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Congressional Hill Brief: Campus Sexual Assault, Title IX, and the Need for Congressional Reform

- Joe Cohn, Legislative & Policy Director
- Shelby Emmett, Legal & Legislative Policy Advocate
- Samantha Harris, Director of Policy Research

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Current Policy Harms All Students: **University of Michigan**

"I caution all UofM students and their parents to avoid reporting sexual violence or using the university's Title IX process at all costs...the biggest threat on campus has now become the Title IX Sexual Assault Policy as implemented by the University."

– Statement from alleged victim

"...The University has surrendered and turned its back on our client, apparently because of its own technical mistakes. Blindsided and betrayed, our client is more damaged from having reported the assault to the university than if she had not come forward at all."

– Attorney for alleged victim

"He had no idea he was on his way out no matter what he said or what the facts were."

– Attorney for accused student

FIRE's General Positions on Campus Sexual Assault Policies

1. This is not a world of absolutes. Reforms must keep campuses safe while also protecting the due process rights of students.
2. College administrators are not qualified to adjudicate these cases. They lack the tools, knowledge, and expertise.
3. Campus proceedings are insufficient because predators still free to prey on other students and those in the surrounding community. Law enforcement must be part of any reform package.

What do Victim Advocates Think?

“While we respect the seriousness with which many schools treat such internal processes, and the good intentions and good faith of many who devote their time to participating in such processes, the simple fact is that these internal boards were designed to adjudicate charges like plagiarism, not violent felonies. The crime of rape just does not fit the capabilities of such boards. They often offer the worst of both worlds: they lack protections for the accused while often tormenting victims.”

- Rape, Abuse, & Incest National Network (RAINN)

What do College Administrators Think?

“The significance of the new legal requirements under Title IX and the Clery Act is that college campuses are being asked to serve in multiple roles—responsible for the prevention, investigation, and adjudication of sexual harassment and sexual violence. But the federal government’s expectations, especially related to investigations and adjudication, seem better-suited to a law enforcement model rather than a complex, diversely populated academic community found on a modern American campus...moreover, administrative investigators lack many of the tools necessary to meet the heightened expectations placed on them by these new regulatory requirements.”

- Janet Napolitano, President of the University of California System, Former Secretary of Homeland Security

Observation from Member of Campus Disciplinary Board

“Title IX, after all, is dedicated solely to sex discrimination; the Harvard Title IX Office, dedicated exclusively to enforcing the University’s new rules on sexual and gender-based harassment, has no mandate to ensure racial equality. Case after Harvard case that has come to my attention, including several in which I have played some advocacy or adjudication role, has involved black male respondents, but the institution cannot “know” about this because it has not been thought important enough to monitor for racial bias.”

- Janet Halley, Royall Professor of Law, Harvard Law School

The Criminal Justice System

- Right to *active* representation of counsel
- Right to remain silent and not incriminate yourself
- Right to confront and cross-examine witnesses against you
- Right to due process of law and a fair trial
- Trained professionals involved in investigating, collecting evidence, and prosecuting the accused along with ethical standards and transparency
- The government must prove your guilt beyond a reasonable doubt
- If you are found not guilty the government can't try you again

Campus Disciplinary Process

- Right to have counsel or advisor *present*
- No right against self-incrimination. To speak means to waive 5th Amendment rights
- Questions asked left to the full discretion of the hearing chair
- Only entitled to a “prompt and equitable” process
- The investigators and adjudicators are not experts. They are not governed by other laws or ethical standards; process not transparent
- The college must use the “more likely than not” standard
- If you are found not responsible, the college may be able to try you again



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Title IX, the Courts, and Due Process

Samantha Harris, Director of Policy Research

Samantha@thefire.org



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Due Process for Students at Public Universities

1. Notice

- Information regarding the date, time, and place of the hearing
- Sufficient statement of the allegations
- Citation to specific campus policy alleged to be violated
- Information regarding procedural rights

2. Opportunity to be Heard

Title IX

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”



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The Expansion of Title IX

Schools must respond to student-on-student harassment that creates a *“hostile environment”* because a failure to do so *“permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX.”*

- Office for Civil Rights, 1997 Sexual Harassment Guidance Letter

The Expansion of Title IX:

Davis v. Monroe County Board of Education

An educational institution could be liable for peer harassment under Title IX only when the conduct in question was “so **severe, pervasive, and objectively offensive** that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”



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April 2011 Dear Colleague Letter

Office for Civil Rights (OCR) issued a groundbreaking “Dear Colleague” letter inserting itself directly into the minutiae of campus sexual assault proceedings.

OCR mandated:

- Use a “preponderance of the evidence”

AND

- “Strongly discourage[d] schools from allowing the parties personally to question or cross-examine each other during the hearing.”



OCR Dramatically Ramped Up its Investigations of Alleged Title IX Violations

- In May 2014, when OCR first made public the list of schools under investigation, the number stood at 55
- By August 2015, 128 schools were under investigation
- More than 60 lawsuits have been filed by accused students since the April 2011 Dear Colleague Letter

Courts Overturn Expulsions for Due Process Violations

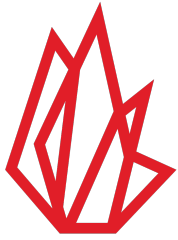
University of California, San Diego

- Lack of meaningful cross-examination at the university hearing
- Specific concerns with the **Single-Investigator Model** –one person effectively acts as investigator, prosecutor, and judge

Courts Overturn Expulsions for Due Process Violations

University of Tennessee at Chattanooga

- The university unfairly required the accused student to prove his innocence
- The University used an “**Affirmative Consent**” or “Yes Means Yes” standard



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The Universities are being Sued

Most of the suits brought by accused students have been filed in federal court. These suits generally claim one or more of these three things:

- (1) Title IX sex discrimination;
- (2) Violation of constitutional due process rights (at public universities); and/or
- (3) Breach of contract



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The Universities are being Sued

Title IX sex discrimination:

- Must offer evidence of actual gender bias, not just a bias against accused students
- Many claims yet to be ruled on; most have been dismissed; some have survived

Washington and Lee University:

- The plaintiff offered evidence that the university's Title IX coordinator had spoken favorably about an article claiming "*that sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express.*"



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The Universities are being Sued

Violation of constitutional due process rights, public universities:

- Plaintiffs at public universities may bring claims under Section 1983
- Due Process violations

Breach of contract, private universities:

- If a university disregards its own written procedures, there may be a claim for breach of contract



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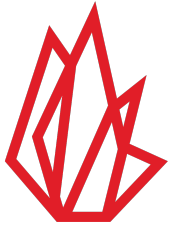
Congress can Solve the Due Process Problem

- Solving the larger due process crisis on campus is going to require a non-judicial solution
- Congress can provide more due process protections to students



Pending Legislation and Recommendations for Congress

Joseph Cohn, Legislative & Policy Director
Joe@thefire.org

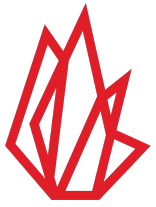


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If Universities are going to Continue to Adjudicate Sexual Assault than Due Process Protections are a Must

1. Right to Active Representation of Counsel
2. Inculpatory and Exculpatory Evidence
3. Conflict of Interest Provision
4. Eliminate the Preponderance of the Evidence Mandate



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Right to Active Assistance of Counsel

- Recent VAWA regulations provide the right to have advisor of one's choice present
- Passive presence of counsel is insufficient

❖ The transcript of Brandon Winston's sexual assault hearing at Harvard Law School was used against him in criminal court, even though his lawyer could not participate



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Active Assistance of Counsel Helps Everyone

- Victims benefit from having an advocate who answers only to them
- Accused students benefit by having an advocate aware of all the legal ramifications of the hearing
- Protects student from waiving 5th Amendment right against self incrimination

Statements by students during campus proceedings may be used against them in criminal court

*“It’s Title IX, not Miranda. Use what you
Can.”*

- Susan Riseling, chief of police and associate vice chancellor University of Wisconsin,
Madison



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Inculpatory and Exculpatory Evidence: Students Must Have the Right to Access the Evidence

- Students should have all the evidence in the college's possession
- Universities have concealed evidence too frequently
- This right will prevent universities from sweeping accusations under the rug and prevent them from punishing students unjustly



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Conflicts of Interest

To prevent one individual's bias from compromising the integrity of the process...

- Investigators should not be allowed to serve as advocates
- Advocates must not be allowed to serve as fact-finders, and
- Fact-finders should be prohibited from serving on appeals boards

The Preponderance Mandate

- Only requires 50.01% certainty
- Mandate issued by OCR without Notice and Comment
- Unfair standard when not coupled with other procedural protections



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Current Legislation to Consider

1. The Campus Accountability and Safety Act (CASA)
2. The Survivor Outreach and Support Campus Act (SOS)
3. The Hold Accountable and Lend Transparency on Campus Sexual Violence Act (Halt)
4. The Safe Campus Act
5. The Fair Campus Act



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Campus Accountability and Safety Act **(CASA)**

- No special proceedings for student athletes
- Provides for confidential advisors for alleged victims
- Requires universities to perform Climate Surveys
- Changes Title IX penalty structure

Campus Accountability and Safety Act

Features FIRE Supports

- Provision eliminating special proceedings for student athletes
- Resources provided to complainants

Features FIRE Opposes

- Uses “victim” in pre-adjudicatory context
- No resources provided to accused students
- No cap on penalty structure
- No meaningful due process protections



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SOS and HALT Acts

Survivor Outreach and Support Campus Act (SOS)

- Requires universities to have an independent advocate for complainants
- No meaningful due process protections

Hold Accountable and Lend Transparency on Campus Sexual Violence Act (HALT)

- Requires Dept. of Education to publish list of institutions under OCR investigation
- Annual climate surveys
- 100% uncapped penalties for title IX violations at OCR's discretion
- No meaningful due process protections

The Safe Campus Act

- Complaints of sexual assault referred promptly to law enforcement, unless complainant tells the University not to
 - Universities may take interim measures to protect complainant and campus community
 - Once complaint referred to law enforcement, police get 30 day exclusive window for investigation of complaint
- When complainant tells university to withhold report to police, university cannot act on the complaint
 - Rape shield provision
 - Safe harbor provision

The Safe Campus Act: Due Process Protections

- Active right to counsel for both students with right to cross-examination
- Inculpatory and exculpatory evidence disclosed to both students
- Prohibits conflicts of interests created when individuals play more than one role
- Allows universities to set their own standard of evidence

The Change FIRE would make to the Safe Campus Act

FIRE would change the reporting provision to make clear that colleges and universities could still provide non-punitive support services and accommodations to complainants who want their reports withheld from law enforcement

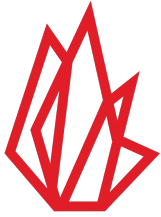


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The Fair Campus Act

- Nearly identical to the Safe Campus Act
- Does not include the reporting to law enforcement provision found in the Safe Campus Act



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What Congress Can Do

Congress should include the best aspects of each pending bill to meet the needs of all students, bring integrity and legitimacy to the system, and protect students and the community from sexual predators



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Questions, Comments, Contacts

Joe Cohn, Legislative & Policy Director

Joe@thefire.org

Shelby Emmett, Legal & Legislative Policy Advocate

Shelby@thefire.org

Samantha Harris, Director of Policy Research

Samantha@thefire.org