

From: William Sam Sneed
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Written Comment of William R. Sneed, III, Independent Education and Career Consultant, on the Department of Education's Office for Civil Rights June 7 to 11, 2021 Public Hearing Addressing the Current Title IX Regulations Adopted in May of 2020 – Submitted June 11, 2021

Thank you for the opportunity to provide this written comment for the Office of Civil Rights (OCR) public hearing on the current Title IX regulations adopted by the Department of Education in May of 2020 (Current Regulations).

I believe I bring a unique and well-informed perspective in addressing the Current Regulations.

While I am a licensed attorney and taught a continuing legal education course for lawyers on Title IX and sexual misconduct for five years pre-COVID-19, for the past 7 years I have been an independent education and career consultant. I have earned a national reputation helping students apply to college, transfer between colleges, apply to graduate and professional schools and secure employment with some kind of academic, student conduct, criminal or Title IX/sexual misconduct issue in their background.

In the Title IX/sexual misconduct area I have helped over 250 students who believe they were wrongly or falsely accused and then wrongfully found responsible by their schools in an adjudicatory process that failed to provide them with a fair hearing and adequate due process – and these were virtually all in processes governed by Title IX rules in place prior to the Current Regulations. They are young men and women who represent virtually every political, ideological, socio economic, race, ethnic, and gender identity. In working closely with them and their families I have observed firsthand the tremendous damage caused to them and their families by a wrongful or false allegation and then a wrongful finding and sanction.

They are primarily damaged in three ways: their mental health, education experience and financial health.

Upon being wrongfully or falsely accused these students experience tremendous anxiety and depression. They are often immediately ostracized in their school communities, removed and shunned from their friend groups, and campus activities such as varsity and club sports, clubs, sororities and fraternities. Despite what is supposed to be a confidential process many quickly are named in postings accusing them of sexual assault on social media and even in school newspapers. Their otherwise fine online reputations are instantly damaged with the first link on their search results often an article or social media post containing the wrongful and false accusations. This reputation damage dramatically

affects their ability to achieve their social, education and career goals. Many experience suicidal ideation and require extensive and intensive in and outpatient therapy. Their education experience is immediately affected, and their grades usually decline, sometimes precipitously. And all this occurs **before** they are wrongly found responsible and sanctioned often with long suspensions and expulsions with the results on their transcript for years. After such findings and sanctions their mental health often deteriorates further as they struggle to gain admission to a new school, think about whether they will ever achieve their life-long career objectives such as medical school (a virtual impossibility with a Title IX finding and sanction) and try to process how an innocent individual could have all of this happen to them in the United States where they supposedly are protected by our foundational constitutional protections, most importantly due process.

They and their families also experience life-altering financial ramifications. These include loss of tuition, loss of scholarships, expenses for mental health counseling, retaining civil and in some cases criminal attorneys, and education and online reputation consultants. I have seen such expenses even force families into selling their homes to help their child try to re-claim their reputation and education, career, and life trajectory.

I recognize and applaud President Biden for his many years of hard work to combat sexual violence against women and his efforts to address sexual harassment and assault on our nation's school campuses. There is no question that sexual harassment and assaults do occur on school campuses just as elsewhere in our society. There is also no question that for years many of our nation's schools failed to take seriously students' claims of sexual harassment and assault. I strongly believe, however, that the Obama era Title IX rules to which the Biden administration has indicated it wants to return, failed to provide fundamentally fair adjudicative processes and adequate due process, particularly for respondents.

Based on my vast experience in this area, I strongly believe the due process safeguards in the Current Regulations must be preserved in any new policies the Department of Education seeks to promulgate. I believe any new policies must include the presumption of innocence, elimination of the single investigator model, timely notice of all charges, truly impartial proceedings, full access to evidence, and a live hearing with cross examination by each party's selected advisors, preferably experienced lawyers who are sensitive to and knowledgeable about best practices in cross examining parties in sexual assault matters.

This last safeguard is especially important. Many student claims arise out of alcohol and drug fueled partying and late-night sexual encounters where the only eyewitnesses are the claimant and respondent. The critical credibility determination often drives the outcome. The United States Supreme Court and many lower courts have observed that the best way to get to the truth in such circumstances is cross examination. I recognize that opponents of the Current Regulations often focus their complaints on the live hearing and cross examination requirements. I understand the challenge of having one's most intimate moments examined. I have worked with over 250 students who have had to recount in excruciating detail the most intimate moments of their sexual lives to their parents, their lawyers, school investigators and panels and me. If a student believes they were sexually harassed or assaulted and makes such serious allegations with life-altering consequences for the other student, however, I believe it is reasonable for them both to appear at a live hearing with the support of their advisors and be questioned about their respective versions of what transpired by an experienced and sensitive practitioner.

It is important to recognize that the modern trend of federal and state courts is to require such live hearings and cross examination as part of school due process safeguards. Some 24 appellate decisions now require such safeguards in their jurisdictions. These decisions are set forth in footnote number 3 to the comment filed by Eric Rosenberg, Esquire, K.C. Johnson and Kimberly Lau, Esquire to which I have added my name: <https://kcjohnson.files.wordpress.com/2021/06/20210604-comment-on-proposed-title-ix-rulemaking-1.pdf> .

I want to address an additional important topic, the evidentiary standard in school Title IX proceedings. Prior to the Obama era Title IX rules many schools required clear and convincing evidence in disciplinary hearings where a student could be sanctioned with suspension and expulsion thus depriving them of access to their school's education program and activities and dramatically impacting their education and career goals with the attendant mental health and financial ramifications. This often happened in academic areas such as plagiarism or honor code violations. The Obama era Title IX rules made a significant change requiring only a preponderance of the evidence standard – in other words more likely than not – when claimants alleged sexual harassment or assault. This occurred even though such allegations often constitute crimes and carry more severe life-long ramifications. Under these rules student respondents met a system often utilizing "trauma-infused" and "victim-centered" processes where there was a strong bias to believe the complainant and a preponderance standard. It is almost impossible to be found not responsible in such a process regardless of one's innocence. Thus, I believe careful consideration should be given to requiring a clear and convincing standard in sexual harassment and assault matters when the conduct at issue could result in long suspensions and expulsions. And especially if the Department of Education cuts back on the due process safeguards in the Current Regulations.

In conclusion, I strongly believe that the Department of Education should preserve the Current Regulations and particularly the live hearing and cross examination requirements found at 34 C.F.R. § 106.45(b)(6). In the event these requirements are weakened or removed, I strongly believe the standard of evidence should be changed to the clear and convincing standard.

William R. Sneed, III, Esquire
Independent Education and Career Consultant

(b)(6)

