



August 31, 2021

Charles Barber  
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2000 Pennsylvania Avenue, NW Suite 305  
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Sent via mail and electronic mail

Dear Mr. Barber,

We write as a group of civil rights professionals interested in how Title IX of the Education Amendments of 1972 is enforced on campuses. Specifically, we study and advise on the responsibilities of colleges and universities that receive federal funding to comply with the obligation to prohibit discrimination on the basis of sex in education programs and activities. These activities include the requirement to address campus sexual misconduct.

As you know, in 2011, the Obama administration issued a “Dear Colleague” letter instructing institutions receiving federal funding to establish certain measures to meet their obligations to prevent, address, and remedy acts of “sexual violence.”<sup>1</sup> That administration undertook subsequent efforts to explain and assist colleges and universities in implementing these requirements.

In 2017, the Trump administration officially withdrew that letter and, in 2020, after a formal notice-and-comment process, issued final regulations governing campus sexual assault pursuant to Title IX.<sup>2</sup> These regulations took effect on August 14, 2020, and remain legally binding.

However, with the change of presidential administrations and the nomination of Catherine Lhamon—who played a key role in developing the Obama-era regime—to once again head the Office of Civil Rights, colleges and universities should expect still more development in this area.

As your institution grapples with your responsibility to provide prompt and equitable grievance procedures and reliable and impartial investigations to resolve sexual misconduct complaints, you must understand the developments in the law. Several hundred lawsuits have been launched by students accused of sexual misconduct against universities alleging basic due process protections were not afforded them before, during, and after sexual misconduct proceedings. A new analysis of the judicial decisions in these cases indicates that in over 200 of them judges

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<sup>1</sup> U.S. Dept. of Education, Office for Civil Rights, Dear Colleague Letter on Sexual Violence (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>2</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2020).

have decided in favor of the student.<sup>3</sup> We enclose a copy of that analysis for your convenience. Moreover, there have been a triple-digit number of settlements in such cases, some of which reaching seven-figure sums.<sup>4</sup>

In light of these rulings and settlements, expected regulatory activity, and to minimize legal liability, we offer the following list of minimal best practices that your institution should maintain—along with a few supportive court citations. These best practices relate to procedural due process, impartiality, burden of proof, evidence, and right to representation, hearings, and final reports. Other appropriate practices can be gleaned from the many court decisions analyzed in the report referenced above. We recommend you study of them.

## BEST PRACTICES

### PROCEDURAL DUE PROCESS NOTICE

Campus disciplinary authorities should clearly and publicly explain ahead of time the process for filing a complaint alongside a step-by-step description of the procedures for investigating and adjudicating the matter. The procedures should define, among other things, (a) the rights and responsibilities of both the complainant and the respondent to include cross examination by an agent of the party and access to the investigative record; (b) the standards by which evidence will be collected, evaluated, and admitted; and (c) a clear explanation of what constitutes sexual misconduct. Ideally, this information should be posted to a public university webpage to which one may easily navigate. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999); *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018); *I. F. v. Adm'rs of the Tulane Educ. Fund*, 131 So. 3d 491 (La. Ct. App. 2013).

### IMPARTIALITY

To avoid gender bias and to treat complainants and respondents equally, schools should appoint different people as investigators, adjudicators, and appeals officials, as well as in the various other roles necessary at particular stages of the grievance process. All of these individuals should undergo initial, regular, and continuing training on impartiality to include, but not be limited to: (a) concepts of conflict of interest and bias; (b) avoiding sex stereotypes; and (c) creating objective reports for the record. The investigatory process should adopt the presumption of innocence for the accused, while providing supportive measures to the accuser. The process for selecting, vetting, and training individuals to serve as resolution officials should be made available for public inspection. To learn more about the importance of impartial, non-“victim-centered” approaches to investigation, review the SAVE organization’s work on this topic.<sup>5</sup> *Doe v. Westmont College*, 2d Civil No. B287799 (Cal. Ct. App. 2019); *Doe v. University of*

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<sup>3</sup> Press Release, SAVE, New Analysis of Judicial Decisions Reveals Widespread Legal Support for Campus Due Process (July 7, 2021) (<https://www.saveservices.org/2021/07/pr-new-analysis-of-judicial-decisions-reveals-widespread-legal-support-for-campus-due-process/>).

<sup>4</sup> Memorandum from SAVE (July 20, 2021) (<https://www.saveservices.org/2021/07/universities-pay-for-costly-title-ix-settlement-agreements/>).

<sup>5</sup> Memorandum from SAVE (<https://www.saveservices.org/sexual-assault/investigations/>).

*Mississippi*, 361 F.Supp.3d 597 (2019); *Doe v. Miami University*, 882 F.3d 579, 600 (6th Cir. 2017); *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940 (9th Cir. 2020); *Doe v. Univ. of Scis.*, 961 F.3d 203 (3d Cir. 2020); *Velez-Santiago v. State University of New York at Stony Brook*, 170 A.D.3d 1182 (2019); *Doe v. Miami University*, 882 F.3d 579 (6th Cir. 2018).

## BURDEN OF PROOF

Each college or university must accept the burden of proving an allegation of sexual misconduct through a fair, thorough, and prompt investigation and hearing. Any suggestion that the respondent bears the burden of disproving that sexual misconduct occurred both presumes all sexual encounters to be sex assaults requiring the accused to prove a negative and violates the bedrock American principle of the presumption of innocence. *Mock v. University of Tennessee at Chattanooga*, No. 14-1687-II (Tenn. Ch. Ct. Aug. 4, 2015).

## EVIDENCE

Colleges and universities must diligently collect all evidence reasonably related to an accusation. Evidence collection should be a broad but time-sensitive undertaking that should result in the gathering of both inculpatory and exculpatory evidence, including that evidence presented to investigators by both parties. Evidence may be found in many forms, such as physical, electronic, and testimonial. Schools should subject all evidence collected to objective evaluation and make that evidence and evaluation fully and easily accessible to all parties involved. *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940 (9th Cir. 2020); *Doe v. University of Denver*, No. 19-1359 (10th Cir. 2021), *Doe v. Univ. of Arkansas - Fayetteville*, 974 F.3d 858, 864–65 (8th Cir. 2020); *John Doe v. Trustees of Boston College*, 892 F.3d 67, 78 (1st Cir. 2018).

## REPRESENTATION, HEARINGS, and FINAL REPORTS

Both parties should have an advisor of their choosing and have that advisor present throughout the proceedings. Parties should be entitled to a live hearing at which cross-examination of witnesses is permitted to test the credibility of witnesses, among other reasons. As proceedings are not governed by state or federal rules of evidence, schools should liberally permit evidence to be presented at hearing that is relevant to an accusation. Final reports should: (a) clearly show how the substantial weight of the evidence supports its findings; (b) include a statement on how to access the full record of the proceedings; and (c) state for how long records will be preserved. *Doe v. Regents of the University of California*, 2d Civ. No. B283229 (Cal. Ct. App. 2d 2018); *Doe v. University of Sciences*, 961 F.3d 203 (3d Cir. 2020); *Boermeester v. Carry*, 263 Cal. Rptr. 3d 261 (Cal. App. 2d Dist. 2020); *Doe v. Univ. of Arkansas - Fayetteville*, 974 F.3d 858 (8th Cir. 2020); *John Doe v. Trustees of Boston College*, 892 F.3d 67, 78 (1st Cir. 2018); *Doe v. Quinnipiac Univ.*, 404 F. Supp. 3d 643 (D. Conn. 2019); *Rolph v. Hobart & William Smith Colleges*, 271 F. Supp. 3d 386.

## CONCLUSION

Ensuring your institution is doing its very best to protect your students, faculty, and staff from sexual misconduct is a weighty task. Investigating and adjudicating allegations of sexual misconduct makes this work that much more challenging. The changing common law and regulatory terrain in this area in the past decade can make understanding your legal requirements and flexibilities daunting.

We hope that by sharing with you the best practices suggested by the wealth of recent judicial decisions related to these matters and found within principles rooted in the Constitution, we will assist your school in developing a regime less susceptible to legal attack. Indeed, we hope this grounding in emergent law helps you establish a regime of grievance procedures that both protect survivors of sexual misconduct and provide robust due process protections. At bottom, striking the appropriate balance delivers trustworthy, reliable, fair, and just results.

We will closely monitor your institution's activities in this area and will intervene as necessary should we discover grievance procedures that do not comply with current law or that fail to adjust for future developments in the law. We welcome an opportunity to engage with your institution about the best practices outlined herein, the judicial decisions upon which some of our suggestions rely, or any other matters related to this subject.

Respectfully,



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## Enclosures

1. SAVE Organization Report: *Analysis of Judicial Decisions affirming the 2020 Title IX Regulation*
2. *The Washington Post* Editorial Board Opinion: "Biden has a chance to restore balance to campus sexual assault" (Mar. 28, 2021, 1:08 PM EDT),  
[https://www.washingtonpost.com/opinions/biden-has-a-chance-to-restore-balance-to-the-rules-on-campus-sexual-assault/2021/03/28/cc4416fc-8767-11eb-8a8b-5cf82c3dffe4\\_story.html](https://www.washingtonpost.com/opinions/biden-has-a-chance-to-restore-balance-to-the-rules-on-campus-sexual-assault/2021/03/28/cc4416fc-8767-11eb-8a8b-5cf82c3dffe4_story.html).
3. *Law and Liberty* Teresa R. Manning: "The Due Process Brick Wall" (Feb. 9, 2021),  
<https://lawliberty.org/the-due-process-brick-wall/>