From: NCFMC President
Sent: Mon, 7 Jun 2021 15:19:22 -0400
To: T9PublicHearing
Subject: Public comment on Title IX regulations
Attachments: Public comments to OCR by NCFMC 6.8.21.pdf

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Dear OCR,

Please find attached our comments related to OCR's review regarding changes to the 2020 Title IX regulations.

Please do not hesitate in contacting me if you have any questions. Thank you.

Respectfully,

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Sent from my iPad

National Coalition For Men Carolinas (NCFMC)

Comments to OCR for Title IX Public Hearing
June 7, 2021

Dear Office for Civil Rights:

I am writing in my capacity as President of the Carolinas chapter of the National Coalition For Men (NCFM) which is the oldest men's human rights organization in America. NCFM Carolinas advocates on behalf of men who face bias and/or have been discriminated against on the basis of sex, inclusive of male college students that have faced prejudicial bias in Title IX related campus disciplinary hearings, which former Education Secretary DeVos rightfully commented as being kangaroo courts[1].

In regard to Title IX related student misconduct cases, NCFM Carolinas has worked with over a hundred-plus students and their families as they navigated a mostly anti-male biased college disciplinary system that prior to the Title IX regulations that went into effect on August 14, 2020, was largely incapable of providing fair and reliable factual determinations whenever a school investigated and adjudicated a sexual harassment complaint.

Largely due to the 2011 *Dear Colleague Letter* (DCL) that was previously implemented by OCR, colleges and universities across the country consistently failed to afford students adequate due process and fundamental fairness in their disciplinary proceedings. While these institutions investigated and punished offenses ranging from vandalism and housing violations to felonious acts of sexual assault, they were handling many cases that were arguably better left to courts and law enforcement. But their willingness to administer what is effectively a shadow justice system has not been accompanied by a willingness to provide even the most basic procedural protections necessary to fairly adjudicate accusations of serious wrongdoing.[2]

Just how badly were colleges and universities across the country failing to afford accused students due process and fundamental fairness in their disciplinary proceedings during the disastrous years following the implementation of the 2011 DCL? We cite data as provided in the Foundation for Individual Rights in Education (FIRE) *Spotlight on Due Process 2018* report:

- Nearly three quarters (73.6%) of America's top 53 universities do not guarantee students that they will be presumed innocent until proven guilty.
- Only slightly more than half of schools (52.8%) require that fact-finders—the

[1] George Liebmann, *Betsy DeVos Aims To End 'Kangaroo Courts' On Campus*, THE AMERICAN CONSERVATIVE (September 8, 2017), available at: https://www.theamericanconservative.com/articles/betsy-devos-aims-to-end-kangaroo-courts-on-campus/

[2] Foundation for Individual Rights in Education (FIRE) *Spotlight on Due Process 2018* available at: https://www.thefire.org/spotlight/due- process-reports/due-process-report-2018/)

institution's version of judge and/or jury—be impartial.

- Fewer than one third of institutions (30.2%) guarantee a meaningful hearing, where each party may see and hear the evidence being presented to fact-finders by the opposing party.
- 47 out of the 53 universities studied receive a D or F grade from FIRE for at least one disciplinary policy, meaning that they fully provide no more than 4 of the 10 elements of a fair procedure that FIRE rated.
- Most institutions have one set of standards for adjudicating charges of sexual misconduct and another for all other non-academic charges. 86.8% of rated universities receive a D or F for protecting the due process rights of students accused of sexual misconduct.[3]

Prior to the implementation of the 2020 OCR Title IX regulations which restored fundamental due process protections, accused students (almost exclusively male) had been subjected to and victimized by an inequitable, biased and discriminatory Title IX campus adjudication process in which the accused (male) student was predetermined guilty, denied due process and almost always summarily expelled or long-term suspended, the very essence of a kangaroo court.

As stated in our NPRM comments submitted to OCR on January 30, 2020 "as significant as it is to ensure that both complainant and respondent are afforded every procedural aspect of due process, it would in our opinion be a mistake to cite and solely rely on due process rulings to justify the new proposed regulation. Due process helps remedy *discrimination* against accused males, namely by requiring decisions based on credible evidence which greatly reduces the role of gender bias and stereotypes in decision-making which will result in fair and reliable determinations."[4]

While recognizing that no law or regulation can completely eliminate gender (or racial) bias from the system, bias can be reduced by expanding the evidence considered by decision-makers. Less evidence results in more decisions based on bias and stereotypes. Bias is so flagrant in low-evidence decisions that one doesn't need to look far to find not just individual instances of discrimination, but systemic discrimination leading to class-action lawsuits, in areas like police stops, or stop-and-frisk policies.[5] The remedy? Fuller investigations which seek and gather more evidence and which will deliver fewer decisions tainted by gender bias or stereotypes.

NCFMC believes that the existing Title IX regulations advanced by OCR in 2020 effectively promote the very purpose of Title IX which in this case requires schools to address sexual harassment. OCR should commit itself to leaving the 2020 Title IX regulations in place because the existing regulations ensure that schools secure due process rights for students who report sexual misconduct and for those accused of it, by requiring colleges to provide live hearings and allowing students' advisers to cross-examine parties and witnesses involved *and* by requiring that institutions presume that those accused of sexual misconduct are innocent *prior to* the investigative and determination process.

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[3] Ibid

[4] *NPRM comments to OCR submitted by NCFMC on January 30, 2020.*

[5] "*Driving While Black' in Maryland*," ACLU, available at: www.aclu.org/cases/driving-while-black-maryland

We believe that it is absolutely vital that recipients understand their legal obligations including what conduct is actionable as harassment under Title IX, the conditions that would initiate a mandatory response by the recipient, and the particular requirements that such a response should meet so that recipients protect the rights of their students to access education free from sex discrimination, gender bias or both.

We fully support the 2020 Title IX regulations definitions for "sexual harassment" and "actual knowledge" in § 106.30 which greatly aid recipients in the meaning of these terms. However, one of the more problematic areas that recipients appear to be struggling with is that of consent. Specifically, that lack of consent may be based on the temporary or permanent mental or physical incapacity of the victim, including incapacity due to ingestion of drugs or alcohol. The Department should inform recipients that inebriation is not equivalent to incapacitation.

If there are areas to improve the 2020 Title IX regulations it would appear to us that the Education Department should modify the regulations to prevent a school from using affirmative consent as part of its code of conduct. We believe an "affirmative consent" standard would be contrary to the 2020 regulations requirement that schools afford respondents a presumption of innocence. An "affirmative consent" standard unfairly shifts the burden of proof to a respondent accused of sexual misconduct to prove him or herself innocent.[6]

Furthermore, "affirmative consent" policies have far more "disparate impact" on males than any procedural technicality addressed by the proposed regulation. Indeed, in practice, "affirmative consent" policies are proxies for intentional discrimination -- inherently having a disparate impact on men because women are content to let men initiate things even when they turn out to be welcome.

Consent is logically neither necessary nor sufficient for liability for sexual harassment, which is what Title IX deals with. Thus, accused men should not have to prove BOTH consent AND welcomeness. Title IX only requires a person to show the conduct was welcome to defeat a claim of sexual harassment, not that it was BOTH welcome AND consensual. The Department should clarify that an "affirmative consent" standard in fact violates Title IX since it is used to disadvantage respondents, one particular sex over another.

Thus, we strongly urge OCR to keep the 2020 Title IX regulations in place as they currently with some slight modifications because:

I. The 2020 Regulations Enhance Title IX's Protections by Adopting Administrative Standards that Are Consistent with Title IX's Text and Purpose, and With Legal Precedent.

The 2020 rules enhanced Title IX's administrative standards, making them consistent with appropriate Supreme Court Title IX related decisions. The Department rightly recognized two

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[6] Samantha Harris, *University of Miami Law Prof: Affirmative Consent Effectively Shifts Burden of Proof to Accused*, (Sept. 11, 2015), https://www.thefire.org/university-of-miami-law-prof-affirmative-consent-effectively-shifts-burden-of-proof-to-accused/.

critically important and relevant Supreme Court decisions—*Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education*[7] — that "are based on a textual interpretation of Title IX and on policy rationales that the department finds persuasive for the administrative context." (83 Fed. Reg. 61466.).

The Department properly relied on the damages liability standards in *Gebser* and *Davis* to address the issue of institutional accountability. The Supreme Court clarified the liability standard that applies when a student seeks damages in a Title IX sexual harassment claim against a school. *Gebser* set forth the standard under which a school may be liable for damages under Title IX for employee-on-student sexual harassment, and *Davis* extended that standard to student-on-student sexual harassment cases.

The Court held that, to secure money damages, plaintiffs must establish that the recipient of federal funds acted with deliberate indifference, that a person with authority to take corrective action had actual notice, and that the harassment was so severe and pervasive that it deprived the victim's access to an educational opportunity. *See Gebser, 524 U.S at 288-90; Davis, 526 U.S. at 629.*

The Department thus rightfully aligned their new rules to Supreme Court decisions such that to recover monetary damages, a plaintiff must show that (1) their school was deliberately indifferent to sexual harassment; (2) an official with authority to take corrective measures had actual knowledge of the harassment; and (3) the harassment was so severe, pervasive, and objectively offensive that it deprived the student of access to educational opportunities and benefits.

In proposing three changes—adopting a "deliberate indifference" standard, changing the "notice" requirement, and changing the definition of "sexual harassment"— the Department utilized commonsense in the administrative enforcement of Title IX.

We applaud the Department's decision to follow the Supreme Court's deliberate indifference standard, notice requirement, and definition of sexual harassment— to account for the circumstances involved in determining liability for monetary damages—and deem the Court's standard to be completely appropriate for the Department to continue to follow.

Likewise, we endorse the Department's definition of sexual harassment as being consistent with the text of Title IX and with the Supreme Court's decisions in *Gebser* and *Davis.* The existing regulations reasonably defined sexual harassment as either an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient or an individual's participation in unwelcome sexual conduct; or unwelcome conduct on the basis of sex that is *so* severe, pervasive, and objectively offensive that it denies a person access to the recipient's education program or activity; or sexual assault as defined in 34 CFR 668.46(0) (implementing the Clery Act).

By following the text and purpose of Title IX, the definition includes sex-based discrimination that

[7] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (detailing standard for employee-on-student harassment); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (detailing standard for student-on-student harassment).

is sufficiently serious as to deprive a student of access to a funding recipient's educational program or activity. We believe that this definition recognizes and incorporates consistent language used by the Court related to the interpretation and thus implementation of Title IX.

II. The 2020 Rules Address Title IX Related Due Process Concerns by Adopting Fair & Equitable Grievance Procedures but Don't Adequately Protect Men from Discrimination on the Basis of Sex in Title IX Hearings

We support the 2020 regulations under **§** 106.45 which addressed required grievance procedures for formal complaints of sexual harassment but do recognize that there are opportunities to make them better. We are glad to see that OCR recognized through the 2020 rules the importance of providing fair and equitable treatment to both complainant and respondent throughout the complaint process.

However, we raise the issue of *bias* based on sex stereotypes (male discrimination) when no evidence exists beyond that of the statements of complainant and respondent, essentially amounting to "he said / she said" recollections of the incident in question which is often clouded by alcohol or drug impaired memories. Time and again we have heard of bias against males being weaponized by school employees in campus discipline cases (which violates Title IX) with predictably unfair and discriminatory outcomes.

So prevalent and widespread is male discrimination in Title IX disciplinary hearings that our organization was able to easily identify (through public records research) biased Title IX training materials used by North Carolina (UNC) universities which incorporate demonstrably flawed "statistics" and discriminatory narratives that portray college men as deliberate sexual predators.

One such example is found from Title IX related training provided to UNC system employees. The training, entitled "*Title IX and Campus Security Authority Training Program*", was presented by Steven J. Healy and Gary J. Margolis of Margolis Healy & Associates[8], a training organization with a dubious reputation in training of Title IX investigators.

An examination into similar Title IX related university employee training conducted by Margolis Healy but which occurred at Middlebury College determined that:

> "Investigators, Margolis Healy instructed Middlebury officials, must not approach the case with 'skepticism.' Indeed, they must 'start by believing' the accuser. The discussion with the accuser must not involve the investigator interrogating her; "This is not the time for 'just the facts.'" (If not then, when?) The investigator must avoid 'victim blaming' questions, such as asking the accuser why she did something. 'Use what we know' about campus sexual assault—that the 'non-stranger sexual offender' says to himself, 'I am going to have sex tonight. If it is consensual, fine. But, I am going to have sex tonight.' While the investigator must 'start by believing' the accuser, the Middlebury official must begin by wondering if the accused is 'who he said he is.' Margolis Healy counseled Middlebury investigators against

[8] Margolis Healy & Associates, "*Title IX and Campus Security Authority Training Program*" (February 13-14, 2013) available at: https://www.slideshare.net/margolishealy/unc-title-ix-training-seminar-feb-2013?from_action=save

using the term 'accuser' ("victim" or "survivor" is preferred)."[9]

Our examination of the Margolis Healy materials used to train Title IX investigators provides a rare behind-the-scenes view of the extraordinarily one-sided training that "impartial" campus adjudicators receive. Some of the egregious and clearly biased Title IX training "facts" presented to school employee participants include the following statements:

- "One in four women have been victims of rape or attempted rape"
- "At last 20% of American men report having perpetrated sexual assault and 5 percent report having committed rape"
- "Alcohol and other substances are used intentionally by men who commit rape (alcohol is the "weapon of choice")"
- "If both parties are drinking, society often blames the victim and excuses the offender"
- "Approach a case believing that 'something' occurred, victims are sensitive to this"[10]

While the 2011 DCL opened the door for universities to advance anti-male bias through the use of discriminatory and flawed Title IX related training to their employees and Title IX investigators, we were encouraged to see OCR recognize and correct for these deficiencies in the promulgation of the Title IX rules that went into effect in August 2020.

It's unfortunate that the 2020 regulations side-stepped the issue of protecting men from discrimination on the basis of sex in regard to Title IX related campus hearings. One doesn't need to look far to find the systemic flawed belief that the 2011 DCL environment produced and many university administrators held, that men rape, women don't lie about sexual assault and that a reporting female student needs to be viewed as a victim. One such example is the "believe women" representation by Jill Moffitt, Title IX Administrator at UNC-Ashville who stated that "**When the victim says they were assaulted, they're assaulted** (emphasis added)."[11] The victim she alludes to is of course, any and all *female student* complainants.

The admonishment for campus Title IX administrators to "believe women" or face dire consequences is well known and we would urge OCR to refrain from heading down this disastrous and harmful path again. "The new standard of proof, coupled with the media pressure, effectively creates a presumption in favor of the woman complainant," Nancy Gertner, a former federal judge, who is now a Harvard law lecturer, wrote in the American Prospect in 2015. "If you find against her, you will see yourself on '60 Minutes' or in an investigation [into federal civil rights] where your funding is at risk. If you find for her, no one is likely to complain."[12]

The results of embracing such a misandrist view are predictable: men being routinely discriminated

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[9] KC Johnson, "*Weaponizing Title IX at Middlebury*", Minding the Campus, (September 23, 2015), available at: http://www.mindingthecampus.org/2015/09/weaponizing-title-ix-at-middlebury/

[10] Margolis Healy & Associates, "*Title IX and Campus Security Authority Training Program*" (February 13-14, 2013) available at: https://www.slideshare.net/margolishealy/unc-title-ix-training-seminar-feb-2013?from_action=save

[11] Emily Henderson, "*UNCA community hopes to improve reputation of sexual misconduct discussions*", thebluebanner.net, (November 14, 2017), available at: http://thebluebanner.net/title-ix-prevention-less-effective-than-student-led-outreach/

[12] T. Rees Shapiro, *"Expelled for sex assault, young men are filing more lawsuits to clear their names"*, The Washington Post, (April 28, 2017), available at: https://www.washingtonpost.com/local/education/expelled-for-sex-assault-young-men-are-filing-more-lawsuits-to-clear-their-names/2017/04/27/c2cfb1d2-0d89-11e7-9b0d-d27c98455440_story.html

against based on gender, unfairly judged and found responsible in regards to Title IX related sexual misconduct, which is why universities and colleges are on the losing end of having lawsuits filed by male student plaintiffs as illustrated by a recent MTD ruling in a lawsuit against Johnson & Wales University of Providence, Rhode Island:

> "After an hour-long oral argument in which Judge John McConnell (an Obama nominee) peppered JWU's lawyers with skeptical questions, the judge ruled from the bench that the Title IX claim would proceed. "On the pleadings," he said, he could "find no reason at all why the result was Mr. Doe's expulsion. The only inference [is] . . . gender played a role," in violation of Title IX."[13]

It is the *Doe v Columbia University* decision by the Second Circuit that is considered the proverbial shot heard around the world in regard to confronting bias favoring one sex over the other in campus Title IX proceedings. A unanimous three-judge panel ruled that accused students alleging gender discrimination needed only to clear a "low standard" of "alleging facts giving rise to a plausible minimal inference of bias."[14]

The Second Circuit court held:

> "A defendant is not excused from liability for discrimination because the discriminatory motivation does not result from a discriminatory heart, but rather from a desire to avoid practical disadvantages that might result from unbiased action. A covered university that adopts, even temporarily, a policy of bias favoring one sex over the other in a disciplinary dispute, doing so in order to avoid liability or bad publicity, has practiced sex discrimination, notwithstanding that the motive for the discrimination did not come from ingrained or permanent bias against that particular sex."[15]

It's no wonder that in the aftermath of the disastrous 2011 Dear Colleague Letter universities are losing in federal and state courts on Title IX related cases:

> "As district courts around the country broke new ground in evaluating the relationship between Title IX and the rights of accused students, the Sixth Circuit issued two important rulings on the question. First, *Doe v. Miami University* established a plaintiff-friendly test for evaluating erroneous outcome Title IX complaints that moved beyond the *Bleiler/King/Sahm* trilogy. The *Miami* test included the complaint citing "statistical evidence that ostensibly shows a pattern of gender-based decision-making"; allegations of "external pressure" from the media and the federal government; a record in which every male charged with sexual misconduct in 2013–2014 was allegedly found guilty; the fact that "nearly ninety percent of students found responsible for sexual misconduct between 2011 and 2014 have male first-names"; and "an affidavit from an attorney who represents many students in Miami

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[13] KC Johnson, *"The Fallout From Weaponizing Title IX"*, Minding the Campus, (May 18, 2019), available at: https://www.mindingthecampus.org/2018/05/18/the-fallout-from-weaponizing-title-ix/

[14] Samantha Harris & KC Johnson, *"CAMPUS COURTS IN COURT: THE RISE IN JUDICIAL INVOLVEMENT IN CAMPUS SEXUAL MISCONDUCT ADJUDICATIONS"*, LEGISLATION AND PUBLIC POLICY (Vol. 22:49, 2019), available at: https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf

[15] Doe v. Columbia Univ., 831 F.3d, 58 (2d Cir. 2016).

University's disciplinary proceedings, which describes a pattern of the University pursuing investigations concerning male students, but not female students." This list was not exclusive; the court cited a necessity to examine "all" the evidence of gender bias before dismissing an accused student's complaint.

Then, in September, the same Sixth Circuit panel that recognized a due process right to a live hearing with cross-examination in *Doe v. Baum* also revived the student's Title IX claim against the University of Michigan. Denying the student an opportunity for cross-examination, the court concluded, was enough in and of itself to raise doubts about the accuracy of the school's finding, thus satisfying the first prong of the *Yusuf* erroneous outcome test. Meanwhile, the possibility of gender discrimination was satisfied by the combination of federal pressure on the university to crack down on sexual assault and the appeals board's having "credited exclusively female testimony (from Roe and her witnesses) and rejected all of the male testimony (from Doe and his witnesses)." The latter point added an additional element beyond *Miami* that district courts could cite to allow accused students' Title IX claims to proceed."[16]

We are encouraged to see that OCR recognizes that unfair, biased or preferential treatment (based on sex) by a recipient institution during the complaint process would constitute discrimination on the basis of sex under Title IX and believe that the 2020 regulations will receive deference from the courts as to its predictive judgment about whether its regulation helps prevent, remedy, or detect sex discrimination and stereotyping. It is our opinion that more Title IX related procedural protections will result in less bias, increased reliable determinations and fewer lawsuits for recipients.

We applaud OCR for ensuring that foundational due process safeguards such as: a presumption of innocence, fair and equitable treatment of all parties, objective evaluation of both inculpatory and exculpatory evidence, the removal of harmful stereotyping materials from Title IX training programs, reasonably prompt timeframes for completing the grievance process and supportive measures are provided by recipient equitably for the benefit of both complainant and respondent are included in the 2020 regulations and urge OCR to refrain from changing any of these foundational elements.

III. The 2020 Title IX Rules Address the Constitutional Right to Cross-Examination in a Live Hearing Which Is Consistent with Federal Court Precedent.

The Department directing institutions of higher education to provide grievance procedures that provide for a live hearing and which requires the recipient decision-maker to permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those that challenge credibility is perhaps the most compelling, necessary and impactful constitutional right included in the 2020 regulations and should be considered the bedrock on

[16] Samantha Harris & KC Johnson, *"CAMPUS COURTS IN COURT: THE RISE IN JUDICIAL INVOLVEMENT IN CAMPUS SEXUAL MISCONDUCT ADJUDICATIONS"*, LEGISLATION AND PUBLIC POLICY (Vol. 22:49, 2019), available at: https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf

which all other Title IX hearing due process rights rest on.

Providing for cross-examination during a hearing is consistent with federal court precedent in that the U.S. Court of Appeals for the Sixth Circuit held that in conducting Title IX investigations, colleges and universities are required to provide parties an opportunity to cross-examine witnesses in the presence of a neutral fact-finder in cases hinging on the credibility of such witnesses. See *Doe v. Baum, et al.*, Case No. 17-2213 (6th Cir. Sept. 7, 2018).

In this regard, we commend OCR for recognizing cross examination as the "greatest legal engine ever invented for the discovery of truth" and would note that denying cross-examination can violate both state and federal law. As noted by Hans Bader, "Under many state APAs, students have a right to cross-examine their accuser, as courts have made clear in cases such as *Arishi v. Washington State University*, 385 P.3d 251 (Wash. App. 2016) and *Liu v. Portland State University*, 383 P.3d 294 (Or. App. 2016)." Hans Bader, *Time to Ed Obama-Era Fed Micromanagement of Colleges Under Title IX*, CNS News, Feb. 22, 2017.[17]

IV. The Existing Rule § 106.45 Should Require School's to Solely Use a Clear and Convincing Evidence Standard in Title IX Sexual Misconduct Related Hearings

While acknowledging that the 2020 regulations greatly improved upon previous guidance issued by OCR, NCFMC believes that the new regulations did not go far enough to ensure that a fair and equitable evidence standard is used by schools adjudicating Title IX related sexual misconduct cases. We firmly believe that it is necessary to require a uniform standard of evidence for all Title IX sexual misconduct cases rather than leave the option to the recipient to choose a standard, and strongly recommend the proper standard in regard to Title IX sexual misconduct cases is the clear and convincing standard.

Moreover, Title IX grievance proceedings are analogous to various kinds of civil administrative proceedings, which often employ a clear and convincing evidence standard. See *Nguyen v. Washington Dept: of Health*, 144 Wash. 2d 516 (2001) (requiring clear and convincing evidence in sexual misconduct case in a professional disciplinary proceeding for a medical doctor as a way of protecting due process); *Disciplinary Counsel v. Bunstine*,136 Ohio St. 3d 276 (2013) (clear and convincing evidence applied in sexual harassment case involving lawyer).

These cases recognize that, where a finding of responsibility carries particularly grave consequences for a respondent's reputation and ability to pursue a profession or career, a higher standard of proof can be warranted. This same logic applies to students who are about to matriculate and enter a profession or career which they invested themselves in through their studies at a recipient institution.

Given that it only requires a 50.1% confidence level to find a student responsible, a preponderance of evidence standard is far too low a bar for a matter as serious sexual assault

[17] Hans Bader, *"Time to End Obama-Era Fed Micromanagement of Colleges Under Title IX"*, CNS News.com, (February 22, 2017), available at: https://www.cnsnews.com/commentary/hans-bader/time-end-obama-era-fed-micromanagement-colleges-under-title-ix.

especially when one considers the irrevocable harm that awaits a guilty finding.

Furthermore, the courts have likewise found that the preponderance standard is too low a standard. In *J. Lee v. The University of New Mexico*, No. CIV. 17-1230 JB\LF, the Court stated:

> "[T]he Court concludes that preponderance of the evidence is not the proper standard for disciplinary investigations such as the one that led to Lee's expulsion, given the significant consequences of having a permanent notation such as the one UNM placed on Lee's transcript."

This ruling is the first to hold explicitly that the preponderance standard is constitutionally improper. It's worth noting that Judge Browning also held that Lee pled plausible due process concerns because UNM does not provide an evidentiary hearing in sexual misconduct cases, while doing so in other disciplinary matters.

Beyond the stigma of being branded a rapist for life, there is expulsion and the loss of educational attainment, harm of one's family name and reputation, loss of career and future earnings, and in some states, potentially being required to register as a sex offender. The Department should modify this rule to require that recipients *solely* use a clear and convincing standard to ensure a greater degree of confidence in recipient decisions which would benefit both complainants and respondents equally.

Summary

The 2020 regulations have made schools safer for students; made it easier for students to report sexual harassment, get help, and stay in school; permit (and require) schools to provide specific resources to students who report sexual harassment; and require schools to provide ALL students, regardless of their sex a fair adjudication process. The existing regulations strengthen and advance a school's response to students harmed by non-consensual sexual misconduct while protecting the due process rights of both complainant and respondent.

As of the writing of this letter, over 700 lawsuits have been filed by plaintiff college students against universities with a majority of these cases being ruled in favor of students. Appellate courts have upheld due process rights for the accused in 23 cases, a clear indication that courts are serious about requiring due process protections in Title IX related sexual misconduct hearings.

In conclusion, the 2020 Title IX rules implemented by OCR provide for reliable determinations and effectuate many of Title IX's intended protections thereby making it easier for students to report sexual harassment, penalizing schools that ignore students' reports of harassment, and restoring fairness and equity in the grievance process by removing bias that prejudicially favors female accusers and forces male respondents to prove their innocence whenever a Title IX related allegation of misconduct is directed against them.

We sincerely appreciate your consideration of our comments. Should you have any questions or require clarification, please contact Gregory Josefchuk, President (ncfmcarolinas@yahoo.com).

Respectfully,

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