From: Jenna Parker
Sent: Fri, 11 Jun 2021 20:53:41 +0000
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (Due Process/Fairness)
Attachments: 20210611 Hathaway Parker Written Comment.pdf

Good afternoon,

The below (and attached) written comment is submitted by the following individuals:

Jenna E. Parker
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June 11, 2021

VIA EMAIL TO T9PublicHearing@ed.gov

U.S. Department of Education
Office for Civil Rights
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, DC 20202-1100

Re: Written Comment regarding Title IX (Due Process/Fairness)

Dear U.S. Department of Education Office for Civil Rights,

We are attorneys in Los Angeles, California who have assisted over 300 students and faculty in Title IX cases and filed some 107 cases in trial court, courts of appeal, and the California Supreme Court to clarify rights and responsibilities in campus sexual misconduct proceedings. We have been instrumental in safeguarding access to higher education for many students, employees, and organizations improperly

denied such access. We urge the Department to ensure due process and civil rights for all students, faculty and staff and to maintain the current regulations, at the very minimum.

Fairness and due process are not difficult concepts to articulate. Students should expect a clear statement of the alleged misconduct and the campus policies or codes that were violated; a fair and prompt investigation by an unbiased investigator; an opportunity to respond to the evidence and present a defense to the charges; and an impartial, neutral person or panel to make the decision.

California's Fourth Appellate District recently summarized the legal consensus that students facing suspension or expulsion for nonconsensual sexual activity have the right to notice of the charges; the school must follow its own policies and procedures; the accused student must have access to all the evidence; there must be a live, in-person hearing, including testimony from the parties and witnesses; and because most cases turn on credibility (he-said, she-said), the adjudicator or adjudicators must be able to see the parties' testimony and the testimony of important witnesses so their demeanor may be observed, and the process must afford an opportunity for cross-examination. (*Knight v. South Orange Community College Dist.* (2021) 60 Cal.App.5th 854, 869, citing *Goss v. Lopez* (1975) 419 U.S. 565, 583-84; *Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1061; *Doe v. University of Southern California* (2018) 29 Cal.App.5th 1212, 1232, fn. 25; *Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44, 56; *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1104; *Doe v. Westmont College* (2019) 34 Cal.App.5th 622, 637; *Doe v. Occidental College* (2019) 40 Cal.App.5th 208, 224; *Berman v. Regents of University of California* (2014) 229 Cal.App.4th 1265, 1271-72; see also *Doe v. Baum* (6th Cir. 2018) 903 F.3d 575; *Doe v. University of Cincinnati* (6th Cir. 2017) 872 F.3d 393.)

These fundamental principles of due process fairness do not singularly benefit the accused. As Second Appellate District Justice Arthur Gilbert noted in 2019, "[C]ompelling colleges to adhere to basic principles of fair hearings—and their own written policies—will lead to an increasing number of decisions upheld by the courts—particularly when the required procedures are not 'excessively burdensome.' That benefits students accused of sexual misconduct, victims, and colleges alike." (*Doe v. Westmont College* (2019) 34 Cal.App.5th 622, 640.)

The Federal Regulations recognize that these familiar and long-recognized rights under the U.S. Constitution, including the First Amendment and Due Process Clauses of the Fifth and Fourteenth Amendments, cannot be diminished for students attending college or university. Here are a few anecdotal examples of why notice, access to evidence, a live hearing before neutral adjudicators, and the questioning of witnesses through the back-and forth of cross examination are so important:

We have seen first-hand that unfair sexual harassment grievance procedures hurt all students regardless of gender or sexual orientation. For instance, in a very recent case, Title IX investigators at a small private liberal arts college fabricated evidence to undermine the female complainant's allegation that she was incapacitated by alcohol and prescription medication when the male respondent had non-consensual sex with her in his apartment. If not for the live hearing and cross examination, the complainant would have been denied a fair opportunity to present her case to an impartial panel, and the case would have been decided against her by the Title IX investigators. In the end, the hearing panel found our client to be more credible than the respondent and ordered the respondent suspended so that our client could complete her education in an unhostile environment. More information about this case can be found in the attached article published by the Orange County Register on June 4, 2021 (https://www.ocregister.com/2021/06/04/in-university-title-ix-proceedings-fairness-is-not-the-enemy/)

In another case, a female student was so intoxicated she could not consent to sex and had no memory of the previous night, but she was expelled because the male student who assaulted her reported to the Title IX office first that she had assaulted him. The university's decision was ordered to be set aside after the University of California conceded that it did not provide the female respondent a meaningful opportunity to defend herself. (*Jane Doe v. Regents of the University of California*, Alameda Superior Court Case No. HG18894233.)

Another case involved a married international male student who made a sexual assault complaint against another male student with whom he was having an affair, but only after his husband found out about the affair. (*John Doe v. Regents of the University of California*, Alameda Superior Court Case No. RG18909313.) Our client attempted to submit text messages showing that the sex was consensual, but the Title IX investigator would not accept them. Again, the University of California conceded that it denied the respondent a fair process, and the university's decision was ordered to be set aside.

In another case, a You Tube video with over 21 million hits called "Rape charge dropped against USC student after video surfaces" shows a drunk female student gesturing to her friend outside a nightclub that she wants to have sex with the male student. (*John Doe (Armaan Premjee) v. University of Southern California*, Los Angeles Superior Court Case No. BS173043; https://www.youtube.com/watch?v=vQvSEGqwiUI .) In fact, they did have sex about an hour later at the female student's apartment. The female student never filed a Title IX complaint, but the university Title IX office found the male student responsible for sexual assault without any hearing and ordered him expelled. After a court decision against the university, there was a live hearing with cross-examination. The female student confirmed there was no sexual assault, and our client was cleared and has graduated.

Another example concerns two students who were both intoxicated. (*John Doe v. Timothy P. White (California State University),* Los Angeles Superior Court, Case No. BS171866.) Both were investigated for non-consensual sex due to incapacitation but without access to all the evidence and without a hearing, the Title IX office expelled only the male student, while clearing the female student even though both students were intoxicated. Later it was learned that the Title IX office had concealed evidence of the female student bragging to her friend early the next morning about hooking up with the male student and that she was "walk of shaming" past her friend's apartment. After a court ruling required a live hearing, right before she was to testify the female student asked to withdraw her accusation and the two students reached an alternative resolution. Our client was able to continue with his education and is seeking a recovery from the university for his three years of lost education and other damages.

Far too often we have seen educations interrupted where there was no complainant and no hostile environment on campus requiring correction. In one campus Title IX decision that was overturned in court, the Title IX investigator relied only on third and fourth-hand reports and never spoke to the supposed victim. (*John Doe v. Timothy P. White (California State University)*, Los Angeles Court Case No. BS168476.)

In another case, a student who had a speech impairment became involved in a Title IX investigation as a witness regarding allegations that his roommate had nonconsensual sex with a female student while she was incapacitated by alcohol. (*John Doe v. Timothy P. White (California State University)*, Los Angeles Superior Court Case No. BS171704.) During his witness interview, the student either misspoke or was misheard by the Title IX investigator as saying that he and his roommate had sex with the complainant.

The witness denied having sex with the complainant and denied saying what the investigator thought she had heard. The respondent denied that the roommate was involved in any sexual activity, and even the complainant expressed surprise upon learning of his alleged involvement. Nevertheless, the student was expelled from his university for sexually assaulting the complainant. To the complainant's detriment, she was informed that she was sexually assaulted by two males, not one, which is false. A court ordered the university's decision to be set aside, and our client has now graduated.

In another case, a student reported that two adult students, who were boyfriend and girlfriend, were intoxicated in bed together. The girlfriend insisted that any sexual contact was entirely consensual, but the male student was ordered suspended anyway. (*John Doe v. Claremont McKenna College*, Los Angeles Case No. BS174089.) The case was resolved through a mutual settlement agreement.

In a case mentioned by Secretary DeVos in her September 2017 speech at George Mason University and currently pending before the California Supreme Court, a football player was expelled for dating violence against his girlfriend, when to this day, the girlfriend insists no dating violence ever occurred and a security video shows no dating violence. (*Boermeester v. Carry et al. (USC),* Los Angeles Court Case No. BS170473, COA No. B290675, SC No. S263180.)

We also often see colleges and universities exceed their jurisdiction and seek out discipline against students and faculty, even when there is no hostile campus environment to address on campus. For instance, a student who studied abroad in China was accused of sexual harassment by a non-student over a year later, just two weeks before graduation. The university threatened to bar the student from graduation ceremonies and to withhold his degree, but eventually relented only after the student filed a court case. (*John Doe v. Regents of the University of California*, Alameda Superior Court Case No. RG18902343.)

In another case, the University of California claimed that it has worldwide, indefinite jurisdiction to police and impose severe discipline on faculty who are accused of sexual misconduct. (*O'Brien v. Regents of the University of California*, Alameda Superior Court Case No. RG20075810.) A faculty member at the University of California was accused of sexual harassment by an adult Ph.D. student from MIT. The Ph.D student had/has no affiliation with the University of California, and the alleged conduct took place in 2012 in Singapore at a conference that had no connection with a UC Berkeley program or activity. The case is still pending in court.

Under the Federal Regulations, Title IX campus personnel are required to expend resources only where there is an actual complainant and an actual hostile environment on campus that requires remediation.

The Federal Regulations are consistent with California law. In 2019, California universities rightly stopped using the "single-investigator model" and began holding live hearings with cross-examination to adjudicate sexual misconduct. (See *Doe v. Allee* (2019) 30 Cal.App.5th 1036.) Since then, we have noticed a dramatic decline in the need to bring litigation to redress unfairness in university Title IX proceedings. As Justice Gilbert suspected would happen, more and more university decisions are also being upheld by the courts.

Eliminating or dumbing down individual rights and due process protections is not the way to protect students, faculty, or college and university campuses. We respectfully request that the Office for Civil Rights maintain the current regulations, at the very minimum.

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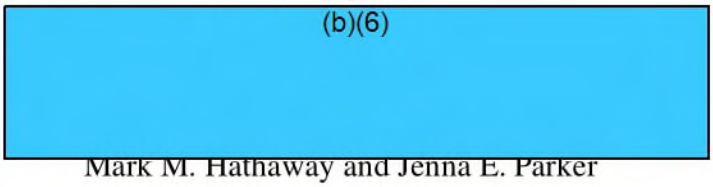

Mark M. Hathaway and Jenna E. Parker

OPINION • Opinion

In university Title IX proceedings, fairness is not the enemy

In university Title IX proceedings, fairness is not the enemy

By **MARK HATHAWAY** and **JENNA PARKER** |
PUBLISHED: June 4, 2021 at 5:00 a.m. | UPDATED: June 4, 2021 at 10:42 a.m.

Nearly a year ago, then-Secretary of Education Betsy DeVos passed much-needed sweeping reforms to Title IX and the adjudication of sexual misconduct on college campuses. Now, President Biden has vowed to bring these reforms to a quick end. That would be very unfortunate. University Title IX proceedings are frequently condemned for failing to provide fundamental procedural safeguards for accusers and accused. The result of procedural unfairness is injustice, and accusers and accused equally deserve better from their colleges and universities.

To clarify universities' obligations under Title IX, in May 2020, the Department of Education issued Federal Title IX Regulations, which recently came under scrutiny by the Biden administration. Victim advocates have called for recission of the Regulations, while due process advocates, including the ACLU, have lauded the steps taken by the DOE to ensure procedural protections.

Having built a law practice representing accusers and accused in university Title IX proceedings, we understand that universities are being pushed to perform functions far afield of academia, and to act as impartial adjudicators, while also appearing to take a hard-nosed stance against campus sexual assault and presenting themselves as safe institutions in the wake of statistics purporting that more than a quarter of all female undergraduate students will be sexually assaulted during their college careers.

The tension has led to some exercises of questionable discretion among university Title IX personnel, elevating the likelihood for error in Title IX proceedings, which can have devastating consequences for accusers, accused, and universities alike.

To illustrate, we recently represented a student who was the unfortunate victim of sexual assault at her university. She retained us after she attended an interview alone with the university's two Title IX co-investigators. During the private interview, which was not audio or video recorded (the interviews never are), one of the investigators made an insensitive comment to the student, which was reported to Human Resources. The Title IX investigator did not recuse himself and was not removed from the investigation despite Human Resources investigating him for the improper comment.

Perhaps in retaliation, or because university Title IX personnel (even at private universities) are generally insulated from liability and their decisions are afforded deference by the courts, the investigator fabricated evidence, seeking to undermine the complainant's credibility.

The student's complaint was that she was incapacitated by alcohol and prescription medication when the respondent had sex with her in his apartment. She did not, and could not, consent. Remarkably, during the investigation meeting, the investigators did not ask her specifics about how much alcohol she consumed or what types of prescription medication she had taken. In response to a preliminary version of the investigation report, we identified what she drank and when, the types of prescription medication she had taken and when, and the amount of food and water she consumed that night. We also provided an opinion from an expert toxicologist explaining the effects of mixing alcohol with the prescription medications and affirming that the student likely would have been incapacitated during the time the respondent said the sexual activity occurred.

When we received the final investigation report months later, the investigators misstated the toxicologist's opinion in their analysis and also claimed for the first time that during the complainant's investigation interview, she reported drinking an insignificant amount of alcohol. They found her credibility now undercut by the detailed information she provided about her alcohol and prescription medication intake. The investigators deliberately changed the complainant's statement to misrepresent her version of events and weaken her credibility. The case was now a "he-said-she-said" and a "she-said-they-said."

Pursuant to California law, the university afforded a live hearing (via Zoom during the COVID-19 pandemic) with an opportunity for both sides to present their case to a neutral three-person panel that would make the final decision. This sexual encounter pre-dated the Regulations, so cross-examination was performed by submitting written questions to the hearing chair, a clunky process that, in this case, extended the hearing by days. In the end, the hearing panel found the complainant more credible than the respondent. If not for the evidentiary hearing, our client would have been denied a fair opportunity to present her case to impartial adjudicators, and the case would not have resolved in her favor.

This is not the first time university Title IX personnel have abused their power. In a case that garnered considerable media attention, USC accused football player Matthew Boermeester of choking and pushing his on-again-off-again girlfriend Zoe Katz, but Mr. Boermeester and Ms. Katz agree that it never happened. USC's Title IX investigator claimed that Ms. Katz made statements during a private, unrecorded interview indicating that Mr. Boermeester abused her. When Ms. Katz stressed that she had not made the statements attributed to her by USC's Title IX investigator and was not a victim of abuse, USC's Title IX office refused to correct the statement, threatened to open an investigation on her, and labeled her later-written statements as "recantations," and "expected, normative behavior" for a domestic abuse survivor. Ms. Katz continues to object to USC's characterization of her as a victim.

Suspending or rescinding the Regulations, as President Biden has ordered the DOE to consider, will have an all-around negative impact on accusers, accused, and universities.

Live evidentiary hearings where both sides have full and equal access to the evidence and a meaningful opportunity to hear and cross-examine witnesses restores, at least to some extent, transparency and objectivity in university Title IX proceedings, diminishing the potential for error.

We urge the DOE not to erode, or completely obliterate, the Regulations, which provide the most clear and comprehensive procedural protections for accusers and accused to date.

The authors are partners at HathawayParker, a Los Angeles based law firm representing Title IX and education defense clients.

Tags: Guest Commentary

Mark Hathaway

Jenna Parker

Join the Conversation

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If you see comments that you find offensive, please use the “Flag as Inappropriate” feature by hovering over the right side of the post, and pulling down on the arrow that appears. Or, contact our editors by emailing moderator@scng.com.

Public Comment of Mark M. Hathaway

My name is Mark Hathaway and I am a 30 year attorney admitted in California, New York, Illinois, and Washington DC. My law partner Jenna Parker and I have assisted over 300 students and faculty in Title IX cases and have filed over 107 cases in trial court and courts of appeal. I urge the Department to ensure due process and civil rights for all students, faculty and staff and to maintain the current regulations, at the very minimum. Here are three examples of why access to evidence, a live hearing before neutral adjudicators, and the questioning of witnesses through the back-and forth of cross examination are so important.

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Over the past few days we have heard from many people who are impacted by Title IX from many points of view. The is why it is so important to ensure the civil rights and Due process of all parties and to keep the protections of the current regulations. Thank you.