HEARING BEFORE THE SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS
"REAUTHORIZING HEA: ADDRESSING CAMPUS SEXUAL ASSAULT AND ENSURING STUDENT SAFETY AND RIGHTS"

TESTIMONY OF PATRICIA M. HAMILL, ESQUIRE, CONRAD O'BRIEN P.C.[1]

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I. INTRODUCTION

As Congress considers reauthorizing the Higher Education Act (HEA), I have been asked to testify before this committee on what a fair process in a campus disciplinary proceeding involving alleged sexual assault should include. I thank you for this opportunity.

I bring a unique perspective to these issues, and a deep understanding of the challenges faced by all the interested parties. I am a partner at the Philadelphia law firm Conrad O'Brien, P.C., and Chair of the firm's nationwide Title IX, Due Process and Campus Discipline practice. I am also a feminist, married to a woman, graduate of a women's college, and the mother of two teenage sons and a daughter who is in college. Given my personal background it may seem incongruous that I have, over the past six years, represented more than a hundred students and academic professionals, mostly men, who have been accused of various levels of sexual misconduct. But it is a fundamental principle of American jurisprudence that all persons are entitled to a fair hearing. My task as an attorney is to advocate for fair, objective, and reliable Title IX proceedings, and I see that as a nonpartisan issue.

Before addressing the question of fair process, I want to draw attention to the fact that many of the campus procedures now in place are an effort to correct for decades of sexual assault claims not being taken seriously or, worse, being completely ignored. I want to be perfectly clear. Sexual assault on and related to college campuses is a serious problem. I am heartened whenever women (and, though less commonly, men) come forward and speak up, when their concerns are taken seriously and properly investigated, and when they are given the support they need both during and after a disciplinary process, regardless of the outcome.

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However, we must be careful not to allow current disciplinary processes to be marred by the sins of the past, however oppressive and heinous they may have been. The corrective to inadequate responses to sexual assault, whether past or present, is not to presume that accused people are guilty, deprive them of the ability to defend themselves, and punish them without a full consideration of the facts from both parties' perspectives. I am concerned by the national polarization on these topics, and by the apparent assumption by many that measures to give accused people – usually men – a fair hearing are a strike against justice for women. Title IX prohibits gender discrimination, and the effort to correct discrimination against one gender does not justify discrimination against others. What is often missing from the public discourse is an understanding that misconduct occurs on a spectrum, and often there are plausible competing narratives and no independent witnesses or corroborating evidence. Many cases involve encounters between young people who are sexually inexperienced, are engaged in the casual hook-up culture prevalent on campuses, or both. They may have misread or misinterpreted each other's feelings or intent. Often both parties have consumed alcohol or drugs, further diminishing their ability to make clear decisions, communicate effectively, or remember what happened. In addressing contested cases – whether they involve sexual or any other form of serious misconduct – our nation's fundamental values require fairness to both parties, a thorough and impartial investigation, and a fair hearing before impartial decisionmakers.[2]

In the words of one judge, commenting on college disciplinary procedures that "appear[] to have substantially impaired, if not eliminated, an accused student's right to a fair and impartial process," "it is not enough simply to say that such changes are appropriate because victims of sexual assault have not always achieved justice in the past. Whether someone is a 'victim' is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. Each case must be decided on its own merits, according to its own facts. If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision. Put simply, a fair determination of the facts requires a fair process, not tilted to favor a particular outcome, and a fair and neutral fact-finder, not predisposed to reach a particular conclusion." *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016).

[2] As the American Civil Liberties Union has observed: "Conventional wisdom all too often pits the interests in due process and equal rights against each other, as though all steps to remedy campus sexual violence will lead to deprivations of fair process for the respondent, and robust fair process protections will necessarily disadvantage or deter complainants. There are, however, important ways in which the goals of due process and equality are shared. Both principles seek to ensure that no student—complainant or respondent—is unjustifiably deprived of access to an education. Moreover, both parties (as well as the schools themselves) benefit from disciplinary procedures that are fair, prompt, equitable, and reliable." ACLU Comment, https://www.aclu.org/letter/aclu-comments-title-ix-proposed-rule.

Providing a fair process and impartial decisionmakers will make each individual disciplinary proceeding and outcome more reliable, and will benefit complainants, respondents, schools, and their officials. At the same time, our focus should not simply be on addressing situations after-the-fact: as a nation, we should consider other steps to address the conditions and attitudes that lead to contested sexual assault complaints, including excessive use of alcohol and drugs, and to provide more effective education on consensual sexual conduct.[3]

I present my comments as follows. First, I give some historical background – how did we get where we are today, and how and why is the federal government involved? (Pages 4-7). As discussed below, starting in 2011, U.S. Department of Education guidance and other federal government initiatives have changed the way sexual assault is adjudicated on school campuses. Concerns have been growing, however, that procedures developed to address sexual assault allegations are not effective for people who report sexual assault, are eroding fundamental protections for people who are accused, and are undermining the legitimacy of campus disciplinary proceedings and outcomes. These concerns have been voiced in public and scholarly commentary, by universities and colleges, in an increasing number of opinions from federal and state courts, in several state legislatures, and in new guidance and proposed Title IX regulations from the Department of Education.

Second, I give a brief overview of the Department of Education's current approach, including its proposed Title IX regulations, and how the proposed regulations match up with my experience and recommendations. (Pages 7-10). Overall, I support the Department's efforts to

[3] I share the concern that many women have been subjected to inappropriate conduct. However, the claim that one in five women is sexually assaulted in college, a claim that has been the basis for advocacy efforts, disciplinary processes, and government policy decisions, is based on anonymous surveys, not scientific studies, and has been seriously challenged. *E.g.*, https://www.washingtonpost.com/news/fact-checker/wp/2014/12/17/one-in-five-women-in-college-sexually-assaulted-an-update/?utm_term=.7f211e30541e; https://www.washingtonexaminer.com/no-1-in-5-women-have-not-been-raped-on-college-campuses; http://www.slate.com/articles/double_x/doublex/2015/09/aau_campus_sexual_assault_survey_why_such_surveys_don_t_paint_an_accurate.html. The Bureau of Justice Statistics' National Crime Victimization Survey reports a much lower rate of sexual assault: 6.1 per 1000 female students from 1995 to 2013, with the rate trending downwards. https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf. Advocates for reported victims also often suggest false accusations of sexual assault are rare. This too has been disputed, has been undermined by some high profile cases, and does not appear to take into account the wide spectrum of situations in which complaints can arise. But let's not let the mission of this committee be sidetracked by surveys and statistics, whether reliable or not. Even one assault is too many. My point here is about ensuring a fair process. Regardless of the accuracy of surveys, the decision in any particular case should be based on the facts of that case, objectively and fairly assessed.

align Title IX regulatory requirements with basic principles of justice, with court precedent requiring fair procedures for people accused of serious misconduct, and with Title IX's proscription of *all* gender discrimination. I also support the Department's proposal to give schools and parties more flexibility to pursue informal, non-punitive resolutions. At the same time, commenters have expressed legitimate concerns about some of the proposed provisions, particularly the definitions and conditions that give rise to schools' duty to respond, and there is room for discussion and compromise.

I conclude by identifying key procedural protections which, under our nation's system of law, are required for fair and reliable determinations, including notice, impartial decisionmakers, thorough and fair investigations where both exculpatory and inculpatory evidence is gathered and considered, a meaningful opportunity to be heard (including the opportunity for the parties to present their positions and confront the testimony against them in a live hearing before decisionmakers), a presumption that the respondent is not responsible unless the applicable standard of proof is met, decisions based on the facts of the particular case, and, if there is a finding of responsibility, sanctions proportionate to the conduct. (Pages 10-15).

II. HISTORICAL BACKGROUND

Title IX of the Education Amendments of 1972 provides that "[n]o 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 . . . ."[4] As interpreted by federal courts, gender discrimination under Title IX includes sexual assault and sexual harassment. The United States Department of Education's Office of Civil Rights (OCR) is the federal agency in charge of enforcing Title IX compliance.

Starting in 2011, the federal government began to take aggressive steps to combat what it viewed as an epidemic of sexual assault on college campuses, focusing on countering discrimination against women. On April 4, 2011, OCR issued a "significant guidance document" known as the 2011 "Dear Colleague letter," stating that "about 1 in 5 women are victims of completed or attempted sexual assault while in college" and setting forth steps schools should take to end sexual harassment and violence.[5] Among other things, the letter defined sexual harassment broadly as "unwelcome conduct of a sexual nature," conflating cases based on conduct with cases based on speech;[6] stated that "mediation is not appropriate even on a

[4] 20 U.S.C. § 1681(a).

[5] *Letter from Russlynn Ali, Ass't Sec'y for Civil Rights, U.S. Dep't of Educ., OCR*, at 2 (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[6] *Id.* at 3.

voluntary basis" in cases involving alleged sexual assault;[7] directed schools to ensure "steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant";[8] directed schools to take interim steps to protect complainants and "minimize the burden on the complainant";[9] "strongly discourage[d]" schools from allowing cross-examination of parties; [10] and urged schools to focus on victim advocacy.[11] The letter also stated that schools "must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred)," and must not use the "clear and convincing standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred.)."[12]

Although the letter was framed as "guidance" and did not go through the procedures required for formal, binding regulations, much of its language – including the standard of proof provision – is mandatory. And the letter specifically warned that "[w]hen a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation."[13]

In 2014, OCR released additional guidance in which it reiterated many of the directives set forth in the 2011 Dear Colleague Letter, including the injunction to "ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant."[14] The same year, a White House Task Force was created, co-chaired by the Office of the Vice President and the White House Council on Women and Girls, with a mission "to tell sexual assault survivors that they are not alone" and "help schools live up to their obligation to protect students from sexual violence."[15] The Task Force's first report

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[7] *Id.* at 8.

[8] *Id.* at 12.

[9] *Id.* at 15-16.

[10] *Id.* at 12.

[11] *Id.* at 19 n.46.

[12] *Id.* at 11.

[13] *Id.* at 16.

[14] *Questions and Answers on Title IX and Sexual Violence*, https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[15] *Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault*, p.2, https://www.justice.gov/ovw/page/file/905942/download.

opened with the claim that "[o]ne in five women is sexually assaulted in college," stated that the federal government was ramping up Title IX enforcement efforts, and stressed again that schools found in violation of Title IX risked losing federal funding.[16] Among other things, the Task Force supported the use of a single investigator model, which generally involves one school official serving as investigator, prosecutor, and decisionmaker and severely limits the respondent's ability to challenge the complainant's account.[17] The Task Force also encouraged colleges and universities to provide "trauma-informed" training for their officials, stating that "when survivors are treated with care and wisdom, they start trusting the system, and the strength of their accounts can better hold offenders accountable."[18] The report stated that the Justice Department, through its Center for Campus Public Safety and its Office on Violence Against Women, was developing trauma-informed training programs.[19] Ultimately, the Department of Justice funded a "Start by Believing" campaign that seeks to train investigators to investigate cases from an initial presumption of guilt and write reports "that successfully support the prosecution of sexual assault cases", including by presenting events "from the victim's perspective"; focusing on evidence that "corroborate[s] the victim's account"; focusing on "what the victim was thinking and feeling;" and "always us[ing] the language of non-consensual sex."[20]

On May 1, 2014, as part of its aggressive enforcement, OCR published a list of 55 higher education institutions nationwide that were under investigation for possible Title IX violations.[21] According to the Chronicle of Higher Education, that number eventually grew to over 500.[22]

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[16] *Id*. at 2, 17.

[17] *Id.* at 3, 14.

[18] *Id.* at 3.

[19] *Id.*

[20] *See* End Violence Against Women International (EVAWI), *Effective Report Writing: Using the Language of NonConsensual Sex*, at 5, 10, 14 https://www.evawintl.org/library/DocumentLibraryHandler.ashx?id=43 (emphasis original); Campus Action Kit, *Start by Believing*, https://www.startbybelieving.org/wp-content/uploads/2018/08/Campus-Action-Kit.pdf.

[21] *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations* (May 1, 2014), https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations.

[22] *Title IX, Tracking Sexual Assault Allegations*, Chronicle of Higher Education, https://projects.chronicle.com/titleix/.

In response to the federal government's directives and enforcement activities, schools have adopted special policies for disciplinary proceedings involving alleged sexual misconduct. The policies are administered by designated officials and include investigatory and decision-making processes, evidentiary standards, and appeal processes based on OCR's actual and perceived requirements. In many instances, the policies and processes are very different from those used to resolve other campus disciplinary matters, including matters involving allegations of serious non-sexual misconduct. Many schools have gone even further than OCR's specific directives, essentially eliminating due process protections for respondents – the great majority of whom are male – in proceedings involving alleged sexual misconduct. Trauma-informed and "#BelieveWomen" approaches have been applied in ways that lead school officials (and the community at large) to presume that an alleged assault occurred or that a complainant's account of an incident must be true. Students and academic professionals are suspended, expelled, or pushed out of their positions without meaningful notice or opportunity to be heard, and are left with records that permanently brand them as sexual offenders, devastate them personally, and severely impact their educational and career opportunities. In this age of social media and the internet, the mere mention of a sexual misconduct accusation can have the same negative and ongoing effects as a finding of responsibility, even if the accused is exonerated.

Since 2011, some 400 students have filed lawsuits asserting that their schools disciplined them for alleged sexual misconduct without providing a fair process or following the schools' own procedures. In over 100 of those cases, federal and state courts have written opinions raising concerns about the lack of meaningful procedural protections in campus Title IX proceedings.[23]

III. THE DEPARTMENT OF EDUCATION'S CURRENT APPROACH

In response to the developing case law and escalating concerns that individual Title IX complaints are not being justly resolved, the Department of Education has modified its position on Title IX enforcement. In September 2017, it withdrew the 2011 Dear Colleague Letter and the 2014 Questions and Answers on Title IX Sexual Violence, and released a new interim Q&A on Campus Sexual Misconduct to guide schools on how to investigate and adjudicate allegations

[23] For a sampling of articles and court opinions expressing concerns about the erosion of procedural protections, see Foundation for Individual Rights in Education (FIRE), *Mountain of evidence shows the Department of Education's prior approach to campus sexual assault was "widely criticized" and "failing"* (Nov. 15, 2018), https://www.thefire.org/mountain-of-evidence-shows-the-department-of-educations-prior-approach-to-campus-sexual-assault-was-widely-criticized-and-failing/; *see also* Comments of Eric Rosenberg, Cynthia Garrett, Kimberly Lau, and KC Johnson on proposed Title IX regulations (Jan. 8, 2019), https://www.regulations.gov/document?D=ED-2018-OCR-0064-6244 (discussing case law foundations for many provisions in the proposed Title IX regulations). I have included FIRE's summary of cases in an appendix, along with more detailed summaries of key cases cited in the FIRE article and cases decided since the article was published.

under federal law. In November 2018, it issued a Notice of Proposed Rulemaking including proposed amended Title IX regulations.[24] Over 100,000 comments have been filed by legislators, colleges, students, attorneys, and other organizations and citizens, and the Department is in the process of digesting and considering them.

Broadly speaking, the proposed regulations have three aspects: first, definitions and conditions that activate a school's obligations under Title IX; second, provisions giving schools more flexibility to take constructive, non-punitive steps to resolve specific concerns and prevent recurrence of inappropriate behavior while still ensuring that both parties can pursue their education; and third, procedural protections required for formal Title IX proceedings.

Along with a number of colleagues, I have submitted detailed comments on the proposed regulations.[25] Overall, I support the Department's efforts to align Title IX regulatory requirements with basic principles of justice and court rulings calling for fair procedures for individuals accused of serious misconduct, including the specific procedures I discuss below. As the Department has acknowledged, Title IX is concerned with all forms of gender discrimination, and a school's treatment of either a complainant or a respondent in connection with a sexual harassment complaint may constitute discrimination on the basis of sex. Discrimination in favor of complainants, who are almost always female, and against respondents, almost always male, is pervasive in campus Title IX proceedings, and the proposed regulations take crucial steps toward addressing it. Even apart from the regulations, courts are requiring schools to protect due process and avoid gender discrimination. To the extent Congress considers legislation to address these issues, any provisions must be constrained by constitutional principles and other statutory

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[24] *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

[25] *See* Comments of Concerned Lawyers and Educators in Support of Fundamental Fairness for All Parties in Title IX Grievance Proceedings, signed by 40 practicing lawyers and professors (Jan. 28, 2019), https://conradobrien.com/uploads/attachments/cjrjac2cb0cmt01iw4vzo4aev-comments-of-concerned-lawyers-and-educators-in-support-of-fundamental-fairness-for-all-parties-in-title-ix-grievance-proceedings-1-28-2019.pdf; Comments of Patricia M. Hamill (Jan. 28, 2019), https://conradobrien.com/uploads/attachments/cjrjaco9u0cmszciwf8gq9jfj-comment-of-p-hamill-on-proposed-title-ix-regulations-1-28-2019.pdf. In my individual comments, I set forth scenarios drawn from cases involving accused students to illustrate why procedural reforms are so badly needed. Other comments to the regulations include personal stories reinforcing this point. Some involve students who were found responsible after a blatantly unfair proceeding. In others, the accused student was ultimately exonerated, but still suffered significant and lasting damage due to the mere fact of the accusation or how the proceedings were handled.

protections. A society dedicated to equal justice under law cannot function if we abandon basic fairness and due process principles in reaction to particular types of cases.[26]

I also support the Department's proposal to give complainants who report conduct covered by Title IX a meaningful choice between a formal Title IX process or an alternative dispute resolution, and the corresponding requirement that schools provide supportive, non-punitive individualized services designed to restore or preserve both parties' access to the school's education programs and activities, whether or not formal proceedings are pursued. The Department's expressed goal is not to limit protections for complainants, but to provide more options, acknowledging that college students are adults and different resolution processes may be appropriate for different individuals and different situations.[27] As I said before, the facts in many contested sexual misconduct cases are nuanced and complicated. I agree with the Department's observation, based on "feedback from many stakeholders," that "often the most effective measures a recipient can take to support its students in the aftermath of an alleged incident of sexual harassment are outside the grievance process and involve working with the affected individuals to provide reasonable supportive measures that increase the likelihood that they will be able to continue their education in a safe, supportive environment." [28] Informal resolution processes are equally, if not more, appropriate when a complainant reports conduct that is not

[26] The Department's confirmation, in proposed Section 106.45(a), that a school's treatment of either a complainant or a respondent may constitute discrimination on the basis of sex, is an essential step toward correcting the view that Title IX allows (or should even be interpreted to require) procedures that are biased in favor of "victims" (again, almost always women). Title IX proceedings should be fundamentally fair to all genders. Schools routinely argue in court proceedings that Title IX does not preclude "pro-victim" bias and some courts have accepted that argument, though others have not. *Compare, e.g., Doe v. University of Oregon*, No. 6:17-CV-01103-AA, 2018 WL 1474531, *15 (D. Or. Mar. 26, 2018) (suggesting that bias against an accused male would not violate Title IX if it "stemmed from a purely 'pro-victim' orientation," and that it would be lawful if a university, "in an attempt to change historical patterns of giving little credence to sexual assault allegations, has adopted a presumption that purported victims of sexual misconduct are telling the truth"), *with Noakes v. Syracuse Univ.*, No. 5:18-CV-43, 2019 WL 936875 (N.D.N.Y. Feb. 26, 2019) (holding that allegations of flawed and pro-complainant proceedings, in combination with allegations of general and university-specific pressure to believe complainants and crack down on accused offenders, suffice at the motion to dismiss stage to plead gender bias).

[27] 83 FR at 61462, 61470.

[28] 83 FR at 61470.

covered by Title IX, for example, conduct that is unwelcome but not necessarily severe or pervasive and does not constitute assault.[29]

At the same time, however, certain aspects of the proposed regulations have given rise to legitimate concerns, and there is room for clarification and compromise. In particular, in setting forth the definitions and conditions that give rise to a school's duty to respond under Title IX, the Department's apparent intent was to restrict formal Title IX proceedings to cases of alleged misconduct that interfere with a complainant's participation in an educational program or activity, consistent with the language of Title IX and with court decisions. But even commenters who welcome the Department's efforts to balance protection of alleged victims with due process protections have expressed concerns that the Department has gone too far in loosening schools' duty to respond. Counterproposals include, on the one hand, expanded definitions of sexual harassment and the conditions that give rise to a duty to respond, and, on the other, measures to ensure schools do not circumvent key procedural protections by handling cases of serious alleged misconduct outside of the Title IX process. While this is beyond the scope of the issues I was asked to address, I encourage lawmakers and the Department to consider the comments and requests for clarification regarding the Department's proposed definitions of sexual harassment and sexual assault (Section 106.30 of the proposed regulations), the "deliberate indifference" standard (Section 106.44(a)); and the standards for what constitutes conduct within a school's "education program or activity" (Section 106.44(a)).[30]

IV. PROCEDURAL PROTECTIONS REQUIRED FOR A FAIR AND RELIABLE PROCESS

The procedural protections I outline below are generally included in the Department's proposed regulations, though in some instances I propose modifications or clarifications. As I have emphasized, these protections are consistent with basic principles of justice and with

[29] Even commenters who oppose other aspects of the regulations have welcomed the provisions giving schools more power to pursue informal resolutions, including restorative justice or mediation. To quote just one of a number of similar comments: "Students and institutions alike desire the power to settle these disputes in a productive manner rather than being arbitrarily forced into a one-size-fits-all solution." Association of Governing Boards of Universities and Colleges, https://www.regulations.gov/document?D=ED-2018-OCR-0064-7550.

[30] While I am not presenting any particular solution to these concerns in this submission, I note suggestions made by Harvard professors Gersen, Gertner, and Halley, https://perma.cc/3F9K-PZSB; the ACLU, https://www.aclu.org/letter/aclu-comments-title-ix-proposed-rule; and Concerned Lawyers and Educators, https://conradobrien.com/uploads/attachments/cjrjac2cb0cmt01iw4vzo4aev-comments-of-concerned-lawyers-and-educators-in-support-of-fundamental-fairness-for-all-parties-in-title-ix-grievance-proceedings-1-28-2019.pdf.

rulings by many courts.[31] Most of them would be freely accepted in any other context, and many have not been the subject of specific objections (with notable exceptions such as the live hearing, cross-examination, standard of proof, and presumption of non-responsibility provisions, which I address below). While commenters have raised general concerns about the potential cost and complexity of these provisions, they are necessary for fair proceedings and can be avoided if schools and parties voluntarily pursue less formal resolutions. In addition, the disproportionate negative impact of sexual misconduct policies and proceedings on men of color has been well documented, and makes due process and other legal rights all the more important.[32]

1. Schools should offer supportive measures – "non-disciplinary, non-punitive individualized services . . . designed to restore or preserve access to the [school's] education program or activity" – to both parties, whether or not a formal complaint is filed.[33]

2. An interim suspension should be imposed only if a school determines, after an individualized analysis, that it is justified by an immediate threat of harm to students or employees, and the respondent should be given notice and an opportunity to challenge the decision immediately after the suspension is imposed. In addition to these protections (included in the proposed regulations),[34] an interim suspension should be allowed only if it is the least restrictive alternative, and the same standards and limitations should apply to the currently-routine practice of placing holds on accused students' transcripts or withholding their degrees while a disciplinary proceeding is pending. This practice can result in severe and unwarranted punishment even if the accused student is ultimately found not responsible.

3. Schools should give both parties timely and adequate notice of the applicable school policy or code provisions and their rights.[35]

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[31] Representative examples of court decisions affirming these rights in the context of Title IX disciplinary proceedings are included in the appendix.

[32] *See*, for example, Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, Harvard Law Review, https://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement-2/.

[33] Proposed Section 106.30.

[34] Proposed Section 106.44(c).

[35] The rest of these points are generally covered by proposed Section 106.45(b). Some points, including 17-20, include suggested modifications of the Department's proposals.

4. Schools should give respondents notice of complaints against them, including the factual allegations on which a complaint is based and the relevant provisions of the school's policy or code, before any initial interview and with sufficient time to prepare a response. Parties should also be notified if the school decides to investigate additional or different allegations or charges from those included in the initial notice.

5. Title IX coordinators, investigators, and decisionmakers should not have conflicts of interest, bias for or against complainants or respondents generally, or bias for or against a particular party.

6. Decisionmaker(s) should not be the same person(s) as the Title IX coordinator or the investigator(s).

7. Investigators, decisionmakers, and all other officials involved in Title IX disciplinary proceedings should be trained on the requirements of Title IX and the school's procedures. They should be trained to conduct impartial proceedings, not to rely on sex stereotypes, and to protect due process for all parties. In particular, while investigators may be appropriately trained to be sensitive in how they question parties, they should not be trained to presume alleged conduct occurred or to make credibility determinations based on presumptions about complainants or respondents.

8. Schools – not parties – should be responsible for gathering all relevant evidence, both inculpatory and exculpatory, and for evaluating it objectively. Credibility determinations should not be based on a person's status as a complainant, respondent, or witness.

9. Respondents should be given a presumption of non-responsibility. Such a presumption is a corollary to the standard of proof: whatever standard is ultimately adopted, if it is not satisfied the respondent should be found not responsible. An express statement of the presumption is necessary because college officials are commonly trained to presume a complainant's credibility.

10. The parties should have an equal opportunity to present witnesses and evidence and to be accompanied during the proceedings by an advisor of their choice.

11. The parties should be given written notice of all interviews, meetings, and hearings, with sufficient time to prepare.

12. The parties should be given an equal and meaningful opportunity to review, respond to, and present all evidence gathered during the investigation, both inculpatory and exculpatory.

13. The investigative report should fairly summarize relevant evidence, both inculpatory and exculpatory, and the parties should be given a meaningful opportunity to review and respond to the report.

14. Decision-makers should issue a comprehensive written determination based on an objective evaluation of the evidence. The determination should identify the relevant policy or code provision(s), describe the investigation, review the evidence, include findings of fact and conclusions as to how the code provisions apply to the facts, state the decision as to each allegation and the rationale for the decision, describe any sanction and the rationale for the sanction, and describe any support measures or remedies provided to the complainant.

15. The parties should receive timely written notice of their appeal rights, and an independent decisionmaker for the appeal.

16. Institutions of higher education should provide a live hearing and allow the parties' advisors to question the other party and witnesses. These provisions in the proposed regulations have provoked particular opposition. However, they are consistent with longstanding legal precedent and critical to a fair determination, ensuring that the parties can test, and decisionmakers can assess, the credibility and reliability of the parties and witnesses. The practice currently used at many schools, where parties can submit written questions, school officials decide what questions to ask, and decisionmakers may never even see the parties in person, is not an adequate substitute. Questioning should take place in real time, in the presence of both the parties and the decisionmakers. The written question process is artificially constrained and does not allow the questioner to flow with the testimony or effectively address new points as they come up. While some have expressed concerns that the prospect of live questioning will deter reporting of sexual misconduct, I have not seen evidence that this is true, and I note that respondents too will be subject to questioning and may decide to accept sanctions rather than undergo that process. Regardless, as I have said, I firmly believe complainants should be supported and taken seriously, but the goal of a particular disciplinary proceeding should be to determine whether the allegations in that case are true. Any assumption that a particular complainant is a victim of sexual misconduct and should not be questioned or effectively tested is not consistent with basic fairness. Schools can, should, and do adopt measures to ensure respectful treatment of parties and witnesses and prevent irrelevant, unfair, or badgering questions, and can also take steps to keep the parties separated.

17. If a Title IX proceeding continues while a criminal investigation is pending, a respondent's right to avoid self-incrimination must be protected and no adverse inference should be drawn if the respondent limits his participation or testimony.

18. Consistent with Federal Rule of Evidence 412, evidence of prior sexual history should be allowed if it is offered to prove that someone else committed the alleged conduct; if it concerns specific incidents of the parties' sexual conduct and is offered to prove consent, non-consent, welcomeness, or unwelcomeness; and if the "probative value [of the evidence] substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[36]

19. A uniform "clear and convincing evidence" standard of evidence should apply. Sexual misconduct charges carry the potential for life-long consequences, including permanent transcript notations that will forever impair a respondent's educational and career prospects. As courts have acknowledged, the preponderance of the evidence standard is not sufficient to protect against unreliable determinations.[37] The clear and convincing standard is essential to ensure that schools reach just results, not simply adopt fairer procedures on paper. Otherwise the risk is high that school officials, long steeped in a pro-"victim," anti-"perpetrator" approach, will continue to bow to widespread pressure to resolve grievances against respondents, and thus perpetuate the gender bias that pervades Title IX disciplinary processes now.

20. Regarding the Department's proposal that schools be required to dismiss a complaint that does not satisfy the standards in the regulations, some commenters have taken the position that the Department's provisions for formal Title IX grievance proceedings should establish a floor, not a ceiling, and that schools should remain free to respond to complaints of conduct that does not fall within the Department's definition of sexual harassment, that violates a school's own policies, etc. I believe this concept is built into the proposed regulations. If a school decides to provide recourse or support for other conduct, however, it should make supportive measures available to both parties, and any proceeding that could result in a respondent's

[36] Rule 412(b)(2). The proposed regulations include the first two conditions; I propose the third based on established rules of evidence and further propose that limits to inquiry into prior sexual history should apply to both parties.

[37] *See, e.g., Lee v. Univ. of New Mexico*, No. 1:17-cv-01230-JB-LF (D.N.M. Sept. 20, 2018); *Doe v. Univ. of Mississippi*, No. 3:16-CV-63-DPJ-FKB, 2018 WL 3570229, *11 (S.D. Miss. July 24, 2018) (allowing student to pursue claims against university based in part on use of preponderance standard to resolve sexual assault complaint). The proposed regulations would generally allow schools to choose whether to apply a preponderance or clear and convincing standard.

being deprived of access to a school's educational programs or activities should provide the procedural protections set forth above.[38]

V. CONCLUSION

While the erosion of due process protections in campus disciplinary proceedings has so far primarily impacted men, it is leading to injustice and insecurity for everyone. This is starkly illustrated by several recent cases in which women have been the accused or have argued that others should receive a fair process. In one reported case, two students had a sexual encounter while under the influence of alcohol. The woman was found responsible for sexual assault and was given a suspension to last as long as the man attended the school. She filed suit and asked the Court to enjoin the sanction, arguing that she was not given due process and that the school should have considered whether she was a victim herself, since both parties had been drinking. She lost her motion and then withdrew her lawsuit.[39] When a well-known feminist scholar was accused of sexually harassing a graduate student, other academics rallied around her, asked that she receive "a fair hearing," and stated their "objection to any judgment against her."[40] And the female CEO of an organization that grew out of the #MeToo movement stepped down after her son was accused of sexual misconduct, stating her intention to stand by him; the organization issued a statement reiterating its unequivocal support for survivors.[41]

I believe *both* complainants and respondents have a right to be heard. *Neither* has a right to be automatically believed. If we want fair processes for ourselves and our loved ones, we must support fair processes across the board, and not abandon our basic principles of justice because of the nature of the accused conduct or the unpopularity of the accused.

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[38] I am also concerned about students who have been found responsible under current processes that did not provide the basic protections necessary to ensure a fair result, and believe consideration should be given to offering them recourse. At the very least, a process should be available for persons found responsible to have their records expunged after a designated period, and there should be a time frame after which respondents are no longer required to report an adverse disciplinary ruling on an application for admission to another school.

[39] *Jane Roe v. U. of Cincinnati*, No. 1:18-cv-312 (S.D. Ohio Aug. 21, 2018), https://kcjohnson.files.wordpress.com/2018/08/roe-v-cincinnati-pi-denial.pdf.

[40] As reported by Nell Gluckman, *How a Letter Defending Avital Ronell Sparked Confusion and Condemnation*, Chronicle of Higher Education (June 12, 2018), https://www.chronicle.com/article/How-a-Letter-Defending-Avital/243650.

[41] David French, *The Great Due-Process Revival* (Feb. 25, 2019), https://www.nationalreview.com/corner/due-process-protections-metoo-movement/.

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APPENDIX

Following is an excerpt from an article by the Foundation for Individual Rights in Education, *Mountain of evidence shows the Department of Education's prior approach to campus sexual assault was "widely criticized" and "failing"* (Nov. 15, 2018), https://www.thefire.org/mountain-of-evidence-shows-the-department-of-educations-prior-approach-to-campus-sexual-assault-was-widely-criticized-and-failing/ (pages 17-19); additional information about the facts and holdings in some of those cases (pages 20-22); and a representative sampling of cases decided since the article was published (pages 22-23).

Excerpt from FIRE article:

> [S]ince 2011, approximately 117 federal courts, as well as a number of state courts, have raised concerns about the lack of meaningful procedural protections in campus adjudications. A number of those judges have put their concerns in particularly clear terms:
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> - *Doe v. Regents of the University of California*, No. B283229 (Cal. Ct. App. Oct. 9, 2018) ("It is ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy.").
> - *Lee v. University of New Mexico*, No. 17-cv-01230 (D.N.M. Sept. 20, 2018) ("[P]reponderance 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.").
> - *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) ("[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.").
> - *Doe v. University of Michigan*, 325 F. Supp. 3d 821 (E.D. Mich. 2018) ("Without a live proceeding, the risk of an erroneous deprivation of Plaintiff's interest in his reputation, education, and employment is significant.").
> - *Doe v. Trustees of Boston College*, 892 F.3d 67 (1st Cir. 2018) (holding that it is "reasonable for a student to expect that a basic fairness guarantee excludes having an associate Dean of Students request Board members to give special treatment to the prime alternative culprit in a case in which the key defense is that someone other than the accused student committed the alleged sexual assault").
> - *Doe v. Marymount University*, 297 F. Supp. 3d 573 (E.D. Va. 2018) ("[C]olleges and universities should treat sexual assault investigations and adjudications with a degree of caution commensurate with the serious consequences that accompany an

adjudication of guilt in a sexual assault case. If colleges and university do not treat sexual assault investigations and adjudications with the seriousness they deserve, the institutions may well run afoul of Title IX.").

- *Doe v. University of Notre Dame*, 2017 U.S. Dist. LEXIS 69645 (N.D. Ind. May 8, 2017) (in response to university's argument that lawyers were not required because its disciplinary process was educational, not punitive, judge wrote: "This testimony is not credible. Being thrown out of school, not being permitted to graduate and forfeiting a semester's worth of tuition is 'punishment' in any reasonable sense of that term.").
- *Doe v. Brandeis University*, 177 F. Supp. 3d 561 (D. Mass. 2016) ("Brandeis appears to have substantially impaired, if not eliminated, an accused student's right to a fair and impartial process. … If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision.").
- *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016) ("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 … .").
- *See also Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018); *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017); *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016); *Rossley v. Drake Univ.*, No. 4:16-cv-00623 (S.D. Iowa Oct. 12, 2018); *Doe v. Univ. of So. Miss.*, No. 2:18-cv-00153 (S.D. Miss. Sept. 26, 2018); *Doe v. Syracuse Univ.*, 2018 U.S. Dist. LEXIS 157586 (N.D.N.Y. Sept. 16, 2018); *Doe v. Brown Univ.*, 2018 U.S. Dist. LEXIS 144967 (D.R.I. Aug. 27, 2018); *Doe v. Pa. St. Univ.*, 2018 U.S. Dist. LEXIS 141423 (M.D. Pa. Aug. 21, 2018); *Doe v. Geo. Wash. Univ.*, 2018 U.S. Dist. LEXIS 136882 (D.D.C. Aug. 14, 2018); *Rowles v. Curators of the Univ. of Miss.*, No. 2:17-cv-04250 (W.D. Mo. July 16, 2018); Doe v. Univ. of Miss., 2018 U.S. Dist. LEXIS 123181 (S.D. Miss. July 14, 2018); *Doe v. Johnson & Wales Univ.*, No. 1:18-cv-00106 (D.R.I. May 14, 2018); *Doe v. DiStefano*, 2018 U.S. Dist. LEXIS 76268 (D. Colo. May 7, 2018); *Werner v. Albright Coll.*, No. 5:17-cv-05402 (E.D. Pa. May 2, 2018); *Doe v. Ohio St. Univ.*, 2018 U.S. Dist. LEXIS 68364 (S.D. Ohio Apr. 24, 2018); *Roe v. Adams-Gaston*, No. 2:17-cv-00945 (S.D. Ohio Apr. 17, 2018); *Elmore v. Bellarmine Univ.*, 2018 U.S. Dist. LEXIS 52564 (W.D. Ky. Mar. 29, 2018); *Doe v. Univ. of Or.*, 2018 U.S. Dist. LEXIS 49431 (D. Or. Mar. 26, 2018); *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573 (E.D. Va. 2018); *Schaumleffel v. Muskingum Univ.*, 2018 U.S. Dist. LEXIS 36350 (S.D. Ohio Mar. 6, 2018); *Gischel v. Univ. of Cincinnati*, 302 F. Supp. 3d 961 (S.D. Ohio 2018); *Powell v. St. Joseph's Univ.*, 2018 U.S. Dist. LEXIS 27145 (E.D. Pa. February 16, 2018); *Doe v. Rider Univ.*, 2018 U.S. Dist. LEXIS 7592 (D.N.J. Jan. 17, 2018); *Doe v. Pa. St. Univ.*, 2018 U.S. Dist. LEXIS 3184 (M.D. Pa. Jan. 8, 2018); *Saravanan v. Drexel Univ.*,

2017 U.S. Dist. LEXIS 193925 (E.D. Pa. Nov. 24, 2017); *Painter v. Adams*, 2017 U.S. Dist. LEXIS 171565 (W.D.N.C. Oct. 17, 2017); *Doe v. Univ. of Chicago*, 2017 U.S. Dist. LEXIS 153355 (N.D. Ill. Sept. 20, 2017); *Rolph v. Hobart & William Smith Colls*., 271 F. Supp. 3d 386 (W.D.N.Y. Sept. 20, 2017); *Doe v. Case Western Reserve Univ.*, 2017 U.S. Dist. LEXIS 142002 (N.D. Ohio Sept. 1, 2017); *Doe v. Trs. of the Univ. of Pa*., 270 F. Supp. 3d 799, 817 (E.D. Pa. 2017); *Gulyas v. Appalachian St. Univ.*, 2017 U.S. Dist. LEXIS 137868 (W.D.N.C. Aug. 28, 2017); *Nokes v. Miami Univ*., 2017 U.S. Dist. LEXIS 136880 (S.D. Ohio Aug. 25, 2017); *Mancini v. Rollins Coll*., 2017 U.S. Dist. LEXIS 113160 (M.D. Fl. July 20, 2017); *Tsuruta v. Augustana Univ*., No. 4:15-cv-04150 (D.S.D. June 16, 2017); Doe v. Univ. of Notre Dame, 2017 U.S. Dist. LEXIS 69645 (N.D. Ind. May 8, 2017); *Doe v. Williams Coll*., No. 3:16-cv-30184 (D. Mass. Apr. 28, 2017); *Doe v. Amherst Coll*., 238 F. Supp. 3d 195 (D. Mass. 2017); *Doe v. Ohio St. Univ*., 239 F. Supp. 3d 1048 (S.D. Ohio 2017); *Neal v. Colo. St. Univ. – Pueblo*, 2017 U.S. Dist. LEXIS 22196 (D. Colo. Feb. 16, 2017); *Doe v. Lynn Univ*., 2017 U.S. Dist. LEXIS 7528 (S.D. Fl. Jan. 19, 2017); *Doe v. W. New England Univ*., 228 F. Supp. 3d 154 (D. Mass. 2017); *Doe v. Alger*, 228 F. Supp. 3d 713 (W.D. Va. 2016); *Collick v. William Paterson Univ*., 2016 U.S. Dist. LEXIS 160359 (D.N.J. Nov. 17, 2016); *Doe v. Brown Univ.*, 210 F. Supp. 3d 310 (D.R.I. Sept. 28, 2016); *Ritter v. Okla. City Univ*., 2016 U.S. Dist. LEXIS 95813 (W.D. Okla. July 22, 2016); *Doe v. Weill Cornell Med. Coll. of Cornell Univ*., No. 1:16-cv-03531 (S.D.N.Y. May 20, 2016); *Doe v. Bd. of Regents of the Univ. Sys. Of Ga*., No. 15-cv-04079 (N.D. Ga. April 19, 2016); *Doe v. George Mason Univ*., No. 1:15-cv-00209 (E.D. Va. Feb. 25, 2016); *Prasad v. Cornell Univ*., 2016 U.S. Dist. LEXIS 161297 (N.D.N.Y. Feb. 24, 2016); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D. Mass. 2016); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177 (D.R.I. 2016); *Marshall v. Indiana Univ*., 170 F. Supp. 3d 1201 (S.D. Ind. 2016); *Doe v. Pa. St. Univ*., No. 4:15-cv-02072 (M.D. Pa. Oct. 28, 2015); *Sterrett v. Cowan*, 2015 U.S. Dist. LEXIS 181951 (E.D. Mich. Sept. 30, 2015); *Doe v. Middlebury Coll*., 2015 U.S. Dist. LEXIS 124540 (D. Vt. Sept. 16, 2015); *Doe v. Salisbury Univ*., 123 F. Supp. 3d 748 (D. Md. August 21, 2015); *Doe v. Washington and Lee Univ*., 2015 U.S. Dist. LEXIS 102426 (W.D. Va. Aug. 5, 2015); *Tanyi v. Appalachian St. Univ*., 2015 U.S. Dist. LEXIS 95577 (W.D.N.C. July 22, 2015); *Doe v. Salisbury Univ*., 107 F. Supp. 3d 481 (D. Md. 2015); *King v. DePauw Univ.*, 2014 U.S. Dist. LEXIS 117075 (S.D. Ind. August 22, 2014); *Benning v. Corp. of Marlboro Coll*., 2014 U.S. Dist. LEXIS 107013 (D. Vt. Aug. 5, 2014); *Harris v. St. Joseph's Univ.*, 2014 U.S. Dist. LEXIS 65452 (E.D. Pa. May 13, 2014); *Wells v. Xavier Univ*., 7 F. Supp. 3d 746 (S.D. Ohio 2014); *Doe v. Geo. Wash. Univ*., No. 1:11-cv-00696 (April 8, 2011).

Additional details from a sampling of these cases, affirming the principles that schools are obligated to follow their own procedures; clearly notify respondents of the charges against them and the factual basis for those charges; conduct a thorough and fair investigation; give respondents a meaningful opportunity to defend themselves (with access to relevant materials and the ability to confront their accusers); ensure decisionmakers and investigators are impartial; meaningfully consider both exculpatory and inculpatory evidence; and give fair and consistent treatment both to complainants (usually female) and respondents (usually male):

- *Doe v. Baum*, 903 F.3d 575 (6th Cir. Sept. 7, 2018): allowed a male student to proceed with due process and Title IX claims because credibility was at issue and plaintiff was not given a hearing or "an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder;" also held plaintiff had plausibly alleged that university officials "discredited all males, including Doe, and credited all females, including Roe, because of gender bias."
- *Doe v. Miami University*, 882 F.3d 579 (6th Cir. 2018): allowed a male student to proceed with claims that the university did not adequately consider inconsistencies in a complainant's statement, did not apply its own definition of consent, and treated the parties differently, failing to take seriously the male student's allegations that the female student engaged in non-consensual conduct.
- *Collick v. William Paterson University*, 699 Fed. Appx. 129 (3d Cir. Oct. 26, 2017): allowed a male student to proceed with claims against an individual college official who conducted a cursory investigation.
- *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. Sept. 25, 2017): enjoined university from suspending a male student, because complainant did not appear at hearing, issues turned on credibility, and plaintiff had no opportunity to confront her.
- *Lee v. University of New Mexico*, No. 17-1230, Order (D.N.M. Sept. 20, 2018): allowed a male student to proceed with due process claims based on allegations that the disciplinary proceeding turned on a problem of credibility "such that a formal or evidentiary hearing, to include the cross-examination of witnesses and presentation of evidence in his defense, is essential to basic fairness;" "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;" and plaintiff did not receive notice of certain charges until his sanctions hearing, when it was too late to prepare an adequate defense.
- *Doe v. Syracuse University*, 341 F. Supp. 3d 125 (N.D.N.Y. Sept. 16, 2018): allowed a male student to proceed with Title IX claims based on allegations that the university had concluded both students were highly intoxicated but applied a presumption of inability to knowingly consent to sexual intercourse only to the female and had not adequately investigated or questioned the female's credibility.

- *Doe v. Brown Univ.*, 327 F. Supp. 3d 397 (D.R.I. Aug. 27, 2018): allowed African American male student to proceed with certain Title IX, race discrimination, and contract claims, based on allegations that the university pursued charges against the male but not the female, notwithstanding evidence that she was the aggressor and had committed other violations of university policy.
- *Doe v. Distefano*, No. 16-CV-1789-WJM-KLM, 2018 WL 2096347 (D. Colo. May 7, 2018): allowed a male student to proceed with due process claims based on alleged procedural flaws that included delays in giving plaintiff notice and access to information and failure to provide impartial investigators and decisionmakers, and using allegations of procedural violations to support an inference of bias, saying that for due process purposes any actual bias is unacceptable.
- *Doe v. University of Oregon*, No. 6:17-CV-01103-AA, 2018 WL 1474531 (D. Or. Mar. 26, 2018): allowed a male student to proceed with claims including allegations that a university decisionmaker explained away inconsistencies in complainant's account and problems with her evidence, ignored evidence favoring him, did not give him advance copies of evidence, and allowed the complainant to introduce new evidence at the hearing without allowing him to respond.
- *Doe v. Marymount University*, 297 F. Supp. 3d 573 (E.D. Va. Mar. 14, 2018): allowed a male student to proceed with claims including allegations that the university did not allow him to interview potential witnesses or gather exculpatory evidence, and did not investigate or consider evidence that contradicted complainant's account, including her inconsistent statements.
- *Schaumleffel v. Muskingum University*, 2018 WL 1173043 (S.D. Ohio Mar. 6, 2018): allowed a male student to proceed with claims including allegations that the university did not consider exculpatory evidence and helped persuade female students to file complaints against him.
- *Gischel v. University of Cincinnati*, 302 F. Supp. 3d 961 (S.D. Ohio Feb. 5, 2018): allowed a male student to proceed with claims that the university's investigator was biased against him, that the university did not consider evidence that contradicted the complainant's account, and that the university denied cross-examination by refusing to ask the complainant questions posed by the respondent.
- *Doe v. Rider University*, No. 3:16-CV-4882-BRM-DEA, 2018 WL 466225 (D.N.J. Jan. 17, 2018): allowed a male student to proceed with claims including allegations that the investigator ignored complainant's inconsistent statements and the hearing panel answered to an official who had prejudged the male student as guilty.
- *Doe v. Pennsylvania State University*, No. 4:17-CV-01315, 2018 WL 317934 (M.D. Pa. Jan. 8, 2018): allowed a male student to proceed with claims including allegations that the university did not give him adequate notice of the charges against him and failed to cite adequate evidence to support the decision of responsibility.

- *Saravanan v. Drexel University*, No. 17-3409, 2017 WL 5659821 (E.D. Pa. Nov. 24, 2017): confirmed universities in disciplinary proceedings "must strive to ensure fairness including avoiding inherent bias or procedures which may favor a woman's claim of sexual harassment and stalking over a man's claim of sexual assault by the woman."
- *Painter v. Adams*, No. 315CV00369MOCDCK, 2017 WL 4678231 (W.D.N.C. Oct. 17, 2017): allowed male student to proceed with claims including allegations that the university refused to consider exculpatory evidence.
- *Rolph v. Hobart and William Smith Colleges*, 271 F. Supp. 3d 386 (W.D.N.Y. Sept. 20, 2017): allowed a male student to proceed with claims including allegations that the university conducted an inadequate investigation, failed to review or preserve evidence, failed to address inconsistencies, helped the complainant prepare her case, and did not treat the parties equally during the hearing.
- *Doe v. The Trustees of the University of Pennsylvania*, 270 F. Supp. 3d 799 (E.D. Pa. Sept. 13, 2017): allowed a male student to proceed with claims including allegations that the university failed to conduct a thorough investigation and trained investigators and members of the Hearing Panel to presume that complainants were telling the truth and accused students were responsible.

Sampling of new cases decided since November 2018:

- *Noakes v. Syracuse University*, No. 5:18-CV-43, 2019 WL 936875 (N.D.N.Y. Feb. 26, 2019): denied university's motion to dismiss Title IX claims by male African American student who was expelled for alleged sexual assault of a female student and claimed mistaken identity; the complainant did not testify at the hearing, plaintiff was not allowed to cross-examine her or key witnesses, and plaintiff alleged flaws in the investigation, pro-complainant assumptions, and unwillingness to consider evidence of plaintiff's innocence or question complainant's credibility, coupled with facts to show public and university-specific pressure to believe accusers and presume accused students responsible.
- *Norris v. Univ. of Colorado*, No. 1:18-CV-02243-LTB, 2019 WL 764568 (D. Colo. Feb. 21, 2019): denied university's motion to dismiss Title IX and due process claims brought by a male student who was suspended for 18 months for alleged sexual misconduct with a female student; plaintiff, among other things, alleged the university applied the wrong version of its code, withheld notice of its investigation until after plaintiff was interviewed by police, denied him a hearing and the right to cross-examine his accuser and other witnesses, unreasonably denied him access to the investigation file, made inconsistent findings, used a "trauma-informed" approach that presumed the truth of complainant's allegations, and assigned officials with conflicts of interest to investigate and decide the case. Court cited other cases finding that "a lack of meaningful cross-examination may contribute to a violation of due process rights of an accused student in a disciplinary hearing regarding sexual assault."

- *Oliver v. University of Texas Southwestern Medical School*, No. 3:18-CV-1549-B, 2019 WL 536376 (N.D. Tex. Feb. 11, 2019): denied motion to dismiss Title IX and due process claims filed by a male medical student who was expelled based on an alleged physical assault of his former fiancée; plaintiff alleged the university had first found the complaint against plaintiff to be unfounded but then reopened it based on "new evidence" which it did not share with plaintiff; held a hearing without requiring complainant to testify and without allowing cross-examination; and disregarded proof that complainant had doctored the audio recording which comprised the "new evidence."
- *Doe v. White*, BS171704 (Cal. Super. Ct. Feb. 7, 2019), https://kcjohnson.files.wordpress.com/2019/02/doe-v-white-csu-northridge.pdf: latest of several recent cases in which California state courts have directed both public and private universities to set aside decisions finding male students responsible for sexual misconduct, and have held that when a disciplinary decision turns on credibility, parties and witnesses must be subjected to questioning and cross-examination at a live hearing before a neutral adjudicator who cannot be the same person as the investigator.
- *Doe v. Univ. of Mississippi*, No. 3:18-CV-138-DPJ-FKB, 2019 WL 238098 (S.D. Miss. Jan. 16, 2019): denied motion to dismiss Title IX, due process, and equal protection claims filed by male student suspended for three years for alleged sexual assault of female student; plaintiff alleged that the investigator excluded exculpatory evidence, failed to interview key witnesses, and failed to address medical records that made clear complainant did not think she was raped, that a panel member mocked defenses raised by men accused of sexual assault, that defendants treated plaintiff less favorably than complainant for the same conduct (sexual activity with someone under the influence of alcohol), that the investigative report was flawed and incomplete, that decision makers were trained to assume an assault occurred, that plaintiff was not allowed to cross-examine complainant or witnesses because they did not appear at the hearing, and that the preponderance standard was not sufficient to protect plaintiff's rights.
- *Doe v. Coastal Carolina University*, 2019 WL 142299 (D.S.C. Jan. 9, 2019): denied motion to dismiss Title IX claims filed by male student expelled for alleged sexual assault of female student; plaintiff was criminally investigated but no charges were filed against him, a panel conducted a hearing and found in plaintiff's favor, the female student appealed without following the school's procedures, the appellate officer requested a new hearing, and an "appeal panel" convened for a second "hearing," without any testimony, and found plaintiff responsible.
- *Doe v. George Washington Univ.*, No. CV 18-553 (RMC), 2018 WL 6700596 (D.D.C. Dec. 20, 2018): denied motion to dismiss breach of contract and Title IX claims by male student suspended for one year (after finishing all his course work) for alleged sexual assault of female student; Court noted among other things that "[t]he Appeals Panel was presented with direct contradictions in the evidence and appears to have strained to overlook such contradictions, leaving no trail of reasoning."