Dear T9 Public Hearing Officer,
Below is my comment for the Title IX public hearings for which I am also scheduled to testify in person.
Please let me know that you received this email, that you could open the attachment, and that my comment is now part of the record.
Thank you for your courtesy,
Raul Jauregui

Raul Jauregui
Attorney
Jauregui Law Firm
720 Arch Street, PO Box 861
Philadelphia, PA 19107
(215) 559-9285

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Comment on Proposed Title IX Rulemaking

Raul Jauregui, Esq.
www.studentmisconduct.com

DACA’S DREAMERS AND TITLE IX REGULATORY DUE PROCESS

Title IX Means to Protect Every Student Present in the US Including Dreamers:

Give or take an estimated 19 million people enrolled in higher education in the United States for fall 2020. And Title IX’s mission is to protect every single last one of them from sexual discrimination while enrolled. However, common sense, and a number of theories, like Intersectionality, suggests that not every single last one of those students will be equally protected under Title IX. The case of Dreamers, students with immigration status under President Obama’s DACA program, highlights the plight of those who are, in fact, more vulnerable to abuse during their schooling, and thus most at risk of missing out from Title IX’s promised protection for everyone.

There are between 600,000 to 800,000 DACA recipients. The task of getting them through higher education, these full English speaking persons who often times do not qualify for any financial aid, has brought out the best in the US. Yet no one has stepped forward to protect Dreamer’s rights under Title IX. This comment aims to do just that. I have practiced Title IX student sexual misconduct since 2013, when I first sued Swarthmore College, a small school outside Philadelphia, and have now focused on the disenfranchisement that Title IX’s sexual misconduct regulations visit upon Dreamers, a group so compelling, that President Biden specifically mentioned them during his recent speech to a joint session of Congress:

“Now, look, if you don’t like my plan, let’s at least pass what we all agree on. Congress needs to pass legislation this year to finally secure protection for DREAMers — the young people who have only known America as their home. (Applause.)”

Dreamers face discrimination three times over while in college: First they are systemically discriminated against because of their race. Second, Dreamers face discrimination because of their national origin. Third, Dreamers, alone amongst all college students, face discrimination, and outright disparate impact, because Title IX, and particularly the due process eroding rule rollbacks currently under consideration, ignores the unique risk they face: To maintain their DACA eligibility requirements, Dreamers cannot be convicted of significant misdemeanor offenses like the kind of sexual misconduct that Title IX rules establish. To not be convicted, to stay in DACA, Dreamers will choose to not defend their side during a Title IX student misconduct hearing—particularly one that is stacked against them in terms of low to no due process in a system racially biased against them. Thus, Dreamer’s risk under an ever weaker Title IX sexual misconduct rule environment constitutes the type of concrete and particularized harm needed to invoke Article III injury and have standing to sue.
Title IX Standards Ignore DACA Status Risk:

Most schools require little evidence of sexual misconduct to hold a Title IX compliant hearing because they will use preponderance as the evidentiary standard—only a feather more worth of evidence will skew the plates of justice on the complainant’s side even if the school presumes the respondent’s innocence. Not surprisingly, US Title IX administrators, once weary of legalese infecting their jobs, have now rushed to praise and implement preponderance, out of all the other evidentiary standards, because it gives them the most latitude. And yes, an important rationale for the preponderance standard remains that under it more “people” will use the system. In fact, most of us Title IX practitioners assume that in-school sexual misconduct complaints would dwindle down to a trickle under a “clear and convincing” regime. The downside of that is that “clear and convincing” provides higher hurdles to prove guilt thus protecting the vulnerable better. In reality, for Title IX rules and rulemaking to provide a maximum of fairness for all “people”, the weaker the standard of proof allowed, the stronger the process due must be.

Inescapably, however, “people” and “due process” in Title IX’s parlance, does not reflect or consider the Dreamer’s reality. Rather, the Title IX normative, and all of us its practitioners, assume that complainants and respondents have full citizenship and can speak loudly so they receive full fairness under preponderance-driven sexual misconduct processes. We assume that every complainant and respondent risks nothing by complaining to OCR, or by suing their school. Not so for Dreamers who face serious risk. What Title IX practice forgets, or chooses to ignore, is that Dreamers cannot just walk into OCR, or the Courts, unconcerned about consequences of that complaint to their immigration status. Title IX practice forgets that Dreamers may well opt out of the system, be they complainants or respondents, to not disturb their DACA eligibility.

Thus the risk for Dreamers, particularly under preponderance driven Title IX hearings, is real. DACA eligibility requires that the Dreamer not be “convicted of a felony offense, [or of] a significant misdemeanor offense” Under current Title IX rules, Dreamers can lose their DACA eligibility because a school proceeding can grow into a criminal one. Simply put, the school’s investigation gathers incriminating evidence. Thus, Dreamers, particularly as respondents, are likely to chose forgoing their education rather than triggering a criminal inquiry which could follow from the school’s finding of responsibility. The criminal inquiry, in turn, could trigger a loss of DACA status. At that point the Dreamer, unique among all the other 19 million students subject to Title IX, has lost his immigration status, because of Title IX’s preponderance standard and currently considered due process roll back increased his risk. Thus, Dreamers, unlike all other 19 million students subject to Title IX, may well opt out of the system and choose to not state their story to defend their reputation. In addition, vis-à-vis their schools, Dreamers face the same racially implicit bias that has for years been known to affect people of color as criminal defendants. Thus it is of the utmost importance to strengthen, not weaken, the Due Process mechanisms in the Title IX rules because they even out the playing field for the most vulnerable, of which Dreamers represent an 800,000 person fractal.
Because DACA provides Dreamers with a fundamental benefit, the ability to live in the US, the entire DACA framework uses a “clear and convincing” standard, except when it overlaps with Title IX hearings which treats Dreamer’s sexual misconduct experience as a civil matter. US law protects Dreamers at every step with higher evidentiary standards for their prosecution because they do not have the power to withstand charges on their own. But the one area where they are not protected with “clear and convincing” standards is in the College Title IX disciplinary setting. Seen otherwise, the regular US citizen facing a Title IX hearing never has to fear deportation if he or she is found guilty. Not so for the Dreamer: a finding of guilt on a Title IX process will trigger an expulsion. The evidence backing that expulsion incriminates. That risk creates a paradox for the Dreamer: Either remain silent during the misconduct investigation and adjudication and hope to be exonerated, or speak up, and risk self-incrimination, to then be prosecuted criminally. Paradoxes are not fair. And strengthened due process considerations in the Title IX rules assuage that unfairness.

The Plight of Dreamers Demands Heightened, Not Lowered, Due Process Guarantees to be Written into Title IX’s Rules

Due process in Title IX, or “fairness” if the school is private, currently grants a minimum of protection to respondents and complainants of sexual misconduct. At present OCR’s rules, formulated after an extensive public comment period, create a framework where Dreamers can state their case. Specifically, these current regulations barely protect Dreamers. Their erosion would subject them to Article III injury: 34 C.F.R. § 106.45(b)(5)(iii) (parties can gather evidence during investigation), (b)(5)(vi) (parties can inspect and review the investigation’s evidence including inculpatory and exculpatory evidence), and (b)(5)(vii) (school creates and all parties receive an investigative report for review and response) barely even out the field that Dreamers step onto during sexual misconduct proceedings. These provisions in the current Title IX regulations state safe havens allowing Dreamers to understand their risk and to defend against it before the hearing even takes place, or not. To change these common sense due process or fairness provisions would put Dreamers at an even higher disadvantage for, as DACA applicants they really need to know all the evidence for they cannot risk self-incrimination from the unknown, while as people of color, they face more bias than the stereotypical white respondent does during an adjudicative process.

34 C.F.R. § 106.45(b)(6)(i) defends Dreamers because their right to a live hearing and cross-examination becomes their last resort to defend their name and maintain their DACA eligibility. Again, in the context of a civil-like hearing that works under the “preponderance” standard, credibility assessments remain crucial, much more so when what is at stake involves maintaining an academic career and an immigration process for a person who faces systemic racial bias. The Federal Courts broadly agree with the current state of this regulation. To change it would create a patchwork where Dreamers receive better or worse treatment according to their school’s state. That result frustrates Title IX’s goal to eradicate sex-based discrimination in education for all.
34 C.F.R. § 160.45(b)(5)(i) defends Dreamers because this provision of the new regulations puts the burden of proof and the burden of gathering enough evidence on the school, not on the Dreamer, or on the other student. In effect, this regulation, if honestly implemented, mitigates the impact of the two great obstacles Title IX misconduct proceedings visit on Dreamers—that the “preponderance” standard requires legally unsophisticated people who cannot violate DACA’s eligibility requirements to risk their eligibility while defending against horrid accusations, and that as people of color they cannot escape systemic bias inherent to these proceedings.

IN CONCLUSION: Title IX protects everyone, including Dreamers, from sex-based discrimination in education and to do so it requires strengthened due process rules.

Sincerely,

Raul Jauregui, Esq.
Jauregui Law Firm
720 Arch Street
PO Box 861
Philadelphia, PA 19107
(215) 559-9285
RJ@RaulJauregui.com
www.studentmisconduct.com

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1 See, e.g., https://nces.ed.gov/programs/digest/d19/tables/dt19_105.30.asp

2 Title IX of the Education Amendments of 1972. Title IX protects people from discrimination based on sex in education programs or activities that receive federal financial assistance. Title IX states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.


3 Intersectionality, a critical race theory of UCLA law professor Kimberlé Crenshaw’s asks me, as a practitioner, to see every law as affecting any person differently and according to how many aspects of the person’s social, race and other identities move the outcome away from a statistical neutral that does not reflect human nature, see, e.g.,

On January 20, 2021, President Biden issued a memorandum directing the Secretary of Homeland Security, in consultation with the Attorney General, to take appropriate action to preserve and fortify DACA, consistent with applicable law. 

https://en.wikipedia.org/wiki/Deferred_Action_for_Childhood_Arrivals

https://www.thedream.us/

I publish my reactions to and impressions about Title IX as part of my law firm’s web page and they can be found here: https://www.studentmisconduct.com/news


See, e.g., “The record of this case makes plain that the two individual plaintiffs have standing to challenge the DHS Rule. They are two Deferred Action for Childhood Arrivals (DACA) recipients who plan to adjust their status in the future, J.A. 38, 43-44, and, more importantly, are presently forgoing specific financial resources (such as applying for student loans), J.A. 40, 45, out of concern that doing so would render them "public charges" at that later point. Unlike with CASA, this is the sort of concrete and particularized harm necessary to establish an Article III injury. The plaintiffs have also alleged sufficient facts to show that this injury is sufficiently actual or imminent, as they have explained how the Rule is having an immediate effect on their lives today, as they make specific plans in anticipation of adjusting their status in the future. Lastly, the two plaintiffs meet the causation and redress ability prongs of standing. We therefore shall proceed to address the plaintiffs' arguments on the merits.” [Internal citations omitted]. Casa de Maryland, Inc.; Angel Aguiluz; Monica Camacho Perez, Plaintiffs-Appellees, v. Donald J. Trump, 971 F.3d 220 (4th Cir., 2020).


See Note 9, Napolitano memorandum, supra.
Schools, and those who populate them—both students and staff—bring profound racial bias to that environment. Thus, Title IX’s effect on sexual misconduct proceedings exists within and must respond to the “structural and implicit racial bias pervading campuses.” Jeannie Suk, *Shutting Down Conversations about Rape at Harvard Law*, NEW YORKER, Dec. 11, 2015, available at: [https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school](https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school). This racial bias affects Dreamers, all of whom by definition are students of color. This racial bias has been perfectly measured and documented as a particularized harm for people of color who face adjudicatory proceedings which is precisely what the Title IX rules control. “A study conducted in Detroit and published in 1996 controlled for a number of offender characteristics, case characteristics, and victim characteristics.26 The study found that the average sentence for blacks who were convicted of sexually assaulting whites was more than three years longer than the sentence for blacks who assaulted blacks, and more than four years longer than the sentence for whites who sexually assaulted whites. This study also found that black men who assaulted whites (whether the victim was a stranger or an acquaintance) and black men who assaulted black strangers received the harshest punishment, while black men who assaulted black acquaintances and white men who assaulted white women (stranger or nonstranger) received lighter punishments.” Tushar Kansal, *Racial Disparity in Sentencing, a Review of the Literature*, p. 13, The Sentencing Project, January, 2005, available at: [https://www.opensocietyfoundations.org/publications/racial-disparity-sentencing](https://www.opensocietyfoundations.org/publications/racial-disparity-sentencing).

See, e.g., *Woodby v. INS*, 385 U.S. 276, 285–86 (1966) (“To be sure, a deportation proceeding is not a criminal prosecution. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. . . . In denaturalization cases the court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence.” (citation omitted)); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (“[I]n view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside—the evidence must indeed be ‘clear, unequivocal, and convincing . . . .’” (quoting *Schneiderman v. United States*, 320 U.S. 118, 125 (1943))).

As I recently argued to Judge Marieka of Delaware District Court, due process for disciplinary matters in higher education exists because a robust consensus of US Courts see continuing one’s education and obtaining a degree as a protected property or liberty interest. Dreamer’s have that right as well. See e.g. *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 12 (1st Cir. 1988) ("a student facing expulsion or suspension from a public educational institution is entitled to the protections of due process"); *Plummer v. Univ. of Houston*, 860 F.3d 767, 773 (5th Cir. 2017) (students “have a liberty interest in their higher education”); *Flaim v. Med. College of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005) ("the Due Process Clause is implicated by higher education disciplinary decisions"); *Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019) (student adequately alleged that school deprived him of a constitutionally protected interest); *Jones v. Snead*, 431 F.2d 1115, 1117 (8th Cir. 1970) ("procedural due process must be afforded a student on the college campus"); *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975) ("We have no
difficulty in concluding” that such a right exists); Barnes v. Zaccari, 669 F.3d 1295, 1307 (11th Cir. 2012) (“the decisions of this court and the Supreme Court clearly established” that student had a constitutionally protected interest). Additionally, at least two other Circuits have accepted this as an assumption without debate. Winnick v. Manning, 460 F.2d 545, 548 (2d Cir. 1972); Butler v. Rector & Bd. of Visitors of the College of William & Mary, 121 F.App’x 515, 518-519 (4th Cir. 2005). This is also the view in the 3rd Circuit, where I live: See, Van Le v. Univ. of Medicine & Dentistry, 379 F.App’x 171, 174 (3d Cir. 2010) stating: “The Due Process Clause protects students during disciplinary hearings at public institutions.” As a result, district courts in the Third Circuit reject any suggestion that the due process rights Juan invokes against his public school do not exist. (Comp. 108, 134). See e.g. Furey v. Temple Univ., 884 F.Supp.2d 223, 246 (E.D. Pa. 2012) (“There is no dispute that the plaintiff, a student at a state-funded school, is entitled to procedural due process in a disciplinary action against him.”).

16 The implausible yet logical alternative to strengthening due process for all under Title IX would be to carve out an evidentiary standard exception from Title IX for not just Dreamers but also for other vulnerable populations, including students on the spectrum, students with severe ADHD, and students with diagnosed mental illness. These groups would then face hearings requiring “clear and convincing” evidence.

17See, e.g., Doe v. Univ. of the Sciences, 961 F.3d 203, 215 (3d Cir. 2020) (“USciences’s contractual promises of ‘fair’ and ‘equitable’ treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to crossexamine witnesses—including his or her accusers.”); Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 69 (1st Cir. 2019) (“[D]ue process in the university disciplinary setting requires ‘some opportunity for realtime cross-examination, even if only through a hearing panel.’); Doe v. Baum [University of Michigan], 903 F.3d 575, 581 (6th Cir. 2018); Doe v. Univ. of Cincinnati, 872 F.3d 393, 401 (6th Cir. 2017) (“‘The ability to cross-examine is most critical when the issue is the credibility of the accuser.’); Lee v. Univ. of New Mexico, 449 F. Supp. 3d 1071, 1128 (D.N.M. 2020) (“Lee did not receive a ‘meaningful opportunity to be heard’ because UNM did not allow for any cross-examination in determining credibility, and because UNM’s procedures unreasonably hindered Lee’s ability to present a meaningful defense.”); Doe v. Univ. of So. Miss., No. 2:18-cv-00153-KS-MTP, Docket 35 (S.D. Miss., Sept. 26, 2018) (“Writing a rebuttal after the testimony is complete is not the same as cross examination, which provides the opportunity to assess the person’s demeanor when asked certain questions and flesh out inconsistencies in a search for the truth.”); Doe v. Rhodes College, No. 2:19-cv-02336-JTF-tmp, Docket 33 (W.D. Tenn., June 14, 2019) (cross-examination right for accused students “invokes due process concerns under Title IX”); Doe v. Univ. of Miss., 361 F. Supp. 3d 597, 613 (S.D. Miss. 2019); Doe v. Univ. of Mich., No. 2:18-cv-11776-AJT-EAS, Docket 30, (E.D. Mich. July 6, 2018), rev’d on other grounds, 2019 WL 3501814 (6th Cir. Apr. 10, 2019); Doe v. Brandeis University., 177 F. Supp. 3d 561, 605 (D. Mass. 2016); Doe v. Univ. of S. Cal. (USC), 241 Cal. Rptr. 3d 146, 167 (Cal. Ct. App. 2018) (decision-maker must be able to see witness respond to questions); Doe v. Claremont McKenna Coll. (CMC) 25 Cal. App. 5th 1055, 1070 (Cal. Ct. App. 2018).