba-news-archives/2017/06/aba\\_task\\_force\\_onco/](https://www.americanbar.org/news/abanews/aba-news-archives/2017/06/aba_task_force_onco/); Ms. Garrett also serves as a liaison on The American Law Institute’s Student Sexual Misconduct project. The American Law Institute, *Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities* (accessed June 10, 2021) <https://www.ali.org/projects/show/project-sexual-and-gender-based-misconduct-campus-procedural-frameworks-and-analysis/>



# **Exhibit 1**



**Student 1**

**July 2020**

I am a parent of four children, three boys and one girl between the ages of 19 and 26, all of whom have attended college or are still enrolled. Our oldest, a son, was wrongly accused of sexual assault in 2015 and expelled from school. It was a traumatic experience for our son and entire family in which the university ignored significant exculpatory evidence in their quest to believe “victims”. In the wake of this experience my husband and I felt more comfortable sending our daughter to college than our younger sons. We were pleased to hear that first steps have finally been taken to begin bringing due process to campus sexual assault cases. I believe that some of the new regulations, had they been in place in 2015, would have made a difference in the outcome of our son’s case.

One of the new regulations is the requirement of a “presumption of innocence” letter that will be sent to the accused. This letter lays the groundwork for investigations where presumption of innocence has been completely missing when it comes to disciplinary hearings involving sexual assault on college campuses. Title IX offices have been staffed with people and have educated people to presume guilt. Our son’s hearing panel included two young female employees of the university who had been trained with presumption of guilt. They chose not to look at evidence they had access to that was exculpatory for our son. By starting with a presumption of innocence, it at least reminds people hearing these difficult “he said she said” cases that we must presume a person is innocent. Without this, our entire American approach to determining someone’s guilt or innocence is up-ended.

Another change that I believe would have affected the outcome of our son’s hearing is allowing for cross examination. His accuser did not have to answer any questions about her story and her words were taken as fact. I understand it is traumatic for a true rape victim to relive the details of a rape, but unfortunately this is a necessary evil that upholds presumption of innocence. Furthermore, allowing each party to have an advisor be an active part of the hearing would have been extremely helpful to our son. While his accuser took part in the hearing via phone with her advisor by her side (most likely speaking and giving advice) our son was only allowed to have an attorney there for support – she was not allowed to speak to him, witnesses, the accuser, or the hearing panel. Our 21 year old son had to navigate this highly stressful and critical proceeding on his own. There were several areas of dispute that his attorney would have known how to address given the opportunity, but our son didn’t have the knowledge or experience to do so.

These new regulations are a good start to change the adjudication process on college campuses, but there is still more work to be done. We need to ensure that our Title IX offices are a place of fairness for all students. I am asking for your support in ensuring these new regulations go into effect in August.



## Student 2

July 2020

The path and outcomes our son experienced under the Obama-era “guilty upon accusation standard” is extraordinarily, and tragically, different when compared to what would have occurred under the current new rule of how colleges investigate and respond to allegations of sexual harassment and assault.

The single investigator model included a one-on-one interview with our son (about 45 minutes) and an interview with the complainant. Interviews were conducted with “witnesses” but NO witnesses were witnesses to the alleged event – only to hearsay conversations. In addition, none of the hearsay witnesses heard the complainant allege any assault immediately after or within the first 48 hours. The single investigator did not pursue available physical evidence that would have corroborated our son’s testimony. Nor did the Investigator follow-up or pursue numerous inconsistencies in the complainant’s testimony and version of events.

From the investigation, thirty-six undisputed facts and one “disputed” fact were generated. The disputed fact was “whether complainant affirmatively consented to perform oral sex on respondent.” Non-disputed facts include the following:

- Respondent asked complainant to engage in sex.
- Complainant said “no.”
- Respondent asked complainant to perform oral sex on him.
- Complainant performed oral sex on respondent.
- Complainant stopped performing oral sex after about 5- 10 seconds.
- Complainant and respondent resume kissing and holding for several minutes.
- Respondent’s phone rang and after answering and a brief telephone conversation, respondent left.

Through the investigative process, the single investigator proclaimed both complainant and respondent were deemed “credible, responsive and non-evasive.”

The single investigator was given the authority to adjudicate and found in favor of the complainant based on two apparent items:

- 1) Our son spoke to fewer people immediately following the encounter (he spoke to only one person after he had left the encounter because a friend has become very ill at a party and he was asked to assist in care). The investigator found that while the complainant never alleged assault to the “witnesses” and none of the witnesses could recount any wrongdoing by the respondent, the complainant’s allegations were more credible because, in the end, more people were spoken to.
- 2) While the complainant was able to say “no” to sex and stopped performing oral



sex after 5-10 was never found or proven that our son exerted pressure – only that the complainant could claim after the fact that pressure was felt..

The process adhered to – which Betsy De Vos called a “kangaroo court” which follows arbitrary rules and offers inadequate protections to the involved – combined with the “guilty upon accusation” culture on our son’s college campus, resulted in an experience that can only be described as “un-American.” During the harrowing experience we consistently wondered out loud *“how could this happen in America?”*

Our son’s case would have followed a completely different trajectory and outcome if the new rules had been in place at that time because the new rules would have provided for the following:

- The accused (and accuser) are allowed to submit evidence. The investigator in our son’s case was not required to and was completely not interested in collecting any evidence. Evidence which was available and never sought/accepted included telephone and text messages (and corresponding time stamps) and key card time stamps to the dorm room.
- Participation in live cross examinations. The complainant never elucidated how she was “pressured” into performing oral sex on our son and the investigative report could not provide any description of our son’s actions leading to “pressure.” A cross-examination process would have quickly revealed that there had been no malfeasance in our son’s actions. It also would have made clear that consent was given in the form of acquiescing to our son’s request for oral sex to be performed on him.

The above notwithstanding, absolutely and without a doubt, the single biggest hindrance to a fair process was the lack of transparency. The process was hidden as the single investigator performed a superficial and flawed investigation and allowed to adjudicate and determine guilt or innocence based on an extremely cursory and indefensible assessment of “evidence.” To be in a process in which the accused cannot speak for himself beyond what the investigator allowed during a short interview performed at the onset of the process and not be allowed to present evidence that would refute the claims of the complainant is abjectly un-American. The process unfolded hidden and essentially drew its power from the phenomenon – if Americans, legislators, governors, councilpersons and even college professors had an inkling of how these investigations really proceed, it would be a stunning revelation.



**Student 3**

**July 2020**

I was an accused male student at a private university. I was falsely accused, and was dragged through a university disciplinary process that shocked me to my core. I was not permitted to present my own evidence or witnesses without arbitrary administration approval (the administration had no criteria and they provided no explanation), I was not allowed to question my accuser or any of her witnesses personally or through an advisor, I was not allowed to *even question* parts of my accuser's story, and the university refused to provide any details of the accusation until after the investigation had concluded. Furthermore, the university violated its own policies by denying all but one of my fact witnesses late on the night before the hearing, while allowing her character witnesses (prohibited by the policy) to testify. The university also declined to ask any of my hundreds of pre-written questions.

I am innocent, and I could have proven my innocence in the campus proceeding had the Regulations been in effect at the time. I could have cross examined my accuser (through my advisor) and her witnesses and called attention to clear inconsistencies and outright lies that permeated her allegations. I could have presented my own witnesses that would have contradicted by eyewitness testimony key portions of her allegations. I would have received notice of the details of the allegation when I was interviewed, so I could more effectively rebut her false claims. But I was not able to do any of these things, and I was erroneously suspended for two and a half years, a punishment that permanently altered my life and career trajectories.

It took thousands of dollars and the intervention of a court to vindicate the rights I should have received from my school.



## Student 4

July 2020

A young woman (Jane) walks into campus security at 10:45pm on a Sunday night and makes an accusation that she was sexually assaulted six days prior. She was offered medical attention, to talk with the police and refused both. She was allowed to have her previous boyfriend and friend(s) with her for support. The counselor on call was contacted and spoke with the young woman. Various people she interacted with offered her more help/counseling on multiple occasions through that night and the next day, which she refused.

This was a he said she said case, no drugs, no alcohol, no sexual intercourse. A no contact order was delivered to John Doe in the middle of the night. The next morning the young man met with Associate Dean of Students/ Senior Deputy TIX director's in his office. The dean said, "you are being charged with sexual misconduct" and you can make a statement at a later date. We know this to be true because this call was legally recorded four days later when the Dean reiterated what he previously had said. He then explained to John there was "inappropriate touching" and he "did not get affirmative consent."

Shortly after this meeting John was abruptly pulled out of his lab class and told he was suspended. He was escorted to his room by three security men to gather his belongings, while signs are being hung on all the buildings that there was a campus sexual assault. A mass email warning was sent to everyone on campus, asking them to report information.

That night the assault was on the news and in the newspaper. John was treated as guilty the moment he was accused! This was not the fair and equal process the college promised. Imagine how you would feel, your friends watching you be escorted away like a criminal. You don't even know why this is happening, you only know an accusation was made and no one wants to hear your side of the story.

Jane's roommate's statement talked about the night of the supposed incident. Her roommate reported Jane "was mostly annoyed" "upset and frazzled ... The roommate states the next day Jane "told me that she had been thinking about the night before and she told me the more she had been thinking about it the more it bothered her...She was not thinking about reporting it at that point and I brought up the counseling center. She wasn't opposed to it but she didn't think she would need the counseling center.

The next day everyone was home on break and Jane texted her roommate:

- Jane; "I tried to talk to my mom today about the John thing. That conversation did not go how I thought it would."

- Roommate; “what happened?”
- Jane; “She told me I need to be more careful with guys.”
- Roommate; “I’m sorry she didn’t react well sometimes parents need time to process before they come to terms and react the way you want.”
- Jane; “I thought she would get upset or mad or something like that but instead she made it seem like it was my fault. You know it wasn’t right?”
- Roommate; “I am sorry she did not react well...”
- Jane; “I was teasing him earlier that day and I did kiss him and stuff...” “Does this count as sexual assault?”
- Roommate; “According to Department of Justice: Sexual assault is any type of sexual contact or behavior that occurs without the explicit consent of the recipient. Falling under the definition of sexual assault.”
- Jane; “So Yes?”
- Roommate; “Honestly, yes I would think it would count.”

The incident report states Jane “tried to tell her mother that she had been sexually assaulted.” And she reported her mother told her “that because it was not rape, Jane just needed to be more careful with boys.”

John and his father were allowed to return to the campus pick up more belongings two days after the accusation. They spoke with the Title IX director about the unfair treatment, being labeled guilty without any presumption of innocence, and the fact that no one wanted to hear his side of the story. They asked how was it that he was just suspended and they simply believed her? How is it that she alleged something happened and was immediately given the title “victim/survivor” What process had already determined she had “survived” something? **The Title IX director stated, “There was a lot of pressure from the Federal Government and that this is just how things work.”**

John and his father started to drive home with most of his belongings when the Title IX director called less than thirty minutes after they left. She said John could return now to the college to attend classes but he could not return to his townhouse. This one interaction, John and his father talking reasonably with the Title IX director seemed to make a difference in how John was perceived. Maybe he was not the “serial rapist” they were treating him as. This was the only glimmer that John might be heard. It did not last long.

The school said there would be an investigation. Shouldn’t an investigation occur before someone is charged? In this case the college had it covered, when deciding if they would be moving forward with a case they only accepted “evidence in support of the complaint.” It definitely seemed like John’s guilt was predetermined.

John was told on a Thursday afternoon at 4:30pm he had to submit a statement no later than Monday



knowing only the accusers name, date, place and that he was “charged” with “rape” and “inappropriate touching.” While this was “only an educational process” per the college you still have to consider anything you say can be used against you in a court of law. It was clear the college itself had not treated John fairly and there was no presumption of innocence.

**Try to find a lawyer in one day.**

A few other key facts learned along the way;

- Jane’s story changed and the story grew worse with each person she spoke. When she finally reported she would only do it with the ex-boyfriend at her side ...
- The Title IX director’s summary of events falsely stated that the “complainant indicated that she was very angry and when respondent texted her and said “I had fun tonight” that Jane’s responding text was, “you can’t do that stuff. You can’t hold me down and force yourself on me.” The only text messages that were supplied at all for evidence were from John and the actual text on the night in question after he walked her back to her dorm was, “I really enjoyed spending time with u (smiley face emoji) and Jane’s response to that was “Thanks”

The Dean/Deputy “Selects, trains and advises the student Conduct Review Board” but it was the Dean/Deputy who had decided John was guilty by accusation ... The Dean/Deputy was trained to “believe the victim,” a trauma informed approach that is “based on flawed science,” “loosely constructed,” and “makes unfounded claims about its effectiveness, and has never once been tested, studied, researched or validated.”<sup>1</sup>

- The investigating officer’s daughter was a friend with the complainant. This officer also wrote a chapter in the Previous Title IX directors book who showcased John’s college campus as a premier example of how a college can “eradicate” sexual violence.”<sup>2</sup>
- 10 days after the accusation John’s roommate received notice that he would be getting a new roommate. Its sure feels like the school predetermined John’s guilt.

John submitted his statement and waited. After some time he was allowed to view what we think was most of the “investigative” materials. The investigation only consisted of statements against John by Jane and her friends. John was then allowed to write one more statement in response to what he had viewed.

**John had NO hearing to attend, NO cross-examination in person or written, John was not allowed to know who was on his hearing panel judging him. There was no verbal questioning of John by the college or the investigator at any time.** How does a hearing panel make a life

altering decision without ever meeting, talking, or interacting with the accused? They made a judgment based solely on information that the college required be supportive of the complainant.

Even within a system that states it is “educational,” it seems when you are labeling someone as a “sex offender” or “rapist” it would be important to hear him or her speak  
... how do you come to a conclusion without ever meeting or interacting with one side?

**I do believe cross-examination would have made a difference in the outcome of this case**, as it is the best tool for determining credibility! Written questions are never an effective substitute for live cross-examination. I think this case is a prime example of why cross-examination is a needed requirement in the new Title IX regulations.

John was found responsible by the college. The effects and impact of being wrongly accused are real. The stigma and vilification of being labeled a “sex offender” cannot be underestimated. The inability to fully clear one’s name can cause extreme pain and embarrassment. Being accused changes your ability to return trust and it is difficult to return to being the valued person you were before the accusations. There are definably changes in personality and social behavior due to the loss of a previously untainted reputation, a loss that cannot be repaired in the absence of clear exculpatory evidence of innocence. Self-blame, suicidal thoughts, paranoia, anxiety, mistrust, social withdrawal and isolation are all commonly seen in many who have gone through similar “educational processes. “It is not only the person accused that suffers this is a life altering event for the whole family and even friends.

Please ask yourselves What is the difference between being labeled “guilty” in a civil or criminal proceeding or being found “responsible” on your college campus of “rape?” Because the consequences of being suspended or expelled, having marks on your records, being judged and labeled by your college campuses has caused irrevocable harm to many students!

Betsy DeVos has taken the time and done her homework on this! It is clear the previous system was broken. Please be supportive of the new regulations and give them the opportunity they deserve!

Sincerely,

Anonymous and forever changed

1. <http://www.prosecutorintegrity.org/sa/trauma-informed/>

2. Sexual Harassment in Education and Work Settings Current Research and Best Practices for Prevention by Michele A. Paludi, Jennifer L Martin, James E. Gruber and Susan Fineran and Bullies in the Workplace by Michele A. Paludi) Praeger (August 26, 2015)



**Student 5****July 2020**

My name is John Doe. I am 28-years-old. I was falsely accused of sexual assault during my senior year of college. I will never forget when I first received the email notifying me of the allegation against me.

Although receiving this news was predictably jarring, I was actually not overly concerned or worried about entering the investigative process. I obviously understood that any allegation of sexual misconduct is extremely serious, but I (naively) believed that my innocence would protect me from harm. I assumed that “the truth would set me free.” I assumed that I was entering an adjudication process that was neutral, fair, and balanced. I assumed that the investigation would reveal that the allegation against me lacked merit, and that the case against me would eventually be dismissed. I even attended my first meeting with the school’s investigator without a lawyer! However, despite overwhelming evidence supporting my innocence, I was eventually found “Responsible” for sexual assault and suspended from school for the rest of the year.

While I was eventually able to prove my innocence in a court of law after spending thousands of dollars, the impact of this ordeal on my life and my psyche cannot be overstated. After I was found Responsible and removed from campus, I quickly descended into what my good friend Joseph Roberts described in his recent article in *USA Today* as the “all-too-familiar pattern for the falsely accused: isolation from friends and family, loss of reputation, depression, substance abuse, [and a] suicide attempt.” It took me five long years to clear my name. That’s half a decade of total professional stagnation and unrelenting psychological turmoil. And even after winning my lawsuit against my university, much of the damage to my reputation and spirit remained. One spurious allegation and a small handful of complicit university administrators was all that it took to irreparably alter my life trajectory.

Education is a civil right, and thus no one should be denied access to education without meaningful due process. The updated Title IX regulations are a historic step in the right direction to ensuring due process for all students. Had this new guidance been in place when I went through the adjudication process, it is possible that I would have been spared this injustice. I have outlined five specific provisions of the new regulations that might have protected me from the false accusation.

**1. MORE DISCRETION IN WHICH CASES THE SCHOOL INVESTIGATES**

Under the previous guidance, schools were required to investigate virtually every allegation of sexual misconduct – regardless of where the conduct occurred, whether the individuals involved were students at the school, or even if those allegations were received second-hand. For example, the

allegation against me was made in relation to a sexual encounter that occurred hundreds of miles from campus, over summer break, with a girl who was not even a student at my university. Considering that Title IX is ostensibly about protecting access to education, it is very difficult to understand how this kind of conduct was investigated and adjudicated under the auspices of Title IX. The new guidance is a step in the right direction because it allows schools to focus on incidents that actually pose a threat of interfering with the campus environment and students' access to education.

## **2. STUDENTS ARE ENTITLED TO REVIEW ALL EVIDENCE**

The ability to review the adverse evidence/testimony is absolutely essential to crafting an effective defense. In my case, my accuser submitted fabricated evidence to the hearing panel in order to bolster her false claims. Unfortunately, that fabricated evidence was withheld from me until the very last minute, so I didn't even get to review it until I showed up for my hearing, and thus I had no way to defend myself. So there I was, a 22-year-old kid, sitting in front of a panel of university administrators, clumsily attempting to prove that the evidence was fake, but with no real way of doing so. Had I been presented that false evidence prior to the hearing I would have had an opportunity to develop a strategy for demonstrating that it was fraudulent.

## **3. STUDENTS ARE ENTITLED TO REPRESENTATION AT THE HEARING**

When I went through this, the norm on college campuses was that students were required to represent themselves during the adjudication process. This rule did not only apply to accused students like me, but also to accusing students. First of all, the idea that a complaining student who has come forward with an allegation of *rape* would have to represent himself or herself in an adversarial process is self-evidently absurd. Furthermore, the idea that accused individuals should have to represent themselves is equally inappropriate. A student accused of a Title IX violation has his entire educational and professional future hanging in the balance. Expecting him to defend himself under such circumstances is not only cruel, but incongruous with the stated goal of a fair and effective process.

I remember during my hearing I was very concerned with coming off as polite and amicable to the hearing board. I did not want to come off as insensitive or aggressive. However, I believe that this prevented me from vigorously defending myself. I would have been much better off with a trained representative advocating on my behalf. A system in which both accusing students and accused students have representation allows for a fairer process for everyone involved.



#### **4. LIVE HEARING WITH CROSS-EXAMINATION**

The new regulations require that there be a hearing that includes an opportunity for some form of “live cross examination.” This is one of the more controversial provisions of the new regulations, but it is absolutely necessary. It is not a coincidence that the appellate courts are increasingly requiring schools to allow some kind of live cross-examination in cases where credibility is at issue – it is because, as described by the Supreme Court, cross-examination is “beyond any doubt the greatest legal engine ever invented for the discovery of truth.” In my case, my accuser had a very well documented history of pathological dishonesty.

However, because there was no opportunity for live cross-examination, I was severely limited in my ability to raise this issue during the hearing. Had I been able to explore this line of questioning, it is very possible that I would not have been found Responsible.

#### **5. PRESUMPTION OF INNOCENCE**

The presumption of innocence is the bedrock of our justice system. However, for the last several years, university students accused of sexual misconduct have regularly been denied this right. Misguided (albeit well-intentioned) policies such as “affirmative consent” and “trauma-informed investigations” have resulted in the reversal of the presumption of innocence and created an environment where accused individuals are presumed to be guilty and then expected to prove their innocence. The new regulations ensure that all accused individuals are presumed to be not guilty until the evidence demonstrates otherwise.

In my case, the evidence overwhelmingly supported my innocence. My accuser claimed that she was unable to consent due to incapacitation. However, throughout the entire disciplinary process, there was not a single piece of evidence presented to corroborate this claim. There were roughly a dozen witnesses who interacted with my accuser in the moments leading up to our encounter, including two of her best friends who were literally in the room with us during the encounter, and every single one testified that nothing in my accuser’s behavior/demeanor indicated that she was blacked out, incapacitated, or otherwise unable to consent. However, despite this total dearth of corroborating evidence, I was still found “Responsible” on nothing more than my accuser’s word. The codification of the presumption of innocence would have ensured that students like me were not denied access to our education until the evidence firmly demonstrated that he was guilty of misconduct.

**Student 6**

**July 2020**

In April 2017, 2 weeks before his last final exam, my college age son was summoned by the Title IX office and informed that he was “charged” with sexual assault contact and sexual assault intercourse. The charge stemmed from a consensual encounter that occurred 6 months prior and was determined by the person who was to investigate and make the ultimate decision of responsibility. In this single person, the university Title IX officer, lay my son’s academic and professional future, as well as much of his emotional and psychological stability.

Under the regulations promulgated by the current Department of Education, this would have never been acceptable. The presumption of innocence, a basic right for all people, would have precluded a situation where a person was charged, thus presumptively responsible in the charging body’s eyes, for an offense, before an investigative process even commenced. A presumption of innocence throughout the process, with the burden of proof on the school, requires that there be evidence upon which a decision is based, and that the accused be given the opportunity to know and challenge the evidence in his or her own defense.

In my son’s case there was no reliable independent evidence upon which to base a decision. There was no physical evidence indicating assault; on the contrary, all available physical evidence, including photographs, show a smiling young lady immediately after her encounter with my son and before her personally recounted 2 other sexual encounters that same night.

The only ‘evidence’ held against my son were the statements of the accuser and her friends, which contained many contradictions and indications of unreliability. Nonetheless a decision of responsibility was made on the sole basis of ‘credibility.’ The decision was made through a single-investigator model in which the investigator makes a decision regarding responsibility in lieu of a hearing before a neutral panel of decision makers. This injustice was compounded because the investigator was accountable to no one but herself as she was also the Title IX director and coordinator. Having made public Facebook posts deriding neutrality and promoting a video likening college campus to hunting grounds for sexual predators, there was little chance she would conduct a fair process.

My son was charged, investigated, and questioned without ever having been informed of the allegations made against him and given the opportunity to respond. The new regulations would have ensured his right to defend himself against allegations by requiring he be informed with sufficient precision of what he was accused of. Without a hearing and the ability to cross examine adverse



witnesses and testimony in real time, he had no means to defend himself against false accusations.

The regulations requiring equal opportunity for parties and their advisors to review the evidence would have protected my son's rights in the same measure as those of the accuser. While his statement was included verbatim in the evidentiary file, only the investigator's summarized narrative of her impressions of witness testimony was presented for my son's review. He had no opportunity to hear or even read the actual testimonies of the parties to challenge them and assert his credibility in contrast to theirs. It was obvious from the reported summarized statements that either the accuser was given access to my son's statement before she "finalized" her statement (after the investigation concluded) or that the investigator, in her summaries and reports, manipulated the accusers statement to address my son's statement regarding the encounter. With a live hearing this could not have happened.

In the whole process, my son was interviewed once, and was the last person to be interviewed. How would an investigator be able to examine claims of the accuser against those of the respondent if without questioning her considering the respondent's statement? My son was branded a sexual predator, with no live hearing or impartial decision making panel, on the mere whim of a biased and incompetent employee who, despite her law degree indicative of knowledge of basic rules of evidence and procedural fairness, violated the governing guidance issued by the OCR in September of 2017, as well as institutional procedures and promises of fairness, timeliness and adherence to obligations to Title IX and the Cleary Act. There was no semblance of investigative thoroughness, neutrality, opportunity to prepare a defense, procedural due process guaranteed to both parties.

My son was subject to retaliation in the form of another accusation by one of the accuser's friends for having presented an appeal that raised procedural irregularities and was subject to another equally flawed and procedurally corrupt process. The realization of what was happening to him provoked a suicide attempt. He was Baker Acted and hospitalized for 3 days.

Unlike the female complaint who had the free support and advisory services of Project Safe, under the direction of a self-proclaimed feminist activist juris doctor, our single income family had to spend \$25k to defend our son from an overzealous and unfair process that threatened not only my son's educational and professional future, but also his very life.

## Student 7

July 2020

My son went through the TIX process while he was a college student and the experience has forever changed our entire family. Compared to other accused students we have come to know, he was one of the fortunate ones. It was the *process* that was the most devastating and life altering. I will try to be brief in giving you key details and how the Department of Education's new regulations would have provided for a fair process for both my son and his accuser. I have included in red text parts of the new regs that would have had a positive impact on how the process played out.

My son was on the track and cross country teams. In September 2016, he received an email from the TIX coordinator stating that she had gotten notice that he *may* have been involved in a sexual assault involving another male student (a person my son has never met and my son is not gay). He had no idea what this was about and thought it must be a mistake, so his reply was "I don't understand. Have I done something wrong?" At this point, he was not overly concerned. The response to him said that his name was given as the perpetrator and the incident took place in 2014- OVER TWO YEARS FROM THE TIME HE GOT THIS NOTICE. My son was told he needed to meet with the TIX coordinator and the school would provide an advocate for him.

The coordinator was an employee of the school's women's center and a victim's advocate. The new Title IX regulations would have required that the coordinator, investigator or any person designated to facilitate an informal resolution process to be free from conflicts of interest or bias for or against complainants or respondents.

My son received the investigative report, which he sent to me. We were confident that this could not move forward. I will highlight some of the reasons why:

- The report said the alleged sexual assault took place between March and April of 2014. Due to the broad range of dates and two years that had passed, this made it impossible for my son to have any witnesses or an alibi. How can this even make sense? A person has a traumatic experience and they can only narrow it down to a TWO MONTH time period?
- No investigator could pursue this as a legitimate claim, so we thought. However, we did not realize the money the school could lose by dismissing this claim.

The accuser offered 3 witnesses, 2 of whom stopped responding to the TIX investigator. The 3<sup>rd</sup> "witness" was a past friend and stated in the interview that the accuser DID NOT CALL THE ENCOUNTER A SEXUAL ASSAULT. The interviewer asked what the perpetrator's name was and his reply was that he did not remember. THE INVESTIGATOR THEN ASKED THIS WITNESS IF THE NAME WAS "JOHN DOE". THE WITNESS SAID-YES THAT SOUNDS RIGHT. This is leading the witness to get a desired response. The new regs require training on how to conduct an investigation, how to serve impartiality, including how to avoid prejudgment of the facts, conflicts of interest and



bias. There must be a presumption of not responsible.

This is just a small portion of what we went through. Can you imagine a 20 year old having to read a report to his mother about a completely fabricated event that contained details of a sexual encounter with another male? My son is not gay; this was humiliating.

However, we live in the United States where there is supposed to be due process. We did not see any way this could move forward. How can anyone be expected to defend themselves from an incident that allegedly occurred almost 2-1/2 years prior in a two month time period?

I called a local attorney to reassure myself that we indeed did not need legal counsel. My heart dropped when he told me that schools care about losing hundreds of thousands of federal dollars more than they do about the students & that he would not be able to speak at the hearing, so we would be wasting our money to hire an attorney. It's a hopeless feeling knowing that the truth is not a priority. The new regs require that the decision maker must permit each party's advisor to ask the other party and witnesses all relevant questions & follow up questions, including those challenging credibility. Parties can be in separate rooms and only relevant questions may be asked.

We were extremely fortunate that the accuser did not show up at the hearing and we learned that he was not even a student at the college at the time. My son was found not responsible, but the effects of the process have been life altering for our entire family. He could not have the option for dismissal or mediation of his complaint. The new regulations provide for dismissal of a formal complaint, at the school's discretion, if the complainant informs the TIX coordinator in writing that he/she desires to withdraw the formal complaint or allegation. The new regs also have the option of mediation.

I appreciate your time and would be more than willing to speak with you or provide additional information. I am hopeful that because of the changes made by the department, all parties will feel that they had a fair process.

Because my son's investigator was a victims' advocate for the Women's Center, there was bias from the beginning. Had the new regulations been in place, my son would have at the least been on an equal playing field. The new regulations require that the coordinator, investigator or any person delegated to facilitate an informal resolution process must be free of conflicts of interest or bias for or against complainants or respondents. This protects all students.

My son has given his consent to tell this story anonymously.

Sincerely,

A Mom

**Student 8**

**July 2020**

I am writing on behalf of my family to express our deep concern for the process by which the Title IX violations are handled. I say on behalf of my family because it didn't just affect my son but included siblings, aunts, uncles, cousins and grandparents. It also included his friends, teammates both past and present and all of the parents who have been following him for years. This is a big deal and not just for our son.

As with most of the other families in this situation, it began with an early morning phone call with our son in tears. His coach text him to say he was suspended from this team for a sexual harassment complaint and that he could not tell him any more information. Needless to say, he was blown away.

Thank god my daughter works for another university and was privy to a flier on the subject of sexual harassment that included a link to the FACE website. I called to find out if I needed to talk to a lawyer before or after the school rendered a decision. They strongly advised I find someone immediately.

Again, thank god we did because our lawyer was a lifesaver for us and our son.

My son was able to prove almost immediately that he did not initiate the email chain where the girl said she was harassed. In fact, he was able to prove that SHE started it but, as we came to find out, with the kangaroo court that handles these complaints at the university level, there is no common sense allowed in the process.

The people at the university that handled the situation were all 'interim' ; we never knew what was going on, when he met with the 'investigator' for the first time the advocate assigned on his behalf told him he was 'screwed'. Once we hired an attorney the proceedings were amazingly elevated to a school lawyer showing up at the 'hearings' but only to protect the university and still not a process you would find in a real court of law. As it turned out, when it came down to the final 'hearing' the people on the panel had not even read the investigator's report!

It is a broken system. I do not expect that sexual harassment and other sexual violations were what was expected when Title XI was implemented. We never expected to pay thousands of dollars to exonerate our son from something that would have taken 30 minutes in a real investigation with people who are trained in this sort of thing to figure out. The havoc it wreaked and the emotional toll it took on our family and community was mind blowing to all that hear about it.

There has to be a better way.



**Student 9**

**July 2020**

We are writing to you about the violation of both civil and constitutional rights occurring to many of our outstanding male students on college campuses nationwide due to the Obama administration's Department of Education's (DoE) Dear Colleague Letter (April 4, 2011), which lowered Title IX standards for colleges to receive federal funding. In order to receive federal funding, this DoE guidance (in reality a directive) forces colleges to aggressively pursue sexual misconduct allegations, strips the accused of both their civil and constitutional rights, and lowers the standard of responsibility from beyond a reasonable doubt to only "a preponderance of the evidence/information"; however, how the standard is being applied, with a lack of due process, it is even lower than preponderance of the evidence/information, i.e., you are assumed guilty or responsible until you prove your innocence.

In February of this year, our son was falsely accused of serious sexual misconduct allegations by a disturbed and delusional lesbian girl who has been documented as having intrusive thoughts and memories and has claimed the same sexual misconduct allegations concerning five other men. These false allegations against our son were claimed to have occurred off-campus; however, the University's Dean's office (a.k.a., Title IX Office) informed our son that he was being investigated for potentially violating their Code of Student Conduct prior to having official approval to investigate by the University's Vice President of Student Affairs.

University "investigators" summoned our son to appear before them for questioning. An advisor of his choice could be present during the questioning, but could not speak during the process. The cost of legal representation for this ranged from \$5,000 to \$25,000 just for the attorney to be present during the "investigation" or, as the attorneys kept calling it, a "kangaroo court." Being a middle class family, we could not afford legal representation; therefore, our son's father, had to take off work, travel to the school, get a hotel, and assist him in preparing for and advising him during the investigation.

Despite our son having receipts, character statements, information from his fiancée, and other items to prove his innocence, and the fact that his accuser, the complainant changed her story drastically three times during the investigation process (which we learned through the investigator's report), the university charged our son with serious sexual misconduct allegations (sexual contact, sexual harassment, and physical abuse, which was later changed to dating violence) just to, as the Title IX officer said, "be fair to her." Additionally,

our son's bishop (we are members of the Church of Jesus Christ of Latter-Day Saints) knew the story and the truth about the complainant (as she went to our son's bishop with the intent to create issues between our son and his fiancée) and the bishop requested to be contacted by the investigators. The investigators stated in their report that they saw no need to contact the bishop. As our son's accuser said, as we discovered during this time, her "words are proof enough" as to what she was falsely accusing our son of doing.

Despite the fact that the complainant drastically changed her story and the fact that our son presented hard evidence to prove the accusations were false, our son was summoned to appear before a Disciplinary Panel. Between the time of the investigation and the Disciplinary Panel, the complainant harassed, stalked, and attempted to publicly humiliate our son and his fiancée, while the university was unwilling to address this conduct with her because "that is her right"; however, our son was not allowed to address her behavior because "that would be intimidating to her."

With the Disciplinary Panel, again, an advisor of our son's choice could be present during the conduct panel, but could not speak during the process. And, again, the cost of legal representation for this ranged from \$5,000 to \$25,000 just for the attorney to be present during the conduct panel, or as the attorneys (including the local County attorney's office that we later visited who called the process an embarrassment) again kept calling it a "kangaroo court."

Before the panel hearing we, the mother and father, had to take off work for several days a week for several weeks, travel to the school, get a hotel, and assist our son in preparing for the conference panel and provide our son with much-needed emotional support (as well as his fiancée providing emotional support) during this entire ordeal. Due to our son facing suspension or expulsion, our son's, his fiancée's, and our health suffered (lack of sleep, the loss of appetite, as well as, the emotional and physiological stress at home, work, and school). We collected an enormous amount of evidence that would have beyond a reasonable doubt shown that our son was not responsible for any of the false charges brought against him by the complainant. All of the evidence (including character statements) that we had collected for my son to present had to be submitted to the Title IX office prior to the conduct hearing for their review.

On the day of the conduct hearing our son's father had to serve as our son's advisor; however, he was not allowed to speak during the conduct hearing. Our son, who is 19 years



old, had to represent himself while his accuser, who our son was not even allowed to face or cross-examine for “her protection” and for the “emotional stress” that would be inflicted on her, was represented by the Title IX Officer and the Title IX Attorney Coordinator, both seasoned professionals.

Three university panel members were chosen to hear and determine our son’s case. When our son was provided back the evidence (including character statements which were not allowed in the conduct panel hearing) that he had to submit to the Title IX office for review, to our surprise, a great deal of it was redacted, according the Title IX Attorney Coordinator, to provide his accuser (actually the Title IX Officer/Attorney Coordinator that represented the accuser), a “fair chance” and not have her “past reviled” (which according to the Title IX Attorney Coordinator her troubled past is irrelevant) and to “maintain her reputation” and not “assassinate her character.” Our son’s accuser, on the other hand, was given the option to present anything she desired or have the Title IX personnel to present, if she chose to. With the amount of evidence that was redacted and with what our son was not allowed to say, what should have been a very short panel hearing turned into an over 11-hour very emotional and stressful ordeal (8:00 am to approximately 7:30 pm) to convey the complainant’s lies and mental instability. It is by God’s grace alone that our son did not give up in his attempt to show he was “not responsible” for what he was being accused of and charged with.

In the end, our son was one of the few lucky individuals to be found not responsible; however, even to this day, it has taken an emotional, physical, and monetary toll on our son, his fiancée, and us as a family. The university’s lack of concern for due process resulted in my son’s civil rights being violated and his rights guaranteed by the Constitution being violated. Unfortunately, our family is not in the position monetarily to take legal action against his accuser or the university. As our son’s mother says, what our son went and continues to go through is similar to the emotional trauma that a rape victim experiences. Our son is the actual victim of Title IX and the April 4, 2011 Dear Colleague Letter.

Thank you for taking the time to read to our concerns and hopefully stopping this unjust epidemic happening to our outstanding male students on college campuses nationwide.

Parents of a wrongfully accused student.

**Student 10**

**July 2020**

This is a hard letter to write. The accusation against my son happened on Oct 2015 and lasted till December 2017. My son was simultaneously dealing with the TIX and criminal justice processes. It is difficult to separate the two and at times may seem confusing. Imagine being a college student and parents that are not lawyers trying to navigate. A brief synopsis for context purposes; there was no alcohol, no drugs, fully clothed, and no sex, kissing, fondling. There was an unfounded accusation taken at face value. My son was found Not Guilty of a criminal charge and Not Responsible for the TIX accusation.

Flaws in the process began with the first letter. It stated someone would contact him in a few days to talk about an alleged violation. He was instructed not to contact the complainant. A few days later he was contacted by the Campus Detective. The Detective did not tell my son he was a police officer investigating a criminal complaint. My son met with the Detective a few days later with one purpose, figure out what he was being accused of. The Detective told my son that the TIX process was separate from what he was investigating. In early November the school TIX investigator finally sent the second letter to my son to schedule a meeting. This meeting was to discuss "the basis for the belief that you engaged in misconduct and afford you the opportunity to respond". The decision of guilt was made before any attempt to get my son's side of the story. It was 33 days, not a few days as the original letter suggested, that he was finally contacted by the TIX investigator about the policy violation in question, still nothing about the accusation itself.

The TIX process at his University included the single investigator model. The investigator's initial finding was one of Responsibility based on her one sided "belief". In the code of conduct, since the sanction recommended suspension, the process required a hearing. The panel would be constructed of 3 faculty and 2 students. The hearing was originally scheduled for the week of finals in December. The code of conduct stated the hearing had to be conducted within 45 days after receiving the initial Responsibility finding. The hearing was rescheduled to mid-January. In a strange move, the University scheduled a pre-hearing meeting with my son, his attorney, the Dean of Students, and the University Lawyer to review how the TIX hearing was to be conducted.

Prior to the school hearing the TIX investigator did not notify or provide all witness materials, which were to be provided 5 days before. Notes written by the school investigator were shared after the hearing. At the hearing the school administrators did not follow their



own established rules. The hearing itself was a farce. My son and his lawyers were informed that it was scheduled for 2 hours, with the school taking up much of the time either explaining the process or presenting the accusers claim. The school held firm to their time commitment, leaving very little time for my son's attorney to do just about anything. As the time came to an end, the panel still had questions, but were told they were out of time. My son's accuser was in the same room with him along with her mother, her sister in law, and her school advocate. My son had his two lawyers.

It was communicated to them the Assistant District Attorney was not permitting the school to use the results from the DNA test for the TIX complaint. Due to the criminal investigation, the DNA results that led to the Felony 2 charge came back negative, exculpatory. At one point the TIX investigator used one of my son's friend's statement to represent his statement, since he had invoked the 5th and 14th amendments. When is it acceptable to use hearsay, as a statement for the respondent?

Not surprising he was again found Responsible. The school did provide a recording and we paid to have the recording transcribed. My son now needed to appeal to the University his rejection of the appeal went as far as to say: "I accept the investigating officers' argument that In 2016 my son's school's TIX process had one more appeal to the Board of Regents, it was not time bound. We waited until after his Not Guilty finding in January 2017 to work on this final appeal. It took till October 2017 to file this last appeal to clear his name. It was 16 pages long with 198 pages of exhibits. Every element of her salacious accusation was disputed with evidence. DNA was on our side. The inconsistencies, the omissions of attempts to destroy evidence, the lies or misrepresentations to police officers and SANE nurse was included. All the evidence overlooked and disregarded by the school administrations.

On Oct 12th, 2017 the Chancellor was contacted by the Board of Regents "I am remanding this matter to Chancellor for reconsideration. I am requesting Chancellor to carefully review all of the new evidence presented and determine whether the discipline met the standards required by [university] chapter\_. The Chancellor should expunge the disciplinary record if the discipline is not sustainable. Regardless of outcome, Chancellor must provide a full explanation of his decision. [My son] may seek the Board's discretionary review of Chancellor Schmidt's reconsidered final decision." – signed by Regent.

In December 2017 – the Chancellor's final decision: "In addition, the DNA evidence,

which was unavailable at the time of my 2015 decision, raises new questions, and does not lend additional credibility to the complainant's account. Upon reconsideration, I am unable to find by a preponderance of the evidence that [my son] sexually assaulted the complainant. Similarly, I am unable to find, by clear and convincing evidence that [my son] engaged in dangerous conduct.”

My son struggles dealing with the false accusation. The arrest record does not go away, nor can the stain on his character be erased. What my son went through, no one should have to go through, the depression caused by the process is heart wrenching. On Christmas Eve 2016 I held my son why he cried non-stop for 2 hours after he left work due to his anxiety, he lost his job a week later. He lived in fear while being on bond for 15 months. Fear of people finding out. He lost all his friends and his educational opportunities. It was the rush to believe by the college TIX administrators, Dean of Students office, and the Campus Police that caused my son and my family to live the surreal experience of facing a criminal trial while concurrently dealing with a TIX kangaroo court.

It was the willingness to disregard hard evidence and deceitful behavior of the accuser that led to \$150,000 in direct costs to my family. My son was firm in his innocence from the beginning. At every step, there was another person not following their own rules. On one of the challenging days, he asked why was he the only one following the rules.

This process has cost us in so many ways; our health, welfare, trust, happiness, and a significant financial set back.

With humble regards,  
A Mother



**Student 11**

**July 2020**

He was a junior when subjected a Title IX investigation for violation of the Student Code for Sexual Misconduct. The initial charge was digital penetration without consent alleged to have happened in her dorm room on campus. They were in a consensual and on-going sexual relationship for approximately seven months. It was when the relationship was ended that the upset young lady filed the complaint. The incident in question occurred a month in to that seven month relationship.

Our son when contacted by the Title IX Office responded immediately and was interviewed by an investigator the next morning. He was certain that it was a misunderstanding and therefore felt no danger in being interviewed. Bad decision.

The process at the school is the single investigator model with investigators using informed trauma methods. The accuser and her story were never vetted. She was assumed to be telling the truth the entire time. Further, we believe she had undiagnosed/untreated PTSD as her parents died as a result of a violent murder/suicide.

He was not once assumed to be innocent of the allegations. His interview, conducted by a professionally trained former prosecutor (a licensed attorney,) was recorded for the record and was not permitted to be amended, whereas the accuser's story and key facts changed multiple times during the course of the investigation. Witness interviews in support of him were entered as "interpretations " by the investigator rather than actual transcripts. Some key witness testimony was left out until we found out and complained.

The "advocate" assigned to the accuser helped craft a story to meet her often changing memory of events. In fact, when the accuser found out that we retained legal counsel she added a second charge of rape the was alleged to have occurred at my son's off-campus apartment. The accuser's language went from initially suggesting that she wanted no discipline for our son to "he is a monster and needs to be expelled".

These scurrilous allegations and resulting investigation have wreaked havoc on my son and family's life. The investigation, according to the university's handbook, was to be adjudicated in 60 days, however it took just over 8 months and tens of thousands of dollars in attorneys' fees.

He was ultimately found responsible for the initial charge. In the second charge the accuser was not deemed credible. We appealed the decision and lost.

He was given a one semester suspension, in the middle of Spring semester. The result of which meant the 18 credits he was currently taking were to be lost and he was not welcome back to campus until 01/01/2020, essentially a 3 semester suspension if you include the summer courses/lab job he had lined up for that summer.

We appealed the sanction and sort of won. He was given a deferred suspension where he could have full access to the campus and follow a program instituted by the Title IX office. He successfully completed the program and graduated a semester early in December of 2019.

The whole process resulted very significant costs, in addition to the money we put out travel, hotel and legal fees. He has been suicidal, withdrawn, angry, sad, embarrassed, isolated, and shocked that a relationship turned sour could potentially ruin his life. We are absolutely shocked and outraged with this entire process.

**Student 12**

**July 2020**

A year ago I was preparing to go back to college. I was recruited to a D-III athletic team, fulfilling a long time personal goal of playing sports on a collegiate team. I was going to be a Resident Assistant, and was thinking about long term aspirations such as a masters' program, a potential Juris Doctorate, and thoughts as to what I may want to do after college. I (admittedly) lacked clarity as to what I wanted to do, knowing only that I wanted to help people. I was outgoing, a strong public speaker, and, if I'm allowed to be a touch self-aggrandizing, an intelligent political science student, who had had professors base multiple classes off of research papers I had written. I had worked hard for everything I accomplished, and prided myself upon that.

These aspirations came to a shocking halt mere weeks after my return to school. I heard I was going to be involved in a Title IX investigation not from the school itself, nor from the other party involved, but instead through my friends. Indeed, it appeared that I was one of the last people on campus to be notified ...

What followed were two weeks of personal hell. I was threatened, assaulted, cut off, and ostracized. My friends were stopped by people I hardly knew in the cafeteria, and still other friends refused to hang out with me in public, specifically citing fear of social retribution. I left the school, and returned home, not out of guilt but out of a fear I have not experienced before or since. I have spent the past 10 months trying to bring my life back together. Despite the promise from the school that the process would only take 45 days max, it took eight months. Eight months of waiting, interviews, written statements, and a deep, lasting trauma. Trauma that drove me towards substance abuse, suicide, and an ingrained fear in my psyche. I am no longer a fearless public speaker, nor is a masters' program likely on the table. Instead, everything I worked so hard for was destroyed the moment I left the school.

I was found responsible at the start of quarantine. I stand by my innocence, and will do so for the rest of my life, but I am not going to argue the specifics of my case. Every time I talk about the case I am in a state of perpetual anxiety for days, and the more specific I get the worse it is.

I am shaking writing just this.

I became a political science major for one reason: I knew where my skills lie, and I want to help people. I saw political science as the best track to line those two facts towards a successful career of doing good. In class, we learned about justice being blind, about the unerring neutrality of the American justice system. After all, isn't that fundamental to American ideals? That no matter how



distasteful the statement, the act, the alleged crime, you will be guaranteed a fair hearing. The Title IX process shatters that illusion.

The head of Title IX was actively unhelpful, to a degree which would shock even those who wish to revoke the new Title IX changes. He broke policy on multiple occasions to allow my accuser to write a character assassination against me, in which she attempted to deeply analyze my supposed character flaws, theorizing how these led to me committing the supposed act. That is not justice, it is not even a poor facsimile of the word. It is instead a pipeline, a system which funnels in young men, disregards any and all legitimate claims to innocence, and equates a homogenous end result of expulsion or severe punishment with a fair process.

Title IX is one of the most important pieces of American legislation for equity in colleges ever introduced. It has allowed women who have experienced the horrors of assault to speak their truths in a comfortable, safe environment. As a survivor of rape and a victim of sexual assault as a 12 year old I see the importance of Title IX, and had either of these situations occurred between myself and a college classmate, I promise you I would have used Title IX. But it is unacceptable to allow Title IX to continue the way it has.

Had [the Final Rules] been introduced when I was going through this process, I would have been able to defend myself, I would have been able to speak my truth, and I would have been presumed innocent, something which is a cornerstone of any developed nation's justice system. I don't deal with what ifs, so I will not say that the final outcome would have been different, because I simply do not know, and doubt I ever will. However, what I can say is that I would have been able to stand on my own two feet, speak my truth, and defend myself the way every person deserves a right to do.

Justice is not Title IX, but it can be and should be, for those accused, but more importantly for those who have been raped and assaulted on campuses, because it will allow them to speak their truths without existing in a phony court, so that they can leave a Title IX hearing with the full confidence that, no matter what, the decision made was just.

**Student 13 - Elliott Pitts****July 2020****TITLE IX INJUSTICE ON CAMPUS**

Andrea Pitts (Mother), Elliott Pitts (Falsely Accused) Dublin, CA

The details I've chosen to bring to your attention regarding my son's situation are important. It will make this letter longer than others you may receive, but it's important for you to read about the event in question, the pursuit of my son by the accuser during this event, and the resulting action taken by a biased and over-reaching Title IX Administrator. Individual circumstances matter greatly, and I appreciate your time and attention to the last 18+ months of our family's life. If it wasn't so personal, it might make for a great novel. Unfortunately, it's non-fiction.

Elliott was in his 3<sup>rd</sup> year as a 4-year Scholarship Athlete (Basketball) at the University of Arizona. It was his dream school and one that would prepare him for a professional career in basketball and eventually coaching. During the pre-season of his Junior year, in the early morning of December 6<sup>th</sup>, 2015, the team arrived back from Spokane, WA, after a huge win against Gonzaga. Elliott's roommates were throwing a party in their off-campus apartment. Most of the basketball team arrived at the party. There were also members of the female Volleyball team in attendance. One of these volleyball players was the sister (call her 'Jane') of Elliott's roommate. These siblings were also part of a family we had become very good friends with. Everyone was drinking, having a good time – typical college party. Elliott was sitting on the couch playing video games with one of his teammates. The sister and her teammates were socializing around the apartment, joking with the guys, again, typical college party.

Witnesses told investigators that Jane had been pre-drinking prior to arrival of the party, and Jane admits to having multiple drinks (4-5) prior to the party, and said she normally drank more. Witnesses also claim Jane was very flirtatious with some of the players, eventually flirting with Elliott, who took the bait. They had been flirting over the past many months; however, for various reasons, had decided to not 'hook up'. At this party, however, Jane proceeded to sit down next to Elliott on the couch (where he was playing video games with his buddy), and put her hand on his crotch. They started kissing, and he suggested they take this to his room, which she agreed to. She then asked him to get a condom, which he did, and he put the condom on. She then proceeded to get on top. They had sex, which during the act, Elliott claims she was an active and verbal participant. Once the act was complete, Elliott left the bedroom where Jane proceeded to fall asleep and he fell asleep on the front room couch.

The brother, partying at another bar, found out Elliott and Jane were hooking up. He came back to their apartment in a rage, found Jane naked in Elliott's bed, and proceeded to take her to her dorm room where he left her in her bed. He called his mom to let her know what was happening and the mother told him to go back and sit with his sister until she could get there. The brother tried to get back in the dorm, but the Resident Assistant wouldn't let him – dorm rules - if Jane wasn't available to let him in herself. That is when this brother said the words, "I have to see my sister, Elliott Pitts just raped her".

As you might imagine, this started a ball rolling that we couldn't have ever imagined would happen. What then proceeded, I will sum up, until we get to the point that the Title IX Administrator gets involved. The R.A. reported this to the University police as well as the Tucson police. Elliott could stay on the team but not play while the criminal investigation was taking place, which would eventually lead to Elliott leaving the team because of the emotional and mental anguish and anxiety he would suffer. Elliott was criminally investigated and after 20+ interviews, review of the U of A camera interview of Jane where she said 'it was consensual...', a rape kit being done with no findings of rape, and eventually Jane telling police she didn't remember what happened, Elliott was not charged. This was a huge load off our minds; however, little did we know, the worst was yet to come with the Title IX process.

The criminal finding of not-responsible came early January. During this time, we met with the Title IX Administrator, Susan Wilson, 2 different times to try and understand the process she would be following because it did not match the U of A Disciplinary Procedures we found on-line. The most notable items to highlight during these meetings were: 1) We questioned the actual Charge Letter sent to Elliott with a link to the U of A Disciplinary Procedures (Policy 5- 403). There were clear time-lines to be followed regarding giving Elliott the actual charges and allowing him to respond. These dates had come and gone. When we asked Ms. Wilson about this, she said that because ...” ***she was representing Title IX, she didn't have to follow these dates/timelines and would proceed without these limitations in her investigation process.*** “

I shared with her our frustration in this because it's not what the Charge Letter stated. ***Her response was (verbatim): “I know, it is a bit confusing”.***

At our 2<sup>nd</sup> meeting with her, I brought out a copy of the Charge letter and told her we had some questions on the charges – ***specifically Codes of Conducts 2, 17, and 20 (regarding stalking, etc.). I asked her if in fact, Mia stated Elliott had done these things or that she had in fact through her interviews with others, if they had seen Elliott do any of these.***

***She specifically said “no”. She told us that in cases like this, where there was possible Sexual Misconduct or assault, quite often, these other actions do come out in her investigation process, so she will (verbatim) “add these to broaden the scope of her investigation”.***

During this very emotional time – even after the Toxicology report came back – we asked our lawyer...” ***How was Elliott to know she was that drunk? SHE approached him.... . SHE was chatty and social in the party.... SHE asked him to get a condom... SHE mounted him..... How was he to know?”.*** Our lawyer's answer was something like: “She could have been doing perfect cartwheels and somersaults throughout the apartment, but it would not have mattered...”. The fact is, they should both be held accountable for their actions, but drunk sex does not equal sexual misconduct / assault.

As the deadline for the appeal Hearing approached, and after finally seeing Ms. Wilson's personal notes from the interviews, and her corresponding biased opinions, as well as other actions (i.e. denial



of our objections of the 2 student's on the panels due to extreme bias; Susan Wilson's continued inclusion of 3 of the 4 un-proven charges in the final violation charge as well as the other egregious examples of Elliott's rights being non-existent), we felt Elliott had no choice but to accept a 'plea' opportunity he was given by the accusers family and U of A, to finish out the semester, agree to the 1 year suspension, and not lose his NCAA eligibility to play elsewhere and move on with his life. As part of the Plea deal, these charges would not appear on his transcripts and only would be available if Elliott gave permission. Little did we know, that although 18 Division I colleges were approached regarding Elliott being available for transfer and to play basketball, 100% of these colleges passed, due to the current climate. The college administrators didn't want any negative attention that might come with Elliott's transfer.

Since this time, the accuser's family has publicly 'outed' the agreement Elliott signed with the family and the school. They sent it to hundreds of U of A basketball alumni and parents, as well as reaching out to Tucson journalists and ESPN to tell their side of the story. The story has appeared in more 'local' papers as recent as last weekend, but ESPN declined to run the story once they heard Elliott's side of things. Still, at this time, it is the #1 search result when someone search's Elliott's name and the University of Arizona. Only recently has Elliott been comfortable to be more social and start hanging out with friends; although, he is very cautious about trusting girls and dating again.

**Other notable items looking back:**

- 1- We were never aware we could open an OCR claim against Susan Wilson, the Title IX Administrator. Once we had heard from other families about this, the time-frame was well past the 180-day limit.
- 2- Our lawyer is the lawyer brought in to meet with each in-coming male athletes for every team, to talk with them about behavior, sexual conduct and so on. He has represented previous male athletes caught up in the Title IX system, and felt based on Elliott's situation, in comparison to these others, Elliott would likely be found non-responsible, but might have to give up a summer session; thus, he was flabbergasted, as were we, when a 1-year suspension was the charge Elliott was given.

At this time, my son is finishing up Community College and had to watch his beloved team win the Pac 12 Championship in February 2017, without him. He would have been a Senior and starting #2 guard. Instead, he was doing his Community College homework on our couch at home. This has been devastating to our son, our finances (~178k spent so far), and our family. We hope and pray that you, and those around you that can change this madness, have the strength and resolve to do so.

Thank you again, Andrea Pitts

1 RELEASE OF THIS LETTER TO ANYONE PERSON(S) OUTSIDE OF THE OFFICE OF CIVIL RIGHTS OR FACE REQUIRES PRE-APPROVAL BY THE PITTS FAMILY – ANDREA & JAMES PITTS, DUBLIN CA.

**Shelley Dempsey, FACE Vice President**

**July 2020**

The Final Rule amending Title IX of the Education Amendments of 1972, 34 CFR Part 106, must go into effect, as promulgated, on August 14, 2020.

I write FACE Vice President and as a former federal regulatory attorney for the Federal Communications Commission and later as an attorney in private practice for a large DC firm with regulatory matters before the FCC, EPA, FERC, and EEOC.

Currently, I serve as Chair of the Intake/Outreach Chair for Families Advocating for Campus Equality (FACE) a 501 (c)(3) Non-Profit Organization that supports and advocates for equal treatment and due process for those affected by inequitable Title IX campus disciplinary processes. Consequently, I followed closely the Notice of Proposed Rulemaking, submitted personal Comments and eagerly awaited the Department of Education Office of Civil Rights' Final Rule.

Neither the 2011 Dear Colleague Letter (DCL) nor the 2014 Guidance under the prior Administration were subject to rigorous public debate through statutory notice and comment requirements under the Administrative Procedure Act (APA); they also lacked the force of law.

Prior guidance created a draconian punitive system holding students responsible for myriad minor infractions or other ill-defined offenses deemed sexual harassment or misconduct. The quasi-judicial "campus courts" became a dragnet that ensnared many innocents falsely or wrongfully accused students while never satisfying "survivors" nor actually tackling the root causes of sexual harassment and sexual misconduct on campus. Lives have been irreparably harmed with life altering consequences on both sides of this debate. While this Final Rule is not perfect it goes a long way toward correcting the confusing and unfair past guidance that dissatisfied complainants and respondents alike.

In my role as Vice President of FACE and especially as Chair of the Intake/Outreach Committee, I am privy to the stories of hundreds of families whose children have been through horrific experiences at the hands of biased campus administrators resulting in life altering consequences and debilitating ongoing critical emotional health issues. You doubtless will be reviewing many of these stories. The number of families reaching out to FACE has increased exponentially. Since September of 2014, we have been contacted by nearly 2000 families. All of these families have been caught in the DCL web of ridiculously vague definitions of sexual misconduct, lack of due process and low burden of proof and often investigated, judged and sanctioned by a single individual.

Educations have been lost, job offers and admissions to graduate schools rescinded and professional licenses unattainable even in cases where the accused student ultimately is found not responsible. Many of the FACE families are unable to afford legal counsel and, for those who can, the cost of defending against a false accusation in a Title IX disciplinary proceeding can prove financially devastating. Without counsel or a specially trained Title IX experienced advocate, the chances of a falsely accused student being found not responsible is frighteningly low. Frankly, it has been absolutely heartbreaking to hear these stories day after day.

While numerous groups supporting the rights of survivors abhor the new regulatory scheme and falsely assert that instances of false or wrongful accusations are “exceedingly rare”, FACE knows from documented experience that there is another equally compelling argument that false/wrongful accusations are actually quite common and hopefully will be better addressed under the Final Rule. The DCL and its vague definitions of sexual misconduct and harassment resulted in myriad Title IX complaints for conduct ranging from innocent hugs or kisses without prior permission even if well meaning, to regretted sexual encounters, to coverups for infidelity, to revenge for difficult relationship breakups, to foggy memories due to drug or alcohol use, to failure to ask for consent for each and every act according to unworkable affirmative consent rules, etcetera, often days, weeks, months, or years after they actually occurred.

### **FACE Experience With Families of Students Subjected to False or Wrongful Accusations and Resulting Life Altering Consequences**

**FACE Intake Vetting Process:** FACE has a rigorous vetting process for families who call or email the organization for support requiring personal contact information and a statement of their situation before gaining access to its information and outreach. The stories almost always follow a pattern of accusations as described above and disciplinary processes that are utterly lacking in due process or fairness as well as sanctions that often clearly are entirely out of line with the behavior alleged by the complainant. While there have been a few instances where FACE has declined support, the vast majority of cases do have the hallmarks of false or wrongful accusations.

**FACE by the Numbers:** Face receives call or emails from accused student families at an average rate of 4-5 per week. Following new student orientation (Sept/Oct), Finals weeks (December/May), Take Back the Night activities and events (January), Sexual Assault Awareness Month activities (Late Mar/Apr) FACE can tally up to 20 new families per week. While the heightened awareness from these programs encourages reporting for all the right reasons, it also leads to reports that are misleading, false or wrongful. Since the release of new guidance and rescission of the DCL, hundreds of lawsuits have been filed against



Colleges and Universities and numerous courts have and are continually ruling in favor of accused students whose rights have been denied. In some cases, the complainants have been held civilly or criminally liable for false accusations. Since 2017, nearly 1000 new families have sought FACE support with over 100 since January 3, 2020.

**Title IX Accusations at the K-12 Level:** Before 2016, FACE was aware of perhaps a dozen cases of younger students accused, suspended or expelled for behavior that never should have risen to such procedures or sanctions. Since that time over 100 families of K-12 students have sought support from FACE. These stories, too, are heart wrenching, and currently average 4 or 5 contacts per month. These cases have involved students as young as 6 where typical playground games have been recast as disturbing accusations of sexual misconduct. “Tag” and “Hide and Go Seek “ can suddenly become described as sexual assault and stalking and, as ridiculous as that sounds, these cases actually exist at FACE. At the high school level, the allegations are very similar to those in Higher Education and similarly the schools have provided little to no due process and generally are biased in favor of complainants. The #Metoo era and “Start By Believing” campaigns have led to unfair outcomes for this generation of students resulting in damage to reputation, education and emotional/mental stability. The Final Rule should lead to better and more equitable procedures and protection for both complainants and respondents at the K-12 level.

**Students with Disabilities:** Another disturbing trend in FACE intake cases involves students with various disabilities (ADD, ADHD, Autism Spectrum) who are accused of harassment, stalking, unwanted touching, or simply being “creepy”, thus leading to complainants making accusations of feeling uncomfortable or unsafe on campus. Under the prior guidance and school procedures, these students often were subjected to processes they could not navigate without coordination with advocates trained under the Americans With Disabilities Act (ADA) and in compliance with the Individuals with Disabilities Education Act (IDEA) requirements. FACE families have experienced extraordinarily difficult procedures that almost ensured that their student would face crushing sanctions and untold emotional distress. The new rules provide for compliance when there is an intersection of provisions of the Civil Rights Act of 1964, the ADA and the IDEA that should protect these students and ensure fair procedures.

**Diversity, Equity and Inclusion (DEI):** The prior Title IX regime and current arguments against the Final Rule actually fly in the face of DEI. Cases at FACE have taught us that students of color, first generation students for whom English is not their first language, international students who are accustomed to varying and unfamiliar cultural norms, as well as students in the LGBTQ+ community are more likely to be disadvantaged by not implementing the Final Rules. Without access to advocates who can actively participate and guide them through their often complex fact sets achieving a fair outcome is extremely difficult.

**Students enrolled in Graduate or Professional Schools:** False accusations or flawed procedures leading to wrongful sanctions under Title IX have disastrous consequences for students whose graduate educations have been earned over many years and are subject to licensing authorities for entry into their chosen fields. Title IX notations on their academic records are often an absolute barrier to entry into their careers. Therefore it is imperative that any accusations are subjected to rigorous investigation and ability to judge credibility before causing life altering and career ending consequences. FACE receives call and emails from numerous students each year whom are at the end of their educational paths and even days before graduation or taking professional exams are suddenly upended by unwarranted accusations under Title IX.

**Faculty, Employees, Administrators accused of Title IX and Title VII**

**Violations:** At both K-12 and College/University institutions, faculty members, teaching assistants, coaches and administrators have been accused of Title IX misconduct and subjected to the same flawed procedures under prior guidance. While horrible stories of abuse have made headline news over the past few years by a few members of this cohort, there is also another side of this issue that has largely been ignored by media and social activists. Title IX ( often accompanied by Title VII issues) disciplinary proceedings involving this group of accused have been equally flawed and have resulted in life altering career ending consequences following biased, unfair procedures under the prior guidance. FACE has been contacted by dozens of these accused individuals and their numbers are now exploding in the #Metoo era and especially now among those who seek to “cancel” individuals with whom they disagree and claim that such disagreements create hostile educational or unsafe environments under Title IX. FACE expects to see a flood of new cases involving this group of accused individuals.

After 10 years of personal and professional experience with the adverse effects of flawed campus disciplinary proceedings, educational harm, reputational harm and potential lifelong effects on future employment, I am passionate about the need for final implementation of the Final Rules amending Title IX of the Education Amendments of 1972. It is clear that the DCL and guidance recommended under the Obama Administration served neither complainants nor respondents. Rules that require equitable procedures, rigorous investigations and the ability to test credibility of all parties according to the rule of law are urgently needed. Therefore, I urge removing any barriers to the August 14, 2020 effective date for implementation of the Final Rule.

Respectfully,

Shelley S. Dempsey

# **Exhibit 2**



## ***Plaintiff Demographics in Accused Student Lawsuits***

Based on an Analysis of 645 Lawsuits

Produced by Title IX For All, 7/6/2020

Source Data at [www.titleixforall.com/title-ix-legal-database](http://www.titleixforall.com/title-ix-legal-database)

