FACE.
Families Advocating for Campus Equality

September 24, 2021

Opposition of Families Advocating for Campus Equality's Families, Students, and Friends to Confirmation of Catherine Lhamon as Assistant Secretary for Civil Rights at the Department of Education

Dear Senator,

The undersigned write to oppose Catherine Lhamon's confirmation as Assistant Secretary at the U.S. Department of Education Office for Civil Rights (OCR). We are over 100 parents, students, attorneys, professors, and others who've suffered or supported those who've suffered as a result of Lhamon's aggressive Title IX enforcement methods during her previous term as Assistant Secretary from 2013-16.

Catherine Lhamon's abominable past performance in the very same position should disqualify her from re-appointment. It also would require you to ignore the countless Title IX experts who've criticized ger policies, the thousands of students and professors harmed by them,[1] as well as the many federal courts that expressed serious concerns with the effects of those policies.

For example, in her previous position as Assistant Secretary, Lhamon instructed schools to subjugate the minimal due process owed respondents to the rights of complainants.[2] Though some of Lhamon's policies may have been "noble and necessary" to ensure schools responded appropriately to sexual misconduct on their campuses, her aggressive over-enforcement accomplished precisely the opposite by "undermin[ing] the legitimacy of the fight against sexual violence,"[3] and causing a backlash by ignoring a heightened "risk for wrongful findings in sexual assault adjudications."[4]

Lhamon coerced schools' compliance with her policies by threatening to withdraw their federal finding, and, at a 2014 Senate hearing, Lhamon insisted she possessed the authority as Assistant Secretary to do so.[5] Another OCR official later confirmed Lhamon did not have such authority.[6]

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[1] For sixteen accounts of those FACE students and professors harmed by Lhamon's policies, *see* Appendices I and II, at pp. 17 and 51 of this PDF (an Appendix Index at p.16 lists the issues involved and PDF page numbers for each account), Appendix I originally was submitted as Exhibit 1 to a FACE amicus brief in *Victim Rights Law Center v. Elizabeth DeVos* (now *Victim Rights Law Center v. Cardona)* Mass. Dist. Court, No. 1:20-cv-11104, August 27, 2020, https://static1.squarespace.com/static/5941656f2e69cffcdb5210aa/t/5f601123dc9f13698fbf34f3/1600131364445/FACE+NY+AMICUS.pdf

[2] U.S. Dept. of Edu., Office for Civil Rights, *2011 Dear Colleague Letter* (*Rescinded)* (Apr. 4, 2011) (Lhamon enthusiastically enforced the Dear Colleague Letter which directed schools to "ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.") https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

[3] Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy,* The Atlantic (Sept. 6, 2017) ("At many schools, the rules intended to protect victims of sexual assault mean students have lost their right to due process—and an accusation of wrongdoing can derail a person's entire college education.") https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/.

[4] Samantha Harris & KC Johnson, *Campus Courts In Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 111, pp. 62-63 (2019) (schools "too often lack the tools to gather the evidence necessary to reach the truth," and that "university self-interest can distort fairness in campus proceedings") https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf.

[5] Under questioning by then-Senator Lamar Alexander, Lhamon insisted this was true, although OCR had not sought comments about its 2011 DCL, nor had it conducted a notice-and-comment process required by the Administrative Procedure Act. *Senate HELP Comm. hearing testimony of Catherine Lhamon* @00:27:00, *Sexual Assault on Campus: Working to Ensure Student Safety* (June 26, 2014), https://www.help.senate.gov/hearings/sexual-assault-on-campus-working-to-ensure-student-safety.

[6] In a subsequent Senate hearing, OCR's Deputy Asst. Sec'y of Ed. Amy McIntosh confirmed Lhamon did not have the

Lhamon's pressure on schools produced a meteoric rise in the number of judicial decisions favoring wrongly accused students and professors victimized by the policies she promoted.[7] Federal Circuit Courts of Appeals in the Second,[8] Third,[9] Sixth,[10] Seventh,[11] Eighth,[12] Ninth,[13] and Tenth[14] circuits have issued rulings favorable to accused students, with each discussing how federal pressure might have caused rather than eradicated gender bias in campus adjudications. In fact, in 2019 7th Circuit court Judge Justice Amy Coney observed that OCR pressure gave to the accused student "a story about why [the university] might have been motivated to discriminate against males accused of sexual assault."[15]

FACE: *Who Are We?*

Families Advocating for Campus Equality (FACE) is a 501(c)(3) nonprofit organization advocating for equitable treatment of those affected by Title IX and other campus sexual misconduct disciplinary proceedings. Since its inception FACE has been contacted by nearly 2000 students and an increasing number of faculty members who've experienced result-driven disciplinary processes.

FACE, the only nonpartisan and gender-neutral organization of its type,[16] supports equal Title IX fairness, and due process rights and protections for *all* parties in sexual misconduct disputes, notwithstanding its 2013 formation by mothers whose sons had been wrongly accused of sexual misconduct,[17] and even though the majority of its accused students and faculty are male.[18]

In support of its mission to balance the interests of complainants and respondents alike, FACE Co-President, and California attorney Cynthia P. Garrett has served on an American Bar Association Task Force, and as a liaison on an American Law Institute sexual misconduct project, both focused on developing equitable Title IX disciplinary procedures,[19] and both similarly comprised of attorneys with diverse perspectives

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authority to enforce compliance with the 2011 DCL by withdrawing funding or otherwise. Senate Homeland Security and Gov't Affairs Comm., *Examining the Use of Agency Regulatory Guidance* (Sept. 23, 2015) https://www.youtube.com/watch?v=dIiXuv-Oirw.

[7] In 2016, Gary Pavela, a fellow for the National Association of College and University Attorneys (NACUA), observed, "In over 20 years of reviewing higher education law cases, I've never seen such a string of legal setbacks for universities, both public and private, in student conduct cases. Something is going seriously wrong. These precedents are unprecedented." Jake New, *Out of Balance*, Inside Higher Ed (Apr. 14, 2016), https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-againstcolleges-punished-them-sexual-assault.

[8] *Doe v. Columbia Univ*., 831 F.3d 46, 48 (2d Cir. July 29, 2016).

[9] *Doe v. Univ. of the Sciences*, 961 F.3d 203, 205 (3d Cir. May 29, 2020).

[10] *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. September 7, 2018); *Doe v. Oberlin Coll*., 963 F.3d 580, 581 (6th Cir. June 29, 2020).

[11] *Doe v. Purdue Univ*., 928 F.3d 652, 656 (7th Cir. June 28, 2019).

[12] *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 860 (8th Cir. September 4, 2020); *Doe v. Regents of the Univ. of Minn*., 2021 U.S. App. LEXIS 16243 (8th Cir. June 1, 2021).

[13] *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 943 (9th Cir. Ariz. July 29, 2020).

[14] *Doe v. Univ. of Denver*, 2021 U.S. App. LEXIS 17763 (10th Cir. June 15, 2021).

[15] *Purdue Univ*., *supra,* note 11, at 669.

[16] FACE also welcomes and has provided support to accused women and LGBTQ+ students.

[17] FACE website: https://www.facecampusequality.org

[18] *See* Appendix IV at p. 72 of the PDF; Source: *Plaintiff Demographics in Accused Student Lawsuits* Chart, https://www.titleixforall.com/wp-content/uploads/2020/07/Plaintiff-Demographics-by-Race-and-Sex-Title-IX-Lawsuits-2020-7-6.pdf, accessed July 12, 2021, at Title IX for All Database, *Black students four times as likely to allege rights violations in Title IX proceedings*, (subscription only) https://www.titleixforall.com/category/databases/.

[19] American Law Institute, *Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities*, https://www.ali.org/projects/show/project-sexual-and-gender-based-misconduct- campus-procedural-frameworks-and-analysis/; American Bar Association, Criminal Justice Section (ABA), *Task Force on College Due Process Rights and Victim Protections*, June 26, 2017, https://www.americanbar.org/groups/criminal_justice/committees/campus/.

(victims' advocates, campus administrators, and attorneys for both Title IX complainants and respondents).

FACE leadership and its members have met with and participated in meetings with hundreds of state and federal legislators as well as many Departments of Justice and Education officials.[20] In January 2019 FACE submitted a detailed comment on the Proposed Title IX Rulemaking.[21]

The Silent 'Survivors' of Title IX

Fortunately for you, as a member of the U.S. Senate, FACE is uniquely positioned to give a voice to wrongly accused students and professors, the vast majority of whose stories you've never heard. These individuals have experienced school officials that:

1) interrogated them before being informed of the details (or the existence) of an allegation;
2) denied them access to and/or silenced their advocate;
3) hampered their defense by refusing to disclose details of complainant or witness statements;
4) denied them access to evidence that may have been relied on to find them responsible;
5) refused them the opportunity to question their accusers and witnesses;[22]
6) relied on hearsay and other evidence inadmissible in any other adjudicatory arena;
7) ignored their lack of harmful intent or good-faith beliefs; and
8) dispensed with any presumption they may be innocent because that would be "inequitable."[23]

Complainants, understandably, have dominated the narrative concerning campus sexual assault, whether through accuser-focused movies like *The Hunting Ground*, national press coverage, or social media posts. Today's culture incentivizes complainants to publicize their allegations: if they "win" their case, they're honored for their bravery in speaking out; if they lose, they still can claim victimhood and accuse their school of ignoring their trauma. Their narrative, and not those of the wrongly accused, dominates media.

On the other hand, once they're accused there is no benefit for respondents to insist they were accused wrongly - *the accusation alone is accepted as sufficient proof of their guilt*. Even if they were to cite a 'not responsible' finding as evidence of their innocence, it'll be said: "they got off." There is nothing to gain by telling anyone beyond family and close friends that one's been falsely accused of such a heinous act, and the resulting isolation compounds the trauma of having been wrongly labeled, in effect, a sexual predator.

In our effort to counterbalance the disparity in awareness of their plight, in this Opposition we have chosen to offer you a unique opportunity to hear some of our otherwise silent accused member voices. To this end, thirteen FACE member experiences are reproduced in full in Appendix I,[24] and another three, including a

[20] Some of these meetings have included female and LGBTQ+ FACE students.

[21] *FACE Comment on Proposed Title IX Rulemaking*, Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Federal Register Vol. 83, No. 230 p. 61462, November 29, 2018, submitted January 30, 2019, https://static1.squarespace.com/static/5941656f2e69cffcdb5210aa/t/5ccbd44ff4e1fcdaca50141f/1556862039627/FACE+NPRM+TITLE+IX+COMMENT+Docket+No.+ED-2018-OCR-0064+ed.+copy.pdf

[22] If written questions are permitted to be submitted to a panel member or investigator in advance of the hearing, our experience has been that many, if not most, of the questions are rejected, ignored, or re-worded ineffectively, and follow-up questions not asked. This is understandable because the school official owes a duty of care to both parties, and many calculate the possible repercussions to demand a decision in the complainant's favor.

[23] Victim advocate members of the ABA Task Force cited in note 19, *supra,* expressed this sentiment; they believe Title IX matters should be treated like a civil action, where neither party is presumed truthful. However, in civil actions, the plaintiff still has the burden of proof, and thus even in those cases, the parties begin on unequal footing. In addition, being accused of what is reprehensible quasi-criminal conduct carries much reputational and emotional harm, unlike the loss of money.

[24] *See* Appendix I, at pp. 17-49 of this PDF. The vast majority of FACE students and families, even when students were found not responsible, are too frightened to provide an account of their experiences, even anonymously, fearing they'll be identified and tormented. Additional FACE family and other accounts can be found in Appendix II at pp. 51-65 of this PDF, and on FACE's website: *Our Stories; Stories From the Trenches*, https://www.facecampusequality.org/our-stories.

professor, are in Appendix II.[25] These FACE member accounts illustrate how, under Lhamon's former policies, the accused were silenced by humiliation, vilification, and trauma, often based merely on an *accusation* they'd engaged in sexual misconduct.

We cannot, of course, begin to remedy the asymmetry in the public narrative, but we can make you aware there is a lesser heard version of the campus sexual misconduct equation. In submitting this Opposition, we hope to illustrate how fair and equitable procedures, such as the majority of those promulgated by OCR in its final Title IX regulations ("Final Rules"),[26] are critically necessary to increase decision-making accuracy and restore basic fairness to campus proceedings for all students and faculty.

FACE: *What Do We Do?*

FACE receives 4 to 5, and sometimes as many as 20, desperate calls and emails from accused students, faculty, and their families every week.[27] Disturbingly, it's not only college students whose lives are devastated by the arbitrary campus sexual misconduct practices fostered by Lhamon; since 2016, FACE has received distraught calls from over 100 families of K-12 students, some as young as 6, in which conduct of children engaged in "typical playground games" has "been recast as disturbing accusations of sexual misconduct."[28] The damage to these children's education and emotional stability is heartbreaking. FACE also receives many calls from parents of disabled students accused of harassment, stalking, unwanted touching, or simply being "creepy."[29] Under Lhamon's policies, disabled students were "subjected to processes they could not navigate" without assistance from trained advocates.[30]

The reality is that, at every level of education, the disabled, minorities,[31] first-generation college students, and those without resources to retain legal assistance are all more likely to be disadvantaged by the impact of the unfair and inequitable campus sexual misconduct policies orchestrated by Catherine Lhamon.

Fair procedures, such as the majority of those detailed requirements in the Final Rules, are critical to increasing decision-making accuracy for kindergarteners as well as graduate students and professors. In drafting the Final Rules, OCR took into account over 124,000 public comments from all perspectives, and reviewed the over 600 post-2011 accused-student lawsuits filed over schools' flawed Title IX and other campus sexual misconduct procedures, as well as the now over 200 court rulings in favor of respondents.[32]

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[25] *See* Appendix II, at pp. 51-65 of this PDF.

[26] *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (Final Rules), 85 FR 30026-30579 (May 19, 2020 (to be codified at 34 C.F.R. pt. 106)).

[27] *See* Appendix 1, at page 47 of this PDF, for the statement of FACE Vice President, who's responsible for calls from families of accused students and faculty. These calls absorb the majority of time, requiring Intake to not only provide access to legal and other resources, but significant emotional support due to the universal trauma suffered by students, faculty, and families alike.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] See Appendix IV, *infra,* at p. 72 of this PDF, which illustrates the disproportionate effect of Lhamon's former policies on minority students. *See* also, Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases,* The Atlantic (Sept. 11, 2017) https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/; Erika Sanzi, *Black Men, Title IX, and the Disparate Impact of Discipline Policies*, Real Clear Education (Jan. 21, 2019) https://www.realcleareducation.com/articles/2019/01/21/black_men_title_nine_and_the_disparate_impact_of_discipline_policies_110308.html; and Jeannie Suk Gersen, *Shutting Down Conversations of Rape at Harvard,* The New Yorker (Dec. 11, 2015) ("The dynamics of racially disproportionate impact affect minority men in the pattern of campus sexual-misconduct accusations") https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school.

[32] KC Johnson Title IX lawsuit database, https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV_BBrv5NAA5z9cv178Fjk3o/ edit#gid=0

We firmly believe the Final Rules' grievance process "effectuates Title IX's non-discrimination mandate both by reducing the opportunity for sex discrimination to impact investigation and adjudication procedures" and "by promoting a reliable fact-finding process so that recipients are held liable for providing remedies to victims of sex discrimination."[33]

As a U.S. Senator, you *must know* decision-making reliability is essential to trust in any decision-making process.

Title IX Professionals Bullied by Lhamon's OCR

While Lhamon-era OCR officials assured each other that their policies would achieve their worthy goal to change campus social norms on sexuality,[34] colleges and universities responded by conducting *To Kill a Mockingbird*-style proceedings[35] that often most severely impacted minority students[36] and those who could not afford to hire an attorney.

U.S. District Court Judge F. Dennis Saylor identified the key problem in the campus environment at that time: universities, he wrote in a 2016 opinion, appeared to

> have substantially impaired, if not eliminated, an accused student's right to a fair and impartial process. And 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.[37]

Judge Saylor concluded the procedures used in *Brandeis* were "closer to Salem, 1692 than Boston, 2015."[38]

Nor were Title IX school officials pleased with the policies Lhamon forced on them. In 2015, former Wheaton College Vice President of Student Affairs and Dean of Students Lee Burdette Williams courageously published an article in which she voiced her frustration at OCR's failure to consult Title IX professionals before issuing the 2011 Dear Colleague letter.[39] In another June 2021 article aptly entitled "'*How Much Damage Have My Colleagues and I Done?'*" Williams described a subsequent Title IX conference at which hundreds of student affairs professionals from schools across the country stood and applauded her for having written her earlier 2015 article.[40]

In her recent June 2021 article, "'*How Much Damage Have My Colleagues and I Done?'*" Williams related

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[33] Final Rules Preamble, *supra*, note 26, at p. 30101.

[34] Janet Halley, *The Move to Affirmative Consent*, Signs; Journalism of Women in Cultural Society (2015), at p. 8 of the article's PDF ("They are seeking social control through punitive and repressive deployments of state power.") https://www.journals.uchicago.edu/doi/pdf/10.1086/686904.

[35] See the list of 8 problematic school practices at p. 3, *supra*.

[36] *See* sources listed at note 31, *supra.*

[37] *Doe v. Brandeis Univ*., 177 F. Supp. 3d 561, 573 (D. Mass. March 31, 2016).

[38] *Doe v. Brandeis Univ*., Case 1:15-cv-11557, Transcript, Oct. 20, 2015, Document 47, at 9.

[39] Lee Burdette Williams, *The Dean of Sexual Assault*, Inside Higher Ed (August 7, 2015) ("Williams explains why the well-intended but misguided push to compel campuses to better protect victims of sexual assault helped drive her from her job.") (emphasis added) https://www.insidehighered.com/views/2015/08/07/how-sexual-assault-campaign-drove-one-student-affairs-administrator-her-job-essay.

[40] Lee Burdette Williams, *'How Much Damage Have My Colleagues and I Done?'; A former dean of students loses faith in how colleges handle sexual assault.* Chronicle of Higher Education (June 10, 2021)(the former 2015 article described the considerable difficulties encountered in, and the tragic consequences of implementing the 2011 DCL and related guidance) https://www.chronicle.com/article/how-much-damage-have-my-colleagues-and-i-done. Williams' comment about the conference was in an earlier version of Ms. Williams' article: Lee Burdette Williams, *About FACE: A Former Dean of Students Rethinks Sexual Assault Response*, Medium (May 13, 2021) https://leeburdettewilliams.medium.com/about-face-a-former-dean-of-students-rethinks-sexual-assault-response-ee08542ddd2e.

how her experience meeting FACE members from across the country at a FACE Phoenix conference had drastically altered her perspective on the treatment of accused students in campus sexual misconduct proceedings:

> When I wrote "The Dean of Sexual Assault," in 2015, I believed that higher-ed professionals occupied a moral high ground in the war against sexual assault. My weekend in Phoenix challenged all of that. I now find myself wondering: How much damage have my colleagues and I done?[41]

Similarly, in 2014, Terry W. Hartle, Senior Vice President for Government and Public Affairs at the American Council on Education reported, "Many universities that have found themselves in a conflict with OCR *believe that this agency does not act in good faith and that it's little more than a bully with enforcement powers*."[42]

As a result, school officials felt they had no choice but to do what OCR demanded, even if it were "technically a suggestion and not a command."[43] Thus, in their effort to avoid the loss of federal funding, OCR's 'bullying' style of enforcement often caused Title IX professionals to police their students' sex lives.[44]

Title IX professionals subjected to Lhamon's OCR were caught in a double-blind, and, as a result, tended to find accused students guilty regardless of the evidence.[45] That was especially so in cases involving intoxication, which has been the basis for the majority of campus allegations we've encountered at FACE.[46] Responding to decisions finding only the male guilty when both were intoxicated, Brett Sokolow of the ATIXA warned schools: "Surely, every drunken sexual hook-up is not a punishable offense," since "there has to be something more than an intent to have sex to make this an offense."[47]

This outcome was hardly surprising because Lhamon's OCR also demanded schools employ other policies and procedures that increased the likelihood of guilty decisions, such as the lowest – *preponderance* - standard of evidence,[48] and promoted schools' use of a "single investigator" method in which one official

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[41] *Id.*

[42] Michael Stratford, *Standoff on Sexual Assaults; As Obama administration unveils new guidance for combating sexual assault on campus, dispute between Tufts and federal officials underscores tensions*, Inside Higher Ed (Apr. 29, 2014) (emphasis added). https://www.insidehighered.com/news/2014/04/29/us-finds-tufts-violating-rules-sexual-assault-amid-larger-crackdown.

[43] Emma Brown, *Senator: Education Dept. overstepped authority on sexual assault complaints*, Washington Post (Jan. 7, 2016) https://www.washingtonpost.com/news/education/wp/2016/01/07/u-s-senator-education-department-overstepped-authority-on-sexual-assault-complaints/https://www.washingtonpost.com/news/education/wp/2016/01/07/u-s-senator-education-department-overstepped-authority-on-sexual-assault-complaints/; *see also*, Sen. James Lankford, *Letter to Acting Secretary of the Dept. of Edu. John B. King* (Jan. 7, 2016) https://www.lankford.senate.gov/imo/media/doc/Sen.%20Lankford%20letter%20to%20Dept.%20of%20Education%201.7.16.pdf.

[44] Jacob Gersen & Jeannie Suk (Gersen), *The Sex Bureaucracy*, 104 Calif. Law Rev., Vol. 104, No. 4 (Aug. 2016), pp. 908-909, https://29qish1lqx5q2k5d7b491joo-wpengine.netdna-ssl.com/wp-content/uploads/2016/09/Gersen-and-Suk-37-FINAL.pdf.

[45] Harris & Johnson, *Campus Courts In Court*, *supra*, note 4, at pp. 62-63 ("If you find against [a complainant], you will see yourself on 60 Minutes or in an OCR investigation where your funding is at risk. If you find for her, no one is likely to complain," *quoting*, Nancy Gertner, *Sex, Lies, and Justice*, AM. PROSPECT (Jan. 12, 2015) https://prospect.org/article/sex-lies-and-justice.

[46] *Confronting Campus Sexual Assault*, p. 6, EduRiskSolutions.org (2015) http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf.

[47] Brett A. Sokolow, J.D., ATIXA Executive Director, *ATIXA Tip of the Week Newsletter SEX AND BOOZE* (Apr. 24, 2014) deleted from the original source but available here: https://www.dropbox.com/s/ie1b0dg0bh0kvff/ATIXA%202014-Tip-of-the-Week-%20Sex%20and%20Booze.pdf?dl=0.

[48] John Villasenor, *A probabilistic framework for modeling false Title IX 'convictions' under the preponderance of the evidence standard*, Law, Probability and Risk, Volume 15, Issue 4, pp. 223–237 (Oct. 14, 2016) (estimated to have a 30% likelihood of error.) https://academic.oup.com/lpr/article/15/4/223/2549058.

investigated and decided a respondent's fate,[49] risking confirmation bias.[50] When combined with policies rooted in a believe-the-victim mantra[51] and trauma-informed theories that evoke a presumption of a respondent's guilt,[52] these procedures caused innocent students and professors, like the sixteen FACE members have reported in Appendices I and II, to be blindsided by findings that they had, though perhaps unintentionally, committed sexual assault.

Criticism and More Criticism

In addition to the over 50 recent articles listed in Appendix III criticizing Lhamon's nomination,[53] numerous well-respected figures and organizations -- from across the political and professional spectrum and over several years -- have criticized Lhamon's one-sided Title IX enforcement. These experts include the Foundation for Individual Rights in Education (FIRE),[54] twenty-eight Harvard Law[55] and sixteen University of Pennsylvania Law[56] professors, the American Association of University Professors (AAUP),[57] the American Council on Education (ACE),[58] the American Bar Association's Criminal Justice Section,[59] and the American College of Trial Lawyers (ACTL).[60]

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[49] Harris & Johnson, *Campus Courts In Court*, *supra*, note 4, at p. 60, note 60 ("A 2014 Obama administration report hailed the 'very positive results' of this model.").

[50] Linda and Charlie Bloom, *Beware of the Perils of Confirmation Bias*, Psychology Today (July 9, 2018) https://www.psychologytoday.com/us/blog/stronger-the-broken-places/201807/beware-the-perils-confirmation-bias; *See*, for example, *Brandeis Univ.*, *supra* note 37, at 606 ("The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions:"); *Doe v. Miami Univ.,* 882 F.3d 579, 605 (6th Cir. 2018) ("although an individual's dual roles do not per se disqualify him or her from being an impartial arbiter, here John has alleged sufficient facts plausibly indicating that Vaughn's ability to be impartial 'had been manifestly compromised.'"); *Doe v. The Penn State Univ. (III),* 336 F. Supp. 3d 441, 450-51 (M.D. Pa. Aug. 21, 2018)("the Investigative Model's virtual embargo on the panel's ability to assess that credibility raises constitutional concerns.").

[51] Of this mantra, former campus administrator Lee Burdette Williams said "The problem with 'believe the woman' . . . is that it places all women into one utterly credible bucket of complainants, and their respondents into another absolutely despicable bucket of violators." Lee Burdette Williams*, 'How Much Damage Have My Colleagues and I Done?', supra,* note 40.

[52] CP Garrett, *Trauma-Informed Theories Disguised as Evidence*, pp. 5-6, 8-9 (May 2, 2019) https://static1.squarespace.com/static/5941656f2e69cffcdb5210aa/t/5ccbd3c153450a492767c70d/1556861890771/Trauma-Informed+Theories+Disguised+as+Evidence+5-2.pdf, *citing and quoting,* Lee H, Roh S, Kim DJ., *Alcohol-Induced Blackout*, International Journal of Environmental Research and Public Health. 2009; 6(11): 2783-2792, 2785, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2800062/; and White, Aaron M. Ph.D., *What Happened? Alcohol, Memory Blackouts, and the Brain*, Published by NIH; National Inst. on Alcohol Abuse and Alcoholism (2003) https://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm.

[53] See Appendix III, at pp. 68-71 of this PDF.

[54] *FIRE Letter to Office for Civil Rights Asst. Sec'y for Civil Rights Russlynn Ali* (May 5, 2011) https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/.

[55] 28 Harvard Law Professors' Opinion; *Rethink Harvard's sexual harassment policy*, Boston Globe (Oct. 14, 2014) https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html.

[56] *See* Jacob Gershman, *Penn Law Professors Blast University's Sexual-Misconduct Policy*, Wall St. J. Lawblog (Feb. 18, 2015) https://www.wsj.com/articles/BL-LB-50632; *Open Letter From Members Of The Penn Law School Faculty; Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, Wall Street Journal (Feb. 18, 2015) http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf.

[57] Comm. on Women in the Acad. Profession, Am. Ass'n Univ. Professors, *Campus Sexual Assault: Suggested Policies and Procedures*, Reports & Publications, p. 371 (2012) ("The AAUP advocates the continued use of 'clear and convincing evidence' in . . . discipline cases as a necessary safeguard of due process and shared governance.") https://www.aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures.

[58] Stratford, *Standoff on Sexual Assaults, supra,* note 42, and accompanying text.

[59] ABA *Task Force on College Due Process Rights and Victim Protections, supra*, note 19. The ABA panel was a diverse group that also included victim advocates and campus administrators, all of whom were able to agree on necessary disciplinary procedures.

[60] American Coll. of Trial Lawyers, *Position Statement Regarding Campus Sexual Assault Investigations* (Mar. 2017)

Even ATIXA's Brett Sokolow has criticized schools' resulting micromanagement of students' sex lives, noting "[s]ome pockets in higher education have twisted the [2011 DCL] and Title IX into a license to subvert due process and to become the sex police."[61]

No Reprieve for the Innocent

When addressing the appropriateness of confirming Catherine Lhamon's nomination, we respectfully ask you to keep in mind that, from our experience, the implications of your decision will be significant and widespread. In a recent Atlantic article the author, Anne Applebaum, after interviewing journalists, academics, graduate students, administrators, and others who'd been wrongly accused, observed,

> Sometimes advocates of the new mob justice claim that these are minor punishments, that the loss of a job is not serious, that people should be able to accept their situation and move on. But isolation plus public shaming plus loss of income are severe sanctions for adults, with long-term personal and psychological repercussions—especially because the "sentences" in these cases are of indeterminate length.[62]

Applebaum's victims were all adults; the impact of a wrongful expulsion for sexual misconduct on a young student is, as University of Chicago Law School Professor Geoffrey Stone has correctly observed "a matter of grave consequence" that "will haunt the student for the rest of his days, especially in the world of the Internet. Indeed, it may well destroy his chosen career prospects."[63]

Our experience at FACE has taught us that "such an expulsion" in fact "does" destroy career prospects and in some cases, even lives.

There is no reprieve for these young people, although it's likely up to 30% of campus Title IX decisions could be wrong.[64] Their transcripts are forever imprinted with a disciplinary notation; **for them, unlike felons, there is no "*ban the box*,"** even though they've been found "responsible" (not "guilty") for conduct that, *if it occurred*, most often was not criminal, in a decision unaccompanied by rules and procedures normally used with such a low evidence standard, and pursuant to a disciplinary "process" conducted by administrators and professors who euphemistically call the experience "educational."

These innocent students could be your sons, daughters, brothers, or sisters – because, *as you must know*, "doing the right thing" no longer protects you in this 'accusation = guilt' world. These are men, women, teenagers, and children who've lost faith in our justice system, entire families who are emotionally and sometimes financially destroyed;[65] all lives permanently and irrevocably changed because of a process with a 30% likelihood of error.

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https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/task_force_allegations_of_sexual_violence_white_paper_final.pdf?sfvrsn=22.

[61] Assoc. of Title IX Administrators (ATIXA), *2017 Whitepaper: Due Process and the Sex Police* (2017) (the statement continues, "The ATIXA Playbook and this Whitepaper push back strongly against both of those trends in terms of best practices.") https://www.ncherm.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf.

[62] Anne Applebaum, The New Puritans, The Atlantic (August 31, 2021) https://www.theatlantic.com/magazine/archive/2021/10/new-puritans-mob-justice-canceled/619818/.

[63] Yoffe, *The Uncomfortable Truth, supra*, note 3.

[64] John Villasenor, *supra*, note 48, at pp. 223–237, https://doi.org/10.1093/lpr/mgw006

[65] For additional FACE family and other accounts Title IX experiences, please see "Our Stories; Stories From the Trenches," on the FACE website at https://www.facecampusequality.org/our-stories.

Catherine Lhamon Is Exactly the Wrong Choice

Though Ms. Lhamon has claimed to have supported the due process rights of respondents as well as complainants in Title IX cases, in only two OCR cases were there *any* concerns expressed about respondents' rights. In one — against Minot State University[66] — the concern expressed had nothing to do with the end result. In the second case against Wesley College, the facts were so egregious that even Lhamon could not ignore them.[67] Lhamon has failed to identify any other decisions or statements in favor of the rights of accused students during her tenure, and KC Johnson has called Lhamon's claims to that effect "shameless."[68]

Recently, Laura Dunn, victim rights attorney and nationally recognized Title IX expert, criticized President Biden's nomination of Lhamon, saying she "did not want to go back to the Obama-era guidance."[69] Dunn added,

> I really hoped the administration would try to find someone that can please both sides of the aisle and try to settle the issue, so that we don't have a political football being thrown about every couple years.[70]

Now that the number of lawsuits from accused students has exceeded 600,[71] and 200+ lower and appellate courts throughout the country have found school Title IX disciplinary procedures severely lacking in basic fairness, it is disheartening to those of us who've seen the devastation suffered by wrongfully accused students and professors, that Lhamon would be confirmed to again lead OCR.

As Senators you should heed the warning of Title IX expert KC Johnson:

> Perhaps no public figure in the past decade has done more to decimate the rights of accused students than Lhamon. No wonder that FIRE, the scrupulously non-partisan campus-civil-liberties organization, denounced her nomination and urged senators to reject it unless she committed, under oath, to upholding specific due-process provisions in Title IX tribunals. Given her record, it seems extremely unlikely that she would ever do so.[72]

On behalf of all FACE members, including the unavoidably anonymous hundreds of members too fearful to add their name below, we ask you to please not confirm Catherine Lhamon. *We can do better*.

Sincerely,

Cynthia P Garrett and Alison Scott, FACE Co-Presidents

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[66] Out of over 17,000 words, the Minot State decision used fewer than 100 discussing respondent rights, none of which were relevant to OCR's final decision. *U.S. Education Department Settles Sexual Assault Case with Minot State University, N.D. (Archived)*, U.S. Department of Education's Office for Civil Rights (July 7, 2016) https://www.ed.gov/news/press-releases/us-education-department-settles-sexual-assault-case-minot-state-university-nd.

[67] *U.S. Education Department Settles Sexual Assault Case with Wesley College,* pp. 2, 20-22 (Oct. 12, 2016) (many issues, including denying accused "procedural protections to which he was entitled under Title IX" and school's "written procedures"; expelling him although the complainant said he was not involved; failure to provide him with the correct policy; not informing him of witness names or given investigation report before the hearing; and no opportunity to explain his side of the events or respond to testimony against him.) https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf.

[68] KC Johnson, *A Shameless Title IX Bureaucrat Poses as a Champion of Due Process*, Minding the Campus (March 15, 2018) https://www.mindingthecampus.org/2018/03/05/a-shamelessness-title-ix-bureaucrat-poses-as-a-champion-of-due-process/.

[69] Jeremy Bauer-Wolf, *Biden's pick of Catherine Lhamon as civil rights head could mean a return to Obama-era policies*, Higher Ed Dive (May 13, 2021) https://www.highereddive.com/news/bidens-pick-of-catherine-lhamon-as-civil-rights-headcould-mean-a-return-t/600159/.

[70] *Id.*

[71] "Sexual Misconduct, Accused Student Lawsuits Filed (post-2011 Dear Colleague letter)," https://docs.google.com/spreadsheets/d/1ldNBm_ynP3P4Dp3S5Qg2JXFk7OmI_MPwNPmNuPm_Kn0/edit#gid=0.

[72] KC Johnson, *The Biggest Enemy of Campus Due Process from the Obama Years Is Back,* National Review (June 1, 2021) https://www.nationalreview.com/2021/06/the-biggest-enemy-of-campus-due-process-from-the-obama-years-is-back/.

FACE OPPOSITION TO CONFIRMATION OF CATHERINE LHAMON

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APPENDICES INDEX

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APPENDIX I

Student and Parent Accounts Nos. 1-13

Student 1 **July 2020**

I am a parent of four children, three boys and one girl between the ages of 19 and 26, all of whom have attended college or are still enrolled. Our oldest, a son, was wrongly accused of sexual assault in 2015 and expelled from school. It was a traumatic experience for our son and entire family in which the university ignored significant exculpatory evidence in their quest to believe "victims". In the wake of this experience my husband and I felt more comfortable sending our daughter to college than our younger sons. We were pleased to hear that first steps have finally been taken to begin bringing due process to campus sexual assault cases. I believe that some of the new regulations, had they been in place in 2015, would have made a difference in the outcome of our son's case.

One of the new regulations is the requirement of a "presumption of innocence" letter that will be sent to the accused. This letter lays the groundwork for investigations where presumption of innocence has been completely missing when it comes to disciplinary hearings involving sexual assault on college campuses. Title IX offices have been staffed with people and have educated people to presume guilt. Our son's hearing panel included two young female employees of the university who had been trained with presumption of guilt. They chose not to look at evidence they had access to that was exculpatory for our son. By starting with a presumption of innocence, it at least reminds people hearing these difficult "he said she said" cases that we must presume a person is innocent. Without this, our entire American approach to determining someone's guilt or innocence is up-ended.

Another change that I believe would have affected the outcome of our son's hearing is allowing for cross examination. His accuser did not have to answer any questions about her story and her words were taken as fact. I understand it is traumatic for a true rape victim to relive the details of a rape, but unfortunately this is a necessary evil that upholds presumption of innocence. Furthermore, allowing each party to have an advisor be an active part of the hearing would have been extremely helpful to our son. While his accuser took part in the hearing via phone with her advisor by her side (most likely speaking and giving advice) our son was only allowed to have an attorney there for support – she was not allowed to speak to him, witnesses, the accuser, or the hearing panel. Our 21 year old son had to navigate this highly stressful and critical proceeding on his own. There were several areas of dispute that his attorney would have known how to address given the opportunity, but our son didn't have the knowledge or experience to do so.

These new regulations are a good start to change the adjudication process on college campuses, but there is still more work to be done. We need to ensure that our Title IX offices are a place of fairness for all students. I am asking for your support in ensuring these new regulations go into effect in August.

Student 2 **July 2020**

The path and outcomes our son experienced under the Obama-era "guilty upon accusation standard" is extraordinarily, and tragically, different when compared to what would have occurred under the current new rule of how colleges investigate and respond to allegations of sexual harassment and assault.

The single investigator model included a one-on-one interview with our son (about 45 minutes) and an interview with the complainant. Interviews were conducted with "witnesses" but NO witnesses were witnesses to the alleged event – only to hearsay conversations. In addition, none of the hearsay witnesses heard the complainant allege any assault immediately after or within the first 48 hours. The single investigator did not pursue available physical evidence that would have corroborated our son's testimony. Nor did the Investigator follow-up or pursue numerous inconsistencies in the complainant's testimony and version of events.

From the investigation, thirty-six undisputed facts and one "disputed" fact were generated. The disputed fact was "whether complainant affirmatively consented to perform oral sex on respondent." Non-disputed facts include the following:

- Respondent asked complainant to engage in sex.
- Complainant said "no."
- Respondent asked complainant to perform oral sex on him.
- Complainant performed oral sex on respondent.
- Complainant stopped performing oral sex after about 5- 10 seconds.
- Complainant and respondent resume kissing and holding for several minutes.
- Respondent's phone rang and after answering and a brief telephone conversation, respondent left.

Through the investigative process, the single investigator proclaimed both complainant and respondent were deemed "credible, responsive and non-evasive."

The single investigator was given the authority to adjudicate and found in favor of the complainant based on two apparent items:

1) Our son spoke to fewer people immediately following the encounter (he spoke to only one person after he had left the encounter because a friend has become very ill at a party and he was asked to assist in care). The investigator found that while the complainant never alleged assault to the "witnesses" and none of the witnesses could recount any wrongdoing by the respondent, the complainant's allegations were more credible because, in the end, more people were spoken to.
2) While the complainant was able to say "no" to sex and stopped performing oral

sex after 5-10 was never found or proven that our son exerted pressure – only that the complainant could claim after the fact that pressure was felt..

The process adhered to – which Betsy De Vos called a "kangaroo court" which follows arbitrary rules and offers inadequate protections to the involved – combined with the "guilty upon accusation" culture on our son's college campus, resulted in an experience that can only be described as "un-American." During the harrowing experience we consistently wondered out loud "*how could this happen in America?*"

Our son's case would have followed a completely different trajectory and outcome if the new rules had been in place at that time because the new rules would have provided for the following:

- The accused (and accuser) are allowed to submit evidence. The investigator in our son's case was not required to and was completely not interested in collecting any evidence. Evidence which was available and never sought/accepted included telephone and text messages (and corresponding time stamps) and key card time stamps to the dorm room.
- Participation in live cross examinations. The complainant never elucidated how she was "pressured" into performing oral sex on our son and the investigative report could not provide any description of our son's actions leading to "pressure." A cross-examination process would have quickly revealed that there had been no malfeasance in our son's actions. It also would have made clear that consent was given in the form of acquiescing to our son's request for oral sex to be performed on him.

The above notwithstanding, absolutely and without a doubt, the single biggest hindrance to a fair process was the lack of transparency. The process was hidden as the single investigator performed a superficial and flawed investigation and allowed to adjudicate and determine guilt or innocence based on an extremely cursory and indefensible assessment of "evidence." To be in a process in which the accused cannot speak for himself beyond what the investigator allowed during a short interview performed at the onset of the process and not be allowed to present evidence that would refute the claims of the complainant is abjectly un-American. The process unfolded hidden and essentially drew its power from the phenomenon – if Americans, legislators, governors, council-persons and even college professors had an inkling of how these investigations really proceed, it would be a stunning revelation.

Student 3 **July 2020**

I was an accused male student at a private university. I was falsely accused, and was dragged through a university disciplinary process that shocked me to my core. I was not permitted to present my own evidence or witnesses without arbitrary administration approval (the administration had no criteria and they provided no explanation), I was not allowed to question my accuser or any of her witnesses personally or through an advisor, I was not allowed to *even question* parts of my accuser's story, and the university refused to provide any details of the accusation until after the investigation had concluded. Furthermore, the university violated its own policies by denying all but one of my fact witnesses late on the night before the hearing, while allowing her character witnesses (prohibited by the policy) to testify. The university also declined to ask any of my hundreds of pre-written questions.

I am innocent, and I could have proven my innocence in the campus proceeding had the Regulations been in effect at the time. I could have cross examined my accuser (through my advisor) and her witnesses and called attention to clear inconsistencies and outright lies that permeated her allegations. I could have presented my own witnesses that would have contradicted by eyewitness testimony key portions of her allegations. I would have received notice of the details of the allegation when I was interviewed, so I could more effectively rebut her false claims. But I was not able to do any of these things, and I was erroneously suspended for two and a half years, a punishment that permanently altered my life and career trajectories.

It took thousands of dollars and the intervention of a court to vindicate the rights I should have received from my school.

Student 4 **July 2020**

A young woman (Jane) walks into campus security at 10:45pm on a Sunday night and makes an accusation that she was sexually assaulted six days prior. She was offered medical attention, to talk with the police and refused both. She was allowed to have her previous boyfriend and friend(s) with her for support. The counselor on call was contacted and spoke with the young woman. Various people she interacted with offered her more help/counseling on multiple occasions through that night and the next day, which she refused.

This was a he said she said case, no drugs, no alcohol, no sexual intercourse. A no contact order was delivered to John Doe in the middle of the night. The next morning the young man met with Associate Dean of Students/ Senior Deputy TIX director's in his office. The dean said, "you are being charged with sexual misconduct" and you can make a statement at a later date. We know this to be true because this call was legally recorded four days later when the Dean reiterated what he previously had said. He then explained to John there was "inappropriate touching" and he "did not get affirmative consent."

Shortly after this meeting John was abruptly pulled out of his lab class and told he was suspended. He was escorted to his room by three security men to gather his belongings, while signs are being hung on all the buildings that there was a campus sexual assault. A mass email warning was sent to everyone on campus, asking them to report information.

That night the assault was on the news and in the newspaper. John was treated as guilty the moment he was accused! This was not the fair and equal process the college promised. Imagine how you would feel, your friends watching you be escorted away like a criminal. You don't even know why this is happening, you only know an accusation was made and no one wants to hear your side of the story.

Jane's roommate's statement talked about the night of the supposed incident. Her roommate reported Jane "was mostly annoyed" "upset and frazzled ... The roommate states the next day Jane "told me that she had been thinking about the night before and she told me the more she had been thinking about it the more it bothered her...She was not thinking about reporting it at that point and I brought up the counseling center. She wasn't opposed to it but she didn't think she would need the counseling center.

The next day everyone was home on break and Jane texted her roommate:

- Jane; "I tried to talk to my mom today about the John thing. That conversation did not go how I thought it would."

- Roommate; “what happened?”
- Jane; “She told me I need to be more careful with guys.”
- Roommate; “I’m sorry she didn’t react well sometimes parents need time to process before they come to terms and react the way you want.”
- Jane; “I thought she would get upset or mad or something like that but instead she made it seem like it was my fault. You know it wasn’t right?”
- Roommate; “I am sorry she did not react well…”
- Jane; “I was teasing him earlier that day and I did kiss him and stuff…” “Does this count as sexual assault?”
- Roommate; “According to Department of Justice: Sexual assault is any type of sexual contact or behavior that occurs without the explicit consent of the recipient. Falling under the definition of sexual assault.”
- Jane; “So Yes?”
- Roommate; “Honestly, yes I would think it would count.”

The incident report states Jane “tried to tell her mother that she had been sexually assaulted.” And she reported her mother told her “that because it was not rape, Jane just needed to be more careful with boys.”

John and his father were allowed to return to the campus pick up more belongings two days after the accusation. They spoke with the Title IX director about the unfair treatment, being labeled guilty without any presumption of innocence, and the fact that no one wanted to hear his side of the story. They asked how was it that he was just suspended and they simply believed her? How is it that she alleged something happened and was immediately given the title “victim/survivor” What process had already determined she had “survived” something? **The Title IX director stated, “There was a lot of pressure from the Federal Government and that this is just how things work.”**

John and his father started to drive home with most of his belongings when the Title IX director called less than thirty minutes after they left. She said John could return now to the college to attend classes but he could not return to his townhouse. This one interaction, John and his father talking reasonably with the Title IX director seemed to make a difference in how John was perceived. Maybe he was not the “serial rapist” they were treating him as. This was the only glimmer that John might be heard. It did not last long.

The school said there would be an investigation. Shouldn’t an investigation occur before someone is charged? In this case the college had it covered, when deciding if they would be moving forward with a case they only accepted “evidence in support of the complaint.” It definitely seemed like John’s guilt was predetermined.

John was told on a Thursday afternoon at 4:30pm he had to submit a statement no later than Monday

knowing only the accusers name, date, place and that he was “charged” with “rape” and “inappropriate touching.” While this was “only an educational process” per the college you still have to consider anything you say can be used against you in a court of law. It was clear the college itself had not treated John fairly and there was no presumption of innocence.

Try to find a lawyer in one day.

A few other key facts learned along the way;

- Jane’s story changed and the story grew worse with each person she spoke. When she finally reported she would only do it with the ex-boyfriend at her side ...

- The Title IX director’s summary of events falsely stated that the “complainant indicated that she was very angry and when respondent texted her and said “I had fun tonight” that Jane’s responding text was, “you can’t do that stuff. You can’t hold me down and force yourself on me.” The only text messages that were supplied at all for evidence were from John and the actual text on the night in question after he walked her back to her dorm was, “I really enjoyed spending time with u (smiley face emoji) and Jane’s response to that was “Thanks”

The Dean/Deputy "Selects, trains and advises the student Conduct Review Board" but it was the Dean/Deputy who had decided John was guilty by accusation ... The Dean/Deputy was trained to “believe the victim,” a trauma informed approach that is “based on flawed science,” “loosely constructed,” and “makes unfounded claims about its effectiveness, and has never once been tested, studied, researched or validated.”1

- The investigating officer’s daughter was a friend with the complainant. This officer also wrote a chapter in the Previous Title IX directors book who showcased John’s college campus as a premier example of how a college can “eradicate” sexual violence.” 2

- 10 days after the accusation John’s roommate received notice that he would be getting a new roommate. Its sure feels like the school predetermined John’s guilt.

John submitted his statement and waited. After some time he was allowed to view what we think was most of the “investigative” materials. The investigation only consisted of statements against John by Jane and her friends. John was then allowed to write one more statement in response to what he had viewed.

John had NO hearing to attend, NO cross-examination in person or written, John was not allowed to know who was on his hearing panel judging him. There was no verbal questioning of John by the college or the investigator at any time. How does a hearing panel make a life

altering decision without ever meeting, talking, or interacting with the accused? They made a judgment based solely on information that the college required be supportive of the complainant.

Even within a system that states it is “educational,” it seems when you are labeling someone as a “sex offender” or “rapist” it would be important to hear him or her speak
... how do you come to a conclusion without ever meeting or interacting with one side?

I do believe cross-examination would have made a difference in the outcome of this case, as it is the best tool for determining credibility! Written questions are never an effective substitute for live cross-examination. I think this case is a prime example of why cross-examination is a needed requirement in the new Title IX regulations.

John was found responsible by the college. The effects and impact of being wrongly accused are real. The stigma and vilification of being labeled a “sex offender” cannot be underestimated. The inability to fully clear one’s name can cause extreme pain and embarrassment. Being accused changes your ability to return trust and it is difficult to return to being the valued person you were before the accusations. There are definably changes in personality and social behavior due to the loss of a previously untainted reputation, a loss that cannot be repaired in the absence of clear exculpatory evidence of innocence. Self-blame, suicidal thoughts, paranoia, anxiety, mistrust, social withdrawal and isolation are all commonly seen in many who have gone through similar “educational processes. “It is not only the person accused that suffers this is a life altering event for the whole family and even friends.

Please ask yourselves What is the difference between being labeled “guilty” in a civil or criminal proceeding or being found “responsible” on your college campus of “rape?” Because the consequences of being suspended or expelled, having marks on your records, being judged and labeled by your college campuses has caused irrevocable harm to many students!

Betsy DeVos has taken the time and done her homework on this! It is clear the previous system was broken. Please be supportive of the new regulations and give them the opportunity they deserve!

Sincerely,

Anonymous and forever changed

1. http://www.prosecutorintegrity.org/sa/trauma-informed/
2. Sexual Harassment in Education and Work Settings Current Research and Best Practices for Prevention by Michele A, Paludi, Jennifer L Martin, James E, Gruber and Susan Fineran and Bullies in the Workplace by Michele A. Paludi) Praeger (August 26, 2015)

Student 5 **July 2020**

My name is John Doe. I am 28-years-old. I was falsely accused of sexual assault during my senior year of college. I will never forget when I first received the email notifying me of the allegation against me.

Although receiving this news was predictably jarring, I was actually not overly concerned or worried about entering the investigative process. I obviously understood that any allegation of sexual misconduct is extremely serious, but I (naively) believed that my innocence would protect me from harm. I assumed that "the truth would set me free." I assumed that I was entering an adjudication process that was neutral, fair, and balanced. I assumed that the investigation would reveal that the allegation against me lacked merit, and that the case against me would eventually be dismissed. I even attended my first meeting with the school's investigator without a lawyer! However, despite overwhelming evidence supporting my innocence, I was eventually found "Responsible" for sexual assault and suspended from school for the rest of the year.

While I was eventually able to prove my innocence in a court of law after spending thousands of dollars, the impact of this ordeal on my life and my psyche cannot be overstated. After I was found Responsible and removed from campus, I quickly descended into what my good friend Joseph Roberts described in his recent article in *USA Today* as the "all-too-familiar pattern for the falsely accused: isolation from friends and family, loss of reputation, depression, substance abuse, [and a] suicide attempt." It took me five long years to clear my name. That's half a decade of total professional stagnation and unrelenting psychological turmoil. And even after winning my lawsuit against my university, much of the damage to my reputation and spirit remained. One spurious allegation and a small handful of complicit university administrators was all that it took to irreparably alter my life trajectory.

Education is a civil right, and thus no one should be denied access to education without meaningful due process. The updated Title IX regulations are a historic step in the right direction to ensuring due process for all students. Had this new guidance been in place when I went through the adjudication process, it is possible that I would have been spared this injustice. I have outlined five specific provisions of the new regulations that might have protected me from the false accusation.

1. MORE DISCRETION IN WHICH CASES THE SCHOOL INVESTIGATES

Under the previous guidance, schools were required to investigate virtually every allegation of sexual misconduct – regardless of where the conduct occurred, whether the individuals involved were students at the school, or even if those allegations were received second-hand. For example, the

allegation against me was made in relation to a sexual encounter that occurred hundreds of miles from campus, over summer break, with a girl who was not even a student at my university. Considering that Title IX is ostensibly about protecting access to education, it is very difficult to understand how this kind of conduct was investigated and adjudicated under the auspices of Title IX. The new guidance is a step in the right direction because it allows schools to focus on incidents that actually pose a threat of interfering with the campus environment and students' access to education.

2. STUDENTS ARE ENTITLED TO REVIEW ALL EVIDENCE

The ability to review the adverse evidence/testimony is absolutely essential to crafting an effective defense. In my case, my accuser submitted fabricated evidence to the hearing panel in order to bolster her false claims. Unfortunately, that fabricated evidence was withheld from me until the very last minute, so I didn't even get to review it until I showed up for my hearing, and thus I had no way to defend myself. So there I was, a 22-year-old kid, sitting in front of a panel of university administrators, clumsily attempting to prove that the evidence was fake, but with no real way of doing so. Had I been presented that false evidence prior to the hearing I would have had an opportunity to develop a strategy for demonstrating that it was fraudulent.

3. STUDENTS ARE ENTITLED TO REPRESENTATION AT THE HEARING

When I went through this, the norm on college campuses was that students were required to represent themselves during the adjudication process. This rule did not only apply to accused students like me, but also to accusing students. First of all, the idea that a complaining student who has come forward with an allegation of *rape* would have to represent himself or herself in an adversarial process is self-evidently absurd. Furthermore, the idea that accused individuals should have to represent themselves is equally inappropriate. A student accused of a Title IX violation has his entire educational and professional future hanging in the balance. Expecting him to defend himself under such circumstances is not only cruel, but incongruous with the stated goal of a fair and effective process.

I remember during my hearing I was very concerned with coming off as polite and amicable to the hearing board. I did not want to come off as insensitive or aggressive. However, I believe that this prevented me from vigorously defending myself. I would have been much better off with a trained representative advocating on my behalf. A system in which both accusing students and accused students have representation allows for a fairer process for everyone involved.

4. LIVE HEARING WITH CROSS-EXAMINATION

The new regulations require that there be a hearing that includes an opportunity for some form of "live cross examination." This is one of the more controversial provisions of the new regulations, but it is absolutely necessary. It is not a coincidence that the appellate courts are increasingly requiring schools to allow some kind of live cross-examination in cases where credibility is at issue – it is because, as described by the Supreme Court, cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." In my case, my accuser had a very well documented history of pathological dishonesty.

However, because there was no opportunity for live cross-examination, I was severely limited in my ability to raise this issue during the hearing. Had I been able to explore this line of questioning, it is very possible that I would not have been found Responsible.

5. PRESUMPTION OF INNOCENCE

The presumption of innocence is the bedrock of our justice system. However, for the last several years, university students accused of sexual misconduct have regularly been denied this right. Misguided (albeit well-intentioned) policies such as "affirmative consent" and "trauma-informed investigations" have resulted in the reversal of the presumption of innocence and created an environment where accused individuals are presumed to be guilty and then expected to prove their innocence. The new regulations ensure that all accused individuals are presumed to be not guilty until the evidence demonstrates otherwise.

In my case, the evidence overwhelmingly supported my innocence. My accuser claimed that she was unable to consent due to incapacitation. However, throughout the entire disciplinary process, there was not a single piece of evidence presented to corroborate this claim. There were roughly a dozen witnesses who interacted with my accuser in the moments leading up to our encounter, including two of her best friends who were literally in the room with us during the encounter, and every single one testified that nothing in my accuser's behavior/demeanor indicated that she was blacked out, incapacitated, or otherwise unable to consent. However, despite this total dearth of corroborating evidence, I was still found "Responsible" on nothing more than my accuser's word. The codification of the presumption of innocence would have ensured that students like me were not denied access to our education until the evidence firmly demonstrated that he was guilty of misconduct.

Student 6 **July 2020**

In April 2017, 2 weeks before his last final exam, my college age son was summoned by the Title IX office and informed that he was "charged" with sexual assault contact and sexual assault intercourse. The charge stemmed from a consensual encounter that occurred 6 months prior and was determined by the person who was to investigate and make the ultimate decision of responsibility. In this single person, the university Title IX officer, lay my son's academic and professional future, as well as much of his emotional and psychological stability.

Under the regulations promulgated by the current Department of Education, this would have never been acceptable. The presumption of innocence, a basic right for all people, would have precluded a situation where a person was charged, thus presumptively responsible in the charging body's eyes, for an offense, before an investigative process even commenced. A presumption of innocence throughout the process, with the burden of proof on the school, requires that there be evidence upon which a decision is based, and that the accused be given the opportunity to know and challenge the evidence in his or her own defense.

In my son's case there was no reliable independent evidence upon which to base a decision. There was no physical evidence indicating assault; on the contrary, all available physical evidence, including photographs, show a smiling young lady immediately after her encounter with my son and before her personally recounted 2 other sexual encounters that same night.

The only 'evidence' held against my son were the statements of the accuser and her friends, which contained many contradictions and indications of unreliability. Nonetheless a decision of responsibility was made on the sole basis of 'credibility.' The decision was made through a single-investigator model in which the investigator makes a decision regarding responsibility in lieu of a hearing before a neutral panel of decision makers. This injustice was compounded because the investigator was accountable to no one but herself as she was also the Title IX director and coordinator. Having made public Facebook posts deriding neutrality and promoting a video likening college campus to hunting grounds for sexual predators, there was little chance she would conduct a fair process.

My son was charged, investigated, and questioned without ever having been informed of the allegations made against him and given the opportunity to respond. The new regulations would have ensured his right to defend himself against allegations by requiring he be informed with sufficient precision of what he was accused of. Without a hearing and the ability to cross examine adverse

witnesses and testimony in real time, he had no means to defend himself against false accusations.

The regulations requiring equal opportunity for parties and their advisors to review the evidence would have protected my son's rights in the same measure as those of the accuser. While his statement was included verbatim in the evidentiary file, only the investigator's summarized narrative of her impressions of witness testimony was presented for my son's review. He had no opportunity to hear or even read the actual testimonies of the parties to challenge them and assert his credibility in contrast to theirs. It was obvious from the reported summarized statements that either the accuser was given access to my son's statement before she "finalized' her statement (after the investigation concluded) or that the investigator, in her summaries and reports, manipulated the accusers statement to address my son's statement regarding the encounter. With a live hearing this could not have happened.

In the whole process, my son was interviewed once, and was the last person to be interviewed. How would an investigator be able to examine claims of the accuser against those of the respondent if without questioning her considering the respondent's statement? My son was branded a sexual predator, with no live hearing or impartial decision making panel, on the mere whim of a biased and incompetent employee who, despite her law degree indicative of knowledge of basic rules of evidence and procedural fairness, violated the governing guidance issued by the OCR in September of 2017, as well as institutional procedures and promises of fairness, timeliness and adherence to obligations to Title IX and the Cleary Act. There was no semblance of investigative thoroughness, neutrality, opportunity to prepare a defense, procedural due process guaranteed to both parties.

My son was subject to retaliation in the form of another accusation by one of the accuser's friends for having presented an appeal that raised procedural irregularities and was subject to another equally flawed and procedurally corrupt process. The realization of what was happening to him provoked a suicide attempt. He was Baker Acted and hospitalized for 3 days.

Unlike the female complaint who had the free support and advisory services of Project Safe, under the direction of a self-proclaimed feminist activist juris doctor, our single income family had to spend $25k to defend our son from an overzealous and unfair process that threatened not only my son's educational and professional future, but also his very life.

Student 7 **July 2020**

My son went through the TIX process while he was a college student and the experience has forever changed our entire family. Compared to other accused students we have come to know, he was one of the fortunate ones. It was the *process* that was the most devastating and life altering. I will try to be brief in giving you key details and how the Department of Education's new regulations would have provided for a fair process for both my son and his accuser. I have included in red text parts of the new regs that would have had a positive impact on how the process played out.

My son was on the track and cross country teams. In September 2016, he received an email from the TIX coordinator stating that she had gotten notice that he *may* have been involved in a sexual assault involving another male student (a person my son has never met and my son is not gay). He had no idea what this was about and thought it must be a mistake, so his reply was "I don't understand. Have I done something wrong?" At this point, he was not overly concerned. The response to him said that his name was given as the perpetrator and the incident took place in 2014- OVER TWO YEARS FROM THE TIME HE GOT THIS NOTICE. My son was told he needed to meet with the TIX coordinator and the school would provide an advocate for him.

The coordinator was an employee of the school's women's center and a victim's advocate. The new Title IX regulations would have required that the coordinator, investigator or any person designated to facilitate an informal resolution process to be free from conflicts of interest or bias for or against complainants or respondents.

My son received the investigative report, which he sent to me. We were confident that this could not move forward. I will highlight some of the reasons why:

- The report said the alleged sexual assault took place between March and April of 2014. Due to the broad range of dates and two years that had passed, this made it impossible for my son to have any witnesses or an alibi. How can this even make sense? A person has a traumatic experience and they can only narrow it down to a TWO MONTH time period?

- No investigator could pursue this as a legitimate claim, so we thought. However, we did not realize the money the school could lose by dismissing this claim.

The accuser offered 3 witnesses, 2 of whom stopped responding to the TIX investigator. The 3rd "witness" was a past friend and stated in the interview that the accuser DID NOT CALL THE ENCOUNTER A SEXUAL ASSAULT. The interviewer asked what the perpetrator's name was and his reply was that he did not remember. THE INVESTIGATOR THEN ASKED THIS WITNESS IF THE NAME WAS "JOHN DOE". THE WITNESS SAID-YES THAT SOUNDS RIGHT. This is leading the witness to get a desired response. The new regs require training on how to conduct an investigation, how to serve impartiality, including how to avoid prejudgment of the facts, conflicts of interest and

bias. There must be a presumption of not responsible.

This is just a small portion of what we went through. Can you imagine a 20 year old having to read a report to his mother about a completely fabricated event that contained details of a sexual encounter with another male? My son is not gay; this was humiliating.

However, we live in the United States where there is supposed to be due process. We did not see any way this could move forward. How can anyone be expected to defend themselves from an incident that allegedly occurred almost 2-1/2 years prior in a two month time period?

I called a local attorney to reassure myself that we indeed did not need legal counsel. My heart dropped when he told me that schools care about losing hundreds of thousands of federal dollars more than they do about the students & that he would not be able to speak at the hearing, so we would be wasting our money to hire an attorney. It's a hopeless feeling knowing that the truth is not a priority. The new regs require that the decision maker must permit each party's advisor to ask the other party and witnesses all relevant questions & follow up questions, including those challenging credibility. Parties can be in separate rooms and only relevant questions may be asked.

We were extremely fortunate that the accuser did not show up at the hearing and we learned that he was not even a student at the college at the time. My son was found not responsible, but the effects of the process have been life altering for our entire family. He could not have the option for dismissal or mediation of his complaint. The new regulations provide for dismissal of a formal complaint, at the school's discretion, if the complainant informs the TIX coordinator in writing that he/she desires to withdraw the formal complaint or allegation. The new regs also have the option of mediation.

I appreciate your time and would be more than willing to speak with you or provide additional information. I am hopeful that because of the changes made by the department, all parties will feel that they had a fair process.

Because my son's investigator was a victims' advocate for the Women's Center, there was bias from the beginning. Had the new regulations been in place, my son would have at the least been on an equal playing field. The new regulations require that the coordinator, investigator or any person delegated to facilitate an informal resolution process must be free of conflicts of interest or bias for or against complainants or respondents. This protects all students.

My son has given his consent to tell this story anonymously.

Sincerely,

A Mom

Student 8 **July 2020**

I am writing on behalf of my family to express our deep concern for the process by which the Title IX violations are handled. I say on behalf of my family because it didn't just affect my son but included siblings, aunts, uncles, cousins and grandparents. It also included his friends, teammates both past and present and all of the parents who have been following him for years. This is a big deal and not just for our son.

As with most of the other families in this situation, it began with an early morning phone call with our son in tears. His coach text him to say he was suspended from this team for a sexual harassment complaint and that he could not tell him any more information. Needless to say, he was blown away.

Thank god my daughter works for another university and was privy to a flier on the subject of sexual harassment that included a link to the FACE website. I called to find out if I needed to talk to a lawyer before or after the school rendered a decision. They strongly advised I find someone immediately.

Again, thank god we did because our lawyer was a lifesaver for us and our son.

My son was able to prove almost immediately that he did not initiate the email chain where the girl said she was harassed. In fact, he was able to prove that SHE started it but, as we came to find out, with the kangaroo court that handles these complaints at the university level, there is no common sense allowed in the process.

The people at the university that handled the situation were all 'interim' ; we never knew what was going on, when he met with the 'investigator' for the first time the advocate assigned on his behalf told him he was 'screwed'. Once we hired an attorney the proceedings were amazingly elevated to a school lawyer showing up at the 'hearings' but only to protect the university and still not a process you would find in a real court of law. As it turned out, when it came down to the final 'hearing' the people on the panel had not even read the investigator's report!

It is a broken system. I do not expect that sexual harassment and other sexual violations were what was expected when Title XI was implemented. We never expected to pay thousands of dollars to exonerate our son from something that would have taken 30 minutes in a real investigation with people who are trained in this sort of thing to figure out. The havoc it wreaked and the emotional toll it took on our family and community was mind blowing to all that hear about it.

There has to be a better way.

Student 9 **July 2020**

We are writing to you about the violation of both civil and constitutional rights occurring to many of our outstanding male students on college campuses nationwide due to the Obama administration's Department of Education's (DoE) Dear Colleague Letter (April 4, 2011), which lowered Title IX standards for colleges to receive federal funding. In order to receive federal funding, this DoE guidance (in reality a directive) forces colleges to aggressively pursue sexual misconduct allegations, strips the accused of both their civil and constitutional rights, and lowers the standard of responsibility from beyond a reasonable doubt to only "a preponderance of the evidence/information"; however, how the standard is being applied, with a lack of due process, it is even lower than preponderance of the evidence/information, i.e., you are assumed guilty or responsible until you prove your innocence.

In February of this year, our son was falsely accused of serious sexual misconduct allegations by a disturbed and delusional lesbian girl who has been documented as having intrusive thoughts and memories and has claimed the same sexual misconduct allegations concerning five other men. These false allegations against our son were claimed to have occurred off-campus; however, the University's Dean's office (a.k.a., Title IX Office) informed our son that he was being investigated for potentially violating their Code of Student Conduct prior to having official approval to investigate by the University's Vice President of Student Affairs.

University "investigators" summoned our son to appear before them for questioning. An advisor of his choice could be present during the questioning, but could not speak during the process. The cost of legal representation for this ranged from $5,000 to $25,000 just for the attorney to be present during the "investigation" or, as the attorneys kept calling it, a "kangaroo court." Being a middle class family, we could not afford legal representation; therefore, our son's father, had to take off work, travel to the school, get a hotel, and assist him in preparing for and advising him during the investigation.

Despite our son having receipts, character statements, information from his fiancée, and other items to prove his innocence, and the fact that his accuser, the complainant changed her story drastically three times during the investigation process (which we learned through the investigator's report), the university charged our son with serious sexual misconduct allegations (sexual contact, sexual harassment, and physical abuse, which was later changed to dating violence) just to, as the Title IX officer said, "be fair to her." Additionally,

our son's bishop (we are members of the Church of Jesus Christ of Latter-Day Saints) knew the story and the truth about the complainant (as she went to our son's bishop with the intent to create issues between our son and his fiancée) and the bishop requested to be contacted by the investigators. The investigators stated in their report that they saw no need to contact the bishop. As our son's accuser said, as we discovered during this time, her "words are proof enough" as to what she was falsely accusing our son of doing.

Despite the fact that the complainant drastically changed her story and the fact that our son presented hard evidence to prove the accusations were false, our son was summoned to appear before a Disciplinary Panel. Between the time of the investigation and the Disciplinary Panel, the complainant harassed, stalked, and attempted to publicly humiliate our son and his fiancée, while the university was unwilling to address this conduct with her because "that is her right"; however, our son was not allowed to address her behavior because "that would be intimidating to her."

With the Disciplinary Panel, again, an advisor of our son's choice could be present during the conduct panel, but could not speak during the process. And, again, the cost of legal representation for this ranged from $5,000 to $25,000 just for the attorney to be present during the conduct panel, or as the attorneys (including the local County attorney's office that we later visited who called the process an embarrassment) again kept calling it a "kangaroo court."

Before the panel hearing we, the mother and father, had to take off work for several days a week for several weeks, travel to the school, get a hotel, and assist our son in preparing for the conference panel and provide our son with much-needed emotional support (as well as his fiancée providing emotional support) during this entire ordeal. Due to our son facing suspension or expulsion, our son's, his fiancée's, and our health suffered (lack of sleep, the loss of appetite, as well as, the emotional and physiological stress at home, work, and school). We collected an enormous amount of evidence that would have beyond a reasonable doubt shown that our son was not responsible for any of the false charges brought against him by the complainant. All of the evidence (including character statements) that we had collected for my son to present had to be submitted to the Title IX office prior to the conduct hearing for their review.

On the day of the conduct hearing our son's father had to serve as our son's advisor; however, he was not allowed to speak during the conduct hearing. Our son, who is 19 years

old, had to represent himself while his accuser, who our son was not even allowed to face or cross-examine for “her protection” and for the “emotional stress” that would be inflicted on her, was represented by the Title IX Officer and the Title IX Attorney Coordinator, both seasoned professionals.

Three university panel members were chosen to hear and determine our son’s case. When our son was provided back the evidence (including character statements which were not allowed in the conduct panel hearing) that he had to submit to the Title IX office for review, to our surprise, a great deal of it was redacted, according the Title IX Attorney Coordinator, to provide his accuser (actually the Title IX Officer/Attorney Coordinator that represented the accuser), a “fair chance” and not have her “past reviled” (which according to the Title IX Attorney Coordinator her troubled past is irrelevant) and to “maintain her reputation” and not “assassinate her character.” Our son’s accuser, on the other hand, was given the option to present anything she desired or have the Title IX personnel to present, if she chose to. With the amount of evidence that was redacted and with what our son was not allowed to say, what should have been a very short panel hearing turned into an over 11-hour very emotional and stressful ordeal (8:00 am to approximately 7:30 pm) to convey the complainant’s lies and mental instability. It is by God’s grace alone that our son did not give up in his attempt to show he was “not responsible” for what he was being accused of and charged with.

In the end, our son was one of the few lucky individuals to be found not responsible; however, even to this day, it has taken an emotional, physical, and monetary toll on our son, his fiancée, and us as a family. The university’s lack of concern for due process resulted in my son’s civil rights being violated and his rights guaranteed by the Constitution being violated. Unfortunately, our family is not in the position monetarily to take legal action against his accuser or the university. As our son's mother says, what our son went and continues to go through is similar to the emotional trauma that a rape victim experiences. Our son is the actual victim of Title IX and the April 4, 2011 Dear Colleague Letter.

Thank you for taking the time to read to our concerns and hopefully stopping this unjust epidemic happening to our outstanding male students on college campuses nationwide.

Parents of a wrongfully accused student.

Student 10 **July 2020**

This is a hard letter to write. The accusation against my son happened on Oct 2015 and lasted till December 2017. My son was simultaneously dealing with the TIX and criminal justice processes. It is difficult to separate the two and at times may seem confusing. Imagine being a college student and parents that are not lawyers trying to navigate. A brief synopsis for context purposes; there was no alcohol, no drugs, fully clothed, and no sex, kissing, fondling. There was an unfounded accusation taken at face value. My son was found Not Guilty of a criminal charge and Not Responsible for the TIX accusation.

Flaws in the process began with the first letter. It stated someone would contact him in a few days to talk about an alleged violation. He was instructed not to contact the complainant. A few days later he was contacted by the Campus Detective. The Detective did not tell my son he was a police officer investigating a criminal complaint. My son met with the Detective a few days later with one purpose, figure out what he was being accused of. The Detective told my son that the TIX process was separate from what he was investigating. In early November the school TIX investigator finally sent the second letter to my son to schedule a meeting. This meeting was to discuss “the basis for the belief that you engaged in misconduct and afford you the opportunity to respond”. The decision of guilt was made before any attempt to get my son’s side of the story. It was 33 days, not a few days as the original letter suggested, that he was finally contacted by the TIX investigator about the policy violation in question, still nothing about the accusation itself.

The TIX process at his University included the single investigator model. The investigator’s initial finding was one of Responsibility based on her one sided “belief”. In the code of conduct, since the sanction recommended suspension, the process required a hearing. The panel would be constructed of 3 faculty and 2 students. The hearing was originally scheduled for the week of finals in December. The code of conduct stated the hearing had to be conducted within 45 days after receiving the initial Responsibility finding. The hearing was rescheduled to mid-January. In a strange move, the University scheduled a pre-hearing meeting with my son, his attorney, the Dean of Students, and the University Lawyer to review how the TIX hearing was to be conducted.

Prior to the school hearing the TIX investigator did not notify or provide all witness materials, which were to be provided 5 days before. Notes written by the school investigator were shared after the hearing. At the hearing the school administrators did not follow their

own established rules. The hearing itself was a farce. My son and his lawyers were informed that it was scheduled for 2 hours, with the school taking up much of the time either explaining the process or presenting the accusers claim. The school held firm to their time commitment, leaving very little time for my son's attorney to do just about anything. As the time came to an end, the panel still had questions, but were told they were out of time. My son's accuser was in the same room with him along with her mother, her sister in law, and her school advocate. My son had his two lawyers.

It was communicated to them the Assistant District Attorney was not permitting the school to use the results from the DNA test for the TIX complaint. Due to the criminal investigation, the DNA results that led to the Felony 2 charge came back negative, exculpatory. At one point the TIX investigator used one of my son's friend's statement to represent his statement, since he had invoked the 5th and 14th amendments. When is it acceptable to use hearsay, as a statement for the respondent?

Not surprising he was again found Responsible. The school did provide a recording and we paid to have the recording transcribed. My son now needed to appeal to the University his rejection of the appeal went as far as to say: "I accept the investigating officers' argument that In 2016 my son's school's TIX process had one more appeal to the Board of Regents, it was not time bound. We waited until after his Not Guilty finding in January 2017 to work on this final appeal. It took till October 2017 to file this last appeal to clear his name. It was 16 pages long with 198 pages of exhibits. Every element of her salacious accusation was disputed with evidence. DNA was on our side. The inconsistencies, the omissions of attempts to destroy evidence, the lies or mis-representations to police officers and SANE nurse was included. All the evidence overlooked and disregarded by the school administrations.

On Oct 12th, 2017 the Chancellor was contacted by the Board of Regents "I am remanding this matter to Chancellor for reconsideration. I am requesting Chancellor to carefully review all of the new evidence presented and determine whether the discipline met the standards required by [university] chapter_. The Chancellor should expunge the disciplinary record if the discipline is not sustainable. Regardless of outcome, Chancellor must provide a full explanation of his decision. [My son] may seek the Board's discretionary review of Chancellor Schmidt's reconsidered final decision." – signed by Regent.

In December 2017 – the Chancellor's final decision: "In addition, the DNA evidence,

which was unavailable at the time of my 2015 decision, raises new questions, and does not lend additional credibility to the complainant's account. Upon reconsideration, I am unable to find by a preponderance of the evidence that [my son] sexually assaulted the complainant. Similarly, I am unable to find, by clear and convincing evidence that [my son] engaged in dangerous conduct."

My son struggles dealing with the false accusation. The arrest record does not go away, nor can the stain on his character be erased. What my son went through, no one should have to go through, the depression caused by the process is heart wrenching. On Christmas Eve 2016 I held my son why he cried non-stop for 2 hours after he left work due to his anxiety, he lost his job a week later. He lived in fear while being on bond for 15 months. Fear of people finding out. He lost all his friends and his educational opportunities. It was the rush to believe by the college TIX administrators, Dean of Students office, and the Campus Police that caused my son and my family to live the surreal experience of facing a criminal trial while concurrently dealing with a TIX kangaroo court.

It was the willingness to disregard hard evidence and deceitful behavior of the accuser that led to $150,000 in direct costs to my family. My son was firm in his innocence from the beginning. At every step, there was another person not following their own rules. On one of the challenging days, he asked why was he the only one following the rules.

This process has cost us in so many ways; our health, welfare, trust, happiness, and a significant financial set back.

With humble regards,
A Mother

Student 11 **July 2020**

He was a junior when subjected a Title IX investigation for violation of the Student Code for Sexual Misconduct. The initial charge was digital penetration without consent alleged to have happened in her dorm room on campus. They were in a consensual and on-going sexual relationship for approximately seven months. It was when the relationship was ended that the upset young lady filed the complaint. The incident in question occurred a month in to that seven month relationship.

Our son when contacted by the Title IX Office responded immediately and was interviewed by an investigator the next morning. He was certain that it was a misunderstanding and therefore felt no danger in being interviewed. Bad decision.

The process at the school is the single investigator model with investigators using informed trauma methods. The accuser and her story were never vetted. She was assumed to be telling the truth the entire time. Further, we believe she had undiagnosed/untreated PTSD as her parents died as a result of a violent murder/suicide.

He was not once assumed to be innocent of the allegations. His interview, conducted by a professionally trained former prosecutor (a licensed attorney,) was recorded for the record and was not permitted to be amended, whereas the accuser's story and key facts changed multiple times during the course of the investigation. Witness interviews in support of him were entered as "interpretations " by the investigator rather than actual transcripts. Some key witness testimony was left out until we found out and complained.

The "advocate" assigned to the accuser helped craft a story to meet her often changing memory of events. In fact, when the accuser found out that we retained legal counsel she added a second charge of rape the was alleged to have occurred at my son's off-campus apartment. The accuser's language went from initially suggesting that she wanted no discipline for our son to "he is a monster and needs to be expelled".

These scurrilous allegations and resulting investigation have wreaked havoc on my son and family's life. The investigation, according to the university’s handbook, was to be adjudicated in 60 days, however it took just over 8 months and tens of thousands of dollars in attorneys' fees.

He was ultimately found responsible for the initial charge. In the second charge the accuser was not deemed credible. We appealed the decision and lost.

He was given a one semester suspension, in the middle of Spring semester. The result of which meant the 18 credits he was currently taking were to be lost and he was not welcome back to campus until 01/01/2020, essentially a 3 semester suspension if you include the summer courses/lab job he had lined up for that summer.

We appealed the sanction and sort of won. He was given a deferred suspension where he could have full access to the campus and follow a program instituted by the Title IX office. He successfully completed the program and graduated a semester early in December of 2019.

The whole process resulted very significant costs, in addition to the money we put out travel, hotel and legal fees. He has been suicidal, withdrawn, angry, sad, embarrassed, isolated, and shocked that a relationship turned sour could potentially ruin his life. We are absolutely shocked and outraged with this entire process.

Student 12 **July 2020**

A year ago I was preparing to go back to college. I was recruited to a D-III athletic team, fulfilling a long time personal goal of playing sports on a collegiate team. I was going to be a Resident Assistant, and was thinking about long term aspirations such as a masters' program, a potential Juris Doctorate, and thoughts as to what I may want to do after college. I (admittedly) lacked clarity as to what I wanted to do, knowing only that I wanted to help people. I was outgoing, a strong public speaker, and, if I'm allowed to be a touch self-aggrandizing, an intelligent political science student, who had had professors base multiple classes off of research papers I had written. I had worked hard for everything I accomplished, and prided myself upon that.

These aspirations came to a shocking halt mere weeks after my return to school. I heard I was going to be involved in a Title IX investigation not from the school itself, nor from the other party involved, but instead through my friends. Indeed, it appeared that I was one of the last people on campus to be notified ...

What followed were two weeks of personal hell. I was threatened, assaulted, cut off, and ostracized. My friends were stopped by people I hardly knew in the cafeteria, and still other friends refused to hang out with me in public, specifically citing fear of social retribution. I left the school, and returned home, not out of guilt but out of a fear I have not experienced before or since. I have spent the past 10 months trying to bring my life back together. Despite the promise from the school that the process would only take 45 days max, it took eight months. Eight months of waiting, interviews, written statements, and a deep, lasting trauma. Trauma that drove me towards substance abuse, suicide, and an ingrained fear in my psyche. I am no longer a fearless public speaker, nor is a masters' program likely on the table. Instead, everything I worked so hard for was destroyed the moment I left the school.

I was found responsible at the start of quarantine. I stand by my innocence, and will do so for the rest of my life, but I am not going to argue the specifics of my case. Every time I talk about the case I am in a state of perpetual anxiety for days, and the more specific I get the worse it is.

I am shaking writing just this.
I became a political science major for one reason: I knew where my skills lie, and I want to help people. I saw political science as the best track to line those two facts towards a successful career of doing good. In class, we learned about justice being blind, about the unerring neutrality of the American justice system. After all, isn't that fundamental to American ideals? That no matter how

distasteful the statement, the act, the alleged crime, you will be guaranteed a fair hearing. The Title IX process shatters that illusion.

The head of Title IX was actively unhelpful, to a degree which would shock even those who wish to revoke the new Title IX changes. He broke policy on multiple occasions to allow my accuser to write a character assassination against me, in which she attempted to deeply analyze my supposed character flaws, theorizing how these led to me committing the supposed act. That is not justice, it is not even a poor facsimile of the word. It is instead a pipeline, a system which funnels in young men, disregards any and all legitimate claims to innocence, and equates a homogenous end result of expulsion or severe punishment with a fair process.

Title IX is one of the most important pieces of American legislation for equity in colleges ever introduced. It has allowed women who have experienced the horrors of assault to speak their truths in a comfortable, safe environment. As a survivor of rape and a victim of sexual assault as a 12 year old I see the importance of Title IX, and had either of these situations occurred between myself and a college classmate, I promise you I would have used Title IX. But it is unacceptable to allow Title IX to continue the way it has.

Had [the Final Rules] been introduced when I was going through this process, I would have been able to defend myself, I would have been able to speak my truth, and I would have been presumed innocent, something which is a cornerstone of any developed nation's justice system. I don't deal with what ifs, so I will not say that the final outcome would have been different, because I simply do not know, and doubt I ever will. However, what I can say is that I would have been able to stand on my own two feet, speak my truth, and defend myself the way every person deserves a right to do.

Justice is not Title IX, but it can be and should be, for those accused, but more importantly for those who have been raped and assaulted on campuses, because it will allow them to speak their truths without existing in a phony court, so that they can leave a Title IX hearing with the full confidence that, no matter what, the decision made was just.

Student 13 - Elliott Pitts **July 2020**

TITLE IX INJUSTICE ON CAMPUS
Andrea Pitts (Mother), Elliott Pitts (Falsely Accused) Dublin, CA

The details I've chosen to bring to your attention regarding my son's situation are important. It will make this letter longer than others you may receive, but it's important for you to read about the event in question, the pursuit of my son by the accuser during this event, and the resulting action taken by a biased and over-reaching Title IX Administrator. Individual circumstances matter greatly, and I appreciate your time and attention to the last 18+ months of our family's life. If it wasn't so personal, it might make for a great novel. Unfortunately, it's non-fiction.

Elliott was in his 3rd year as a 4-year Scholarship Athlete (Basketball) at the University of Arizona. It was his dream school and one that would prepare him for a professional career in basketball and eventually coaching. During the pre-season of his Junior year, in the early morning of December 6th, 2015, the team arrived back from Spokane, WA, after a huge win against Gonzaga. Elliott's roommates were throwing a party in their off-campus apartment. Most of the basketball team arrived at the party. There were also members of the female Volleyball team in attendance. One of these volleyball players was the sister (call her 'Jane') of Elliott's roommate. These siblings were also part of a family we had become very good friends with. Everyone was drinking, having a good time – typical college party. Elliott was sitting on the couch playing video games with one of his teammates. The sister and her teammates were socializing around the apartment, joking with the guys, again, typical college party.

Witnesses told investigators that Jane had been pre-drinking prior to arrival of the party, and Jane admits to having multiple drinks (4-5) prior to the party, and said she normally drank more. Witnesses also claim Jane was very flirtatious with some of the players, eventually flirting with Elliott, who took the bait. They had been flirting over the past many months; however, for various reasons, had decided to not 'hook up'. At this party, however, Jane proceeded to sit down next to Elliott on the couch (where he was playing video games with his buddy), and put her hand on his crotch. They started kissing, and he suggested they take this to his room, which she agreed to. She then asked him to get a condom, which he did, and he put the condom on. She then proceeded to get on top. They had sex, which during the act, Elliott claims she was an active and verbal participant. Once the act was complete, Elliott left the bedroom where Jane proceeded to fall asleep and he fell asleep on the front room couch.

The brother, partying at another bar, found out Elliott and Jane were hooking up. He came back to their apartment in a rage, found Jane naked in Elliott's bed, and proceeded to take her to her dorm room where he left her in her bed. He called his mom to let her know what was happening and the mother told him to go back and sit with his sister until she could get there. The brother tried to get back in the dorm, but the Resident Assistant wouldn't let him – dorm rules - if Jane wasn't available to let him in herself. That is when this brother said the words, "I have to see my sister, Elliott Pitts just raped her".

As you might imagine, this started a ball rolling that we couldn't have ever imagined would happen. What then proceeded, I will sum up, until we get to the point that the Title IX Administrator gets involved. The R.A. reported this to the University police as well as the Tucson police. Elliott could stay on the team but not play while the criminal investigation was taking place, which would eventually lead to Elliott leaving the team because of the emotional and mental anguish and anxiety he would suffer. Elliott was criminally investigated and after 20+ interviews, review of the U of A camera interview of Jane where she said 'it was consensual….', a rape kit being done with no findings of rape, and eventually Jane telling police she didn't remember what happened, Elliott was not charged. This was a huge load off our minds; however, little did we know, the worst was yet to come with the Title IX process.

The criminal finding of not-responsible came early January. During this time, we met with the Title IX Administrator, Susan Wilson, 2 different times to try and understand the process she would be following because it did not match the U of A Disciplinary Procedures we found on- line. The most notable items to highlight during these meetings were: 1) We questioned the actual Charge Letter sent to Elliott with a link to the U of A Disciplinary Procedures (Policy 5- 403). There were clear time-lines to be followed regarding giving Elliott the actual charges and allowing him to respond. These dates had come and gone. When we asked Ms. Wilson about this, she said that because …**" *she was representing Title IX, she didn't have to follow these dates/timelines and would proceed without these limitations in her investigation process. "***

I shared with her our frustration in this because it's not what the Charge Letter stated. ***Her response was (verbatim): "I know, it is a bit confusing***".

At our 2nd meeting with her, I brought out a copy of the Charge letter and told her we had some questions on the charges – ***specifically Codes of Conducts 2, 17, and 20 (regarding stalking, etc.). I asked her if in fact, Mia stated Elliott had done these things or that she had in fact through her interviews with others, if they had seen Elliott do any of these***.

She specifically said "no". She told us that in cases like this, where there was possible Sexual Misconduct or assault, quite often, these other actions do come out in her investigation process, so she will (verbatim) "add these to broaden the scope of her investigation".

During this very emotional time – even after the Toxicology report came back – we asked our lawyer**…" How was Elliott to know she was that drunk? SHE approached him…. . SHE was chatty and social in the party…. SHE asked him to get a condom… SHE mounted him……. How was he to know?".** Our lawyer's answer was something like: "She could have been doing perfect cartwheels and somersaults throughout the apartment, but it would not have mattered…". The fact is, they should both be held accountable for their actions, but drunk sex does not equal sexual misconduct / assault.

As the deadline for the appeal Hearing approached, and after finally seeing Ms. Wilson's personal notes from the interviews, and her corresponding biased opinions, as well as other actions (i.e. denial

of our objections of the 2 student's on the panels due to extreme bias; Susan Wilson's continued inclusion of 3 of the 4 un-proven charges in the final violation charge as well as the other egregious examples of Elliott's rights being non-existent), we felt Elliott had no choice but to accept a 'plea' opportunity he was given by the accusers family and U of A, to finish out the semester, agree to the 1 year suspension, and not lose his NCAA eligibility to play elsewhere and move on with his life. As part of the Plea deal, these charges would not appear on his transcripts and only would be available if Elliott gave permission. Little did we know, that although 18 Division I colleges were approached regarding Elliott being available for transfer and to play basketball, 100% of these colleges passed, due to the current climate. The college administrators didn't want any negative attention that might come with Elliott's transfer.

Since this time, the accuser's family has publicly 'outed' the agreement Elliott signed with the family and the school. They sent it to hundreds of U of A basketball alumni and parents, as well as reaching out to Tucson journalists and ESPN to tell their side of the story. The story has appeared in more 'local' papers as recent as last weekend, but ESPN declined to run the story once they heard Elliott's side of things. Still, at this time, it is the #1 search result when someone search's Elliott's name and the University of Arizona. Only recently has Elliott been comfortable to be more social and start hanging out with friends; although, he is very cautious about trusting girls and dating again.

Other notable items looking back:

1- We were never aware we could open an OCR claim against Susan Wilson, the Title IX Administrator. Once we had heard from other families about this, the time-frame was well past the 180-day limit.
2- Our lawyer is the lawyer brought in to meet with each in-coming male athletes for every team, to talk with them about behavior, sexual conduct and so on. He has represented previous male athletes caught up in the Title IX system, and felt based on Elliott's situation, in comparison to these others, Elliott would likely be found non-responsible, but might have to give up a summer session; thus, he was flabbergasted, as were we, when a 1-year suspension was the charge Elliott was given.

At this time, my son is finishing up Community College and had to watch his beloved team win the Pac 12 Championship in February 2017, without him. He would have been a Senior and starting #2 guard. Instead, he was doing his Community College homework on our couch at home. This has been devastating to our son, our finances (~178k spent so far), and our family. We hope and pray that you, and those around you that can change this madness, have the strength and resolve to do so.

Thank you again, Andrea Pitts

1 RELEASE OF THIS LETTER TO ANYONE PERSON(S) OUTSIDE OF THE OFFICE OF CIVIL RIGHTS OR FACE REQUIRES PRE-APPROVAL BY THE PITTS FAMILY – ANDREA & JAMES PITTS, DUBLIN CA.

Shelley Dempsey, FACE Vice President **July 2020**

The Final Rule amending Title IX of the Education Amendments of 1972, 34 CFR Part 106, must go into effect, as promulgated, on August 14, 2020.

I write FACE Vice President and as a former federal regulatory attorney for the Federal Communications Commission and later as an attorney in private practice for a large DC firm with regulatory matters before the FCC, EPA, FERC, and EEOC.

Currently, I serve as Chair of the Intake/Outreach Chair for Families Advocating for Campus Equality (FACE) a 501 (c)(3) Non-Profit Organization that supports and advocates for equal treatment and due process for those affected by inequitable Title IX campus disciplinary processes. Consequently, I followed closely the Notice of Proposed Rulemaking, submitted personal Comments and eagerly awaited the Department of Education Office of Civil Rights' Final Rule.

Neither the 2011 Dear Colleague Letter (DCL) nor the 2014 Guidance under the prior Administration were subject to rigorous public debate through statutory notice and comment requirements under the Administrative Procedure Act (APA); they also lacked the force of law.

Prior guidance created a draconian punitive system holding students responsible for myriad minor infractions or other ill-defined offenses deemed sexual harassment or misconduct. The quasi-judicial “campus courts” became a dragnet that ensnared many innocents falsely or wrongfully accused students while never satisfying “survivors” nor actually tackling the root causes of sexual harassment and sexual misconduct on campus. Lives have been irreparably harmed with life altering consequences on both sides of this debate. While this Final Rule is not perfect it goes a long way toward correcting the confusing and unfair past guidance that dissatisfied complainants and respondents alike.

In my role as Vice President of FACE and especially as Chair of the Intake/Outreach Committee, I am privy to the stories of hundreds of families whose children have been through horrific experiences at the hands of biased campus administrators resulting in life altering consequences and debilitating ongoing critical emotional health issues. You doubtless will be reviewing many of these stories. The number of families reaching out to FACE has increased exponentially. Since September of 2014, we have been contacted by nearly 2000 families. All of these families have been caught in the DCL web of ridiculously vague definitions of sexual misconduct, lack of due process and low burden of proof and often investigated, judged and sanctioned by a single individual.

Educations have been lost, job offers and admissions to graduate schools rescinded and professional licenses unattainable even in cases where the accused student ultimately is found not responsible. Many of the FACE families are unable to afford legal counsel and, for those who can, the cost of defending against a false accusation in a Title IX disciplinary proceeding can prove financially devastating. Without counsel or a specially trained Title IX experienced advocate, the chances of a falsely accused student being found not responsible is frighteningly low. Frankly, it has been absolutely heartbreaking to hear these stories day after day.

While numerous groups supporting the rights of survivors abhor the new regulatory scheme and falsely assert that instances of false or wrongful accusations are "exceedingly rare", FACE knows from documented experience that there is another equally compelling argument that false/wrongful accusations are actually quite common and hopefully will be better addressed under the Final Rule. The DCL and its vague definitions of sexual misconduct and harassment resulted in myriad Title IX complaints for conduct ranging from innocent hugs or kisses without prior permission even if well meaning, to regretted sexual encounters, to coverups for infidelity, to revenge for difficult relationship breakups, to foggy memories due to drug or alcohol use, to failure to ask for consent for each and every act according to unworkable affirmative consent rules, etcetera, often days, weeks, months, or years after they actually occurred.

FACE Experience With Families of Students Subjected to False or Wrongful Accusations and Resulting Life Altering Consequences

FACE Intake Vetting Process: FACE has a rigorous vetting process for families who call or email the organization for support requiring personal contact information and a statement of their situation before gaining access to its information and outreach. The stories almost always follow a pattern of accusations as described above and disciplinary processes that are utterly lacking in due process or fairness as well as sanctions that often clearly are entirely out of line with the behavior alleged by the complainant. While there have been a few instances where FACE has declined support, the vast majority of cases d0 have the hallmarks of false or wrongful accusations.

FACE by the Numbers: Face receives call or emails from accused student families at an average rate of 4-5 per week. Following new student orientation (Sept/Oct), Finals weeks (December/May), Take Back the Night activities and events (January), Sexual Assault Awareness Month activities (Late Mar/Apr) FACE can tally up to 20 new families per week. While the heightened awareness from these programs encourages reporting for all the right reasons, it also leads to reports that are misleading, false or wrongful. Since the release of new guidance and rescission of the DCL, hundreds of lawsuits have been filed against

Colleges and Universities and numerous courts have and are continually ruling in favor of accused students whose rights have been denied. In some cases, the complainants have been held civilly or criminally liable for false accusations. Since 2017, nearly 1000 new families have sought FACE support with over 100 since January 3, 2020.

Title IX Accusations at the K-12 Level: Before 2016, FACE was aware of perhaps a dozen cases of younger students accused, suspended or expelled for behavior that never should have risen to such procedures or sanctions. Since that time over 100 families of K-12 students have sought support from FACE. These stories, too, are heart wrenching, and currently average 4 or 5 contacts per month. These cases have involved students as young as 6 where typical playground games have been recast as disturbing accusations of sexual misconduct. " Tag" and "Hide and Go Seek " can suddenly become described as sexual assault and stalking and, as ridiculous as that sounds, these cases actually exist at FACE. At the high school level, the allegations are very similar to those in Higher Education and similarly the schools have provided little to no due process and generally are biased in favor of complainants. The #Metoo era and "Start By Believing" campaigns have led to unfair outcomes for this generation of students resulting in damage to reputation, education and emotional/mental stability. The Final Rule should lead to better and more equitable procedures and protection for both complainants and respondents at the K-12 level.

Students with Disabilities: Another disturbing trend in FACE intake cases involves students with various disabilities (ADD, ADHD, Autism Spectrum) who are accused of harassment, stalking, unwanted touching, or simply being "creepy", thus leading to complainants making accusations of feeling uncomfortable or unsafe on campus. Under the prior guidance and school procedures, these students often were subjected to processes they could not navigate without coordination with advocates trained under the Americans With Disabilities Act (ADA) and in compliance with the Individuals with Disabilities Education Act (IDEA) requirements. FACE families have experienced extraordinarily difficult procedures that almost ensured that their student would face crushing sanctions and untold emotional distress. The new rules provide for compliance when there is an intersection of provisions of the Civil Rights Act of 1964, the ADA and the IDEA that should protect these students and ensure fair procedures.

Diversity, Equity and Inclusion (DEI): The prior Title IX regime and current arguments against the Final Rule actually fly in the face of DEI. Cases at FACE have taught us that students of color, first generation students for whom English is not their first language, international students who are accustomed to varying and unfamiliar cultural norms, as well as students in the LGBTQ+ community are more likely to be disadvantaged by not implementing the Final Rules. Without access to advocates who can actively participate and guide them through their often complex fact sets achieving a fair outcome is extremely difficult.

Students enrolled in Graduate or Professional Schools: False accusations or flawed procedures leading to wrongful sanctions under Title IX have disastrous consequences for students whose graduate educations have been earned over many years and are subject to licensing authorities for entry into their chosen fields. Title IX notations on their academic records are often an absolute barrier to entry into their careers. Therefore it is imperative that any accusations are subjected to rigorous investigation and ability to judge credibility before causing life altering and career ending consequences. FACE receives call and emails from numerous students each year whom are at the end of their educational paths and even days before graduation or taking professional exams are suddenly upended by unwarranted accusations under Title IX.

Faculty, Employees, Administrators accused of Title IX and Title VII Violations: At both K-12 and College/University institutions, faculty members, teaching assistants, coaches and administrators have been accused of Title IX misconduct and subjected to the same flawed procedures under prior guidance. While horrible stories of abuse have made headline news over the past few years by a few members of this cohort, there is also another side of this issue that has largely been ignored by media and social activists. Title IX (often accompanied by Title VII issues) disciplinary proceedings involving this group of accused have been equally flawed and have resulted in life altering career ending consequences following biased, unfair procedures under the prior guidance. FACE has been contacted by dozens of these accused individuals and their numbers are now exploding in the #Metoo era and especially now among those who seek to "cancel" individuals with whom they disagree and claim that such disagreements create hostile educational or unsafe environments under Title IX. FACE expects to see a flood of new cases involving this group of accused individuals.

After 10 years of personal and professional experience with the adverse effects of flawed campus disciplinary proceedings, educational harm, reputational harm and potential lifelong effects on future employment, I am passionate about the need for final implementation of the Final Rules amending Title IX of the Education Amendments of 1972. It is clear that the DCL and guidance recommended under the Obama Administration served neither complainants nor respondents. Rules that require equitable procedures, rigorous investigations and the ability to test credibility of all parties according to the rule of law are urgently needed. Therefore, I urge removing any barriers to the August 14, 2020 effective date for implementation of the Final Rule.

Respectfully,

Shelley S. Dempsey

APPENDIX II

Parent and Professor Accounts Nos. 14-16

Student 14

Dear Senators:

We have been apprised that Catherine Lhamon has been nominated to again lead the Department of Education's Office of Civil Rights. We write this Letter as "Mr. and Mrs. Doe," parents of "John Doe," the plaintiff in *Doe v. Claremont McKenna Coll*. [25 Cal. App. 5th 1055, 236 Cal. Rptr. 3d 655 (Aug. 8, 2018), review denied, No. 5251318, 2018 Cal. LEXIS 9212 (Cal. Nov. 20, 2018).] to strongly oppose this confirmation.

We are choosing to keep our identities anonymous in order to protect our son, whose mental state is broken beyond repair as a direct result of the corrupted Title IX process to which he was subjected as a freshman at Claremont McKenna College ("CMC"), Located in Claremont, California.

After CMC unjustly found our then 19-year old son responsible for sexual assault in June 2015, our son was distraught. Our son had worked Long and hard to gain admission to CMC, a highly regarded private liberal arts college. Suddenly the life he knew and Loved had been shattered by a false allegation and a broken Title IX system.

Our son always believed that the truth would set him free and justice would ultimately be served, but that did not happen. To say he was shocked that he was found responsible for something horrible, that he did not do is an understatement. After the miscarriage of justice conducted by the college he so Loved, he felt Life was no Longer worth Living and attempted suicide. He survived his first attempt to kill himself in August 2015, only to attempt a second and a third time, as recently as August 2020.

Our son had to wait a very Long time for the truth to set him free and to see justice finally served, which required nearly 4 years of Litigation. It was traumatic enough to be falsely accused as a 19 year old freshman, but it was CMC's complete denial of fairness that triggered one of the worst illnesses conceivable--schizoaffective (schizophrenia plus bi-polar), which has Left our son not even a shadow of his former self, unable to care for himself, but not mentally competent to see that.

Here is the background: After CMC denied our son's appeal as the final step of the college's administrative proceedings, and our son was suspended for a year, we filed a Writ of Mandamus in the Los Angeles Superior Court in the fall of 2015. In November 2016, we Lost at the trial court Level, which further devastated our son's fragile mental state.

We chose to keep fighting for justice to prevail. Finally, on August 8, 2018, a panel composed of 3 female California Court of Appeal justices, ruled unanimously in our son's favor, as John Doe, in a published opinion. The California Court of. Appeal found that John Doe was denied a fair process since the CMC finders of fact had no opportunity to evaluate the credibility of the accuser, who chose to not attend the hearing in person or through Skype, or other technology. The court made it clear that in a "he said/she said" case, it is essential that the review panel be able to directly assess the credibility of the accuser through direct questioning.

In September 2018, CMC chose to file a Petition for Review with the California Supreme Court seeking to overturn the decision of the California Court of Appeal On November 20, 2018, the California Supreme Court denied CMC's Petition for Review. The Appellate Court thus instructed the trial court to grant John

Doe's Writ of Mandamus to vacate the findings and the sanctions (though at this point John had already served his one-year suspension).

We pursued litigation against CMC not just for our son (whose mental illnesses are so debilitating that he will never be able to ever return to college or to work as he has met the high bar set by the Social Security Administration for determination of permanent disability), but for all students falsely accused and/or denied a fair Title IX process at their respective colleges.

The false finding of responsibility issued by CMC against our son was a product of the federal guidelines set forth in the Dear Colleague letter issued by the federal Department of Education's Office of Civil Rights in 2011-that were defective, destructive and in need of fundamental overhaul. We were relieved that changes were made to the regulations in favor of fairness through the proper approval channels under the previous administration.

NOTICE AND INVESTIGATION

CMC refused to give notice to John of the accusations against him before taking his testimony. In fact during John's first interview, he asked the investigator, an outside attorney hired by CMC, whether he could see a copy of the complaint, the investigator told him, "There was nothing to see."

At no time during the investigative process was John notified of any specific charges being asserted against him by the complainant. He had no way of knowing whether the complainant was claiming she had consented to none of their sexual activity, claiming she was incapacitated and could not provide consent, claiming she had consented but at some point had withdrawn her consent, claiming she had been forcibly raped, or was perhaps claiming something else.

Nearly 2 months after the complainant filed the Title IX complaint, John received a copy of the Preliminary Investigative Report ("PIR") that advised him for the first time the specific charges being asserted against him by the complainant. By that time, he had already submitted to three separate interviews by the investigator. But at no time, during any of these interviews or outside of them, did the investigator inform John that the basis for the complainant's claim of sexual assault was she allegedly withdrew her consent during the last few minutes of a 2-hour session of otherwise fully consensual sexual relations.

Before the PIR was drafted and circulated by the investigator, all that John had been given was a letter notifying him that an unspecified and unexplained charge of generic "sexual assault" had been brought against him by the complainant and that an investigation of this unspecified and unexplained charge would ensue. CMC argued that this letter, coupled with a link to CMC's conduct policy (which had buried within it an operating definition of the term "sexual assault"), sufficed to give John full and adequate notice of the charges sufficient to permit him to make a meaningful response. Of course, this was complete nonsense.
By keeping John in the dark about the specifics of the charges leveled against him, CMC was able to exploit John's ignorance about what was important to recall concerning his sexual encounter with the complainant over 5 months earlier (the complainant waited 5 months to file her complaint.) The majority of the review panel found John's inability to immediately recall the complainant's words was highly probative of the complainant's claim that she had revoked her consent at the very end. It did not matter to the review panel that John later recalled her specific words, where she gave him consent for the last few

minutes. CMC's failure to provide notice of the specific allegation in the complainant's claim of sexual assault severely restricted John's ability to defend himself.

Cal. Rptr. 3d 655 (Aug. 8, 2018), review denied, No. S251318, 2018 Cal. LEXIS 9212 (Cal. Nov. 20, 2018), the California Court of Appeal issued a very narrow ruling in the case. It held:

1) In a "he said/she said" case where serious sanctions are at risk (i.e. expulsion or suspension), the credibility of the parties must be assessed through direct questioning (essentially cross-examination). CMC argued that John was allowed to submit questions to the investigator after he had received the PIR, satisfying the requirement of direct questioning. However, CMC refused to ask the complainant any of John's questions. The court acknowledged that the CMC review panel could not possibly have assessed the complainant's credibility because the complainant was never directly questioned at the hearing and none of John's questions were ever asked; and
2) All members of the review panel must assess the credibility of the parties. Only the investigator met the complainant; the two CMC professors on the review panel never met the complainant or questioned her. The court rejected CMC's argument that the investigator could tell the other two review panel members that the complainant was credible.

SINGLE INVESTIGATOR MODEL

CMC 's "...Grievance Process is designed to provide a fair, neutral and equitable process for investigating and resolving complaints of alleged Civil Rights policy violations." However, CMC's grievance process was anything but fair, neutral and equitable.

CMC characterized it Investigation and Review Committee (the "review panel") as "a neutral, three-person panel." But while the review panel did consist of three persons, it was hardly "neutral." One of the three panel members was an attorney hired by CMC to act as the investigator. But she did far more than just investigate. Not only did she determine which witnesses would be interviewed, she conducted all witness interviews and prepared summaries (not transcripts) of those interviews. She advocated for and provided emotional support to the complainant, determined what evidence would be taken into consideration, prepared findings in support of the charges brought against John, and acted as the head of the After John was found responsible for sexual assault (required a vote of 2 of the 3 review panel members), he appealed the decision to CMC. He pointed out that he had been denied fundamental due process, by among other things, not being notified of the allegations against him until after the investigator had completed her investigation and circulated the PIR. Although CMC denied his appeal, CMC made no attempt to contradict the fact that it had withheld from John any specific notification of the charges brought against him until after the PIR was complete.

In denying the appeal, CMC maintained that John was subjected to intensive questioning during his interviews, but acknowledged that he was never informed of the allegations being asserted against him until the investigation was complete when he was given a copy of the PIR. CMC excused its failure to advise John of the allegations made against him any earlier by asserting that due to "the administrative nature of an academic proceeding...[t]here are no indictment charges."

In CMC's Opposition Brief, CMC cites various case authorities in support of the principal that: "Generally, courts are satisfied that students have adequate notice if they are apprised of the charges such that they can meaningfully respond." In light of this, one must ask: What kind of "meaningful" response can possibly be made if the charges are not disclosed until after three separate interviews of the accused have been

conducted and the PIR (which was nearly identical to the Final Investigative Report ["FIR''] ultimately submitted to the review panel) had been circulated?

CMC refused John's request for CMC to re-interview him after he had been apprised of the basis for the complaint through the PIR. John's ability to thereafter respond to those charges in his written submissions to the review panel does not make up for the serious denial of fairness and due process flowing from CMC's refusal to disclose the charges to him prior to his statements being taken and the investigation being completed.

LIVE HEARINGS and CROSS-EXAMINATION

CMC's grievance procedures provided an opportunity for the complainant and the respondent to deliver an oral presentation to the review panel soon after the Final Investigative Report was issued. The review panel was composed of the investigator (yes, the investigator) and two CMC professors. The meeting was overseen by CMC's Chief Civil Rights Officer/Title IX Coordinator.

John attended the meeting and delivered a closing statement to the review panel. The complainant chose to not attend, even when given the opportunity to attend via Skype.

During the "hearing," the review panel did not ask John a single question. And, of course, the review panel never asked the complainant a single question since she was not present. In fact, the review panel never met with or questioned the complainant at all. Only the investigator met with the complainant.
On August 8, 2018, in *Doe v. Claremont McKenna Coll.,* 25 Cal. App. 5t h 1055, 236three-person review panel assigned to assess and draw findings from the FIR which the investigator herself had prepared.

Beyond this, the investigator also authored the "Investigation Review and Findings Meeting Report" that issued from the review panel. No person can be called "neutral" who conducts the investigation, advocates for the complainant, heads the fact-finding review panel, is given one of the three deciding votes, and in the end prepares the findings of fact. Justice cannot be achieved if the investigator acts as the police, complainant's advocate, the prosecutor, the jury foreman and the judge.

The lack of neutrality led to bias. The investigator's bias infected the entire review panel.
Soon after CMC denied our son's appeal, CMC switched from the 3-person review panel to the single investigator model. The single investigator model is even more unfair than the process used in our son's grievance process, which itself was devoid of all fundamental fairness and due process.

The January 4, 2019 ruling by the California Court of Appeal (Second Appellate District) in Doe vs Allee, 30 Cal. App. 5t h 1036 (2019) skillfully obliterated the single investigator model favored by so many colleges and universities throughout the country. ((Allee is the Title IX Investigator for University of Southern California.) This new ruling was made in reliance upon our case, *Doe v. Claremont McKenna Coll*., 25 Cal. App. 5th 1055, 236 Cal. Rptr. 3d 655 (Aug. 8, 2018), review denied, No. S251318, 2018 Cal. LEXIS 9212 (Cal. Nov. 20, 2018).

BIAS, CONFLICTS OF INTEREST AND EQUITABLE TREATMENT

CMC's refused to conduct nearly all of the additional investigation steps requested by John after he first learned of the allegations against him through the PIR. This underscores and affirms CMC's denial to John

of any meaningful opportunity to respond to the charges leveled against him. CMC's denial of John's right to present witnesses and evidence in his defense and CMC's overt bias in favor of the accuser throughout the process were all natural outcomes of the Dear Colleague Letter.

John received the PIR after CMC had substantially concluded its investigation. This was the first time he was apprised not only of what he was accused, but also the first time that he found out who were the witnesses providing testimony in support of the complainant's allegations -- who might know what the complainant said - or when she may have said anything -- how she acted after she was with John.

The CMC grievance procedures allowed John to then request additional investigation steps he would like CMC to take. He was to provide a list of all witnesses to be interviewed or re-interviewed with the questions to be asked and the reasons why such questions needed to be asked. He was also allowed to request additional documentation or evidence to be provided.

John requested 20 additional investigation steps. CMC agreed to just two of them. And one of those two requests was effectively denied as well, as the complainant refused to turn over the requested document.

There was one person who was the single most important third-party witness. Yet, John did not even know she existed until the PIR was released. The PIR identified her using the fictitious name of ff Jessica Baldwin." The PIR described the close relationship Jessica Baldwin had with the complainant (discernible from various other witnesses' testimony besides the complainant's), and the fact that she had been with the complainant immediately following the complainant leaving John's dorm room and for most of the following day. Remarkably, however, Jessica Baldwin, was not on the complainant's witness list and therefore was not interviewed by CMC. The fact that the complainant did not want Ms. Baldwin to be interviewed speaks volumes about the damage she feared Ms. Baldwin might cause to her claims. No witness interviewed by CMC could have the knowledge of Jessica Baldwin - the single most important third-party witness.

Even though the investigator was well aware of Ms. Baldwin, the investigator and the CMC Chief Civil Rights Officer/Title IX Coordinator chose to not interview her to avoid having her testimony in the PIR. When John requested Ms. Baldwin be interviewed, CMC flatly refused to do so. CMC's refusal to interview this key witness and include her testimony in the written report presented to the review panel is convincing evidence of the prejudicial bias by both the investigator and CMC's Chief Civil Rights Officer/Title IX Coordinator. It clearly shows CMC's desire to do nothing, which might have permitted the complainant's claims to be exposed as false. CMC's refusal to interview Jessica Baldwin was an atrocious denial of common law due process and fundamental fairness to the accused.

In stark contrast to how CMC treated John and in contravention of CMC's own Grievance Procedures, CMC allowed the complainant to submit 8 pages with her "corrections and clarifications" to the testimony previously provided by various third- party witnesses. In response to the PIR, the complainant stated, "I am not requesting any additional witnesses. listed below are the corrections and clarifications I wanted to make based on the report, including some additional information." She was allowed to freely and openly attack and explain the testimony of any and all of the witnesses. She had no need for additional follow-up questions since she spoon-fed her version of events/information she wanted the investigator and Title IX Coordinator to accept.

John, on the other hand, followed the rules. John submitted his Request for Additional Investigation Steps, outlining his request for new witnesses to be interviewed and why they should be interviewed, and his request for follow-up interviews of previous witnesses and why they should be further interviewed. He did not try to control the situation with commentary and/or judgment. CMC further revealed its bias in favor of the complainant by including in its Final Investigative Report ("FIR") all 8 pages submitted by the complainant.

Yet, John's legitimate requests for clarification of existing testimony and interviews of additional witnesses (all expressly permitted by CMC's Grievance Procedures) fell on deaf ears. Not surprisingly, the FIR was virtually identical to the PIR given CMC's refusal to conduct 95% of the additional investigation steps requested by John. This is just another example of CMC's extreme bias in favor of the complainant, which resulted in an unfair process against John.

In court, CMC misstated that it fulfilled two of the 20 requests made by John. CMC represented fa\se\y that it agreed to clarify the testimony of one witness, when in fact, CMC denied this request to clarify the testimony of a previous witness. CMC agreed to interview only 1 new witness, period. And this new witness was not the most important witness, Jessica Baldwin. CMC's misstatement deceived the trial court judge who adopted it as true that CMC had interviewed one new witness and clarified the testimony of a previous witness in her ruling in favor of CMC.

Actual bias on the part of the CMC investigator is strongly shown by the summaries of her interviews of the complainant, which demonstrate that the investigator repeatedly revealed to the complainant the substance of the testimony given by John. This then gave the complainant the opportunity to modify her own testimony to better refute John's statements. The complainant's story was constantly changing, and it appeared that she was being coached by the investigator of how to change her story to make it more believable. Meanwhile, the investigator steadfastly refused to reveal to John throughout the investigative process any of the allegations that the complainant had brought against him. The investigator kept John completely in the dark.

The summaries of the 4 separate interviews of the complainant prepared by the investigator show that the investigator repeatedly advised the complainant of the testimony that John had given. In one instance (John's second interview), a mere 23 minutes later, the investigator was advising the complainant of John's testimony, essentially inviting her to change and tailor her testimony to counteract John's testimony.

Without going into fine details of each and every instance of where the investigator gave to the complainant's the specifics of John's testimony, suffice it to say that there was a drastic imbalance in the way John and the complainant were treated. There is plenty of evidence of bias and non-neutrality by CMC. But perhaps the most dramatic and significant evidence of CMC's bias against John is displayed by the single-page complainant's Response to Appeal in response to John's appeal to the findings. This document was submitted to the CMC Title IX office 2 days after the deadline for its submittal. It did not materialize until John asked CMC whether the complainant had filed a response to his appeal.

Despite missing the deadline by 2 days, CMC accepted the Response anyway. But it is no wonder that CMC accepted it. Upon inspection, it was obvious that CMC wrote it for the complainant!

Strikingly, the style, language and syntax used in this document bear no resemblance to that of any writings previously submitted by the complainant. A computer program, using the Fleish-Kincaid Index, which compares two documents, showed almost identical index numbers, indicating that both the Response to Appeal and the Appeal Decision were written by the same person at CMC. It further showed that the Response to Appeal was not written by the complainant when comparing the Response to Appeal to previous submissions made by the complainant.

Appalling as it seems, personnel from the CMC Title IX office chose to actively controvert John's position and to surreptitiously act as an advocate for the complainant by ghost-writing a counterfeit Response to Appeal on her behalf, perhaps without her knowledge or consent. We later learned that the complainant was traveling around Europe and blogging about her experiences at the time the Response was filed by CMC. This is the most blatant display of bias imaginable.

Actual bias is also shown by CMC's acceptance, without hesitation, of a sanctions statement written and submitted by the Title IX coordinator at Scripps College on the complainant's behalf. This statement was used by the CMC Dean of Students to help determine what sanctions John would face. This further demonstrated CMC's disturbing non-neutrality.

Needless to say, a sanctions statement written by an administrator at the complainant's college was not permitted under CMC's procedures. But the CMC Title IX office permitted this to bolster its efforts the imposition of sanctions against John beyond those warranted by the evidence.

CONCLUSION

CMC's disciplinary action violated California statute that requires fairness in administrative hearings, such as the Title IX process. CMC violated the required fairness and provided no due process to our son, first and foremost, by concealing from John the factual basis of the charges against him until after all three of his interviews. John had specifically requested in his first interview an explanation of what he had allegedly done wrong but CMC refused to tell him. CMC can offer no justification for this concealment, especially when it forced John to guess what he had supposedly done wrong, and then held his incorrect guess against him.

Likewise, even though the case presented a paradigmatic "he said/she said" credibility contest-as CMC admitted-CMC failed to give the review panel any opportunity to gauge the complainant's credibility, another fatal flaw Overwhelming evidence negated the complainant's claim of sexual assault based on an alleged withdrawal of consent. No reasonable trier of fact could have found in favor of the complainant based on the record as a whole. And had CMC not denied John a fair hearing and basic due process, the record would even more strongly have demonstrated the baselessness of the complainant's claims. Subsequent regret about engaging in sex is not the same thing as withdrawal of consent during sex.

Finally in an attempt to minimize John's need for relief from by the California Court of Appeal, CMC claimed in its brief that John had served his suspension and thus was eligible to receive a degree from CMC in Spring 2019. This assertion was not based on anything in the record. But more importantly, CMC knew it was false.

Although John did return to CMC after his one-year suspension, he was forced to take a medical leave of absence in March 2017 when he went into full psychosis-a leave of absence acknowledged and approved by CMC itself. John's mental health issues, which his treating doctors have attributed directly to the trauma he suffered as a result of CMC's patently unfair and biased grievance process, have prevented John from ever resuming his education.

The revised regulations, approved during the prior administration, righted a horrific wrong and provided guidelines where justice can finally prevail. We spoke out in favor of those revised regulations, including addressing the Department of Education in September 2017, to shed light on how the falsely accused were found responsible through corrupted proceedings in which fundamental fairness and due process had been routinely and callously ignored. We wanted the DOE to understand how those found responsible under kangaroo court-type proceedings suffer greatly and are victims in the truest sense of the word.

Due process should not be a partisan issue. It is an American issue. Due process protects all-the accused as well as the accuser. If applied properly, it should reveal the truth--the real truth and not the contrived truth. Ultimately justice is what is needed to support both the victims of sexual assault as well as those falsely accused/found responsible.

If the revised regulations put in place by the prior administration had been in effect in 2015 when our son was falsely accused of sexual assault as a freshman at CMC, his life may well have been spared. The due process protections outlined in the regulations currently in place help guard the mental health of falsely accused students. The revisions to the regulations came too late for our son. Let's not go backwards by compromising fairness provided for in the current regulations. The regulations must provide protections of fairness for both complainants and respondents, not just complainants.

With appreciation,

"Mr. and Mrs. Doe," parents of John Doe, the plaintiff in Doe vs Claremont McKenna College

Student 15

They say, “The road to hell is paved with good intention”.

My respondent student is a “long-hauler” with 9 years in, navigating campus Title IX. He’s lost nearly everything important to him. The continued journey we face promises to take most of the rest; it seeks to destroy.

Revered as a noble cause, the 2011 Dear Colleague Letter firmly reminded schools of their obligation under Title IX - to provide education and its benefits to all students, complainants and respondents alike, free from sex-based discrimination. Mob voice and politics intersected with good intention - confusion, pressure and fear grew - and Title IX’s protection became the weapon.

Flawed processes barricaded institutions and administrators from government. Students were left to navigate Hell alone. Good intention was abandoned. Choices made and decisions reached guaranteed fair, equal treatment for no one.

For 1000s like my family, the Road’s journey requires a “every human for oneself” strategy to survive an inhumane process.

A presumption of innocence, the constitutional concept taught in grade school did not, strikingly, apply at school.

My student’s experience with campus Title IX revealed fundamentally unfair processes, including

Processes implemented that did not align with published school policy, both of which were often revised while kept from the students involved

- Multiple adjudications of the same allegation, one after the other under separate school policies; commonly known as double, even triple jeopardy
- The inability to defend oneself before unbiased hearing panelists, all pertinent evidence considered, and opportunity to question, indirectly, each student
- Processes based on political narrative rather than truth
- Falsification of student records by schools to protect school interest
- To remain unheard, dismissed, over provable concerns of unfair practices, harassment and stalking of a respondent with no action taken.
- To experience a finding of non responsibility, which, from that day forward, does not provide for an education free from discrimination and unencumbered from wrongful restraints

In that year, my child spent most days on the floor of his dorm bathroom, in the fetal position, shower running to muffle his cries. At 20, he attempted to take his life.

Once, my student described his life’s view as “a cup filled to the brim.” Today, he is left with permanent brain damage as a direct result of what The Road to Hell inflicted on him as an adolescent college freshman.

No human should be made to suffer this way again.

My son and a friend were talking recently, and the topic of campus Title IX came up. (It's been in the news a lot lately.) The friend, a Native American student who also attended a federally funded United States university, listened intently to my student's story from beginning to end. The friend's response was quick: "I don't understand. Why would you ever have lesser rights than me under Title IX? That's discrimination based on race, and is illegal. As a Native American, I am guaranteed due process protections in school discipline investigations but other races were not until DeVos ?The discriminators targeted you because you're a guy and a non Native American?"

Don't be fooled; my respondent student's experience is not an outlier; thousands have also journeyed The Road to Hell. Like my student, they suffer the effects of PTSD and ongoing psychological and emotional illness. Ignorance, lack of consideration, and unwillingness to understand are only feeble excuses by those who prefer their blindness to the truth.

Over two thousand students and families have contacted support organizations like Families Advocating for Campus Equality (FACE). A majority of Congressional staffers polled report a friend, roommate, teammate "who this happened to" while in college. Families learn that multiple classmates from their secondary school have left to go to college only to have "that happen to them". All are forever impacted by former unfair, biased practices.

Do your plans for reform acknowledge the wrongs against them with plans to ensure it will not happen again? Do your plans provide them security in knowing they can count on fair and equal treatment? Do your plans provide them a voice?

We MUST solidify Title IX reform with current Regulation guaranteeing fair and equal treatment of every student, required school compliance, without fueled political narrative and its resulting discrimination based on gender and race. THIS is the true crisis and there is no excuse for not correcting these imbalances. It's the right thing to do. It's the law.

July 13, 2021

Professor Statement Opposing the Confirmation of Catherine Lhamon as Assistant Secretary for Civil Rights at the Department of Education

I am writing in opposition to Catherine Lhamon's nomination for Assistant Secretary for Civil Rights in the Department of Education and am asking that HELP Senators vote against her confirmation when it comes up for a vote in the Senate HELP Committee. Although Ms. Lhamon held the same position from 2013 through 2017 during the Obama administration, her prior performance in that job is disqualifying for a second round.

Ms. Lhamon is most noted for her zealous enforcement of the 2011 Dear Colleague Letter[1] and her authorship of the 2014 Guidance document[2], both thankfully rescinded, that trampled all over the constitutional and civil rights of thousands of students, as well as many faculty. Ms. Lhamon's Title IX compliance guidance engendered thousands of erroneous decisions in campus sexual harassment and sexual assault disputes, many of which devastated innocent respondents.

As a former Professor of Biochemistry and Molecular Biology at The Oregon Health & Science University in Portland, OR, I had the misfortune of experiencing Lhamon Title IX guidance up close after I was falsely accused of sexual harassment by the one first year female medical student who failed to pass the medical course I directed.

1) I was not allowed to know the allegations with which I was charged. I learned of the charges ten months after my case was closed, and they were fabrications.
2) I was not allowed to know the name of the complainant or her witnesses.
3) There were no formal or written charges.
4) I was not allowed to have witnesses on my behalf.
5) I was not allowed to present evidence.
6) All exculpatory evidence was withheld from me.
7) I was not allowed to defend myself in any way, something that would have proven difficult given the absence of charges.
8) There was no investigation, just a prosecution.

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[1] 2011 Dear Colleague Letter (https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf)

[2] 2014 Questions and Answers on Title IX and Sexual Violence (https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf)

9) I was gagged throughout the proceedings, i.e., I was not allowed to seek help, discuss with colleagues, etc….
10) Etc……

Kim Jung-un would have been proud.

After I was found responsible for sexual misconduct, I appealed to Ms. Lhamon's OCR directly (OCR Reference No. 10152256) for relief. Not only did Lhamon's OCR bestow its stamp of approval for the procedures my university implemented in its investigation of me, but the OCR emphasized in its decision letter that it would have employed comparable measures if it had conducted the primary investigation. I also learned from Ms. Lhamon's OCR that innocence is no defense in a Title IX proceeding.

Despite the absence of wrongdoing – at least on my part – I was eventually terminated from my faculty position. If interested, you can read more about my ordeal here[3].

As a note of analogy, if the allegations against President Biden had been adjudicated in a Title IX proceeding under Lhamon guidance, he would have been found responsible, lost his job, and never been our President. The irony of President Biden's pick of Ms. Lhamon as Assistant Secretary is not lost on her victims.

I have read both the Dear Colleague Letter and the subsequent guidance that Ms. Lhamon authored. Both are vague and undetailed, markedly biased against and unfair toward the accused, discriminatory, constitutionally unsound, and legally dubious. At least that's what our federal and state courts have found.

Among the many thousands of erroneous findings in Title IX proceedings under Lhamon guidance, there have been, as of today, 724 lawsuits[4] from wrongly reprimanded and innocent students, many of whom were suspended and expelled. The majority of the judicial decisions rendered have been favorable to the plaintiff, and ~100 have been favorably settled pre-trial. Noteworthy, these verdicts have been decreed by judges across the ideological continuum.

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[3] The Weaponization of Title IX at Oregon Health & Science University (https://www.saveservices.org/2020/03/the-weaponization-of-title-ix-at-oregon-health-and-science-university/)

[4] Title IX Legal Database (https://titleixforall.com/title-ix-legal-database/)

Presently, there have been at least 23 appellate court decisions[5] that have arisen from these cases that have rendered findings of due process violations using Lhamon guidance. These violations include: 1) insufficient hearing process; 2) insufficient notice; 3) inadequate credibility assessment; 4) improper use or exclusion of witness testimony; 5) potential sex bias; 6) inadequate investigation; 7) lack of cross-examination; 8) misuse of affirmative consent policy; 9) conflicting role of college officials; 10) single investigator model; 11) improper review of appeal; 11) withholding evidence from the accused; 12) inability to question witnesses; 13) refusal to allow respondent's attorney to attend disciplinary hearing; 14) inaccurate investigative report; 15) hearing panel did not read investigative report; 16) selective enforcement of sexual misconduct policy; 17 lack of live hearing; 18) inexplicable decision to discipline plaintiff, i.e., retaliation; 19) university' failure to follow own policy or meet its on deadlines; 20) refusal to allow appeal; 21) open hostility to accused; 22) appeals panel only credited female accuser testimony; 23) unexplained finding of female student's incapacitation; and 24) external pressure from OCR, state legislature, and student protests.

This is quite the record. Clearly, due process, free speech, and the United States Constitution are not among Ms. Lhamon's strong suits.

Lhamon has done more to obliterate the constitutional and civil rights of accused students and faculty than perhaps any other American, and I blame her, among others, for enabling my Title IX debacle. I am particularly reminded of her advocacy for the policy that "schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant[2]." Nobody in public service should subordinate the United States Constitution, which grants Americans due process rights, to anything. The statement is appalling and prohibitive for the position for which she is being considered.

Lhamon, if confirmed, will be charged with the implementation of the current Title IX compliance rule, which she does not support. She has stated that the new rule takes "us back to the bad old days, that predate my birth, when it was permissible to rape and sexually harass students with impunity[6]." As ludicrous as her statement is, the Office for

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[5] Appellate Court Decisions for Allegations of Campus Due Process Violations, 2013-2020 (https://www.saveservices.org/wp-content/uploads/2021/04/Appellate-Court-Cases-2013-2020.pdf)

[2] 2014 Questions and Answers on Title IX and Sexual Violence (https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf)

[6] Catherine Lhamon's Twitter Feed – May 5th, 2020 (https://twitter.com/CatherineLhamon/status/1257834691366772737)

Civil Rights needs a leader that has less reactionary views and who will implement current policy fairly and equitably and in good conscience.

Furthermore, we all know that the current Title IX rule, which is currently under review by the OCR under Acting Assistant Secretary Goldberg, was launched by the same person who rescinded Lhamon's Dear Colleague Letter and Guidance documents. This review should be supervised by someone with a fresh set of ideas to avoid any conflict-of-interest or perception of bias or retaliation. And reinstalling the Lhamon guidance debacle is unthinkable.

I do not intend to offer a defense of the current Title IX rule in this email, but I, a progressive Democrat, laud the new rule because it, unlike Lhamon guidance, is meticulous, thoughtful and supports all parties to gender discrimination, sexual harassment, and sexual assault disputes fairly and equitably.

I am requesting HELP Senators to vote against Catherine Lhamon's nomination for Assistant Secretary for Civil Rights in the Department of Education. The nominee has caused too much havoc and suffering for too many individuals and families to deserve this appointment. She is a poor, provocative and unwise selection for this leadership position, and there are many better choices.

Thank you.

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APPENDIX III

List of Articles Critical of Catherine Lhamon's Confirmation

List of Articles Critical of Catherine Lhamon's Confirmation

Organized by Date Published

KC Johnson, *How Badly Do the Democrats Want Catherine Lhamon Back in Power?*, The James Martin Center for Academic Renewal (September 22, 2021) https://www.jamesgmartin.center/2021/09/how-badly-do-the-democrats-want-catherine-lhamon-back-in-power/

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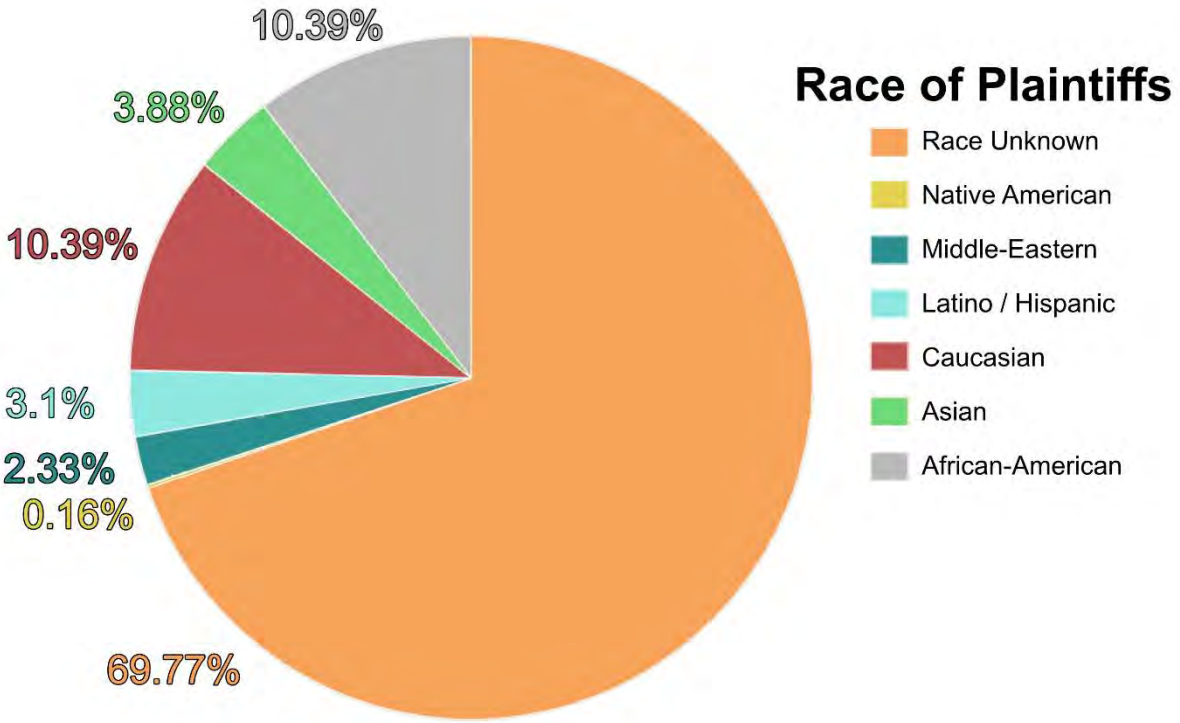
APPENDIX IV

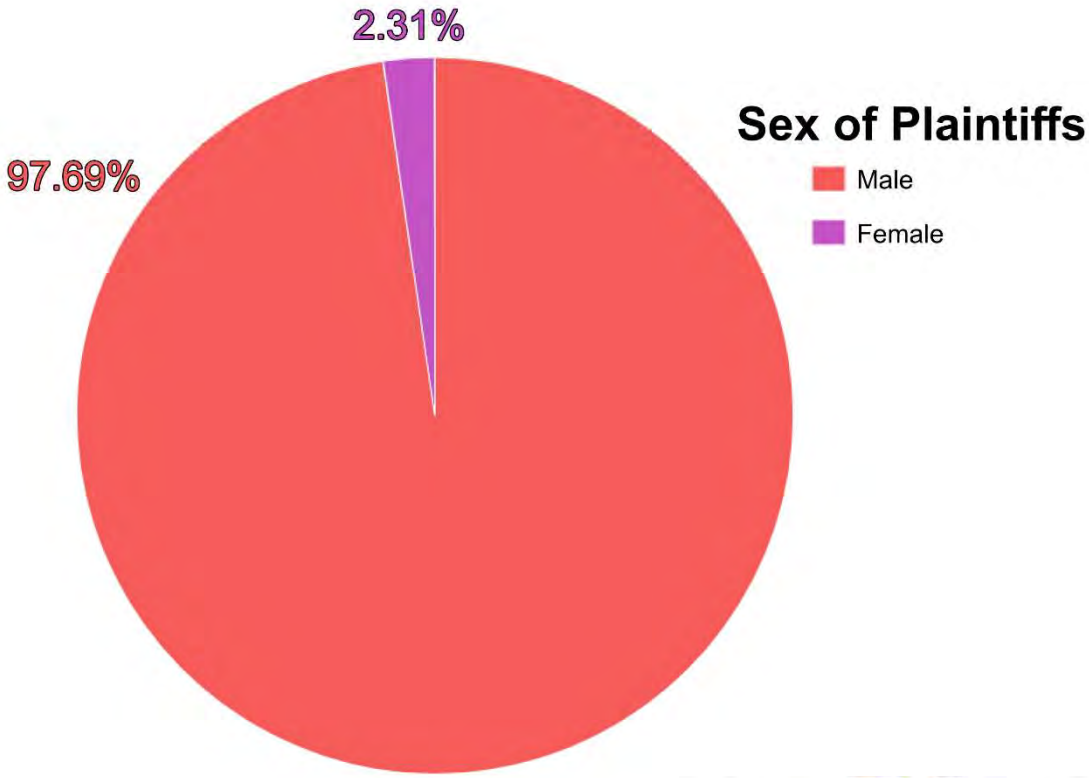
Plaintiff Demographics in Accused Student Lawsuits

Plaintiff Demographics in Accused Student Lawsuits

Based on an Analysis of 645 Lawsuits and p roduced by Title IX For All, 7/6/2020 Source Data at:

https://www.titleixforall.com/wp-content/uploads/2020/07/Plaintiff-Demographics-by-Race-and-Sex-Title-IX-Lawsuits-2020-7-6.pdf





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