

# FACE.

Families Advocating for Campus Equality

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## Comment on Proposed Title IX Rulemaking<sup>1</sup>

*Nondiscrimination on the Basis of Sex in Education Programs or Activities  
Receiving Federal Financial Assistance*

Docket Number: ED-2021-OCR-0166-0001 / RIN: 1870-AA16

September 12, 2022

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<sup>1</sup> This Comment is intended to be included as part of the Administrative Record for *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, A Proposed Rule (2022 Proposed Rules) by the [Education Department](https://www.ed.gov/) (July 12, 2022) 87 FR 41390- 41579, <https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

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I. Who Are We? .....	11
II. Who Are the Accused? .....	2
• <i>Minorities</i> .....	2
• <i>Learning Disabled Students</i> .....	3
III. What Exactly Is “Truth”? .....	4
IV. “[T]here has to be something more than an intent to have sex” .....	6
V. The Other, Silent “Survivors” .....	7
VI. Guilty “no matter what” .....	6
VII. The 2020 Final Rules .....	9
VIII. The 2022 Proposed Rules: the Single Investigator Returns .....	10
<i>The Single Investigator Model is ‘dangerous’</i> .....	10
<i>FACE Students Subjected to Single Investigator Model</i> .....	13
• <i>Confirmation bias and accountability</i> .....	14
• <i>Impaired ability to mount a defense</i> .....	18
IX. The 2022 Proposed Rules: Live Hearings & Cross-Examination .....	18
<i>Appellate Courts Across the US Require Live Hearings</i> .....	19
<i>FACE students denied live hearings and/or cross-examination</i> .....	22
X. The 2022 Proposed Rules: Access to Evidence .....	25
<i>Appellate Courts Demand Students be Given Evidence</i> .....	25
<i>FACE students denied access to evidence</i> .....	26
XI. The 2022 Proposed Rules: Severe Repercussions and Irreparable Damage .....	27
<i>Courts Recognize Repercussions Suffered by the Wrongly Accused</i> .....	28
<i>FACE Students Have Endured Severe &amp; Life-threatening Repercussions</i> .....	30
XII. Conclusion .....	35
Exhibit 1 .....	PDF p. 39
Exhibit 2 .....	PDF p. 68
Exhibit 3 .....	PDF p. 70

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Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.<sup>1 2</sup>

Families Advocating for Campus Equality (FACE)<sup>3</sup> submits this Comment in response to a request from the Department of Education's Office for Civil Rights (OCR) for input on its proposed Title IX regulations (2022 Proposed Rules)<sup>4</sup> revising the 2020 Title IX regulations (2020 Final Rules).<sup>5</sup>

In this Comment, FACE illustrates through seventeen family and student accounts<sup>6</sup> how OCR's 2022 Proposed Rules will decrease decisionmaking accuracy, deny basic fairness in Title IX campus disciplinary proceedings, and result in ruined careers and innocent students and faculty emotionally devastated to the point of suicidal ideation and even suicide.

### I. Who Are We?

FACE is a nonpartisan, gender-neutral nonprofit founded and run primarily by women, many of whom are parents of daughters as well as sons. FACE advocates for and supports students and faculty wrongfully subjected to biased and inequitable Title IX investigations. Since 2013, FACE has been contacted on behalf of over 2000 Title IX respondents, and receives four to five, and sometimes as many as 20, desperate calls and emails from accused students, faculty, and their families every week.<sup>7</sup>

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<sup>2</sup> *Doe v. Univ. of S. Cal.*, 29 Cal. App. 5th 1212, 1231 (2018).

<sup>3</sup> Families Advocating for Campus Equality, <https://www.facecampusequality.org>.

<sup>4</sup> 2022 Proposed Rules, *supra*, note 1.

<sup>5</sup> *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 FR 30026-30579 (May 19, 2020) (codified at 34 C.F.R. pt. 106) (2020 Final Rules).

<sup>6</sup> Exhibit 1 - FACE Respondent Accounts, includes 17 detailed accounts of wrongly accused students. <https://static1.squarespace.com/static/5941656f2e69cfcdb5210aa/t/5f601123dc9f13698fbf34f3/1600131364445/FACE+NY+AM+ICUS.pdf>. Exhibits 1, 2, and 3 were filed as an appendices to a FACE amicus brief in *Doe v. Massachusetts Institute of Technology*, Case No. 22-1056, United States Court of Appeals For the First Circuit, filed April 14, 2022.

<sup>7</sup> Exhibit 2 – Intake Report, by FACE Vice President and Intake Director who responds to incoming calls from families of accused students and professors. These calls declined due to campus closures during COVID.

## II. Who Are the Accused?

Despite assumptions to the contrary, unfair Title IX proceedings are not only an issue at institutions of higher education and privileged white men are not the only students accused of sexual offenses. FACE's 2000+ student respondents include many minorities, first-generation college students, as well as women, LGBTQ+, and other students ranging in age from kindergarteners to graduate students and faculty members.<sup>8</sup>

The increasing presence of young children among our numbers is concerning; since 2016 FACE has received distraught calls from well over 100 families of K-12 students, some as young as six, in which the conduct of children engaged in "typical playground games" has "been recast as disturbing accusations of sexual misconduct."<sup>9</sup> The damage to these young children's education and emotional stability is heartbreaking.

### *Minorities.*

At every level of education, the disabled, students of color, first-generation college students, and those without resources to retain legal assistance are all more likely to be disadvantaged by the impact of unfair school Title IX policies.<sup>10</sup> In *The Atlantic* journalist Emily Yoffe asked, "Is the system biased against men of color?" and revealed that "black men make up only about 6 percent of college undergraduates, yet are vastly overrepresented in the cases I've tracked."<sup>11</sup> Black faculty members also often have found themselves the target of Title IX proceedings.<sup>12</sup>

the outsized harm being done to Black college students accused of sexual assault is, by definition, disparate impact and those committed to protecting Obama's legacy need to decide if they care about that. At the moment, all evidence points to the conclusion that they don't.<sup>13</sup>

Unfortunately, the same politicians who claimed the Trump administration's 2020 Title IX Regulations<sup>14</sup> "turned its back on our most underserved and vulnerable [Black] students," are inexplicably now attempting to return to 2011 "Obama-era policy," which "disproportionately affect[ed] young black men."<sup>15</sup> In a 2019 article entitled *Black Men, Title IX, and the Disparate Impact of Discipline Policies*, Erika Sanzi observed that the Obama administration's 2011 guidance "changed the way sexual campus assault is adjudicated on college and university campuses" and

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<sup>8</sup> Exhibit 3 – Lawsuit Demographics, published as *Plaintiff Demographics in Accused Student Lawsuits* (Chart), Title IX for All, <https://www.titleixforall.com/wp-content/uploads/2020/07/Plaintiff-Demographics-by-Race-and-Sex-Title-IX-Lawsuits-2020-7-6.pdf>, accessed Sept. 10, 2012, in Title IX for All Database, *Black students four times as likely to allege rights violations in Title IX proceedings*, <https://www.titleixforall.com/category/databases/>

<sup>9</sup> Exhibit 2 – Intake Report, *supra*, note 7.

<sup>10</sup> Raul Jauregui, Title IX Needs to Protect Every Student Present in the US, Including Dreamers. (June 2, 2021) <https://www.saveservices.org/2021/06/title-ix-needs-to-protect-every-student-present-in-the-us-including-dreamers/>

<sup>11</sup> Emily Yoffe, The Question of Race in Campus Sexual-Assault Cases. (Sept. 11, 2017) *The Atlantic*. <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/>

<sup>12</sup> L. Douglas Wilder, Secretary DeVos Right to Restore Due Process on Campus. (June 3, 2020) [https://www.roanoke.com/opinion/commentary/wilder-secretary-devos-right-to-restore-due-process-on-campus/article\\_dfac7ff4-7d4d-5109-9657-2532a0816f1d.html](https://www.roanoke.com/opinion/commentary/wilder-secretary-devos-right-to-restore-due-process-on-campus/article_dfac7ff4-7d4d-5109-9657-2532a0816f1d.html)

<sup>13</sup> Erika Sanzi, Black Men, Title IX, and the Disparate Impact of Discipline Policies (January 21, 2019) RealClear Education ("While the Office of Civil Rights quite remarkably [did] not collect any data on race in these kinds of Title IX cases, the anecdotes are consistent and many.") [https://www.realcleareducation.com/articles/2019/01/21/black\\_men\\_title\\_nine\\_and\\_the\\_disparate\\_impact\\_of\\_discipline\\_policies\\_110308.html](https://www.realcleareducation.com/articles/2019/01/21/black_men_title_nine_and_the_disparate_impact_of_discipline_policies_110308.html)

<sup>14</sup> 2020 Final Rules, *supra*, note 5.

<sup>15</sup> Erika Sanzi, Black Men, Title IX, and the Disparate Impact, *supra*, note 13.

led to a disproportionate number of expulsions and scholarship losses for Black male students. It is an unintended consequence, but not surprising in a context where due process is suspended, and a mere accusation is sufficient for the accused to be presumed guilty. Almost no one wants to talk about the role race plays in allegations of sexual assault but those brave enough to address it are unequivocal about the imbalance they see.<sup>16</sup>

It cannot be ignored that the 2011 DCL contributed to the many court decisions criticizing schools for implementing and applying sex discriminatory procedures.<sup>17</sup> According to the database maintained by Title IX for All, to date 804 lawsuits have been filed by students accused of sexual misconduct against the schools that have disciplined them.<sup>18</sup> KC Johnson, who closely follows Title IX court decisions, reports that “judges have issued hundreds of rulings deploring the star chambers and kangaroo courts to which these male students were subjected.”<sup>19</sup>

Acting Assistant Secretary for Civil Rights Suzanne B. Goldberg has acknowledged “[o]ur nation’s civil rights laws require fair and nondiscriminatory school discipline practices, yet we have data that show concerning disparities based on race, sex, and disability in the administration of discipline.”<sup>20</sup> Harvard Law Professor Janet Halley also reported that in her experience, “male students of color are accused and punished at ‘unreasonably high rates’ in campus sexual misconduct investigations.”<sup>21</sup>

Title IX For All has analyzed demographic data from the over 800 lawsuits filed by respondents against schools since 2011: among the 30% of cases in which the race of the accused student was known, black students were four times as likely as white students to file lawsuits alleging their rights were violated in Title IX disciplinary proceedings.<sup>22</sup> At one university it was revealed that “black male students were accused of 50% of the sexual violations reported to the university,” even though they represented only 5.2% of all undergraduate students.<sup>23</sup>

### *Learning Disabled Students.*

Similarly, FACE receives numerous calls from parents of disabled students accused of stalking, unwanted touching, or of simply being “creepy.”<sup>24</sup> Under school policies used before the 2020 Final Rules, disabled students were “subjected to processes they could not navigate” without assistance from trained advocates.<sup>25</sup> Learning disabled students often have difficulty navigating social relationships, making them more

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<sup>16</sup> *Id.*

<sup>17</sup> *Doe v. Arizona Board of Regents, et al.*, Order, Aug. 30, 2022, Case No. CV-18-01623-PHX-DWL.

<sup>18</sup> Title IX for All, <https://titleixforall.com/title-ix-legal-database/#title-ix-lawsuits-database/database-gateway/>.

<sup>19</sup> Emily Yoffe, Biden’s Sex Police; The White House’s new regulations will gut due-process rights for college students accused of sexual misconduct (Jun 27, 2022) [https://www.common sense.news/p/bidens-sex-police?utm\\_source=substack&utm\\_medium=email&triedSigningIn=true](https://www.common sense.news/p/bidens-sex-police?utm_source=substack&utm_medium=email&triedSigningIn=true)

<sup>20</sup> Department of Education (June 4, 2021), U.S. Department of Education’s Office for Civil Rights Seeks Information on the Nondiscriminatory Administration of School Discipline. <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-seeks-information-nondiscriminatory-administration-school-discipline#:~:text=%22Our%20nation’s%20civil%20rights%20laws,in%20the%20administration%20of%20discipline.>

<sup>21</sup> G. Piper (August 4, 2015). Shut out of sexual-assault hearing, critics of pro-accuser legislation flood Senate committee with testimony. <https://www.thecollegefix.com/shut-out-of-sexual-assault-hearing-critics-of-pro-accuser-legislation-flood-senate-committee-with-testimony/>

<sup>22</sup> E Exhibit 3 – Lawsuit Demographics, *supra*, note 8.

<sup>23</sup> Soave, Robby (Sept. 14, 2017). We Need to Talk About Black Students Being Accused of Rape Under Title IX. Reason. <https://reason.com/2017/09/14/we-need-to-talk-about-black-students-bei/>

<sup>24</sup> Exhibit 2 – Intake Report, *supra*, note 7.

<sup>25</sup> *Id.*

vulnerable to accusations of sexual misconduct.<sup>26</sup> Learning disabled students in particular, cannot often read social cues, and are therefore more vulnerable to accusations of sexual misconduct.<sup>27</sup>

### III. What Exactly Is “Truth”?

Section 106.45(h)(5) of the 2022 Proposed Rules provides:

(h) *Determination of whether sex discrimination occurred.* Following an investigation and evaluation process under paragraphs (f) and (g) of this section, the recipient must: . . .

(5) Not discipline a party, witness, or others participating in a recipient’s grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the recipient’s determination of whether sex

It is incomprehensible that a United States agency would expressly forbid holding accountable a student who *intentionally* “makes a false statement” that results in an innocent student being disciplined. But this appears to be what Section 106.45(h)(5) is intended to accomplish. Just a glance at the reputational destruction, trauma, and attempted suicides of the many FACE wrongly accused students discussed throughout this Comment and specifically in Section XI, makes us wonder, what was OCR thinking?

We believe that the majority of sexual misconduct allegations<sup>28</sup> on campus are truthful. Unfortunately, attention to the issue of “wrongful” allegations of campus sexual misconduct has been overshadowed by arguments citing wildly diverging claims based on dubious statistics concerning false accusations, the allegedly minuscule likelihood any complainant would lie, and disbelief that anyone would fabricate such a traumatic experience.

Complicating the issue further is a tendency to conflate the likelihood of false or wrongful *criminal* allegations with false or wrongful *campus* allegations of sexual assault,<sup>29</sup> although the statistics on this issue

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<sup>26</sup> William Russell (Jan. 1, 2017). Sexual Misconduct on Campus: A Brief Introduction to Title IX Guidelines and Policies for Parents and Caregivers. Autism Spectrum News. <https://autismspectrumnews.org/sexual-misconduct-on-campus-a-brief-introduction-to-title-ix-guidelines-and-policies-for-parents-and-caregivers/>; Lee Burdette Williams (Feb. 8, 2018), The Nexus of Autism and Title IX. Inside Higher Ed. <https://www.insidehighered.com/views/2018/02/08/colleges-should-understand-special-issues-related-autism-and-title-ix-opinion>; Susan Stone and Kristina Supler (July 12, 2021), ‘I Don’t Get It:’ Why College Students with Autism are Vulnerable to Charges of Sexual Misconduct. <https://studentdefense.kjk.com/2018/07/02/i-dont-get-it-why-college-students-with-autism-are-vulnerable-to-charges-of-sexual-misconduct/>; Michael Allen (December 20, 2018), Disability Rights and Title IX. <https://allen-lawfirm.com/2018/12/20/disability-rights-and-title-ix/>; David Golub, (May 9, 2021), How Will Title IX Policies Affect Autistic Students? SAVE. <https://www.saveservices.org/2021/05/how-will-title-ix-policies-affect-autistic-students/>

<sup>27</sup> Susan Stone and Kristina Supler (July 12, 2021), ‘I Don’t Get It:’ Why College Students with Autism are Vulnerable to Charges of Sexual Misconduct. <https://studentdefense.kjk.com/2018/07/02/i-dont-get-it-why-college-students-with-autism-are-vulnerable-to-charges-of-sexual-misconduct/>; Michael Allen (December 20, 2018), Disability Rights and Title IX. <https://allen-lawfirm.com/2018/12/20/disability-rights-and-title-ix/>; David Golub, (May 9, 2021), How Will Title IX Policies Affect Autistic Students? SAVE. <https://www.saveservices.org/2021/05/how-will-title-ix-policies-affect-autistic-students/>; William Russell (Jan. 1, 2017). Sexual Misconduct on Campus: A Brief Introduction to Title IX Guidelines and Policies for Parents and Caregivers. Autism Spectrum News. <https://autismspectrumnews.org/sexual-misconduct-on-campus-a-brief-introduction-to-title-ix-guidelines-and-policies-for-parents-and-caregivers/>; Lee Burdette Williams (Feb. 8, 2018), The Nexus of Autism and Title IX. Inside Higher Ed. <https://www.insidehighered.com/views/2018/02/08/colleges-should-understand-special-issues-related-autism-and-title-ix-opinion>

<sup>28</sup> Unless otherwise specified, ‘sexual misconduct,’ ‘sexual harassment,’ and sexual assault’ are used interchangeably.

<sup>29</sup> The distinction between the likelihood of criminal and campus wrongful allegations is impacted by procedures unavailable on campus that are normally used in courtroom and administrative hearings. These include discovery, various pretrial motions, rules of evidence, sanctions for perjury, and experienced attorneys and judges. Though the

address *criminal*, not campus allegations.

However, the truth is more nuanced: whether 5% or 40% of allegations on campus are “wrongful”, and whether they are provably false, unfounded, or misremembered, there is no doubt they exist. Our experience tells us that, whatever the percentage of wrongful allegations, there is a heightened risk on our college campuses. In fact, Brett Sokolow, President of the Association of Title IX Administrators (ATIXA), has acknowledged that up to “40 or 50% of allegations of sexual assault” on campus could be “baseless,” particularly when alcohol was involved.<sup>30</sup> Even so, we believe many of Sokolow’s supposedly “baseless” allegations are not *knowingly* false, but instead are likely misremembered or otherwise distorted by intoxication, blackouts, peer pressure, and campus culture.

For example, there are misperceptions and inconsistencies in the interpretation of behavior, such as that almost half of all college women believe their “nod in agreement” isn’t consent.<sup>31</sup> Adding to the obviously distorting effects of alcohol on memory in the *78% of cases involving intoxication*,<sup>32</sup> memories are also easily contaminated by peer influence, social barometers, and attitudes.<sup>33</sup> This is particularly so on today’s campuses, where powerful ideology infuses not only the disciplinary process but the entire campus belief system, unchecked by fear of reprisal for critical expression.<sup>34</sup>

FACE student cases frequently involve recognized recurring themes and motivations common to wrongful allegations, such as:

- regret after a consensual hook-up,
- unmet expectations,
- unfaithfulness,
- discovery of the incident by a religious parent, boyfriend or friend,
- retribution for rejection, and
- sex while intoxicated or blacked out.<sup>35</sup>

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2020 Final Rules provide for cross-examination and a live hearing, even those procedures are subject to restrictions that undermine their comparison with how those procedures are conducted in other settings. See R. Shep Melnick, *Analyzing the Department of Education’s Final Title IX Rules on sexual misconduct*, Brookings.edu (June 11, 2020) (“[T]hose conducting the hearing must screen each cross-examination question to ensure that it is both relevant and civilly presented”; 2020 Final Rules §106.45(b)(5) (iv) and (b)(6)(i).) <https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/>.

<sup>30</sup> Richard Bernstein, Legal experts say Biden’s pushing ahead to the Obama past on campus rape could be a mistake, (Dec. 16, 2020) Real Clear Wire [https://www.thecentersquare.com/national/legal-experts-say-bidens-pushing-ahead-to-the-obama-past-on-campus-rape-could-be/article\\_184d1e3a-3fc0-11eb-956d-87947675f52c.html](https://www.thecentersquare.com/national/legal-experts-say-bidens-pushing-ahead-to-the-obama-past-on-campus-rape-could-be/article_184d1e3a-3fc0-11eb-956d-87947675f52c.html).

<sup>31</sup> *Washington Post & Kaiser Survey* (2015) <http://apps.washingtonpost.com/g/page/national/washington-post-kaiser-family-foundation-survey-of-college-students-on-sexual-assault/1726/>.

<sup>32</sup> EduRisk, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (Feb. 2015 p. 6, EduRiskSolutions.org, [http://www.ncdsv.org/ERS\\_Confronting-Campus-Sexual-Assault\\_2015.pdf](http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf); Nash & Ost, *False and Distorted Memories (Current Issues in Memory)* (2017) Psych. Press (Kindle Ed.), at p. 55.

<sup>33</sup> Nash & Ost, *False and Distorted Memories (Current Issues in Memory)* (2017) Psych. Press (Kindle Ed.), at p. 54-55.

<sup>34</sup> Cynthia P. Garrett, *Trauma-Informed Theories Disguised as Evidence* (May 2, 2019) pp. 5, 10, <https://static1.squarespace.com/static/5941656f2e69cfffcd5210aa/t/5ccbd3c153450a492767c70d/1556861890771/Trauma-Informed+Theories+Disguised+as+Evidence+5-2.pdf>

<sup>35</sup> Saunders, Candida L., *The Truth, The Half-Truth, and Nothing Like the Truth, Reconceptualizing False Allegations of Rape* (2012) *The British Journal of Criminology*, 52(6), 1152-1171 <http://bjc.oxfordjournals.org/content/52/6/1152.full.pdf>; John Erwin, *Missing The Mark; False Allegations in the U.S. Government* (August 8, 2014) *American Analyst*, p. 8, [https://www.dropbox.com/s/5uod2nvqyg3z86w/Erwin\\_MISSING\\_THE\\_MARK\\_False\\_Allegations\\_in\\_the\\_U.S.\\_Government.pdf?dl=0](https://www.dropbox.com/s/5uod2nvqyg3z86w/Erwin_MISSING_THE_MARK_False_Allegations_in_the_U.S._Government.pdf?dl=0) [Recently deleted from original source:

Reliable indications that an accused student is innocent are that the story follows one of these patterns, the process lacked fair procedures, and the decision was inconsistent with the weight of the evidence.

#### IV. “[T]here has to be something more than an intent to have sex.”

OCR’s previously broad definition of sexual misconduct (“unwanted touching of a sexual nature”),<sup>36</sup> along with schools’ eagerness to avoid the ire of OCR officials, caused the 78% of Title IX cases involving intoxication<sup>37</sup> to become convenient fodder for schools to suspend or expel primarily male accused students. Despite the parties’ mutual intoxication, the proliferation of affirmative consent policies and outdated stereotypes about how men and women interact<sup>38</sup> also resulted in schools most often penalizing an accused male as the perpetrator, while assuming the female accuser was a “survivor”.<sup>39</sup>

In response to the frequency of school decisions finding only the male student guilty when both students were intoxicated, Title IX expert Brett Sokolow warned schools: “Surely, every drunken sexual hook-up is not a punishable offense” . . . “there has to be something more than an intent to have sex to make this an offense.”<sup>40</sup> Schools’ repeated conflation of “intoxication” and “incapacitation,” also prompted Sokolow to caution them not to take complainant intoxication-based claims of inability to consent at face value: “[t]here are a lot of cases where someone says they were incapacitated, but the evidence doesn’t support that they weren’t able to make a decision.”<sup>41</sup>

Finally, increasing further the odds of a wrongful finding of guilt, pre-2017 OCR-sanctioned trauma-informed policies caused Title IX officials to rely on a complainant’s distorted, faulty, and – *in cases where a complainant claimed to have not remembered or blacked out during the incident* – even a complainant’s *non-existent* memories.<sup>42</sup>

#### V. Guilty “no matter what”.

Some insist our schools do not discriminate against men, but are simply targeting perpetrators. Attorney Jackie Gharapour Wernz, who worked at OCR in the Obama and Trump administrations, saw it differently:

“We did see some bad cases in the Obama era, cases where it basically didn’t matter what evidence there was” . . . “The college was going to find against the defendant, the male

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<https://www.scribd.com/doc/236235147/False-Allegations-in-the-U-S-Government>

<sup>36</sup> Dept. of Ed. OCR, *Dear Colleague Letter* (Apr. 4, 2011) p. 3,

[https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104\\_pg3.html](https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104_pg3.html)

<sup>37</sup> EduRisk, *Confronting Campus Sexual Assault*, *supra*, note 37, at p. 6.

<sup>38</sup> See Harvard Law professor Janet Halley’s discussion of the problematic interaction between intoxication and affirmative consent policies, Janet Halley, *The Move to Affirmative Consent*, *Signs; Journalism of Women in Cultural Society* (2015) Currents: Feminist Key Concepts and Controversies, Univ. of Chicago Press Journals, p. 8 of the PDF, p. 264 of journal (“seeking social control through punitive and repressive deployments of state power.”)

<https://www.journals.uchicago.edu/doi/pdf/10.1086/686904>.

<sup>39</sup> FACE has seen many cases in which only the male was suspended or expelled, though both parties were equally intoxicated. For example, in *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016), the investigator “approached the Relationship as if John was the Dominant Male Aggressor and J.C. was the Submissive Female Victim, stereotypes derived from heterosexual culture. Those stereotypes would be inappropriate in any sexual misconduct investigation . . .”

<sup>40</sup> 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>.

<sup>41</sup> Richard Bernstein, *supra*, note 35.

<sup>42</sup> Garrett, *Trauma-Informed Theories*, *supra*, note 34, at pp. 5-6, 8-9.



defendant, no matter what. I think the schools felt pressure under the Obama guidance.”<sup>43</sup>

On some campuses, it was all but guaranteed decisionmakers would unfairly target male respondents. This was the inevitable result of factors discussed in the sections above, combined with pre-2017 OCR directives that discouraged cross-examination, minimized the need for due process for the accused,<sup>44</sup> and seemed to condone the absence of adequate notice, concealment or disregard of evidence, and the lack of sanctions for false statements.

## VI. The Other, Silent “Survivors”.

False allegations and inaccurate findings of responsibility are more likely to happen on college campuses, where young people often “spread their wings” for the first time and negotiate complicated personal and sexual relationships. FACE student cases have included a “complainant’s attempts to conceal or deny discovered infidelity;”<sup>45</sup> “consensual sexual activity that is subsequently regretted”;<sup>46</sup> and “historic complaints following the breakdown of a relationship.”<sup>47</sup>

Of course, allegations may not be intentionally false; there are misperceptions in the interpretation of behavior, such as that almost half of college-age women believe their “nod in agreement” doesn’t indicate consent.<sup>48</sup> Additionally, memories can be contaminated, particularly in the 78% of cases involving alcohol,<sup>49</sup> and distorted by peer influence, social barometers, and ideology,<sup>50</sup> which infuses not only the disciplinary process but the entire campus belief system.<sup>51</sup>

Understandably, the stories of sexual misconduct complainants have dominated the public narrative. Accuser-focused movies like *The Hunting Ground*,<sup>52</sup> national press coverage, and narratives on social media have incentivized sexual misconduct victims to come out of the shadows and publicize their allegations. Unlike the accused, however, if complainants “win” their Title IX case, they are honored for their bravery in

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<sup>43</sup> KC Johnson, *The Biggest Enemy of Campus Due Process from the Obama Years Is Back* (June 1, 2021) National Review, <https://www.nationalreview.com/2021/06/the-biggest-enemy-of-campus-due-process-from-the-obama-years-is-back/>.

<sup>44</sup> U.S. Dept. of Edu., Office for Civil Rights, *2011 Dear Colleague Letter* (Rescinded) (Apr. 4, 2011) (“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.”) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

<sup>45</sup> Exhibit I at 24-25 (Student 14’s case involved an accusation after the breakup, concerning an incident that allegedly occurred months before the breakup).

<sup>46</sup> John Erwin, *Missing The Mark; False Allegations in the U.S. Government* (Oct. 10, 2014), available at <https://www.dropbox.com/s/8d55715osghazbp/Erwin%2C%20MISSING%20THE%20MARK%2C%20False%20Allegations%20in%20the%20U.S.%20Government.pdf?dl=0> (last visited Apr. 11, 2022).

<sup>47</sup> Candida Saunders, *The Truth, The Half-Truth, and Nothing Like the Truth: Reconceptualizing False Allegations of Rape*, 52 BRIT. J. OF CRIMINOLOGY, 1152–1171 (2012), available at <http://bjc.oxfordjournals.org/content/52/6/1152.full.pdf>.

<sup>48</sup> Nick Anderson, and Peyton M. Craighill, *College students remain deeply divided over what consent actually means*, Wash. Post (June 14, 2015), [https://www.washingtonpost.com/local/education/americas-students-are-deeply-divided-on-the-meaning-of-consent-during-sex/2015/06/11/bbd303e0-04ba-11e5-a428-c984eb077d4e\\_story.html](https://www.washingtonpost.com/local/education/americas-students-are-deeply-divided-on-the-meaning-of-consent-during-sex/2015/06/11/bbd303e0-04ba-11e5-a428-c984eb077d4e_story.html).

<sup>49</sup> *EduRisk, Confronting Campus Sexual Assault*, *supra*, note 32.

<sup>50</sup> Nash & Ost, *False and Distorted Memories*, *supra*, note 33, p. 55.

<sup>51</sup> Cynthia P. Garrett, *Trauma-Informed Theories Disguised as Evidence*, *supra*, note 34, at 5, 10.

<sup>52</sup> *The Hunting Ground Blurs the Truth; The documentary is shaping the public debate around campus rape*. (June 1, 2015) Slate (“But a closer look at one of its central cases suggests the filmmakers put advocacy ahead of accuracy”) <https://slate.com/news-and-politics/2015/06/the-hunting-ground-a-closer-look-at-the-influential-documentary-reveals-the-filmmakers-put-advocacy-ahead-of-accuracy.html>; Stuart Taylor Jr., *A Smoking-Gun E-mail Exposes the Bias of The Hunting Ground* (November 16, 2015) National Review, <https://www.nationalreview.com/2015/11/hunting-ground-smoking-gun-e-mail-exposes-filmmaker-bias-against-accused/>.

speaking out. If they lose, complainants can take to social media and claim victimhood by accusing the school of ignoring or discounting their trauma. There remain few disincentives for complainants to publicize their experiences.

While complainant narratives permeate the media, the vast majority of wrongly accused students and faculty are silenced by humiliation, vilification, and trauma, often based merely on the *accusation* they'd engaged in sexual misconduct. If found responsible, there is no benefit for innocent students to insist they were wrongfully accused - the accusation alone is accepted as sufficient proof of their guilt. Indeed, more and more accused students and are faculty 'outed' on social media as "rapists", often by name, whether or not they have been found responsible; their fear of publicity leaves them helpless to defend themselves.

Even if the accused were to cite a "not responsible" finding as evidence of their innocence, it will be said, "they got off." Because there is nothing to gain by telling anyone beyond family and close friends that one's been falsely accused of such a heinous crime, the resulting isolation compounds the trauma of having been wrongfully labeled a sexual predator.

While the #MeToo movement has allowed sexual misconduct victims to express their pain and anger, it also has allowed untested allegations to ruin lives. "The tragedies of wrongly accused are extensive. It begs the question, how has a false accuser been given so much power to create so much harm with just an accusation? That alone accounts for the strong reaction an accusation can generate."<sup>53</sup>

In today's cultural and political environment, revealing an accused student's name triggers irreparable damage to his reputation and his emotional stability.<sup>54</sup> Exposing the name of a student who claims to have been wrongly accused, particularly one who is seeking relief from the justice system, ensures that no matter how the court rules, the false accusation will haunt him forever.

FACE cannot, of course, begin to remedy this asymmetry in the public narrative, but it can at least make OCR aware there is an alternate, lesser-heard version of the Title IX equation. To that end, Exhibit I includes accounts of 17 FACE students who were wrongly accused of sexual misconduct. In at least eight of the 17 cases, public disclosure of their names contributed to severe trauma and reputation damage.<sup>55</sup> Even absent publicity, trauma resulted in seven cases, including three in which the student was found not responsible.<sup>56</sup>

In nine of the 17 FACE student cases, either no complaint ever was filed, the student was found not responsible, or the decision was favorably reversed by the school or a court.<sup>57</sup> In seven of those nine cases in which students were found not responsible or exonerated, the students still suffered both severe trauma and reputational harm based only on the accusation.<sup>58</sup> Three of those nine students successfully pursued John Doe lawsuits.<sup>59</sup>

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<sup>53</sup> Reggie Yager, *What's Missing from Sexual Assault Prevention and Response*, 99 (Apr. 22, 2015) (working draft), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2697788](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2697788) (last visited Sept. 10, 2022) n. 16, at 36.

<sup>54</sup> *Id.*, at p. 5 (explaining "how devastating false accusations can be and why we should be concerned with protecting the wrongly accused"). See, also, Exhibit 1 and section XI., *infra*.

<sup>55</sup> Exhibit 1, at 1-2 (Student 1), 2-3 (Student 2), 3-4 (Student 3), 7-11 (Student 7), 18-21 (Student 12), 21-24 (Student 13), 25-27 (Student 15), and 28-29 (Student 17).

<sup>56</sup> *Id.* at 4-5 (Student 4), 7 (Student 6), 11-13 (Student 8), 15-17 (Student 10, found not responsible ("NR")), 17-18 (Student 11, found NR), 18-21 (Student 12, found NR), and 24-25 (Student 14).

<sup>57</sup> *Id.* at 1-2 (Student 1), 2-3 (Student 2), 7 (Student 6), 11-13 (Student 8), 13-15 (Student 9), 15-16 (Student 10), 17-18 (Student 11, found NR), 18-21 (Student 12, found NR), and 21-24 (Student 13, found NR).

<sup>58</sup> *Id.* at 1-2 (Student 1), 2-3 (Student 2), 3-4 (Student 3), 15-17 (Student 10), 17-18 (Student 11), 18-21 (Student 12), and 21-24 (Student 13, whose case was reversed on appeal).

<sup>59</sup> *Id.* at 7 (Student 6), 11-13 (Student 8), and 15-17 (Student 10).

## VII. The 2020 Final Rules.

The 2020 Final Rules detailed the basis for and carefully considered requirements for Title IX disciplinary procedures critical to ensure they would increase decisionmaking accuracy. The Rules clarified OCR's previously "vague and inconsistent" policies on how and when schools should respond to sexual harassment,<sup>60</sup> specified the scope of conduct that falls under Title IX, and the methods schools must use to reach accurate resolutions of complaints.

The 2020 Final Rules appear to be more effective than earlier OCR policies; according to the lawsuit database maintained by KC Johnson, "lawsuits involving post-August [2020] incidents have dropped to a trickle. Since the current regulations draw so closely from relevant court decisions, universities that implement them in good faith have little to fear."<sup>61</sup>

Pre-2017 OCR directives, such as those that discouraged cross-examination and minimized the need for due process for the accused,<sup>62</sup> resulted in the denial of adequate notice, concealment or disregard of probative evidence, and the lack of sanctions for false statements, have contributed to the more than 800 respondent lawsuits against schools and over 230 court decisions in their favor.<sup>63</sup>

Though there are certain 2020 Final Rules FACE would like to see amended,<sup>64</sup> those that will facilitate schools' ability to thoroughly probe the allegations and increase the likelihood of accurate findings of responsibility include:

- respondents be informed of the details of the allegations against them;
- all relevant inculpatory and exculpatory evidence be disclosed;
- conduct investigations and live hearings in cases involving credibility that allow decisionmakers to hear a full and unbiased presentation of evidence; and
- advocate assistance for both parties in representing their interests and questioning witnesses.

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<sup>60</sup> Jake New, Must vs. Should: Colleges say the Department of Education's guidance on campus sexual assault is vague and inconsistent (Feb. 25, 2016) Inside Higher Ed, <https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance>; see also Samantha Harris & KC Johnson, *Campus Courts In Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications* (2019) 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 111, pp. 62-3, <https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf>.

<sup>61</sup> Citing KC Johnson, Comment, [https://docs.google.com/spreadsheets/d/1ldNBm\\_ynP3P4Dp3S5Og2JXFk7Oml\\_MPwNPmNuPm\\_Kn0/edit#gid=0](https://docs.google.com/spreadsheets/d/1ldNBm_ynP3P4Dp3S5Og2JXFk7Oml_MPwNPmNuPm_Kn0/edit#gid=0).

<sup>62</sup> U.S. Dept. of Edu., Office for Civil Rights, *2011 Dear Colleague Letter (Rescinded)* (Apr. 4, 2011) ("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.") <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

<sup>63</sup> KC Johnson, Post Dear-Colleague Letter Rulings/Settlements, [https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV\\_BBv5NAA5z9cv178Fjk3o/edit#gid=0](https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV_BBv5NAA5z9cv178Fjk3o/edit#gid=0).

<sup>64</sup> A problematic rule includes §106.45(b)(6)(i) (rejection of written statements when a witness doesn't appear- rejected by the court in *Victim Rights Law Center v. Cardona*, 552 F. Supp. 3d 104, 138 Dist. Court, D. Massachusetts 2021. See, also, for example, Kimberly Lau, KC Johnson, Eric Rosenberg, *Written Comment: Title IX Public Hearing Regarding Potential Revisions to 34 C.F.R. §106* (June 2021) filed with OCR and signed by nearly 100 attorneys, professors, and other professionals, <https://kcjohnson.files.wordpress.com/2021/06/20210604-comment-on-proposed-title-ix-rulemaking-1.pdf>.

## VIII. The 2022 Proposed Rules: the Single Investigator Returns

The 2022 Proposed Rule §106.45(b)(2) Would permit the return of the single investigator model, also known as the investigative model, where the coordinator, investigator, and adjudicator may all be the same person.<sup>65</sup> “KC Johnson, a professor of history at Brooklyn College and expert on campus Title IX procedures, says that the resurrection of the single-investigator model is the most alarming aspect of the new rules.”<sup>66</sup> “The possibility of wrongful findings, almost always biased against the accused, dramatically increases under such a procedural regime,” he says.<sup>67</sup>

Joe Cohn, legislative and policy director at the Foundation for Individual Rights and Expression (FIRE) believes “The Department of Education’s proposed regulations seek to erase essential due process protections that are required by the Department’s current Title IX regulations,”

They authorize institutions to forego live hearings, returning to a single investigator model that is incompatible with the basic requirements of fundamental fairness. In allowing a return to the single investigator model, the proposed regulations also eliminate the right to meaningful cross-examination, and thus the current right to have legal counsel conduct a cross-examination.<sup>68</sup>

### *The Single Investigator Model is ‘dangerous.’*

Not only those of us who advocate for fair treatment of accused students believe returning to the single investigator model is ill-advised: Alexandra Brodsky, a lawyer who generally has represented sexual harassment complainants, says “many advocates on all sides’ have criticized” the model.<sup>69</sup> Brodsky acknowledges “the concern is usually that a single investigator, the one with all that power, will be biased in favor of the accuser.”<sup>70</sup> However, Brodsky has “heard complaints about this not just from respondents but from victims as well.”<sup>71</sup> As an example, “an investigator who believes certain rape myths that could cause him or her to unfairly dismiss a victim’s allegations.”<sup>72</sup>

The new rules recommend a return to a “single investigator” model that was barred under the DeVos reform. This means one administrator can act as detective, prosecutor, judge, and jury on a Title IX complaint. The new rules also undo many of the procedural protections for the accused—including the right to see all the evidence, inculpatory and exculpatory, gathered against him.<sup>73</sup>

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<sup>65</sup> The 2020 DeVos Rule §106.45(b)(7)(i) prohibited use of the “single investigator model” in which a single school official may investigate and adjudicate sexual harassment allegations and impose punishment” and required that “at least three separate school officials ... participate in the grievance process.”

<sup>66</sup> Robby Soave, 5 Ways Biden’s New Title IX Rules Will Eviscerate Due Process on Campus; The new rules would drop live hearings, bring back the single-investigator model, and limit accused students’ options.

(June 23, 2022) Reason <https://reason.com/2022/06/23/title-ix-rules-cardona-biden-sexual-misconduct-campus/?comments=true#comments>

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Tom Bartlett, The Proposed Title IX Change That Worries Some Experts (July 26, 2022) Chronicle of Higher Education, <https://www.chronicle.com/article/the-proposed-title-ix-change-that-worries-some-experts>

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Emily Yoffe, Biden’s Sex Police, *supra*, note 19.

S. Daniel Carter, “a longtime victims'-rights advocate who helped develop the Campus Sexual Violence Elimination Act, is among those who think the single-investigator model is misguided . . . What you're doing is allowing a single person to be in charge of everything, with no oversight until you get to the appeal. I think that's crazy.”<sup>74</sup> Carter believes that “the best model for any student disciplinary hearing involving an alleged crime should be a live hearing.”<sup>75</sup>

One of the most fundamental improvements of the DeVos rules was the establishment of cross-examination. A representative for the accused student—such as an attorney—had the right to scrutinize an accuser's claim during an actual hearing to adjudicate the dispute. Under the new rules, this is no longer the case.<sup>76</sup>

Janet Halley, a respected Harvard Law professor, criticized Harvard's sexual-misconduct rules, in an open letter as “jettisoning balance and fairness in the rush to appease certain federal administrative officials.”<sup>77</sup> Halley believes the single investigator model can be dangerous:

“One of the dangers is that a person develops views about what's going on in a case, and that colors what they ask and what they hear,” she says. “The fact that a single investigator makes a decision from which appeal can only be taken on limited grounds — I just don't even understand how a person could sleep at night with that kind of power.”<sup>78</sup>

S. Daniel Carter, warns that,

Removing the requirement for a hearing might be the most significant of the Biden administration's proposed reforms of how the federal gender-equity law is enforced, and the one with the greatest potential to alter how colleges carry out Title IX investigations. It's also troubling to some Title IX experts.<sup>79</sup>

“Carter notes that some colleges have allowed parties to testify remotely so that they need not be in the same room. ‘If it's carried out in a conscientious way, it doesn't have to retraumatize the complainant,’ he says.”<sup>80</sup>

Joe Cohn warns that “‘When it comes to finding out what's true,’ he says, ‘we shouldn't be taking any shortcuts.’”<sup>81</sup> “It's an evisceration of the procedural protections given to the accused,” says historian KC Johnson, co-author of *The Campus Rape Frenzy: The Attack on Due Process at America's Universities*.<sup>82</sup>

Numerous appellate courts throughout the U.S. have found the single investigator model lacking. For example, the court in *Doe v. Westmont College*<sup>83</sup> found that the school official's “dual roles as an investigator and adjudicator compound our concerns with the Panel's credibility determinations”<sup>84</sup> In *Westmont*, “it

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<sup>74</sup> Tom Bartlett, The Proposed Title IX Change That Worries Some Experts, *supra*, note 69.

<sup>75</sup> *Id.*

<sup>76</sup> Robby Soave, 5 Ways Biden's New Title IX Rules Will Eviscerate Due Process on Campus, *supra*, note 66.

<sup>77</sup> Eugene Volokh, 28 Harvard law professors condemn Harvard's new Sexual Harassment Policy and Procedures (Oct. 15, 2014), The Washington Post, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/15/28-harvard-law-professors-condemn-harvards-new-sexual-harassment-policy-and-procedures/>

<sup>78</sup> Tom Bartlett, The Proposed Title IX Change That Worries Some Experts, *supra*, note 69.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Emily Yoffe, Biden's Sex Police, *supra*, note 19.

<sup>83</sup> *Doe v. Westmont Coll.*, 34 Cal.App.5th 622 (Cal. App. 2d Dist. 2019), *reh'g denied* (May 17, 2019)

<sup>84</sup> *Id.*, at 637.

appears that the Panel ‘simply approve[d] the credibility determinations of the one [Panel] member who was also the investigator’”<sup>85</sup>

“Brandeis appears to have substantially impaired, if not eliminated, an accused student’s right to a fair and impartial process,” Saylor wrote. “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.”<sup>86</sup>

A California appellate court in *Doe v. Allee* ruled that . . .

a right of “cross-examination” conducted by a single individual acting as investigator, prosecutor, fact finder and sentencer, is incompatible with adversarial questioning designed to uncover the truth. It is simply an extension of the investigation and prosecution itself.<sup>87</sup>

The 3rd Circuit Court of Appeals reversed a district court’s decision in 2020,<sup>88</sup> finding that “at least as it has been implemented here, the single-investigator model violated the fairness that USciences promises students accused of sexual misconduct.”<sup>89</sup>

In 2018, the U.S. Court of Appeals for the 6th Circuit in *Doe v. Miami University*<sup>90</sup> reversed a district court decision, finding that “Doe had adequately alleged a claim that the investigator was not an impartial adjudicator and that she did not fully provide him the evidence used against him.”<sup>91</sup> The court noted that “John has alleged sufficient facts plausibly indicating that [the investigator’s] ability to be impartial “had been manifestly compromised”<sup>92</sup> because of her “alleged dominance on the three-person panel,” and “the only one of the three with conflicting roles.”<sup>93</sup>

In *Doe v. Brandeis University*, Judge Saylor warned,<sup>94</sup>

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. The dangers of such a process can be considerably mitigated if there is an effective review by a neutral party, but here that right of review was substantially circumscribed.<sup>95</sup>

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<sup>85</sup> *Doe v. Westmont Coll.*, 34 Cal.App.5th at 637, quoting *Doe v. Claremont Mckenna Coll.*, 25 Cal. App. 5th 1055, 1073 (2018).

<sup>86</sup> Jake New, Out of Balance, Colleges lose series of rulings in suits brought by male students accused of sex assault; In stinging decisions, judges fault lack of due process (April 14, 2016), quoting *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. Mar. 31, 2016), <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault>.

<sup>87</sup> *Doe v. Allee*, 30 Cal.App.5th 1036, 1068 (2019) (Cal. App. 2d Dist. 2019).

<sup>88</sup> *Doe v. Univ. of Sciences*, 961 F.3d 203 (3d Cir. 2020)

<sup>89</sup> *Id.*, at p. 216.

<sup>90</sup> *Doe v. Miami Univ.*, 822 F.3d 579 (6th Cir. 2018).

<sup>91</sup> *Id.*, at 603-604

<sup>92</sup> *Id.*, at 601, quoting *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d 556, 568 (6th Cir. 2011)

<sup>93</sup> *Id.*

<sup>94</sup> *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, (D. Mass. Mar. 31, 2016)

<sup>95</sup> *Id.*, at 606.

In *Doe v. The Penn State Univ. (III)*, the court found “[i]n a case like this, however ... there is really only one consideration for the decisionmaker: credibility . . . . As a result, in this Court’s view, the Investigative Model’s virtual embargo on the panel’s ability to assess that credibility raises constitutional concerns.”<sup>96</sup>

### *FACE Students Subjected to Single Investigator Model.*<sup>97</sup>

At least eight of the 17 FACE accused students whose accounts are outlined in Exhibit 1<sup>98</sup> have had the unfortunate experience of having their cases controlled by some form of a single investigator model. All eight students report a frustrating experience during which the many restrictions made it impossible for them to defend themselves.<sup>99</sup> Student 5’s parent called the process “abjectly un-American,” and explained:

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.<sup>100</sup>

As an example, in Student 4’s<sup>101</sup> case the investigators ignored exculpatory evidence,<sup>102</sup> and the “accuser did not have to answer any questions about her story;” instead “her words were taken as fact.”<sup>103</sup> Student 4’s parent believes the fact that the investigators were “two young female employees . . . trained with presumption of guilt” contributed to the unfair and biased process.<sup>104</sup> His parent reports “In the wake of this experience my husband and I felt more comfortable sending our daughter to college than our younger sons.”<sup>105</sup>

Student 9’s<sup>106</sup> disciplinary process was based on allegations that stemmed from a consensual encounter six months prior and the investigator, who was also a decisionmaker, determined Student 9 was responsible.<sup>107</sup> Justice under Title IX for FACE accused students like Student 9, most of whom cannot afford attorneys, is not cheap:

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.<sup>108</sup>

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<sup>96</sup> *Doe v. The Penn State Univ. (III)*, 336 F. Supp. 3d 441 (M.D. Pa. Aug. 21, 2018).

<sup>97</sup> In some of the students’ cases the entire process, from investigation through decisionmaking, was conducted by a single investigator. Others were investigated and a finding was recommended by the investigator to a panel or individual who made the final decision. In a few of the cases, the decisionmaking panel held a hearing, often after the respondent’s appeal of an investigator-recommended responsibility decision. In nearly all of these cases there was no opportunity for the respondent to question the accuser, either orally or in writing.

<sup>98</sup> Exhibit 1, *supra*, note 6.

<sup>99</sup> Exhibit 1, Student 4; Student 5; Student 6; Student 7; Student 9; Student 10; Student 13; and Student 14.

<sup>100</sup> *Id.* at p. 6 (Student 5).

<sup>101</sup> *Id.* at pp. 4-5 (Student 4).

<sup>102</sup> *Id.* at p. 4 (Student 4).

<sup>103</sup> *Id.* at pp. 4-5 (Student 4).

<sup>104</sup> *Id.* at p. 4 (Student 4).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 14-15 (Student 9).

<sup>107</sup> *Id.* at 14 (Student 9).

<sup>108</sup> *Id.* at 15 (Student 9).

- *Confirmation bias and accountability*

The fact that there is no check on a single investigator's decisions only increases the chances of bias infecting the process. In Student 9's case, in which the Title IX director and coordinator had "made public Facebook posts deriding neutrality and promoting a video likening college campus to hunting grounds for sexual predators," the "injustice [of the process] was compounded because the investigator was accountable to no one but herself."<sup>109</sup>

Studies have shown that once someone has made an initial judgment or opinion about something, there is a strong tendency to reaffirm that assessment by intentionally seeking out evidence that will confirm or reinforce that point of view and to deny or intentionally avoid considering any evidence to the contrary.<sup>110</sup>

We believe victim advocates who serve as Title IX investigators are more vulnerable to confirmation bias due to their experiences with sexual misconduct victims or as victims themselves. This was the case for Student 10:<sup>111</sup> "[t]he coordinator was an employee of the school's women's center and a victim's advocate."<sup>112</sup> Student 10's parent believes "the [2020 Final Rules] 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."<sup>113</sup>

The possibility that a single investigator may harbor gender bias exacerbates the danger of wrongful findings in sexual misconduct disciplinary proceedings. In *Doe v. Miami University*,<sup>114</sup> the investigator who also served as a decisionmaker was alleged to have "announced during the hearing that 'I'll bet you do this [i.e., sexually assault women] all the time.'"<sup>115</sup> The court found this comment indicated the investigator "had determined prior to the hearing that John was responsible for the misconduct . . . and had a propensity for engaging in sexual misconduct."<sup>116</sup> It is fortunate for the Doe in the *Miami University* case that he could afford legal assistance to correct this error.

Bias can also exist due to personal relationships. In Student 7's case,<sup>117</sup> "[t]he investigating officer's daughter was a friend with the complainant." The same officer also wrote a chapter in a book that "showcased [Student 7's] college campus as a premier example of how a college can 'eradicate' sexual violence."<sup>118</sup>

In *Westmont*, the decisionmakers inexplicably determined witnesses who had not even testified were more credible than those who had.<sup>119</sup> The court criticized the decisionmakers for "simply approv[ing] the credibility determinations of the one [Panel] member who was also the investigator."<sup>120</sup> More surprisingly, because "critical witnesses" did not testify at the conduct meeting, the respondent was not able to ask questions of them, or challenge discrepancies in their reports. Nevertheless, the decisionmakers based their

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<sup>109</sup> *Id.* at 14 (Student 9).

<sup>110</sup> [Linda and Charlie Bloom Stronger at the Broken Places Beware of the Perils of Confirmation Bias Not accepting information that challenges preconceived beliefs.](https://www.psychologytoday.com/us/blog/stronger-the-broken-places/201807/beware-the-perils-confirmation-bias) Posted Jul 09, 2018, <https://www.psychologytoday.com/us/blog/stronger-the-broken-places/201807/beware-the-perils-confirmation-bias>.

<sup>111</sup> *Id.* at 16-17 (Student 10).

<sup>112</sup> *Id.* at 16 (Student 10).

<sup>113</sup> *Id.*

<sup>114</sup> *Doe v. Miami Univ.*, 822 F.3d 579 (6th Cir. 2018).

<sup>115</sup> *Id.*, at 601

<sup>116</sup> *Id.*

<sup>117</sup> exhibit 1, at 7-11 (Student 7).

<sup>118</sup> *Id.* at 10 (Student 7).

<sup>119</sup> *Doe v. Westmont Coll.*, 34 Cal.App.5th at 636.

<sup>120</sup> *Id.*, at 639.



decision on these same witnesses' reports.<sup>121</sup> The court concluded this “denied John the opportunity to fully respond to the evidence against him.”<sup>122</sup>

Though the judge in *Doe v. Westmont College*<sup>123</sup> found that an investigator also serving as an adjudicator may not *always* “deprive a student of a fair hearing,” where there are inconsistent witness accounts “independent evaluation of witness credibility is ‘pivotal to a fair adjudication.’”<sup>124</sup>

In Student 14’s case,<sup>125</sup> use of the single investigator model “with investigators using informed trauma methods” meant “[t]he accuser and her story were never vetted. She was assumed to be telling the truth the entire time.”<sup>126</sup> The responsibility decision for Student 13, reversed on appeal,<sup>127</sup> was based on the single investigator’s “one-sided ‘belief.’”<sup>128</sup>

Student 9 “was interviewed once, and was the last person to be interviewed.”<sup>129</sup> His parent asks, “How would an investigator be able to examine claims of the accuser against those of the respondent without questioning her considering the respondent’s statement?”<sup>130</sup> Nonetheless, Student 9 was found responsible based only on the accuser’s ‘credibility,’ through a single-investigator model in which the investigator decides without a hearing before neutral decisionmakers.<sup>131</sup>

The single investigator model inhibits a respondent’s ability to test the accuser’s memory and credibility. For example, in Student 4’s case<sup>132</sup> the “accuser did not have to answer any questions about her story”, instead “her words were taken as fact.”<sup>133</sup> Student 9 also “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.”<sup>134</sup>

Student 6<sup>135</sup> “was not allowed to question [his] accuser or any of her witnesses personally or through an advisor”; in fact, Student 6 “was not allowed to even question parts of my accuser’s story.”<sup>136</sup> Though Student 6 eventually pursued a successful lawsuit, he “was dragged through a university disciplinary process that shocked me to my core.”<sup>137</sup>

*Doe v. Westmont College* illustrates the difficulty of funneling questions through a school official. There the plaintiff was not able “to question the details of witnesses’ testimony, even indirectly”,<sup>138</sup> because not only was information withheld from him but he was denied the opportunity to ask follow-up questions.<sup>139</sup>

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<sup>121</sup> *Doe v. Westmont Coll.*, 34 Cal.App.5th at 639.

<sup>122</sup> *Id.*, at 636, 639.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*, at 637, quoting *Doe v. Allee*, 30 Cal.App.5th 1036, 1069 (Cal. App. 2d Dist. 2019).

<sup>125</sup> Exhibit 1, at 24-25 (Student 14).

<sup>126</sup> *Id.* at 24 (Student 14).

<sup>127</sup> *Id.* at 21-24 (Student 13).

<sup>128</sup> *Id.* at 22 (Student 13).

<sup>129</sup> *Id.* at 14 (Student 9).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 14 (Student 9).

<sup>132</sup> *Id.* at pp. 4-5 (Student 4).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at p. 15 (Student 9).

<sup>135</sup> *Id.* at 7 (Student 6).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Doe v. Westmont Coll.*, 34 Cal.App.5th at 633.

<sup>139</sup> *Id.*, at 636.

The California Court of Appeal criticized the school for this, holding that “where a college’s decision hinges on witness credibility, the accused must be permitted to pose questions to the alleged victim and other witnesses, even if indirectly.”<sup>140</sup> The *Westmont* court also held that “each adjudicator must hear from critical witnesses—in person, by videoconference, or by some other method—before assessing credibility.”<sup>141</sup>

According to the court in *Doe v. Kegan Allee*,<sup>142</sup>

The notion that a single individual, acting in these overlapping and conflicting capacities, is capable of effectively implementing an accused student’s right of cross-examination by posing prepared questions to witnesses in the course of the investigation ignores the fundamental nature of cross-examination: adversarial questioning at an in-person hearing at which a neutral fact finder can observe and assess the witness’s credibility.<sup>143</sup>

Student 5’s<sup>144</sup> parent reveals the frustration of being “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,” or “not be allowed to present evidence that would refute the claims of the complainant.”<sup>145</sup> In Student 5’s case, there was no transparency “as the single investigator performed a superficial and flawed investigation and found Student 5 responsible “based on an extremely cursory and indefensible assessment of ‘evidence.’”<sup>146</sup> Student 5’s parent called the process “abjectly un-American.”<sup>147</sup>

Student 6<sup>148</sup> was denied the opportunity “to question my accuser or any of her witnesses personally or through an advisor,” was not allowed to even question parts of my accuser’s story,”<sup>149</sup> and all of Student 6’s “pre-submitted questions were denied.”<sup>150</sup> Student 6 explains, had he been able to ask questions, he “could have . . . called attention to clear inconsistencies and outright lies that permeated [his accuser’s] allegations.”<sup>151</sup> Student 6 eventually pursued a successful lawsuit; “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.”<sup>152</sup>

A single investigator model can result in the complainant never facing or even being asked questions submitted by the respondent. In both *Doe v. Purdue University*<sup>153</sup> and *Doe v. University of Southern California*<sup>154</sup> the complainant did not appear before whomever was deciding the respondent’s fate. In *Purdue*, the 7th Circuit marveled at the fact that the Dean of Students, who also served as the Title IX

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<sup>140</sup> *Id.*, at 638-9, citing *Doe v. Allee*, 30 Cal.App.5th 1036, 1066 (2019); *Southern Cal. II, supra*, 29 Cal.App.5th at p. 1237; *Doe v. Claremont Mckenna Coll.*, 1055, 1070 (2018).

<sup>141</sup> *Doe v. Westmont Coll.*, 34 Cal.App.5th at 637, citing *Doe v. Univ. of So. Cal.*, 29 Cal.App.5th 1212, 1232-1237 (2018).

<sup>142</sup> *Doe v. Allee*, 30 Cal.App.5th 1036 (2019)

<sup>143</sup> *Id.*, at 1068.

<sup>144</sup> Exhibit 1, at 5-7 (Student 5).

<sup>145</sup> *Id.* at 6 (Student 5).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 7 (Student 5).

<sup>148</sup> *Id.* at 7 (Student 6).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* Student 6 also “was not permitted to present my own evidence or witnesses without arbitrary administration approval (the administration had no criteria and they provided no explanation)” *Id.* at 7

<sup>152</sup> *Id.* at 7 (Student 6).

<sup>153</sup> *Doe v. Purdue Univ.*, 928 F.3d 652, 659 (7th Cir. 2019).

<sup>154</sup> *Doe v. Univ. of S. Cal.*, 29 Cal. App. 5th 1212 - (Cal. App. 2d Dist. Div. 7 2018)

officer, “found Jane credible even though neither [she] nor the Advisory Committee talked to her in person.”<sup>155</sup> Likewise, in *Doe v. University of Southern California*,<sup>156</sup> where the student was not entitled to a hearing, “the Title IX investigator served as both the investigator and adjudicator.”<sup>157</sup> Nevertheless, in both *Purdue University*<sup>158</sup> and *University of Southern California*<sup>159</sup> the investigator determined the complainants were credible without ever having met with them.<sup>160</sup> The *Purdue* court held,

in a case that boiled down to a ‘he said/she said,’ it is particularly concerning that Sermersheim and the committee concluded that Jane was the more credible witness—in fact, that she was credible at all—without ever speaking to her in person. Indeed, they did not even receive a statement written by Jane herself, much less a sworn statement.<sup>161</sup>

Student 7’s case<sup>162</sup> was a “*he said she said*,” without drugs, alcohol, or even sexual intercourse,<sup>163</sup> yet a “no contact order” was served “in the middle of the night” due to an allegation of “inappropriate touching.”<sup>164</sup> “There was no verbal questioning of John by the college or the investigator at any time,”<sup>165</sup> and Student 7 “was treated as guilty the moment he was accused.”<sup>166</sup> His “friends watch[ed] [him] 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.”<sup>167</sup>

Student 7’s parent rightfully asks,

[h]ow 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.<sup>168</sup>

When Student 7’s family expressed their shock at the unfairness of the process, the Title IX director admitted, “There was a lot of pressure from the Federal Government and that this is just how things work.”<sup>169</sup> Student 7’s parent asks,

What is the difference between being labeled “guilty” in a civil or criminal proceeding or being found “responsible” on your college campus of “rape?”<sup>170</sup> Because the consequences

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<sup>155</sup> *Doe v. Purdue Univ.*, 928 F.3d at 659

<sup>156</sup> *Doe v. Univ. of So. Cal.*, 29 Cal. App. 5th 1212 - (Cal. App. 2d Dist. Div. 7 2018)

<sup>157</sup> *Id.*, at 1235.

<sup>158</sup> *Doe v. Purdue Univ.*, 928 F.3d 652, 659 (7th Cir. 2019) (Barrett, J.)

<sup>159</sup> *Doe v. Univ. of S. Cal.*, 29 Cal. App. 5th 1212 - (Cal. App. 2d Dist. Div. 7 2018)

<sup>160</sup> In *Doe v. Purdue Univ.*, 928 F.3d at 659. “Jane did not appear before the Advisory Committee; [the investigator] had no opportunity to cross-examine Jane.” In *Doe v. Univ. of So. Cal. II*, 29 Cal.App.5th 1212 at pp. 1215 (2018) “Dr. Allee did not interview three central witnesses, .... Instead, Dr. Allee relied on the summary of the interviews by another Title IX investigator, ... Accordingly, Dr. Allee was not able to assess the credibility of these critical witnesses during the interviews.”

<sup>161</sup> *Doe v. Purdue Univ.*, 928 F.3d at 664

<sup>162</sup> Exhibit 1, at 7-11 (Student 7).

<sup>163</sup> *Id.* at 8 (Student 7).

<sup>164</sup> *Id.* at 7-8 (Student 7).

<sup>165</sup> *Id.* at 10 (Student 7).

<sup>166</sup> *Id.* at 8 (Student 7).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 10 (Student 7).

<sup>169</sup> *Id.* at 9 (Student 7).

<sup>170</sup> *Id.* at 10 (Student 7).

of being suspended or expelled, having marks on your records, being judged and labeled by your college campuses have caused irrevocable harm to many students!<sup>171</sup>

- *Impaired ability to mount a defense*

In Student 9's<sup>172</sup> single investigator process he was not informed of the details of the allegations, permitted to question his accuser in writing or otherwise, or allowed to respond.<sup>173</sup> He was accused based on "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."<sup>174</sup> His parent said, "In this single person . . . lay my son's academic and professional future, as well as much of his emotional and psychological stability."<sup>175</sup> Indeed, Student 9 was ultimately hospitalized for attempted suicide spurred by the experience and retaliation from his accuser "in the form of another accusation by one of the accuser's friends for having" appealed the decision finding him responsible.<sup>176</sup> Unlike the complainant, he had to pay for his own legal support, and the single-income family spent "\$25,000 just to defend our son from an overzealous and unfair process that threatened not only [his] educational and professional future but also his very life."<sup>177</sup>

Student 14 was accused by an ex-girlfriend from whom he had recently separated. The accusation, for an alleged incident that took place one month into what would become their *seven-month relationship*, was for "digital penetration without consent."<sup>178</sup> He ultimately was found responsible for the initial charge by a single investigator. "We appealed the decision and lost."<sup>179</sup>

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.<sup>180</sup>

As a result, Student 14 "has been suicidal, withdrawn, angry, sad, embarrassed, isolated, and shocked that a relationship turned sour could potentially ruin his life."<sup>181</sup> His parents "are absolutely shocked and outraged" at what their son was forced to endure.<sup>182</sup>

## IX. The 2022 Proposed Rules: Live Hearings & Cross-Examination

According to Joe Cohn, legislative and policy director at the Foundation for Individual Rights and Expression (FIRE), "It's clear that students accused of sexual misconduct cannot rely on this Department of Education to ensure their basic rights are respected."<sup>183</sup> This is because the 2022 Proposed Rule §106.46(f)(1), (f)(3) would

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<sup>171</sup> *Id.* at 11 (Student 7).

<sup>172</sup> *Id.* at 14-15 (Student 9).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 14 (Student 9).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 15 (Student 9).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 24 (Student 14).

<sup>179</sup> *Id.* at 25 (Student 14).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Robby Soave, 5 Ways Biden's New Title IX Rules Will Eviscerate Due Process on Campus, *supra*, note 66, quoting Joe Cohn of FIRE.

abolish the requirements for postsecondary schools to conduct a live hearing and require cross-examination. The proposed rule would “authorize institutions to forego live hearings”,<sup>184</sup> thereby “eliminat[ing] the right to meaningful cross-examination.”<sup>185</sup>

Removing the requirement for a hearing might be the most significant of the Biden administration’s proposed reforms of how the federal gender-equity law is enforced, and the one with the greatest potential to alter how colleges carry out Title IX investigations. It’s also troubling to some Title IX experts.<sup>186</sup>

Though Proposed Rule §106.46(f)(1) would *permit* questioning by either party in a live hearing, any questions would be restricted to those the decisionmaker allows and determines are not “unclear” or “harassing,” thereby giving the decisionmaker unilateral power to arbitrarily limit questioning. Under these types of restrictions, FACE students have had some or even all of their submitted questions never asked or, if asked, their follow-up questions were ignored rendering any responses to their initial question useless. For example, every one of Student 6’s “pre-submitted questions were denied,<sup>187</sup> making it impossible for him to show “clear inconsistencies and outright lies that permeated [the complainant’s] allegations.”<sup>188</sup> Student 6 was fortunate to have the resources to pursue a successful lawsuit.<sup>189</sup>

### *Appellate Courts Across the US Require Live Hearings.*

These 2022 Proposed Rules require policies and procedures that contradict numerous state and federal appellate court decisions across the country. Those decisions have found live hearings and “some form” of cross-examination critical to a credibility determination in sexual misconduct disciplinary proceedings.

One of the most fundamental improvements of the DeVos rules was the establishment of cross-examination. A representative for the accused student—such as an attorney—had the right to scrutinize an accuser’s claim during an actual hearing to adjudicate the dispute. Under the new rules, this is no longer the case.<sup>190</sup>

When a complainant is effectively represented by the school, it is unfair to require students like Student 4 “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.”<sup>191</sup>

Student 1 was subjected to 3 different school processes in each of which he was found not responsible. His accuser was relentless, filing in another venue when she lost in the previous one, and constantly feeding the rumor mill.<sup>192</sup> At one point a grand jury was convened. Student 1 was so traumatized that he was unable to return to (another) school for 5 years.<sup>193</sup>

As early as 1982 the California Supreme Court held,

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<sup>184</sup> Robby Soave, 5 Ways Biden’s New Title IX Rules Will Eviscerate Due Process on Campus, *supra*, note 66.

<sup>185</sup> *Id.*

<sup>186</sup> Tom Bartlett, The Proposed Title IX Change That Worries Some Experts, *supra*, note 69.

<sup>187</sup> *Id.* at 7 (Student 6).

<sup>188</sup> *Id.* Student 6 also “was not permitted to present my own evidence or witnesses without arbitrary administration approval (the administration had no criteria and they provided no explanation)” *Id.* at 7

<sup>189</sup> *Id.* at 7 (Student 6).

<sup>190</sup> Robby Soave, 5 Ways Biden’s New Title IX Rules Will Eviscerate Due Process on Campus, *supra*, note 66.

<sup>191</sup> *Id.* at p. 5 (Student 4).

<sup>192</sup> *Id.* at pp. 1-2 (Student 1).

<sup>193</sup> *Id.* at p. 2 (Student 1).

a reasonable person in the conduct of serious affairs will not rely solely on written statements but will demand that witnesses be produced so that their credibility may be tested and their testimony weighed against conflicting evidence when their testimony appears readily available and there is no substantial reason why their testimony may not be produced.<sup>194</sup>

Since then, there have been “a number of lawsuits in recent years in which judges have ruled that students shouldn’t face serious discipline without a hearing.”<sup>195</sup> In 2016, district court Judge Saylor in *Brandeis University* recognized that the “dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious.”<sup>196</sup> In that case, Judge Saylor observed,

Brandeis appears 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.<sup>197</sup>

Also in 2016, the Washington State Court of Appeals in *Arishi v. Washington State University*<sup>198</sup> found “[b]ecause assessment of veracity and credibility were key, safeguards of the subpoena power, oral testimony, and cross-examination were critical.”<sup>199</sup> The court held that “the fact that [the accuser] did not testify and was never cross-examined” despite “evidence undermining her credibility,” together with “denial of representation by counsel,” all “undermine[d] confidence in the outcome.”<sup>200</sup>

In 2017 the 6th Circuit Court of Appeals decided *Doe v. University of Cincinnati*,<sup>201</sup> a case in which the complainant chose not to appear, giving the accused student no opportunity to question her.<sup>202</sup> Despite this fact, the decisionmakers still relied on the investigator’s report to conclude her claim that the sexual encounter was nonconsensual was more credible than the accused’s claim it was consensual.

<sup>203</sup> The decisionmakers were left with “a choice between believing an accuser and an accused.”<sup>204</sup>

We acknowledge this procedure may not relieve Roe’s potential emotional trauma. Still, a case that “resolve[s] itself into a problem of credibility” cannot itself be resolved without a mutual test of credibility, at least not where the stakes are this high . . . One-sided determinations are not known for their accuracy. Jane Roe deserves a reliable, accurate outcome as much as John Doe.<sup>205</sup>

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<sup>194</sup> *John A. v. San Bernardino City Unified School Dist.* (1982) 33 Cal.3d 301 at pp. 307-308 (John A.)

<sup>195</sup> Tom Bartlett, The Proposed Title IX Change That Worries Some Experts, *supra*, note 69, citing *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 606 (D. Mass. Mar. 31, 2016).

<sup>196</sup> *Doe v. Brandeis University*, 177 F. Supp. 3d 561, 606 (D. Mass. Mar. 31, 2016).

<sup>197</sup> Jake New, Out of Balance, Colleges lose series of rulings in suits brought by male students accused of sex assault; In stinging decisions, judges fault lack of due process (April 14, 2016), quoting *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. Mar. 31, 2016), <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault>

<sup>198</sup> *Arishi v. Wash. State Univ.*, 385 P.3d 251 (2016).

<sup>199</sup> *Id.*, at ¶63.

<sup>200</sup> *Id.*, at ¶¶73., 74.

<sup>201</sup> *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017).

<sup>202</sup> *Id.*, at 397.

<sup>203</sup> *Id.*, at 402, 407.

<sup>204</sup> *Id.*, at 402.

<sup>205</sup> *Id.*, at 404.

In 2018 two important appellate court decisions were released that agreed students should be given an opportunity to ask questions of the accuser in a live hearing. The 6th Circuit Court of Appeals in *Doe v. Baum*<sup>206</sup> reversed “the district court’s dismissal of John Doe’s procedural due process claim insofar as it is based on the university’s failure to provide a hearing with the opportunity for cross-examination”.<sup>207</sup>

Today, we reiterate that holding once again: if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder. Because the University of Michigan failed to comply with this rule, we reverse.<sup>208</sup>

Shortly thereafter a California Court of Appeal addressed *Doe v. Claremont Mckenna College*,<sup>209</sup> in which the student plaintiff was denied both a hearing and the opportunity to question his accuser:

We conclude that these cases distill to a set of core principles applicable to cases where the accused student faces a severe penalty and the school’s determination turns on the complaining witness’s credibility. First, the accused student is entitled to a process by which the respondent may question, if even indirectly, the complainant.<sup>210</sup> Second, the complaining witness must be before the finder of fact either physically or through videoconference or like technology to enable the finder of fact to assess the complaining witness’s credibility in responding to its own questions or those proposed by the accused student.<sup>211</sup>

In January 2019 in *Doe v. Kegan Allee*<sup>212</sup> another California Court of Appeal “agree[d] . . . that, where credibility is central to a university’s determination, a student accused of sexual misconduct has a right to cross-examine his accuser, directly or indirectly, so the fact finder can assess the accuser’s credibility.”<sup>213</sup> That court held that when an accused student

faces severe disciplinary sanctions, and the credibility of witnesses . . . is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which . . . the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (e.g., videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments.<sup>214</sup>

The *Allee* court concluded that the “fact finder cannot be a single individual with the divided and inconsistent roles occupied by the Title IX investigator in the USC system.”<sup>215</sup>

Also in 2019, the plaintiff in *Doe v. Westmont College*,<sup>216</sup> alleged he’d “had no ability to question the details of witnesses’ testimony, even indirectly”<sup>217</sup> and “was unable to challenge the discrepancies he saw in the

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<sup>206</sup> *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

<sup>207</sup> *Id.*, at 588.

<sup>208</sup> *Id.*, at 578.

<sup>209</sup> *Doe v. Claremont Mckenna Coll.*, 25 Cal. App. 5th 1055 (2018).

<sup>210</sup> *Id.*, at 1070.

<sup>211</sup> *Id.*

<sup>212</sup> *Doe v. Allee*, 30 Cal.App.5th 1036 (2019) (Cal. App. 2d Dist. 2019).

<sup>213</sup> *Id.*, at 1066.

<sup>214</sup> *Id.*, at 1069

<sup>215</sup> *Id.*

<sup>216</sup> *Doe v. Westmont Coll.*, 34 Cal.App.5th 622 (Cal. App. 2d Dist. 2019), *reh’g denied* (May 17, 2019)

<sup>217</sup> *Id.*, at 633.

testifying witnesses' responses to the Panel's questions."<sup>218</sup> Decisionmakers "withheld information from him and did not recall witnesses for follow-up questions."<sup>219</sup> To make matters worse, "certain critical witnesses relied on by the Panel for its decision . . . did not testify at the conduct meeting."<sup>220</sup>

In *Westmont*, the California Court of Appeal concluded these issues had "impeded John's ability to suggest questions that may have impacted the Panel's credibility determinations."<sup>221</sup> The court held "where a college's decision hinges on witness credibility, the accused must be permitted to pose questions to the alleged victim and other witnesses, even if indirectly,"<sup>222</sup> and that "each adjudicator must hear from critical witnesses—in person, by videoconference, or by some other method—before assessing credibility."<sup>223</sup>

Though the investigator in the 2020 decision in *Doe v. University of the Sciences*<sup>224</sup> "listened to Doe during her two interviews with him," Doe was not provided "a real, live, and adversarial hearing. Nor did USciences permit Doe to question witnesses—including his accusers."<sup>225</sup>

As we explained above, basic fairness in the context of sexual-assault investigations requires that students accused of sexual assault receive these procedural protections. Thus, Doe states a plausible claim that, at least as it has been implemented here, the single-investigator model violated the fairness that USciences promises students accused of sexual misconduct.<sup>226</sup>

In *Doe v. The Regents of the University of California* the California Court of Appeal chastised the university for its biased and unfair process:<sup>227</sup>

It is ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy. This case turned on the Committee's determination of the credibility of the witnesses. Credibility cannot be properly decided until the accused is given the opportunity to adequately respond to the accusation. The lack of due process in the hearing here precluded a fair evaluation of the witnesses' credibility. In this respect, neither Jane nor John received a fair hearing.<sup>228</sup>

### *FACE Students Denied Live Hearings and Cross-Examination.*

Ten out of the 17 FACE students whose accounts are reproduced in Exhibit 1 were denied live hearings through which their responsibility was decided.<sup>229</sup> For example, Student 4<sup>230</sup> suffered through a single

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<sup>218</sup> *Id.*, at 639.

<sup>219</sup> *Id.*, at 636.

<sup>220</sup> *Id.*, at 639.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*, at 638-9, citing *Doe v. Allee*, 30 Cal.App.5th 1036 at 1066 (Cal. App. 2d Dist. 2019); *Doe v. Claremont Mckenna Coll.*, 25 Cal. App. 5th 1055, at p. 1070 (2018).

<sup>223</sup> *Doe v. Westmont Coll.*, 34 Cal.App.5th at 637.

<sup>224</sup> *Doe v. Univ. of Sciences*, 961 F.3d 203 (3d Cir. 2020)

<sup>225</sup> *Id.*, at 216.

<sup>226</sup> *Id.*

<sup>227</sup> *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44 (2018).

<sup>228</sup> *Id.*, at 61.

<sup>229</sup> Exhibit 1, at 4-5 (Student 4); 5-7 (Student 5); 6-7 (Student 6); 7-11 (Student 7); 11-13 (Student 8); 13-15 (Student 9); 16-17 (Student 10); 18-21 (Student 12); 21-24 (Student 13); 24-25 (Student 14).

<sup>230</sup> *Id.* at 4-5 (Student 4).



investigator process in which the investigators ignored exculpatory evidence,<sup>231</sup> and the “accuser did not have to answer any questions about her story” - instead “her words were taken as fact.”<sup>232</sup>

Student 9<sup>233</sup> “was charged, investigated, and questioned without ever having been informed of the allegations” or “given the opportunity to respond.”<sup>234</sup> In fact, Student 9 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.”<sup>235</sup> Without a hearing and the ability to cross-examine adverse witnesses and testimony, he had no means by which to defend himself against the false accusations.<sup>236</sup> Student 9 ultimately was hospitalized for attempted suicide spurred by retaliation from his accuser “in the form of another accusation by one of the accuser’s friends” for appealing his responsibility finding.<sup>237</sup> His single-income family spent \$25,000 to defend him “from an overzealous and unfair process that threatened not only [his] educational and professional future but also his very life.”<sup>238</sup>

Student 7 “had NO hearing to attend, NO cross-examination in person or written,” nor was he “allowed to know who was on his hearing panel judging him.”<sup>239</sup> He was never verbally questioned by anyone at the school. His parent asks, “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.”<sup>240</sup>

Student 5’s experience “under the Obama-era ‘guilty upon accusation standard’ is extraordinarily, and tragically, different when compared to what would have occurred under the [2020 Rules concerning] how colleges investigate and respond to allegations of sexual harassment and assault.”<sup>241</sup>

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.<sup>242</sup>

Student 6<sup>243</sup> “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”<sup>244</sup> Additionally, Student 6 was unable to present witnesses.<sup>245</sup> Student 6 explains, “I could have ... called attention to clear inconsistencies and

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<sup>231</sup> *Id.* at 4 (Student 4).

<sup>232</sup> *Id.* at 4-5 (Student 4).

<sup>233</sup> *Id.* at 13-15 (Student 9).

<sup>234</sup> *Id.* at 14-15 (Student 9).

<sup>235</sup> *Id.* at 15 (Student 9).

<sup>236</sup> *Id.* at 14-15 (Student 9).

<sup>237</sup> *Id.* at 15 (Student 9).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 7-8 (Student 7).

<sup>240</sup> *Id.* at 10 (Student 7).

<sup>241</sup> *Id.* at 5 (Student 5).

<sup>242</sup> *Id.* at 6 (Student 5).

<sup>243</sup> *Id.* at 6-7 (Student 6).

<sup>244</sup> *Id.* at 7 (Student 6).

<sup>245</sup> *Id.*

outright lies that permeated her allegations.”<sup>246</sup> Additionally, even all of Student 6’s “pre-submitted questions were denied.”<sup>247</sup> Student 6 eventually pursued a successful lawsuit: “I . . . was dragged through a university disciplinary process that shocked me to my core.”<sup>248</sup> “It took thousands of dollars and the intervention of a court to vindicate the rights I should have received from my school.”<sup>249</sup>

Student 8<sup>250</sup> reports that “because there was no opportunity for live cross-examination, I was severely limited in my ability to raise this issue during the hearing . . . A system in which both accusing students and accused students have representation allows for a fairer process for everyone involved.”<sup>251</sup>

Student 12’s<sup>252</sup> ability to present evidence was limited, while his accuser was “given the option to present anything she desired or have the Title IX personnel to present, if she chose to.”<sup>253</sup> The unequal treatment did not stop there: Student 12 also was subjected to retaliation by his accuser (who had accused five other men), as she “harassed, stalked, and attempted to publicly humiliate our son and his fiancée,” which “the university was unwilling to address.” because that apparently was “her right”.<sup>254</sup> The experience took “an emotional, physical, and monetary toll” on Student 12, his family, and his fiancée.<sup>255</sup> While he was found not responsible, “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.”<sup>256</sup>

For Student 13,<sup>257</sup> whose responsibility finding was eventually reversed on appeal years later, “It was the willingness to disregard hard evidence and deceitful behavior of the accuser that led to \$150,000 in direct costs to [his] family.” His mom explains, “What my son went through, no one should have to go through, the depression caused by the process is heart wrenching.” . . . 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.<sup>258</sup> And the trauma does not go away: “This process has cost us in so many ways; our health, welfare, trust, happiness, and a significant financial set back.”

Student 14<sup>259</sup> was accused by an ex-girlfriend from whom he had recently separated. The accusation, for an alleged incident that took place one month into what would become their month-long relationship, was for “digital penetration without consent.”<sup>260</sup> Student 14 was found responsible and “has been suicidal, withdrawn, angry, sad, embarrassed, isolated, and shocked that a relationship turned sour could

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<sup>246</sup> *Id.* Student 6 also “was not permitted to present my own evidence or witnesses without arbitrary administration approval (the administration had no criteria and they provided no explanation)” *Id.* at 7

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 11-13 (Student 8).

<sup>251</sup> *Id.* at 13 (Student 8).

<sup>252</sup> *Id.* at 18-21 (Student 12).

<sup>253</sup> *Id.* at 20-21 (Student 12).

<sup>254</sup> *Id.* at 20 (Student 12).

<sup>255</sup> *Id.* at 21 (Student 12).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 21-24 (Student 13).

<sup>258</sup> *Id.* at 23-24 (Student 13).

<sup>259</sup> *Id.* at 24-25 (Student 14).

<sup>260</sup> *Id.* at 24 (Student 14).

potentially ruin his life.”<sup>261</sup> His parents “are absolutely shocked and outraged” at what their son was forced to endure.<sup>262</sup>

He was given a one-semester suspension, in the middle of Spring semester. [¶] 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.<sup>263</sup>

## X. The 2022 Proposed Rules: Access to Evidence

“Under the DeVos rules, both the accused and the accusers were entitled to ‘inspect and review any evidence obtained as part of the investigation.’”<sup>264</sup> However, under the 2022 Proposed Rules:

- For postsecondary institutions:
  - Proposed Rule §106.46(e)(6) would require schools to offer “equitable access” to relevant and not otherwise impermissible evidence or to an investigative report summarizing the evidence. If the institution provides the report, and any party seeks access to evidence, it must give parties access to the relevant and not otherwise impermissible evidence.
  - Proposed Rule §106.45(b)(7)(iii) defines “otherwise impermissible evidence” to include evidence of a complainant’s sexual interests and prior sexual conduct.
- For K-12 schools, Proposed Rule §106.45(f)(4) would not require schools to provide investigative reports to the parties, but would instead allow Title IX Coordinator to give these parties a summary of the evidence.

We agree with history professor and Title IX expert KC Johnson, that Proposed Rule §106.46(e)(6) allowing a school to provide “an investigative report summarizing the evidence” instead of access to evidence itself is “an evisceration of the procedural protections given to the accused.”<sup>265</sup>

This is a significant revision that could substantially derail a student's efforts to prove their side of the story. An administrator could summarize the other party's claims incorrectly, giving the accused a wrongful impression about the case against them. In many of the cases adjudicated under the Obama-era standards, accused students did not even fully understand the accusations; some had to guess who their accusers were, and what they had said. The new rules would once again create situations where accused students would have to rely on the accuracy of statements made by the very investigators charged with determining their guilt.<sup>266</sup>

### *Appellate Courts Demand Students be Given Evidence.*

In *Doe v. University of Southern California* (2016)<sup>267</sup> the court criticized the fact that the accused student “was not allowed to access any evidence used to support those accusations unless he actively sought it through a written request.”<sup>268</sup> And in 2018, another California court of appeal rejected the school’s claim that the

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<sup>261</sup> *Id.* at 25 (Student 14).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> Robby Soave, 5 Ways Biden’s New Title IX Rules Will Eviscerate Due Process on Campus, *supra*, note 66.

<sup>265</sup> Emily Yoffe, Biden’s Sex Police, *supra*, note 19.

<sup>266</sup> Robby Soave, 5 Ways Biden’s New Title IX Rules Will Eviscerate Due Process on Campus, *supra*, note 66.

<sup>267</sup> *Doe v. Univ. of S. Cal.*, 246 Cal. App. 4th 221 (2016).

<sup>268</sup> *Doe v. Univ. of S. Cal.*, 246 Cal. App. 4th at 248.

accused student was entitled to merely a portion of a SART report, finding that the student was entitled to the “complete SART report” to give him “a fair opportunity to cross-examine the detective” who relied on that report for his testimony.<sup>269</sup> The court concluded, “the accused must be permitted to see the evidence against him. Need we say more?”<sup>270</sup>

In *Doe v. Miami University*,<sup>271</sup> The U.S. Court of Appeals for the 6th Circuit reversed the district court’s dismissal of Doe’s Title IX and §1983 claims:<sup>272</sup>

To summarize, John has sufficiently pleaded a procedural-due-process claim against Vaughn based on the claims that she was not an impartial adjudicator and that she did not fully provide him the evidence used against him. Thus, we reverse the district court with respect to these claims against Vaughn.<sup>273</sup>

### *FACE Students Denied Access to Evidence.*

FACE students have been prejudiced by their inability to access actual evidence, as opposed to mere summaries. In Student 4’s case, he was not given “the notes recording the Panel’s questions and witnesses’ responses, impeding his ability to respond to the evidence against him.”<sup>274</sup> Instead, he was provided with “significantly less detailed” oral summaries.<sup>275</sup>

In Student 12’s<sup>276</sup> case,

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.<sup>277</sup>

In Student 5’s<sup>278</sup> case, the investigator ignored exculpatory evidence such as telephone and text messages (and corresponding time stamps) and key card time stamps to the dorm room.”<sup>279</sup>

Student 9’s<sup>280</sup> ability to defend himself was compromised because he was given “no opportunity to hear or even read the actual testimonies of the parties to challenge them and assert his credibility in contrast to theirs.”<sup>281</sup> Instead, he was given “only the investigator’s summarized narrative of her impressions of witness testimony” rather than “the actual testimonies of the parties to challenge them and assert his credibility in contrast to theirs.”<sup>282</sup>

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<sup>269</sup> *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44, 58-59 (2018).

<sup>270</sup> *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44, 57 (2018).

<sup>271</sup> *Doe v. Miami Univ.*, 822 F.3d 579 (6th Cir. 2018).

<sup>272</sup> *Doe v. Miami Univ.*, 822 F.3d at 605.

<sup>273</sup> *Doe v. Miami Univ.*, 822 F.3d at 603-604

<sup>274</sup> *Doe v. Westmont Coll.*, 34 Cal.App.5th at 633.

<sup>275</sup> *Doe v. Westmont Coll.*, 34 Cal.App.5th at 637.

<sup>276</sup> *Id.* at 18-21 (Student 12).

<sup>277</sup> *Id.* at 21 (Student 12).

<sup>278</sup> *Id.* at 5-7 (Student 5).

<sup>279</sup> *Id.* at 6 (Student 5).

<sup>280</sup> *Id.* at 13-15 (Student 9).

<sup>281</sup> *Id.* at 15 (Student 9).

<sup>282</sup> *Id.*

## XI. The 2022 Proposed Rules: Severe Repercussions and Irreparable Damage

In today's society, publication of Plaintiff's name will trigger irreparable damage to his or her reputation and emotional stability.<sup>283</sup> Even without name disclosure,<sup>284</sup> the impact of an accusation of sexual misconduct on a student's life can be reputation-destroying, soul-crushing,<sup>285</sup> and life-threatening.<sup>286</sup> In FACE cases without name disclosure<sup>287</sup> innocent FACE students still have suffered unimaginable trauma, some despite having been found not responsible.<sup>288</sup> The reality of being accused of something so vile that it would ruin friendships and derail long-planned for educational goals is enough for most FACE students to consider suicide.<sup>289</sup> The internet is full of stories of students and others who ended their lives, some even after being proven innocent.<sup>290</sup> Even innocent students suffer unimaginable trauma, many despite having been found not responsible.<sup>291</sup>

Every single one of the 17 students whose accounts are below and in Exhibit 1 was traumatized in some way. Many FACE students have considered suicide, including at least eight of the 17 in Exhibit I.<sup>292</sup> Three have attempted,<sup>293</sup> and we know a few have succeeded.<sup>294</sup>

The trauma wrongly accused students suffer is severe. Harvard student Patrick Witt was accused but never found responsible for sexual misconduct at Yale. Nevertheless, his life and career prospects have been irreparably changed:

The complaint lodged against me caused me and my family immense grief, and as a simple Google search of my name reveals, its malignant effects have not abated. It cost me my reputation and credibility, the opportunity to become a Rhodes scholar, the full-time job offer I had worked so hard to attain, and the opportunity to achieve my childhood dream of playing in the NFL. I have had to address it with every prospective employer whom I've contacted,

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<sup>283</sup> Yager, *supra* n. 53, at 5.

<sup>284</sup> The information may be communicated to employers, transfer schools, and the like, causing the student to be fired, expelled, and otherwise prevented from being a contributing member of society.

<sup>285</sup> See Appendix, Exhibit I. The majority of FACE students, even when found not responsible, are too frightened to provide an account of their experiences, even anonymously, fearing they will be identified and tormented.

<sup>286</sup> In the most extreme cases, those falsely accused of rape have been murdered without any finding they were guilty. Yager, Reggie, *supra*, note 53, p. 9.

<sup>287</sup> The information may be communicated to employers, transfer schools, and the like, causing the student to be fired or expelled.

<sup>288</sup> Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*; Sept. 6, 2017, <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/> ("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.")

<sup>289</sup> Informal polling has revealed this fact.

<sup>290</sup> See, *infra* n. 305, and accompanying text.

<sup>291</sup> Yoffe, Emily, *supra*, note 48; Stephanie Linning, *Sister of a boy, 17, who killed himself after being falsely accused of rape shares story*, Sept. 10, 2020, Daily Mail, <https://www.dailymail.co.uk/femail/article-8718345/Sister-boy-17-killed-falsely-accused-rape-shares-ordeal.html>.

<sup>292</sup> Exhibit I at 1-2 (Student 1), 3-4 (Student 3), 7-11 (Student 7), 11-13 (Student 8), 13-15 (Student 9), 24-25 (Student 14), 25-27 (Student 15), and 27-28 (Student 16).

<sup>293</sup> *Id.* at 1-2 (Student 1), 11-13 (Student 8), and 13-15 (Student 9).

<sup>294</sup> See, *infra* n. 305, for examples of suicide cases following false allegations.

with every girl that I've dated since, and even with Harvard Law School during my admissions interview. It is a specter whose lingering presence is rooted in its inexplicability.<sup>295</sup>

Mr. Witt eloquently describes the frustration and devastation a mere accusation can cause:

I cannot begin to describe how exasperatingly difficult it has been to try to explain to people what an informal complaint is and how there was never any evidence – nor any effort made to discover evidence – to substantiate the claim made by my accuser. My summer employer and the NFL certainly couldn't understand it, and the media flat out didn't care – the words “informal complaint” were all that was needed to establish my guilt in their eyes.<sup>296</sup>

### *Courts Recognize Repercussions Suffered by the Wrongly Accused.*

Courts also have recognized the reputational devastation caused by a false allegation. In *Arishi v. Washington State University*<sup>297</sup> the student faced damage to his reputation from a finding that he had committed what amounted to sex-related felonies, the loss of his visa, and his right to remain in the United States.<sup>298</sup> The Washington State Court of Appeals recognized that,

A subsequent university to which a student may apply always knows of the reasons for his prior dismissal . . . If he leaves without having earned his degree, the student must make an affirmative showing to any subsequent university to which he applies that he left the original university in 'good standing.'<sup>299</sup>

In 2005 the 6th Circuit in *Flaim v. Med Coll. of Ohio* noted that Flaim's private interest was “significant. It extends beyond his immediate standing at Medical College of Ohio and could 'interfere with later opportunities for higher education and employment.'”<sup>300</sup> Then in 2017, that same court wrote:

A finding of responsibility for a sexual offense can have a “lasting impact” on a student's personal life, in addition to his “educational and employment opportunities,” especially when the disciplinary action involves a long-term suspension. [] The “private interest that will be affected by the official action” is therefore compelling.<sup>301</sup>

In 2018 the Appellate Division of the Supreme Court of New York agreed with the 6th Circuit in *Doe v. Univ. of Cincinnati*:

The disciplinary proceeding here lies on the extreme end of that spectrum and its outcome was of great personal importance to petitioner, as “[a] finding of responsibility for a sexual offense can have a ‘lasting impact’ on [his] personal life, in addition to his ‘educational and employment opportunities,’ especially” because an established finding of sexual violence would and did result in permanent dismissal from SUNY.<sup>302</sup>

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<sup>295</sup> Patrick Witt, “A Sexual Harassment Policy That Nearly Ruined My Life,” Boston Globe (Nov. 13, 2014) <https://www.bostonglobe.com/opinion/2014/11/03/sexual-harassment-policy-that-nearly-ruined-life/hY3XrZrOdXjvX2SSvuciPN/story.html>, also can be found at <https://www.facecampusequality.org/stories-11>.

<sup>296</sup> *Id.*

<sup>297</sup> *Arishi v. Wash. State Univ.*, 385 P.3d 251 (2016).

<sup>298</sup> *Arishi v. Wash. State Univ.*, 385 P.3d 251, 264 (2016).

<sup>299</sup> *Arishi Id.* at p. 264, quoting James M. Picozi, Note, University Disciplinary Process: What's Fair, What's Due, and What You Don't Get, 96 Yale L.J. 2132, 2138 (1987).

<sup>300</sup> *Flaim v. Medical College of Ohio*, 418 F. 3d 629 (6th Cir. 2005), quoting *Goss v. Lopez*, 419 US 565, 575 (1975).

<sup>301</sup> *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017), quoting *Mathews v. Eldridge*, 424 US 319, 335 (1976).

<sup>302</sup> *Matter of Jacobson v. Blaise*, 164 A.D.3d. 1072 (3d Dep't 2018).

Then in 2019, a California Court of Appeal agreed that

Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life. [] . . . [The student's] personal relationships might suffer. [] And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled. [citations]<sup>303</sup>

In *Doe v. University of the Sciences* the 3rd Circuit distinguished the sexual misconduct case before it from academic disciplinary matters, explaining “students accused of sexual misconduct face grave consequences, including a suspension of up to two years or—as in Doe’s case—permanent expulsion”:

This is not [an academic] case . . . The investigation and fair adjudication of alleged criminal activity like sexual assault is not uniquely within the province of colleges and universities. Yet accused “students have a substantial interest at stake when it comes to school disciplinary hearings for sexual misconduct,” *Baum*, 903 F.3d at 582, because the consequences are potentially dire and permanent: “[a] finding of responsibility for a sexual offense can have a ‘lasting impact’ on a student's personal life, in addition to his ‘educational and employment opportunities,’ especially when the disciplinary action involves a long-term suspension.” *Miami Univ.*, 882 F.3d at 600 (citation omitted).<sup>304</sup>

In addition to reputational destruction, numerous reports can be found online about wrongly accused students and others who attempted or succeeded in ending their lives,<sup>305</sup> some despite being proven innocent. FACE students are no different – many have considered suicide, including at least eight of the seventeen in *Exhibit 1*.<sup>306</sup> Three have attempted,<sup>307</sup> and we know some have succeeded.<sup>308</sup>

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<sup>303</sup> *Doe v. Allee*, 30 Cal. App.5th 1036, 1059 (Cal. App. 2d Dist. 2019), citing (*Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018)).

<sup>304</sup> *Doe v. Univ. of Sciences*, 961 F.3d 203, 213 (3d Cir. 2020).

<sup>305</sup> Soave, Robby, *Lawsuit: Male Student Accused of Sexual Harassment for Rejecting Gay Advances Commits Suicide After Title IX Verdict*, Reason, Apr. 12, 2017, <https://reason.com/2017/04/12/lawsuit-male-student-accused-of-sexual-h/>; Taylor, Jonathan, *Accused student commits suicide in wake of Occidental's Title IX investigation*, Title IX for All, Mar. 10, 2019, <https://titleixforall.com/accused-student-commits-suicide-in-wake-of-title-ix-investigation/>; Hartocollis, Anemona, *He Was Accused of Enabling Abuse. Then Came a Downward Spiral*, New York Times, Jan. 4, 2020, Updated Jan. 9, 2020, <https://www.nytimes.com/2020/01/04/us/dartmouth-lawsuit-bucci.html> (“he was blindsided when seven female students later named him in a lawsuit against Dartmouth, accusing him of looking the other way and intimidating those who had spoken out. He grew deeply distressed, his wife and closest colleagues said, especially after he was advised not to complicate the litigation by defending himself publicly.”); Lining, Stephanie, *Sister of a boy, 17, who killed himself after being falsely accused of rape shares story*, Daily Mail, Sept.10 2020, <https://www.dailymail.co.uk/femail/article-8718345/Sister-boy-17-killed-falsely-accused-rape-shares-ordeal.html> (“The girl dropped the charges after two weeks but by then Jay, who was described as a ‘gentleman’ and ‘intelligent’, had already ‘spiraled completely’ Sadly, in the same case: Mann, Tanveer, *Mother of teen who hanged himself over false rape allegations commits suicide*, Metro.co.uk, Jul. 29, 2016, <https://metro.co.uk/2016/07/29/mother-of-teen-who-hanged-himself-over-false-rape-allegations-commits-suicide-6037994/>; Juneau Jen, *Parents of Stanford Soccer Star Katie Meyer Open Up About Her Death: ‘Worst Nightmare’*; Stanford Daily, Mar. 4, 2022, <https://people.com/sports/stanford-soccer-player-katie-meyer-parents-open-up-about-her-death-today-show/> (According to Katie’s dad Steven, before her death, she “was defending a teammate on campus over an incident and the repercussions of her defending that teammate (were possibly resulting in disciplinary action);\_OpIndia Staff, *He was not a rapist, stop calling him that*, OpIndia, May 7, 2020, <https://www.opindia.com/2020/05/he-was-not-a-rapist-stop-calling-him-that-brother-of-the-class-12-boy-who-committed-suicide-says-that-social-media-made-him-a-rapist-overnight/> (brother of boy who committed suicide says that social media made him a rapist overnight.”)

<sup>306</sup> Exhibit I, Students 1 (pp. 1-2), 3 (pp. 3-4), 7 (pp. 7-11), 8 (pp. 11-13), 9 (pp.13-15), 14 (pp. 24-25), 15 (pp. 25-27), and 16 (pp. 27-28).

<sup>307</sup> *Id.*, Students 1 (pp. 1-2), 8 (pp. 11-13), and 9 (pp.13-15).

<sup>308</sup> See, *supra*, note 304, for citations to suicide cases following false allegations.

*FACE Students Have Endured Severe & Life-threatening Repercussions.*

As an example, Student 1<sup>309</sup> was subjected to 3 different school processes in each of which he was found not responsible. Unfortunately for Student 1, his accuser was relentless, filing in another venue when she lost in the previous, and constantly feeding the rumor mill.<sup>310</sup> At one point a grand jury was convened. Student 1 was so traumatized by the ongoing harassment that he attempted suicide by an intentional drug overdose.<sup>311</sup>

Doctors diagnosed him with Post Traumatic Stress Disorder (PTSD), Authoritative Anxiety, Anticipatory Anxiety, and Social Anxiety, which cause panic attacks so severe often he cannot function. The diagnosis directly resulted from the multiple, unfair, and unequal campus adjudications held without a presumption of innocence and social pressure of rumors that he is a rapist.<sup>312</sup>

Due to the trauma, Student 1 was unable to return to (another) school for 5 years.<sup>313</sup> Seven years later, the same school administrators who had failed to protect him reported his involvement in a disciplinary action to transfer schools.<sup>313</sup>

Student 2,<sup>315</sup> had his name “published in local newspapers, “and rumors spread around [his] high school” where his sister also attended and where his mother taught.”<sup>316</sup> “There were marches on campus where he was named as part of the school’s ‘rape culture’.”<sup>317</sup> The mom reports,

I cannot express how traumatic this false accusation has been to him and our family as a whole. We’ve had many tearful days and hearing him say that he’ll be explaining this false allegation for the rest of his life just breaks our hearts. He has had to rethink his entire life journey and we have learned that this is a rollercoaster and we have to take it one day at a time. In our darkest moments, all of us would be crying at the same time about the nightmare we never could have imagined. He sees a therapist for trauma, as do the other members of our family. I can only hope that in time, he heals and he can resume his positive outlook on life once again.<sup>318</sup>

Student 3,<sup>319</sup> was a “well-known athlete who had competed nationally, had athletic sponsors and a huge social media presence,” when an anonymous accuser named him on Instagram along with 75–100 other students after a school rally.<sup>320</sup> Based only on that allegation, Student 3 lost his athletic sponsors within 24 hours and was subjected to death threats.<sup>321</sup> “The reputational impacts are ongoing and severe,” and Student 3 became suicidal;

It’s been almost a year and my son goes into deep depression and has a tremendous amount of anxiety. He moved but still runs into people he knows. He is constantly worried

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<sup>309</sup> *Id.* at 1-2 (Student 1).

<sup>310</sup> *Id.* at pp. 1-2 (Student 1).

<sup>311</sup> *Id.* at 1 (Student 1).

<sup>312</sup> *Id.* at 2 (Student 1).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> Exhibit I, Student 2 (pp. 2-3).

<sup>316</sup> *Id.* at 2-3 (Student 2).

<sup>317</sup> *Id.* at 2 (Student 2).

<sup>318</sup> *Id.* at 3 (Student 2).

<sup>319</sup> *Id.*, at 3-4 (Student 3).

<sup>320</sup> *Id.* at 3 (Student 3).

<sup>321</sup> *Id.* at 3 (Student 3).



that someone is going to contact his employer with one of the social media posts. He has no idea how to repair the damage that was done to his reputation. This was a happy, confident college student with hundreds of friends and now he wants to hide.<sup>322</sup>

Student 3's family also suffered: "We are a local family so it was the worst day of our lives. My son went from being well liked and looked up to, to a sexual predator and rapist."<sup>323</sup>

In Student 4's<sup>324</sup> case, he "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 [the 2020 Final Rules] have finally been taken to begin bringing due process to campus sexual assault cases. I believe that some of the [the 2020 Final Rules], had they been in place in 2015, would have made a difference in the outcome of our son's case.<sup>325</sup>

For Student 5,<sup>326</sup>

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 [the 2020 Final Rules] of how colleges investigate and respond to allegations of sexual harassment and assault.<sup>327</sup>

Student 5's parent says, "The process . . . resulted in an experience that can only be described as 'un-American.'"<sup>328</sup> "During the harrowing experience we consistently wondered out loud '*how could this happen in America?*'"<sup>329</sup>

Student 6 "was dragged through a university disciplinary process that shocked me to my core."<sup>330</sup> Student 6 suffered trauma, severe reputational harm, loss of jobs, and other opportunities.<sup>331</sup> "It took thousands of dollars and the intervention of a court to vindicate the rights I should have received from my school."<sup>332</sup>

Student 7's<sup>333</sup> mother reports his "friends watched him 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."<sup>334</sup> His mother explained that when an innocent student is found responsible,

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

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<sup>322</sup> *Id.* at 4 (Student 3).

<sup>323</sup> Exhibit I at 4 (Student 3).

<sup>324</sup> *Id.* at pp. 4-5 (Student 4).

<sup>325</sup> *Id.* at p. 4 (Student 4).

<sup>326</sup> *Id.* at pp. 5-7 (Student 5).

<sup>327</sup> *Id.* at p. 5 (Student 5).

<sup>328</sup> *Id.* at p. 6 (Student 5).

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 7 (Student 6).

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 7-11 (Student 7).

<sup>334</sup> *Id.* at 8 (Student 7).

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 . . . Self-blame, suicidal thoughts, paranoia, anxiety, mistrust, social withdrawal, and isolation are all commonly seen in many who have gone through similar “educational processes.”<sup>335</sup>

In Student 7’s case, the family discovered “[i]t is not only the person accused that suffers this is a life altering event for the whole family and even friends.”<sup>336</sup>

Student 8,<sup>337</sup> who was also driven to attempt suicide,<sup>338</sup> says “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.”<sup>338</sup>

Though Student 8<sup>339</sup> says he “was eventually able to prove my innocence in a court of law after spending thousands of dollars,” he worked “five long years” to do so. “That’s half a decade of total professional stagnation and unrelenting psychological turmoil.” Even though Student 8’s lawsuit was successful, “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.”<sup>340</sup>

Student 9<sup>341</sup> suffered through a single investigator process during which he was not informed of the allegations or given any opportunity to respond. He, too, ultimately was hospitalized for attempted suicide due in part to retaliation from his accuser, “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.”<sup>342</sup>

Unlike the complainant, Student 9 had to pay for his own support, and the single-income family spent “\$25,000 just to defend our son from an overzealous and unfair process that threatened not only [his] educational and professional future, but also his very life.”<sup>343</sup>

For Student 10,<sup>344</sup> the sexual misconduct disciplinary process was described as traumatic and “the effects of the process [have] been life altering for our entire family,”<sup>345</sup> though his parent says he was relatively fortunate,

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<sup>335</sup> *Id.* at 10 (Student 7).

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*, at 11-13 (Student 8).

<sup>338</sup> *Id.* at 11 (Student 8), citing Joseph Roberts, In college, I was falsely accused of sexual harassment. Men like me deserve due process. (July 2, 2020) USA Today, <https://www.usatoday.com/story/opinion/voices/2020/07/02/sexual-assault-title-ix-due-process-betsy-devos-column/3281103001/>. Joseph Roberts, the former FACE student mentioned by Student 8, also attempted suicide, as he told on a Nightline piece concerning his story that can be found here: The accuser and the accused: The debate over sexual misconduct allegations on campus (Oct. 19, 2018) <https://abcnews.go.com/Nightline/video/accuser-accused-debate-sexual-misconduct-allegations-campus-58605786>.

<sup>339</sup> Exhibit I at 11-13 (Student 8).

<sup>340</sup> *Id.* at 11 (Student 8).

<sup>341</sup> *Id.*, at 13-15 (Student 9).

<sup>342</sup> *Id.* at 15 (Student 9).

<sup>343</sup> *Id.* at 15 (Student 9).

<sup>344</sup> *Id.* at 15-17 (Student 10).

<sup>345</sup> *Id.* at 17 (Student 10).

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.<sup>346</sup>

Though Student 11<sup>347</sup> “was able to prove almost immediately that he did not initiate the email chain where [his accuser] said she was harassed,”<sup>348</sup> and was eventually found not responsible, “[t]he havoc it wreaked and the emotional toll it took on our family and community was mind blowing.”<sup>349</sup> His parent reports,

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.<sup>350</sup>

Student 11’s family “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.” His parent says “There has to be a better way.”<sup>351</sup>

Student 12,<sup>352</sup> also found not responsible, was accused by a “disturbed and delusional” lesbian complainant who had also accused five other men, and “harassed, stalked, and attempted to publicly humiliate” Student 12 and his fiancée.” Unfortunately, his university refused to protect Student 12 from the harassment” because “that is her right”.<sup>353</sup> As a result, the experience took “an emotional, physical, and monetary toll” on Student 12, his fiancée, and his family,<sup>354</sup> While also was relatively fortunate to be found not responsible, “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.”<sup>355</sup>

For Student 13,<sup>356</sup> who was exonerated on appeal, “It was the willingness to disregard hard evidence and deceitful behavior of the accuser that led to \$150,000 in direct costs to [his] family.”

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 while 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.<sup>357</sup>

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<sup>346</sup> *Id.* at 15-16 (Student 10).

<sup>347</sup> Exhibit I at 17-18 (Student 11).

<sup>348</sup> *Id.* at 18 (Student 11).

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 18-21 (Student 12).

<sup>353</sup> *Id.* at 20 (Student 12).

<sup>354</sup> *Id.* at 21 (Student 12).

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 21-24 ( Student 13).

<sup>357</sup> *Id.* at 23-24 (Student 13).

Student 13's mother explains that the trauma does not go away: "This process has cost us in so many ways; our health, welfare, trust, happiness, and a significant financial set back."<sup>358</sup>

Student 14<sup>359</sup> was accused by an ex-girlfriend from whom he had recently separated.<sup>360</sup> The accusation, for an alleged incident one month into their 7-month relationship, was for "digital penetration without consent."<sup>361</sup> Student 14 was found responsible even though he'd been confident there was only a misunderstanding.<sup>362</sup> Despite being able to eventually complete his degree, Student 14 "has been suicidal, withdrawn, angry, sad, embarrassed, isolated, and shocked that a relationship turned sour could potentially ruin his life."<sup>363</sup> His parents "are absolutely shocked and outraged" at what their son was forced to endure.<sup>364</sup>

Student 15<sup>365</sup> also was driven to attempt suicide and his description of the repercussions he suffered *based just on a mere accusation*, is worth quoting in full to illustrate the traumatic repercussions when accusations are taken as fact:

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 master's program likely on the table. Instead, everything I worked so hard for was destroyed the moment I left the school.<sup>366</sup>

Student 15 concluded, "I am shaking writing just this."<sup>367</sup>

Though there was no Title IX complaint in Student 16's case (his accusers attended a different school), his case is an example of the trauma generated by only an allegation of sexual misconduct.<sup>368</sup> Because he was a local football player, there were newspaper articles and social media postings with his name and photo, which was "absolutely devastating,"<sup>369</sup> and his reaction "so severe that [Student 15] refused to leave his room, would not socialize, his hair has fallen out, he has lost weight and he has constant panic and anxiety attacks."<sup>370</sup> Student 15 "went from a happy, well-adjusted college student with no history of depression . . . to deep dark suicidal thoughts as a direct result of having his name disclosed." His parent

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<sup>358</sup> *Id.* at 23 (Student 13).

<sup>359</sup> *Id.*, Student 14 (pp. 24-25).

<sup>360</sup> *Id.* at 24 (Student 14).

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 25-27 (Student 15).

<sup>366</sup> *Id.*

<sup>367</sup> Exhibit I at 26 (Student 15).

<sup>368</sup> *Id.* at 27-28 (Student 16).

<sup>369</sup> *Id.* at 28 (Student 16).

<sup>370</sup> *Id.*

calls the experience "Tragic. Absolutely tragic." Though Student 15 "only entertained suicide . . . at one point he locked himself in his room crying for 50 minutes we were very concerned. He didn't leave his room for 4-5 days, didn't speak for days, just withdrew into himself."<sup>371</sup> Student 15 "is now heavily medicated."<sup>372</sup> According to his therapist, "the trauma of his experience is causing bipolar episodes."<sup>373</sup>

My hands still shake just typing about it now. It is not just my son's reputation damaged, which is irreversible, but when his name was disclosed, the accusations alone caused unimaginable emotional damage. Unimaginable. It is the kind of distress that no one should endure. It is a dreadful combination of embarrassment, anger, and constant, constant worry. I believe if there had been no disclosure of his name he'd be a different person today.<sup>374</sup>

Student 17<sup>375</sup> was "accused almost 6 months after a night of consensual sex followed by a second night that the accuser admits was consensual." Though the accuser continued to pursue him, and returned to have "consensual" sex the following day, he was still found responsible "because one of her witnesses stated she had been drinking."<sup>376</sup> Sexual misconduct allegations have an uncanny staying power - in Student 17's case, a #MeToo campaign was waged years later when he was named on Instagram in three anonymous posts.

The word spread through our neighborhood and his high school. His new school was contacted. His high school was contacted. His phone number and our address were all over Instagram. Our younger daughter, then at the same high school, was threatened. I was threatened. My son lost every single friend he had. Every single one.<sup>377</sup>

Student 17's sister is in therapy and on meds, and the family has moved. They know this will come up again, so they're careful not to post anything on social media; "We live in fear that someone in our new community will have a tie to our old. [¶] Instagram finally took down the posts but the damage is done and irreparable. For him, for his sister and for us."<sup>378</sup>

## XII. Conclusion

By now you should know that "doing the right thing" no longer protects you in this 'accusation = guilt' world. Vulnerable young adults, such as the 17 discussed throughout this Comment, have lost faith in our justice system, families emotionally, professionally, and sometimes financially destroyed.<sup>379</sup> You may not believe it, but our experiences at FACE have made us realize these students could be anyone's sons, daughters, brothers, or sisters.

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<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*, Student 17 (pp. 28-29).

<sup>376</sup> *Id.* at 28 (Student 17).

<sup>377</sup> *Id.* at 29 (Student 17).

<sup>378</sup> *Id.*

<sup>379</sup> 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>.

FACE knows well how difficult it is for innocent young students to defend themselves against sexual misconduct allegations, particularly when the assumption is such allegations are true. Our experience is that wrongly accused students trust their school will treat them fairly and are told “tell the truth and you’ll be fine.” In reality, these students have been blindsided by campus attorneys and administrators who act as prosecutors, compiling only evidence to establish their guilt, while denying them access to any equivalently experienced advocate, and refusing them access to the very evidence relied on to find them responsible.

Campus tribunals are not courts of law, and hundreds of court decisions across this country have ruled their decisions were discriminatory, unsupported by the weight of the evidence, or used decidedly unfair, inadequate, or even unconstitutional procedures.

Appallingly, despite the fact that up to 30% of campus Title IX decisions are very likely to be wrong,<sup>380</sup> the transcripts of those students found “responsible” are forever imprinted with a disciplinary notation; for them, there is no “*ban the box*,” even though they’ve been found “responsible” (not “guilty”) for conduct that, *if* it occurred, most often is not criminal, in a decision unaccompanied by rules and procedures normally used with the preponderance of evidence standard, and pursuant to a disciplinary “process” conducted by administrators and professors who euphemistically call the experience “educational.”

Educational it is decidedly not. Student 7’s parent asks:

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 have caused irrevocable harm to many students!<sup>381</sup>

We respectfully request that when addressing the appropriateness of the 2022 Proposed Rules, you keep in mind that the implications of your decision will be significant and widespread. While a school’s “educational mission is, of course, frustrated if it allows dangerous students to remain on its campuses. Its mission is equally stymied . . . if [it] ejects innocent students who would otherwise benefit from, and contribute to, its academic environment.”<sup>382</sup>

Respectfully submitted,

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<sup>380</sup> Villasenor, John, *A probabilistic framework for modeling false Title IX ‘convictions’ under the preponderance of the evidence standard*, Law, Probability and Risk, Volume 15, Issue 4, December 2016, pp. 223–237, <https://doi.org/10.1093/lpr/mgw006> (estimated risk of error for preponderance standard to be 30%.)

<sup>381</sup> *Id.* at 10-11 (Student 7).

<sup>382</sup> *Doe v. Penn, State Univ.* (M.D. Pa. 2018) 336 F. Supp. 3d 441, 449.

## EXHIBIT I

*The following student accounts are reproduced as closely as possible to the originals.*

### **Student 1**

She levied the accusation of non-consensual sex against him. They were both just 19 years old and in the 7th week of their first year in college.

Detectives interviewed him and witnesses and declined to arrest and charge him.

He fought for survival; he didn't understand how far this would lead. Finally, to preserve a crumbling educational record and protect what few emotional and psychological reserves remained at a point in time, he withdrew from all but one class; his GPA was the single thing they could not take from him.

He spent the rest of his time on campus behind a locked bathroom door, lying naked on the bathtub floor with the shower water running to mask his sobs. For hours. For days on end.

She fed the rumor mill; it lifted the bandwagon promoting her cause. She found him; she stood uncomfortably close at the event, sat at the library table beside him, enjoyed meals within feet away from him – whispering to members of the mill. She didn't stop.

He appeared under Grand Jury Referral without the right to counsel present; two prosecutors represented the state on her behalf. He received a No Bill of Indictment. It wouldn't matter.

She was just getting started with him. She continued to hunt him down. The rumor mill took on a life of its own and raged. In 2013, she took her same accusation to the school's Title IX Coordinator's Office. They investigated him for the sexual assault allegation under the school's not-yet-published Title IX school policy overseen by then Assistant Secretary to Office for Civil Rights) Catherine Lhamon. Despite all odds, the office found him not responsible of the allegation, yet the gag order they imposed, threatening severe sanctions up to expulsion should he violate restrictions, remained.

The mill's rage turned hostile. Its members stole everything from him, of him. Finally, he attempted suicide by an intentional drug overdose.

Her business was unfinished.

She then turned to the Dean of Student's Office, claiming the same accusation of sexual assault against him. He refused to acknowledge responsibility for the behavior, which ignited a second school investigation of the original allegations, now under the school's Code of Conduct. After five months, the school held a disciplinary hearing. Again, hearing adjudicators found him not responsible.

Her parents withdrew her from school; she didn't want to leave. Yet, on the other hand, he faced an ongoing threat of triple jeopardy.

School administrators led the one-a-half-year process against him, which destroyed his

emotional and psychological capabilities.

He remained enrolled until he could no longer exist there; it was only a matter of months before the mob and its leaders ran him off campus despite numerous determinations finding him not responsible.

He walked away from his college career on a Wednesday, mid-semester, sobbing, defeated, and friendless.

Doctors diagnosed him with Post Traumatic Stress Disorder (PTSD), Authoritative Anxiety, Anticipatory Anxiety, and Social Anxiety, which cause panic attacks so severe often he cannot function. The diagnosis directly resulted from the multiple, unfair, and unequal campus adjudications held without a presumption of innocence and social pressure of rumors that he is a rapist.

Seven years later, the same administrators reported his involvement in disciplinary action to other transfer schools, which did not admit him.

He is now nearly 29 years old. He believes he is only 40 percent back physically and emotionally; testing will soon begin to assess indications of permanent brain damage believed to be caused by the trauma.

His future is uncertain. No positive determination can restore his good name; the rumor mill is more reliable than truth and findings. No medical or psychiatric therapies have restored his psychological, emotional, and good health.

Six weeks ago, she took to social media again, stoking the rumor mill flame, which consistently simmers just under the surface. He remains isolated and a social outcast.

What, exactly, did a Grand Jury, two school adjudications of the same allegation with pending triple jeopardy get wrong? The processes failed to protect him in every possible way. Rumor and innuendo prevailed.

## **Student 2**

Our son was falsely accused on a Saturday in the fall around 7pm. He called us within minutes of the girl accusing him after he told her he had dinner plans. He was hysterical and kept repeating that he had done everything right and it was consensual. They had had previous consensual encounters. We immediately got in the car and were at his side by 1 that morning and he was arrested a few days later. Luckily, we were able to get him out of jail on bail and returned with him to our home in another state. His name was published in the university's newspaper, was linked to the just booked website and was picked up by a local newspaper.

Our local paper soon picked it up, and rumors spread around our high school where my daughter is a student and the town where I am a teacher. Not only was our son just devastated by what this young women did, but we became virtual hermits in our home, literally afraid to be out in the community. There were marches on campus where he was



named as part of the school's "rape culture". We all felt isolated, not being able to discuss it with anyone and just kept repeating that it was consensual, it was as a false allegation, we were confident the truth would be found out.

He missed his friends at college and his home friends as they were all still in school and he was at home alone and isolated. He feared that given the political climate with #MeToo that he might be sent to prison for something he did not do. We fully expected that we would be shunned in our community and both he and we as a family, would lose friends. Luckily, he has amazing friends, as do we, and we did not lose any close friends. Thank goodness his criminal case was dropped early on, but his name remains highly Google-able due to the press coverage.

He loved his school and was just devastated that this young woman would do such a thing. However, he obviously cannot return to his university, and has been in limbo as we fight the Title 9 accusation. He desperately wants to continue his college career and has accepted his life as he knew it is over as he prepares to apply as a transfer student with a Title 9 allegation still open.

I cannot express how traumatic this false accusation has been to him and our family as a whole. We've had many tearful days and hearing him say that he'll be explaining this false allegation for the rest of his life just breaks our hearts. He has had to rethink his entire life journey and we have learned that this is a rollercoaster and we have to take it one day at a time. In our darkest moments, all of us would be crying at the same time about the nightmare we never could have imagined. He sees a therapist for trauma, as do the other members of our family. I can only hope that in time, he heals and he can resume his positive outlook on life once again.

### **Student 3**

His name was put out on Instagram with 75 – 100 male students after a school rally. He was a well-known student and athlete with a heavy presence on social media. The posts about him were seen by thousands of students, members in the sports community, athletic sponsors, kids he coached, professors, family friends, this list goes on and on. The accusers attached a Google doc to all the posts that went out that night titled "Sexual Predators ...," with almost 300 names on it. The women were anonymous and put men's names, dates and details of their alleged sexual experiences with him.

Within minutes he started receiving death threats, people were going to beat him up. The girls copied and posted the posts about him to everyone on his Instagram page, employers, sponsors, local businesses. He was known all over the US since he was in a competitive sport and had competed nationally. Within 24 hours he had lost his athletic sponsors, reputation, and was suicidal.

We were advised to let it drop because he was never charged and never been found responsible. It's been almost a year and he wants the posts down and to fight the women who

did this to him. We all need closure, especially my son. He switched to online school and moved because the harassment was so bad.

We are a local family so it was the worst day of our lives. My son went from being well liked and looked up to, to a sexual predator and rapist. Nothing has come out about him in the last year and the school has had several rallies since. Since April is #Survivor month we are holding our breath.

My son is doing well but knows that this will come up again, as do we. We never post pictures or news about him on social media. We don't share his glories. We live in fear that someone in our new community will have a tie to our old. Instagram finally took down the posts but the damage is done and irreparable. For him, for his sister and for us.

It's been almost a year and my son goes into deep depression and has a tremendous amount of anxiety. He moved but still runs into people he knows. He is constantly worried that someone is going to contact his employer with one of the social media posts. He has no idea how to repair the damage that was done to his reputation. This was a happy, confident college student with hundreds of friends and now he wants to hide.

#### **Student 4**

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.

The 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.

## **Student 5**

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 6**

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 7**

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."<sup>1</sup>

- 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." <sup>2</sup>

- 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 8

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 9

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 10

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 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 11**

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 12**

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 2020, 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 13**

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 misrepresentations 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 14**

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 she 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 15**

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 16**

My son was attending a football game at another university in a nearby state. When he found a place to sit on the bleachers five girls behind him were irritated and told him it was reserved seating and he couldn't sit there. He knew this was untrue, so he didn't move - there were over 100k fans at this game and not a lot of palaces to move. Next the girls called over a state trooper to tell him my son was not allowed there, but the trooper said he was allowed.

The five girls continued to harass him to get him to move. At one point everyone was standing on the bleachers cheering and he accidentally stumbled and fell backward onto one of the girls, and immediately apologized. Another accused him of touching her "boob," and they then managed to contact the local police who came to them. The police removed him from the stands, but did nothing else.

One month later the police from the state where the incident occurred asked him to come in – at that point he had no idea why. We immediately called a lawyer.

We discovered there were criminal charges in the state where the incident had occurred, for misdemeanor indecent assault, harassment, underage drinking, and disorderly conduct. Specifically three of the girls claimed he was groping them during the game. Two others said he was striking them: one claimed when he hit her on her head with his pom pom when they were all standing and cheering, and the other claimed his elbow hit her temple when cheering with the pom pom. Yet another "thinks he touched her butt" – apparently her friend told her he did. He apologized for both incidents, which his accusers admit. Though he been charged and arraigned,

the case has been pending since last year.

For the next week to 10 days, article after article after article came out about my son, with my son smiling in his university football photo, his name, and the accusations all over the internet, the university and our community. The horror of being falsely accused, was still fresh and this article was shocking and absolutely devastating. This experience has been so severe that my son refused to leave his room, would not socialize, his hair has fallen out, he has lost weight and he has constant panic and anxiety attacks.

My son went from a happy, well-adjusted college student with no history of depression, a high average, playing on his D1 sports team, to deep dark suicidal thoughts as a direct result of having his name disclosed. Tragic. Absolutely tragic. He only entertained suicide ...but when at one point he locked himself in his room crying for 50 minutes we were very concerned. He didn't leave his room for 4-5 days, didn't speak for days, just withdrew into himself.

Our son is now heavily medicated. He has seen 4-6 doctors, and has been on 4-5 different medications. His psychiatrist is treating him with a drug for bipolar disorder – she said he is not bipolar and he had no history of depression, but the trauma of his experience is causing bipolar episodes.

My hands still shake just typing about it now. It is not just my son's reputation damaged, which is irreversible, but when his name was disclosed, the accusations alone caused unimaginable emotional damage. Unimaginable. It is the kind of distress that no one should endure. It is a dreadful combination of embarrassment, anger and constant, constant worry. I believe if there had been no disclosure of his name he'd be a different person today.

## **Student 17**

My son was accused almost 6 months after a night of consensual sex followed by a second night that the accuser admits was consensual. Though the accuser admits to pursuing my son, to initiating sex and to returning the following day for what she calls consensual sex, my son was found responsible because one of her witnesses stated she had been drinking.

He was found responsible and expelled - his appeal was denied and his OCR complaint still has not been adjudicated. My son worked hard to get admitted to another university and graduated with honors.

Two years after transferring and cutting all ties with friends he had

made at the first school, a #MeToo Instagram campaign was waged. My son was called out by name on Instagram in three anonymous posts. Though he had been out of that school for two years the word spread immediately through our neighborhood and his high school. His new school was contacted.

His high school was contacted. His phone number and our address were plastered all over Instagram. Our younger daughter, then at the same high school, was threatened. I was threatened. My son lost every single friend he had. Every single one. They were terrified of being cancelled themselves so cut ties with him. With us.

My daughter started therapy and is on meds, We moved. My amazing son is doing well but knows that this will come up again, as do we. We never post any pictures or news about him on social media. We don't share his glories. We live in fear that someone in our new community will have a tie to our old.

Instagram finally took down the posts but the damage is done and irreparable. For him, for his sister and for us.

## EXHIBIT 2 - FACE INTAKE REPORT

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

# Exhibit 3

Case 1:20-cv-11104-WGY Document 126-2 Filed 08/27/20 Page 2 of 2

## ***Plaintiff Demographics in Accused Student Lawsuits***

Based on an Analysis of 645 Lawsuits

Produced by Title IX For All, 7/6/2020

Source Data at [www.titleixforall.com/title-ix-legal-database](http://www.titleixforall.com/title-ix-legal-database)

