

From: Natanya DeWeese
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To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing
Attachments: Guilty Until Proven Innocent - The Devastating Impact of the Pre-2020 Title IX Regulations.pdf

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To Whom It May Concern:

I am an attorney with the firm of Shaw & Murphy in Ithaca, New York and I represent college students accused of Title IX violations. I am submitting the attached as my written comment for the Title IX public hearing. This article has also been published on the saveservices.org website at <https://www.saveservices.org/2021/04/guilty-until-proven-innocent-the-devastating-impact-of-the-pre-2020-title-ix-regulations-on-college-students-accused-of-title-ix-violations/>.

In addition to the concerns raised in the attached written comment, I also encourage OCR to uphold the regulations requiring an objective evaluation of all evidence, avoiding credibility determinations based on a person's status as complainant or respondent, the presumption of innocence, giving both sides equal opportunities to present evidence, an investigative report that fairly summarizes the evidence, and a written determination with findings of fact, conclusions about whether the alleged conduct occurred, and a rationale for each finding. As an attorney representing students of accused Title IX violations, I have seen the devastating impact and unfair outcomes that result when colleges do not provide these measures.

Please let me know if you would prefer the attachment copied and pasted in the body of this email. Thank you for considering my comments. Please let me know if there is anything further you need from me.

Sincerely,

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Guilty Until Proven Innocent: The Devastating Impact of the Pre-2020 Title IX Regulations on College Students Accused of Title IX Violations

Natanya DeWeese, Esq.

It is common knowledge that criminal defendants have constitutional rights, including the right to confront the witnesses against them. College students accused of violating Title IX have far fewer rights. Instead of being found guilty beyond a reasonable doubt, they are found responsible by a preponderance of the evidence. This legal standard is applied by college faculty, staff, and sometimes students, many of whom have no legal knowledge. To a college student accused of violating Title IX, the possibility of losing their college education and future career is just as serious as a defendant facing criminal charges. If the due process protections given to accused students in the 2020 regulations¹ are rescinded, accused students will lose the few rights they have in these proceedings. As an attorney who represents students accused of Title IX violations, I have seen firsthand the devastating impact the pre-2020 regulations had on accused students and the unfair outcomes that resulted when the accused could not tell their stories.

The current policy of permitting advisors to cross-examine allows the accused to explore inconsistencies and challenge credibility, and allows the hearing panel to determine the truth. Without cross-examination, the accuser dictates the narrative, permitting hearing panels to find students responsible for sexual misconduct based on very little evidence. This has devastating consequences for accused students, including suspension or expulsion. If an accuser admitted in writing that she consented and she was not afraid of the accused, but testified to the contrary at the hearing, the accused would have no opportunity to question her about these inconsistencies without cross-examination. Without a way for the accused to ask follow-up questions or challenge the accuser's credibility, a hearing panel would not explore possible evidence of consent and could find the accused responsible based on the accuser's testimony. Since suspension or expulsion are likely sanctions for students found responsible for sexual misconduct, there is too much at stake to not allow the truth to be explored.

Before the regulations permitted advisors to cross-examine, colleges enacted poor substitutes that did not allow students' stories to be told. Approaches included having students submit questions to the hearing chair in advance to ask each other at the hearing, having students or their advisor email the hearing chair during the hearing with questions for a witness, or relying on interview transcripts in the investigation file and not having the witnesses testify at all. These approaches resulted in students reading prepared answers at the hearing with no opportunity to ask each other follow-up questions, allowing hearing chairs to change the wording of questions so they asked something entirely different from what the student intended, and hearing panels making determinations based on transcripts of interviews with witnesses who had no personal knowledge of the incident and barely knew the accused. None of these approaches allowed accused students to meaningfully question their accuser or witnesses.

¹ "U.S. Department of Education Launches New Title IX Resources for Students, Institutions As New Rule Takes Effect," August 14, 2020, <https://www.ed.gov/news/press-releases/us-department-education-launches-new-title-ix-resources-students-institutions-historic-new-rule-takes-effect>

It is also important to retain the policy that colleges provide an investigative report that fairly summarizes the evidence. Without a fair report, colleges are free to proceed based only on information from the accused. In one case², the investigative file was missing most of what the accused student said in his interview with the investigator. The college claimed the recording of his interview was corrupted and the investigator didn't take notes. Rather than interviewing him again, the college proceeded to a hearing, with a file that contained several pages of evidence from the accuser and half a page from the accused. The student was found responsible and suspended.

Students who are suspended or expelled for Title IX violations face the sudden end of their educational and career aspirations. They are left in a world of fear, uncertainty, anxiety, and depression. Do they want to return to the college that suspended them? Can they transfer to another college with this mark on their record? Do they even want to try? And what will become of their future if they don't? They are ostracized by their peers and fear interactions with others. For the falsely accused, it is as if they are wearing a scarlet letter "R" for "rapist," but they did nothing wrong.

Despite college policies claiming that students are presumed innocent, this is not always the case in practice, especially before the 2020 regulations. Students feel they are presumed guilty and that nothing they say makes a difference, especially when they are not given a fair opportunity to tell their side of the story or challenge the evidence against them. The process is traumatic and dehumanizing for students, creating a PTSD that is triggered even by receiving an email from a college official. They don't trust the colleges to get to the truth of what happened. Without allowing students to cross-examine their accusers or receive a fair investigation, how can colleges accurately determine who is responsible and who is not?

I do not diminish the trauma that victims of sexual assault go through. OCR should consider that accused students are traumatized too, especially under the prior regulations that gave them few rights and little opportunity to have their side of the story told. OCR should give students equal rights and opportunities to be heard, because without regulations that give both students due process, the colleges will not.

² OCR found that the college discriminated against this student on the basis of sex and did not provide him with a fair process. <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02182335-a.pdf>