From: KC Johnson
Sent: Thu, 10 Jun 2021 20:40:13 -0400
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (fairness in campus Title IX adjudications)
Attachments: KC Johnson--submittted comment.pdf

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My written comment is attached.

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10 June 2021

My name is KC Johnson, and I am a professor at Brooklyn College and the CUNY Graduate Center. My recent research has focused on lawsuits filed by students accused in Title IX disciplinary matters.[1] These cases, which proliferated after 2013[2], helped expose the shortcomings of the pre-2020 system, as multifaceted pressure—including from the federal government—led to increasing numbers of factually dubious findings of responsibility.

Colleges and universities could—and *should*—have responded to this record by developing fairer Title IX procedures themselves. But, absent court rulings *requiring* them to do so, they proved almost entirely unwilling. As a result, the previous administration issued regulations addressing problems the court cases revealed. That list included colleges and universities:

- providing insufficient notice to accused students, hampering their ability to mount a defense;
- showing disinterest in evidence seen as exculpatory to accused students;
- using training that too often trafficked in gender stereotypes, and which rationalized virtually any behavior as consistent with the accuser's truthfulness;[3]

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[1] For a sample of my writing on this topic, see Samantha Harris & KC Johnson, "Campus Courts in Court," *NYU Journal of Legislation and Public Policy* 22 (2019), pp. 49-127; Stuart Taylor Jr. & KC Johnson, *Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case* (New York: Thomas Dunne Books, St. Martin's Press, 2007); KC Johnson & Stuart Taylor Jr., *Campus Rape Frenzy: The Attack on Due Process at America's Universities* (New York: Encounter Books, 2017); Johnson, "The Campus Sex Crimes Tribunals Are Losing," *Commentary*, Sept. 2017, https://www.commentarymagazine.com/articles/campus-sex-crime-tribunals-losing/; KC Johnson and Stuart Taylor, "The Title IX Training Travesty," *Weekly Standard*, Nov. 10, 2017, https://www.weeklystandard.com/kc-johnson-and-stuart-taylor-jr/the-title-ix-training-travesty.

[2] https://docs.google.com/spreadsheets/d/1ldNBm_ynP3P4Dp3S5Qg2JXFk7OmI_MPwNPmNuPm_Kn0/edit?usp=drive_web&ouid=106635375097840739490.

[3] Johnson and Taylor, "The Title IX Training Travesty."

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- employing single-investigator models that denied to an accused student either a hearing or a chance to challenge the investigator's bias; and
- denying to accused students an opportunity to cross-examine adverse witnesses.

No issue was more important than ensuring that accused students, through a lawyer or advocate, have an opportunity to cross-examine adverse witnesses—given the heavy pressure universities have faced to return more findings of responsibility.

Harvard Law School professors Jacob Gersen and Jeannie Suk Gersen described the altered environment: "The transformation of the Title IX grievance procedure over several decades wrought a corresponding transformation in the OCR's job of oversight. No longer was it simply monitoring whether schools were engaging in discriminatory acts. Rather, OCR's task became specifying . . . schools' policies, procedures, and organizational forms."[4]

University leaders used the comment period for the regulations to criticize more robust procedural protections for accused students.[5] But since the rule's implementation, all sides have benefited:

- the new procedures have made it less likely that wrongly accused students will be found responsible;
- survivors have obtained more reliable results;
- and universities have been less likely to face lawsuits from accused students.

Indeed, lawsuits involving post-August incidents have dropped to a trickle.[6] Since the current regulations draw so closely from relevant court decisions, universities that implement them in good faith have little to fear.

One exception, however, exists to this pattern. Since August, many colleges have created a two-tiered sexual misconduct system, in which only students accused of an *on-campus* offense

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[4] Jacob Gersen and Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 902 (2016), http://www.californialawreview.org/wp-content/uploads/2016/09/Gersen-and-Suk-37-FINAL.pdf.

[5] KC Johnson and Stuart Taylor, "Colleges Bristle as Judges, DeVos Push Protections for the Accused," *Real Clear Politics,* https://www.realclearpolitics.com/articles/2019/12/04/colleges_bristle_as_judges_devos_push_protections_for_the_accused_141877.html.

[6] https://docs.google.com/spreadsheets/d/1ldNBm_ynP3P4Dp3S5Qg2JXFk7OmI_MPwNPmNuPm_Kn0/edit?usp=drive_web&ouid=106635375097840739490.

receive the full array of procedural protections provided by the regulations.[7] Nothing in the rule, of course, *requires* this. This voluntary adoption of a more burdensome approach is all the more puzzling in light of some of the testimony in this week's sessions suggesting that fair procedures are too burdensome for colleges to implement—suggesting that university protests ought not be taken at face value on this point.

That universities nonetheless have exploited a loophole in the regulations to deny fair procedures to as many accused students as *possible*—even at the risk of inviting more lawsuits[8]—provides a compelling, if unintentional, demonstration of why the regulations' procedural protections are so important. Without the federal government ensuring that allegations of sexual misconduct are fairly adjudicated, the record of the last decade suggests that universities will not do so on their own.

Finally, a comment on the procedurally unusual nature of this session—an event that takes place after both the President and the nominated OCR head strongly condemned the regulations, albeit without offering any specifics, but before the administration has issued any guidance or an NPRM. I hope that this week's sessions aren't designed as an end-run around the APA, if the administration goes ahead and proposes a new rule to revive policies from a bygone era.[9] As Jackie Gharapour Wernz, who worked as an OCR lawyer during the Obama years, recently admitted, "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."[10] We need not return to a system in which, too often, wrongly accused

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[7] Samantha Harris and Michael Thad Allen, "Universities Circumvent New Title IX Regulations," *National Review,* https://www.nationalreview.com/2020/09/title-ix-universities-circumventing-new-rules/.

[8] *See,* for instance, Doe v. Regents of the University of California, N.D. Cal. Case No. 5:21-cv-03315; as well as comparable litigation against RPI, Case Western Reserve, and Virginia Tech.

[9] Commenting on these procedures in 2014, Harvard Law professor Elizabeth Bartholet, director of Harvard's Child Advocacy Program, predicted that "history will demonstrate the federal government's position to be wrong [and] our society will look back on this time as a moment of madness." Joe Palazzolo, "Harvard Law Professor: Feds' Position on Sexual-Assault Policies Is 'Madness,'" *Law Blog*, *Wall Street Journal*, December 31, 2014, http://blogs.wsj.com/law/2014/12/31/harvard-law-professor-feds-position-on-sexual-assault-policies-is-madness.

[10] Richard Bernstein, "Biden's Pushing Ahead to the Obama Past on Campus Rape. He'll Need Good Luck with That," *Real Clear Investigations,* https://www.realclearinvestigations.com/articles/2020/12/15/bidens_pushing_ahead_to_the_obama_past_on_campus_rape_hell_need_good_luck_with_that_126353.html

students had to rely on litigation to address improper findings of responsibility, issued after dubious Title IX procedures.

Due process exists to protect the individual against the arbitrary exercise of power by institutions. Due process is the irreducible core of OCR's obligations under Title IX. Colleges that followed the "Dear Colleague" guidance have suffered a grave loss of credibility in the courts as case after case has demonstrated that the "Dear Colleague" approach was biased and unfair. The 2020 regulation was an essential corrective to the damage done by the "Dear Colleague" directions. Any suggestions to improve the 2020 regulations must not back rack on the return of due process to its proper place in those regulations.

To properly understand OCR's obligations, it is mandatory to fully consider the court decisions that flowed from the "Dear Colleague" abuses. All of the court decisions referenced below are incorporated in full into this comment as if fully reprinted here.

All of the court decisions below are hereby made part of the Administrative Record.

Sincerely,

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Importance of Cross-Examination

Doe v. Univ. of the Sciences, 961 F.3d 203 (3d Cir. May 29, 2020)

Doe v. Baum, 903 F.3d 575 (6th Cir. 2018)

Doe v. Univ. of Cincinnati, 872 F.3d 393 (6th Cir. 2017)

Messeri v. Distefano, 480 F. Supp. 3d 1157 (D. Colo. August 20, 2020)

Doe v. Rhodes Coll., No. 2:19-cv-02336 (W.D. Tenn. June 14, 2019)

Doe v. Univ. of Miss., 361 F. Supp. 3d 597 (S.D. Miss. 2019)

Doe v. Univ. of S. Miss., No. 2:18-cv-00153 (S.D. Miss. Sept. 26, 2018)

Doe v. Univ. of Mich., 325 F. Supp. 3d 821 (E.D. Mich. 2018)

Nokes v. Miami Univ., No. 1:17-cv-482, 2017 U.S. Dist. LEXIS 136880 (S.D. Ohio Aug. 25, 2017)

Procedural Unfairness as Possible Gender Discrimination

Doe v. Regents of the Univ. of Minn., 2021 U.S. App. LEXIS 16243 (8th Cir. June 1, 2021)

Schwake v. Ariz. Bd. of Regents, 967 F.3d 940 (9th Cir. July 29, 2020)

Doe v. Oberlin Coll., 963 F.3d 580 (6th Cir. June 29, 2020)

Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. June 28, 2019)

Doe v. Baum, 903 F.3d 575 (6th Cir. 2018)

Doe v. Washington & Lee Univ., 2021 U.S. Dist. LEXIS 74222 (W.D. Va. April 17, 2021)

Doe v. Univ. of Mass.-Amherst, No. 1:20-cv-11571, ECF 19 (D. Mass. April 28, 2021)

Doe v. Am. Univ., 2020 U.S. Dist. LEXIS 171086 (D.D.C. September 18, 2020)

Unknown Party v. Ariz. Bd. of Regents, 2019 U.S. Dist. LEXIS 221425 (D. Ariz. December 26, 2019)

Doe v. Rhodes Coll., No. 2:19-cv-02336 (W.D. Tenn. June 14, 2019)

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Doe v. Marymount Univ., 297 F. Supp. 3d 573 (E.D. Va. 2018)

Neal v. Colo. State Univ.-Pueblo, No. 16-cv-873, 2017 U.S. Dist. LEXIS 22196 (D. Colo. Feb. 16, 2017)

Doe v. Lynn Univ., Inc., 235 F. Supp. 3d 1336 (S.D. Fla. 2017)

Harris v. St. Joseph's Univ., No. 13-3937, 2014 U.S. Dist. LEXIS 65452 (E.D. Pa. May 13, 2014)

Possibility of Gendered Assumptions or Training Improperly Influencing Outcome

Schwake v. Ariz. Bd. of Regents, 967 F.3d 940 (9th Cir. July 29, 2020)

Doe v. Oberlin Coll., 963 F.3d 580 (6th Cir. June 29, 2020)

Doe v. Univ. of the Sciences, 961 F.3d 203 (3d Cir. May 29, 2020)

Doe v. Miami Univ., 882 F.3d 579 (6th Cir. 2018)

Doe v. Washington & Lee Univ., 2021 U.S. Dist. LEXIS 74222 (W.D. Va. April 17, 2021)

Doe v. Am. Univ., 2020 U.S. Dist. LEXIS 171086 (D.D.C. September 18, 2020)

Doe v. Purdue Univ., 464 F. Supp. 3d 989, 993 (N.D. Ind. June 1, 2020)

Doe v. Colgate Univ., 457 F. Supp. 3d 164, 167 (N.D.N.Y. April 30, 2020)

Doe v. Quinnipiac Univ., No. 3:17-cv-364, 2019 U.S. Dist. LEXIS 115089 (D. Conn. July 10, 2019)

Doe v. Grinnell College, No. 4:17-cv-00079 (S.D. Iowa July 9, 2019), ECF No. 151

Doe v. Rector & Visitors of the Univ. of Va., No. 3:19-cv-00038, 2019 U.S. Dist. LEXIS 108990 (W.D. Va. June 28, 2019)

Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799 (E.D. Pa. 2017)

Doe v. Univ. of Miss., 361 F. Supp. 3d 597 (S.D. Miss. 2019)

Doe v. Brown Univ., 210 F. Supp. 3d 310 (D.R.I. 2016)

Norris v. Univ. of Colo., Boulder, 362 F. Supp. 3d 1001 (D. Colo. 2019)

Doe v. Pa. State Univ., 336 F. Supp. 3d 441 (M.D. Pa. 2018)

Saravanan v. Drexel Univ., No. 17-3409, 2017 U.S. Dist. LEXIS 193925 (E.D. Pa. Nov. 24, 2017)

Rolph v. Hobart & William Smith Colls., 271 F. Supp. 3d 386 (W.D.N.Y. 2017)

Doe v. Lynn Univ., Inc., 235 F. Supp. 3d 1336 (S.D. Fla. 2017)

Doe v. Brown Univ., 166 F. Supp. 3d 177 (D.R.I. 2016)

Prasad v. Cornell Univ., No. 5:15-cv-322, 2016 U.S. Dist. LEXIS 161297 (N.D.N.Y. Feb. 24, 2016)

University Indifference to Exculpatory Evidence

Doe v. Univ. of Ark.-Fayetteville, 974 F.3d 858 (8th Cir. September 4, 2020)

Schwake v. Ariz. Bd. of Regents, 967 F.3d 940 (9th Cir. July 29, 2020)

Doe v. Oberlin Coll., 963 F.3d 580 (6th Cir. June 29, 2020)

Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. June 28, 2019)

Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016)

Doe v. Am. Univ., 2020 U.S. Dist. LEXIS 171086 (D.D.C. September 18, 2020)

Doe v. Univ. of Conn., 2020 U.S. Dist. LEXIS 11170 (D. Conn. January 23, 2020)

Doe v. Quinnipiac Univ., No. 3:17-cv-364, 2019 U.S. Dist. LEXIS 115089 (D. Conn. July 10, 2019)

Doe v. Alger, 228 F. Supp. 3d 713 (W.D. Va. 2016)

Oliver v. Univ. of Tex. Sw. Med. Sch., No. 3:18-cv-1549, 2019 U.S. Dist. LEXIS 21289 (N.D. Tex. Feb. 11, 2019)

Doe v. George Washington Univ., 321 F. Supp. 3d 118 (D.D.C. 2018)

Gischel v. Univ. of Cincinnati, 302 F. Supp. 3d 961 (S.D. Ohio 2018)

Doe v. Ohio State Univ., 311 F. Supp. 3d 881 (S.D. Ohio 2018)

Doe v. Univ. of Notre Dame, No. 3:17CV298-PPS/MGG, 2017 WL 1836939 (N.D. Ind. May 8, 2017)

Doe v. Amherst Coll., 238 F. Supp. 3d 195 (D. Mass. 2017)

Neal v. Colo. State Univ.-Pueblo, No. 16-cv-873, 2017 U.S. Dist. LEXIS 22196 (D. Colo. Feb. 16, 2017)

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Doe v. Brandeis Univ., 177 F. Supp. 3d 561 (D. Mass. 2016)

Prasad v. Cornell Univ., No. 5:15-cv-322, 2016 U.S. Dist. LEXIS 161297 (N.D.N.Y. Feb. 24, 2016)

Sterrett v. Cowan, No. 2:14-cv-11619, 2015 U.S. Dist. LEXIS 181951 (E.D. Mich. Sept. 30, 2015)

Harris v. St. Joseph's Univ., No. 13-3937, 2014 U.S. Dist. LEXIS 65452 (E.D. Pa. May 13, 2014)

Wells v. Xavier Univ., 7 F. Supp. 3d 746 (S.D. Ohio 2014)

Importance of Procedural Fairness

Doe v. Trs. of Bos. Coll., 892 F.3d 67 (1st Cir. 2018)

Doe v. New York Univ., 2021 U.S. Dist. LEXIS 62985 (S.D.N.Y. March 31, 2021)

Doe v. Princeton Univ., 2020 U.S. Dist. LEXIS 236290 (D.N.J. December 16, 2020)

Doe v. Rensselaer Polytechnic Inst., No. 1:20-CV-1185, 2020 WL 6118492 (N.D.N.Y. Oct. 16, 2020)

Doe v. Colgate Univ., 457 F. Supp. 3d 164, 167 (N.D.N.Y. April 30, 2020)

Doe v. Univ. of Conn., 2020 U.S. Dist. LEXIS 11170 (D. Conn. January 23, 2020)

Doe v. Johnson & Wales Univ., 425 F. Supp. 3d 108, 110 (D.R.I. November 26, 2019)

Oliver v. Univ. of Tex. Sw. Med. Sch., No. 3:18-cv-1549, 2019 U.S. Dist. LEXIS 21289 (N.D. Tex. Feb. 11, 2019)

Montague v. Yale Univ., No. 3:16-cv-00885 (D. Conn. Mar. 29, 2019), ECF No. 177

Doe v. George Washington Univ., 321 F. Supp. 3d 118 (D.D.C. 2018)

Doe v. Pa. State Univ., No. 4:17-CV-01315, 2018 WL 317934 (M.D. Pa. Jan. 8, 2018)

Doe v. Ohio State Univ., 311 F. Supp. 3d 881 (S.D. Ohio 2018)

Doe v. Amherst Coll., 238 F. Supp. 3d 195 (D. Mass. 2017)

Painter v. Adams, No. 3:15-cv-00369, 2017 WL 4678231 (W.D.N.C. Oct. 17, 2017)

Doe v. Univ. of Notre Dame, No. 3:17CV298-PPS/MGG, 2017 WL 1836939 (N.D. Ind. May 8, 2017)

Nokes v. Miami Univ., No. 1:17-cv-482, 2017 U.S. Dist. LEXIS 136880 (S.D. Ohio Aug. 25, 2017)

Doe v. Brandeis Univ., 177 F. Supp. 3d 561 (D. Mass. 2016)

Doe v. Weill Cornell Med. Coll. of Cornell Univ., No. 16-cv-3531 (WHP), 2016 WL 5369613 (S.D.N.Y June 8, 2016)

Doe v. Alger, 228 F. Supp. 3d 713 (W.D. Va. 2016)

Tanyi v. Appalachian State Univ., No. 5:14-cv-170, 2015 U.S. Dist. LEXIS 95577 (W.D.N.C. July 22, 2015)

King v. DePauw Univ., 2014 WL 4197507 (S.D. Ind. Aug. 22, 2014)

Wells v. Xavier Univ., 7 F. Supp. 3d 746 (S.D. Ohio 2014)

Potential Impact of Inappropriate Pressure on University Decisionmaking

Doe v. Regents of the Univ. of Minn., 2021 U.S. App. LEXIS 16243 (8th Cir. June 1, 2021)

Doe v. Univ. of Ark.-Fayetteville, 974 F.3d 858 (8th Cir. September 4, 2020)

Doe v. Oberlin Coll., 963 F.3d 580 (6th Cir. June 29, 2020)

Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016)

Doe v. Rhodes Coll., No. 2:19-cv-02336 (W.D. Tenn. June 14, 2019)

Doe v. George Washington Univ., 321 F. Supp. 3d 118 (D.D.C. 2018)

Doe v. Amherst Coll., 238 F. Supp. 3d 195 (D. Mass. 2017)

Neal v. Colo. State Univ.-Pueblo, No. 16-cv-873, 2017 U.S. Dist. LEXIS 22196 (D. Colo. Feb. 16, 2017)

Doe v. Middlebury Coll., No. 1:15-cv-192-JGM, 2015 WL 5488109 (D. Vt. Sept. 16, 2015)

Other Relevant Decisions

Doe v. Syracuse Univ., No. 5:18-cv-377, 2019 U.S. Dist. LEXIS 77580 (N.D.N.Y. May 8, 2019)

Doe v. N. Mich. Univ., No. 2:18-cv-196, 2019 U.S. Dist. LEXIS 88717 (W.D. Mich. May 28, 2019)

Powell v. Mont. State Univ., No. 17-cv-15, 2018 WL 6728061 (D. Mont. Dec. 21, 2018)

Doe v. Cal. Inst. of Tech., No. 2:18-cv-09178, slip op. at 7 (C.D. Cal., Apr. 30, 2019), ECF No. 35

Jia v. Univ. of Miami, No. 17-cv-20018, 2019 U.S. Dist. LEXIS 23587 (S.D. Fla. Feb. 12, 2019)

Mancini v. Rollins Coll., No. 6:16-cv-22322, 2017 U.S. Dist. LEXIS 113160 (M.D. Fla. July 20, 2017)

Tsuruta v. Augustana Univ., No. 4:15-cv-04150 (D.S.D. Oct. 26, 2015), ECF No. 25

Doe v. W. New England Univ., 228 F. Supp. 3d 154 (D. Mass. 2017)

Gulyas v. Appalachian State Univ., No. 5:16-cv-00225, 2017 U.S. Dist. LEXIS 137868 (W.D.N.C. Aug. 28, 2017)

Collick v. William Paterson Univ., No. 16-471, 2016 WL 6824374 (D.N.J. Nov. 17, 2016)

Doe v. Salisbury Univ., 107 F. Supp. 3d 481 (D. Md. 2015)

Faiaz v. Colgate Univ., 64 F. Supp. 3d 336 (N.D.N.Y. 2014)

Johnson v. W. State Colo. Univ., 71 F. Supp. 3d 1217 (D. Colo. 2014)

Benning v. Corp. of Marlboro Coll., No. 2:14-cv-71, 2014 U.S. Dist. LEXIS 107013 (D. Vt. Aug. 5, 2014)

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