From: Troy Shinbrot
Sent: Sat, 29 May 2021 21:08:25 +0000
To: T9PublicHearing
Cc: (b)(6)
(b)(6)
Subject: Written Comment: Title IX Public Hearing (Final rule: denial of due process).
Attachments: FIRE Speech Code Memo re Rutgers Title IX policy agreement.pdf, NDA Evidence_Agreement-1.pdf

Dear Sir or Madam,
I would like to comment concerning the Public Hearing; Title IX of the Education Amendments of 1972. The DoE Title IX Final Rule (here) states that:
"The Department also takes no position on nondisclosure agreements that comply with these final regulations."
Some universities (e.g. Rutgers University, policy 60.1.33; NDA attached) have taken this to mean that they may impose a nondisclosure agreement on plaintiffs, which appears to impose prior restraint preventing use of evidence in future proceedings, and may deny plaintiffs' access to due process (independent legal analysis also attached). I urge the Department of Education to clarify or amend the Final Rule to make clear that evidence obtained in investigations of Title IX complaints cannot be withheld from future proceedings.
Thank you.
-Troy Shinbrot
Professor, Rutgers University
Senator, Rutgers University Senate
Representative, Rutgers Board of Governors
Affiliations for identification only; opinions are mine and not those of my employer or any organization

FIRE
Foundation for Individual Rights in Education

MEMORANDUM

To: Dr. Troy Shinbrot, Professor of Biomedical Engineering, University Senator, Faculty Representative to the Rutgers Board of Governors, Member Executive Committee, Rutgers AAUP
From: Susan Kruth, Director of Procedural Advocacy & Ryan Ansloan, Program Officer, Policy Reform, Foundation for Individual Rights in Education (FIRE)
Date: January 22, 2021
Re: Title IX Policy at Rutgers University

I. Introduction

This memorandum will provide the Foundation for Individual Rights in Education's (FIRE's) recommendations for how Rutgers University's (Rutgers') "Title IX Policy and Grievance Procedures" (Title IX Policy)[1] can be revised to better protect students' rights to free speech and expression and due process under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

FIRE is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

As a public institution, Rutgers is bound by the First, Fifth, and Fourteenth Amendments and must uphold its students' and faculty members' free speech and due process rights. The Title IX Policy is problematic because it contains a provision that prohibits parties involved in a Title IX proceeding from discussing elements of their case with outside parties.

II. Rutgers' Title IX Policy and Evidence Agreement

Despite its obligation, as a public university, to uphold students' and faculty members' constitutional rights, Rutgers' Title IX Policy contains two clauses with language amounting to a prior restraint on parties seeking to obtain evidence and other information critical to their proceeding.

The first relevant clause is excerpted below:

---

[1] *Title IX Policy and Grievance Procedures*, Rutgers Univ. (Aug. 14, 2020), https://uec.rutgers.edu/wp-content/uploads/60-1-33-current-1.pdf.

510 Walnut Street, Suite 1250 Philadelphia, PA 19106
phone: 215-717-3473 fax: 215-717-3440
thefire.org

> Prior to obtaining access to any evidence, the Parties and their Support Persons, Campus Liaisons, and Advisors must sign an agreement not to disseminate, photograph or otherwise copy any of the evidence obtained during the investigation or hearing process, and/or any of the testimony heard during the hearing for any purpose unrelated to the Title IX grievance process. Once signed, this agreement may not be withdrawn.[2]

A second clause contains similar language:

> Parties will be given access to the complete case file upon request prior to the hearing. The case file will contain the Investigation Report, information provided by the Parties, and any additional information gathered by investigators during the investigation that is directly related to the allegations in the Formal Complaint. Prior to obtaining access to any evidence, the Parties and their Support Persons, Campus Liaisons, and Advisors must sign an agreement not to disseminate any of the testimony heard or evidence obtained in the hearing or use such testimony or evidence for any purpose unrelated to the Title IX Grievance Process. Once signed, this Agreement may not be withdrawn.[3]

The agreement itself goes into further detail:

> **By signing this Agreement, Signatories agree not to print, copy, screenshot, photograph, or video the screen, make any audio or video recording a reading of the material, or otherwise use analog or technological methods, known or unknown, to capture the content of the records.[4]**
>
> [. . .]
>
> Each Signatory shall receive a separate link to access the records, and the links and records will not be re-shared or forwarded to anyone, including the Parties, Advisors, Campus Liaisons, and Support Persons, regardless of whether such person is also a Signatory to this Agreement.

As stated above, this policy and the associated agreement raise both free speech and due process concerns, which will now be evaluated in turn.

III. Free Speech

Rutgers' policy raises significant free speech concerns because it prevents either party involved in a proceeding—accuser or accused—from speaking to others, publicly or privately,

---

[2] *Id.* at 23.
[3] *Id.* at 25.
[4] AGREEMENT REGARDING EVIDENCE DISCLOSED IN A TITLE IX INVESTIGATION OR HEARING, RUTGERS UNIV. (on file with author) (bold in original).

about the incident in question. By proactively limiting the ability of parties to talk to others about the details of their proceeding, the clause amounts to a prior restraint on speech. The Supreme Court of the United States views such prohibitions on speech particularly unfavorably, stating that "[a]ny prior restraint on expression comes . . . with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Moreover, the Supreme Court has even stated that the "chief purpose" of the First Amendment was to prevent prior restraints on publication. *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

Rutgers' policy prevents any conversations involving "testimony heard or evidence obtained in the hearing . . . for any purpose unrelated to the Title IX Grievance Process." This is a sweepingly broad prohibition that could prevent parties from obtaining aid and support as they seek to navigate an already difficult process, or from sounding the alarm about problems within the university disciplinary system. Prohibitions like this are sometimes issued in the interest of helping to ensure a fair trial, but the Supreme Court has recognized that that concern must be balanced against First Amendment rights; consequently, such prohibitions face a heavy presumption against validity. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976) (holding unconstitutional a gag order that prohibited those attending a trial from sharing what they heard).

The case for prior restraint is perhaps strongest in cases implicating national security, and even under some such circumstances, the Supreme Court has struck down limitations on publication. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (holding that the United States could not enjoin *The New York Times* from publishing the so-called Pentagon Papers, which detailed decision-making during the Vietnam War). Rutgers' desire to limit public discussion of Title IX cases does not trump the rights of students to discuss these cases.

Rutgers cannot infringe on students' First Amendment right to speak about their cases simply because it may make implementing the disciplinary process easier for administrators.

IV. Due Process

The provisions quoted above are also likely to impede a student's ability to prepare for his or her case, making it more difficult for that student to receive due process. Particularly in the present moment, when so much communication must take place remotely in order to be safe, it is unacceptable to prohibit making digital copies in any form and sharing them "regardless of whether such person is also a Signatory to this Agreement." Advisors must have access to these records, including evidence, in order to serve their purpose as advisor. Disallowing a student from, for example, emailing her advisor a copy of the complaint with her own notes on it serves only to hinder the student's preparation process, and does not in any way affect any student's privacy or Rutgers' ability to administer a fair hearing.

Aside from the First Amendment implications of this policy, it is critically important for information—including "capture[d] content" of records relating to a case—to be able to flow back and forth between each student and his or her advisor. Otherwise, the student will not

have a meaningful opportunity to prepare his or her case, an essential element of a fundamentally fair disciplinary proceeding. To limit students and advisors as Rutgers has done here is not compatible with its obligations to provide due process to students before disciplining them.

V. Conclusion

The prior restraint effected by Rutgers University's policy restricts fundamental free speech and due process rights. Rutgers must immediately rescind the provisions discussed above and ensure that parties to a proceeding have unfettered access to the complete case file and all evidence upon request.

RUTGERS
UNIVERSITY | NEW BRUNSWICK

Office of Student Affairs Compliance & Title IX
Rutgers University–New Brunswick
2 Richardson St
New Brunswick, NJ 08901

http://compliance.rutgers.edu
NBTitleIX@rutgers.edu

p. 848-932-8200

Agreement Regarding Evidence Disclosed in a Title IX Investigation or Hearing

I. Signatories to the Agreement

This Agreement is made between Rutgers University and _____, who is a Party/Advisor of Choice/Support Person/Campus Liaison in Case No. _____.

II. Scope of the Agreement

This Agreement governs access to evidence as specifically provided in the 2020 U.S. Department of Education Final Rule on Title IX of the Education Amendments of 1972 (Regulations), 85 Fed. Reg. 30026 (May 19, 2020), and the Rutgers University Title IX Policy and Grievance Procedures (Title IX Policy). The Title IX Policy is developed and enforced according to Rutgers' obligations under the U.S. Department of Education's Final Title IX Rule of May 19, 2020 (you may view the Final Rule at http://bit.ly/TitleIXReg).

Parties (complainant(s) and respondent(s)) may generally discuss *the allegations* under investigation with a parent, friend, advocate, or other source of emotional support. They may also speak with their Advisor, Support Person and/or Campus Liaison about the facts and evidence of this case. **However, this Agreement prohibits Parties from discussing information that *does not consist of* the allegations under investigation, including evidence related to the allegations that has been collected and exchanged during the investigation, or the draft or final investigative reports prepared by the Title IX Office with anyone other than their Advisor, Support Person or Campus Liaison**. *See*, 85 Fed. Reg. 30295-30296. **This Agreement also prohibits the sharing of evidence and investigation reports to which they have been provided access during the course of the investigation and/or hearing process, except as specifically provided below.**

This Agreement shall survive any amendments to or withdrawal of the Title IX Final Rule and/or any amendments to or withdrawal of University policy. It may not be revoked.

III. Evidence Sharing Process

Pursuant to the Title IX Policy, Rutgers will provide access to the evidence and investigation report prior to the hearing. These records are protected by federal and state privacy laws (including FERPA). Applicable laws and regulations as well as Rutgers Policy strictly limit re-disclosure and require that access and use of such records be only and strictly for the purposes delineated in the Regulations.

As described in the Title IX Policy, Rutgers will provide Parties and Advisors, Support Persons or Liaisons ("Signatories") access to view the evidence and investigation report, provided that that person first submit a signed copy of this Agreement to the Title IX Office. Access to these records will be provided via Box, which student Parties may access using their Rutgers email account. All printing, sharing, editing, or deleting functions will be disabled in Box. **By signing this Agreement, Signatories agree not to print, copy, screenshot, photograph, or video the**

Office of Student Affairs Compliance & Title IX
Rutgers University–New Brunswick
2 Richardson St
New Brunswick, NJ 08901

http://compliance.rutgers.edu
NBTitleIX@rutgers.edu

p. 848-932-8200

screen, make any audio or video recording a reading of the material, or otherwise use analog or technological methods, known or unknown, to capture the content of the records.

Upon request by a Party or Advisor, Rutgers shall provide paper copies of the records at a hearing which may be utilized by such individuals.

IV. Security and Confidentiality Protocols

All Signatories agree that they will maintain a password or other security on any device they use to access the evidence and investigation report. They further agree that they will not re-share or re-disclose access to these records or their password or security process used to access the records to any person, including family, friends, those with whom they live, witnesses, or other parties. Each Signatory shall receive a separate link to access the records, and the links and records will not be re-shared or forwarded to anyone, including the Parties, Advisors, Campus Liaisons, and Support Persons, regardless of whether such person is also a Signatory to this Agreement.

Further, Parties and Advisors agree that they will not physically share the space for review with any person, other than each other, with the limited exception that Advisors may physically share the space looking at the records with other persons in their professional capacity who are assisting them in preparing for their role as an Advisor in this case (for instance, an associate in a law firm). The Advisor is responsible for requiring that the additional person or persons who access the content alongside the Advisor comply with the terms of this Agreement.

V. Waiver of Disclosure to Advisors

By default, access to records will be shared with Advisors who have been designated in writing by the Parties. If a Party DOES NOT want the records shared with their Advisor (as allowed under the Regulations), they must indicate such request in writing to the Title IX Coordinator.

VI. Disability Accommodations

If a Signatory discloses a disability under the Americans with Disabilities Act (ADA) that requires a different method of providing access to the records, Rutgers will work with that Signatory to provide access to the records. Signatories may contact the Title IX Coordinator to disclose a disability and request accommodations. Rutgers encourages all Signatories who may need a disability-related accommodation related to records access to contact the Title IX Coordinator as soon as possible so that arrangements can be made with minimal delay to the process.

VII. Discipline and Sanctions for Violations of the Agreement

If Rutgers learns of a re-disclosure of or improper access to records by a Signatory, it may bring charges against them pursuant to the Code of Student Conduct or other applicable university policies. Penalties for violation of this Agreement by Parties, whether knowing or negligent, may include sanctions under the Code of Student Conduct, and for other Signatories, may include

Office of Student Affairs Compliance & Title IX
Rutgers University–New Brunswick
2 Richardson St
New Brunswick, NJ 08901

http://compliance.rutgers.edu
NBTitleIX@rutgers.edu

p. 848-932-8200

ineligibility for a term or permanent ineligibility to serve as an Advisor, Liaison, or Support Person, or in future cases.

For Advisors, Campus Liaisons and Support Persons (who are not students), evidence of violation(s) of this agreement will be gathered by the Title IX Coordinator, Director of Student Conduct, or a designee of either and presented to the Vice Chancellor for Student Affairs or designee. The Advisor/Campus Liaison/Support Person may provide an explanation or alternative evidence in writing for consideration within ten (10) calendar days of receipt of a notice of a charge of re-disclosure or improper access to records. There shall be no right to a live hearing, oral testimony, or cross-examination. The Vice Chancellor for Student Affairs or designee shall consider the evidence under a preponderance of the evidence standard and issue a finding in writing and, if the finding is Responsible, shall include a Sanction. The finding shall be issued in writing to all Parties and the Signatory alleged to be in violation of this Agreement within fifteen (15) calendar days unless extended for good cause. There is no appeal of this finding. Sanctions shall be higher for intentional re-disclosure of records than for negligent re-discourse. In the event that an Advisor is barred permanently or for a term from serving in the role as Advisor in the future, they may request a review of that bar from the Vice Chancellor for Student Affairs no earlier than three-hundred and sixty-five (365) days after the date of the findings letter.

These rules and standards apply equally to all Signatories regardless of sex, gender, or other protected class, and regardless of whether they are in the role of or assisting the Complainant or Respondent.

_____

Name (printed or typed)

_____

Signature (or electronic signature)

_____

Date