

POLICY *focus*

RECIPES FOR RATIONAL GOVERNMENT

JANUARY 2020

Title IX, Sexual Misconduct, and Due Process on Campus

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What You Should Know

For too long, American colleges and universities showed little interest in supporting victims of sexual assault or in disciplining student offenders, leaving the problem almost entirely to law enforcement. Unfortunately, in recent decades, the pendulum has swung too far in the opposite direction.

In an attempt to appear tough on sexual assault and sexual harassment, many colleges and universities today prohibit expansive categories of behavior, loosely referred to as “sexual misconduct.” This umbrella term often includes **speech** that has the “effect” of creating an “intimidating” educational environment, as well as a range of other **lawful activities**, such as repeated requests for a date, accidental touching, and sex that takes place under the influence of alcohol or without explicit affirmative consent at each stage of the encounter.

To enforce these policies, colleges and universities have built massive sexual misconduct bureaucracies that employ Inquisition-like investigatory procedures. These procedures frequently stack the deck against the accused, by denying students access to the specific allegations and evidence against them; prohibiting accused students from questioning adverse witnesses or submitting exculpatory evidence; and disregarding the time-honored principle that an accused person is innocent until proven guilty.

Such procedures certainly increase school discipline-rates, but they do little to reduce sexual assault or harassment on campus and are fundamentally inconsistent with basic notions of fairness and due process.

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Why You Should Care

Colleges and universities have an obligation to take allegations of sexual misconduct seriously. But they also have a duty to evaluate claims objectively.

- **Biased disciplinary procedures lead to numerous miscarriages of justice.** Barring students from discussing their disciplinary proceedings with others, expelling them on the basis of tenuous “he said-she said” allegations, and forever labeling them rapists inflicts serious, tangible harm on these students.
 - **Hundreds of students penalized by Orwellian sexual assault tribunals have sued,** arguing that their school denied them due process or otherwise violated their contractual relationship. Federal courts have issued more than 90 decisions favorable to accused students and have settled numerous cases prior to any decision.
 - **Countless others have not challenged unjust results because they lack the resources or the sophistication to do so.** Unless colleges and universities revise their policies to ensure due process, injustices will continue to pile up—many of which will never be righted in court.
 - **The system hurts the community at large.** Biased and unfair disciplinary procedures undermine the legitimacy of all sexual misconduct actions and, therefore, harm survivors. In addition, unnecessarily large sexual misconduct bureaucracies waste resources that might otherwise be spent on campus safety.
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Background

College administrators have long defended their sexual misconduct policies as necessary to comply with Title IX. But are they?

Title IX prohibits sex discrimination by schools that receive federal funds. Specifically, **Title IX** states:

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.

While neither the statute nor its original implementing regulations mention sexual violence or harassment, the Supreme Court has interpreted Title IX as creating affirmative obligations for schools to address claims of sexual harassment (including sexual assault) in a non-discriminatory manner.

The Department of Education in 2011 went much further, issuing the now infamous “**Dear Colleague**” letter to colleges and universities across the nation. That missive, issued without warning and with no input from the public, required schools to take action with respect to any “unwelcome conduct of a sexual nature.”

The 2011 Dear Colleague letter dictated that schools adopt a “preponderance of the evidence” standard for determining responsibility for sexual misconduct, meaning that schools can find students guilty of sexual assault even where it is only “more likely than not”—or 50.1 percent likely—that the accuser’s allegation is truthful.

(By contrast, in cases of alleged academic misconduct, many schools use the more exacting “clear and convincing evidence” standard, and criminal courts punish defendants accused of sexual assault only if the government proves its case “beyond a reasonable doubt.”)

The letter also strongly discouraged schools from allowing students or their representatives to question adverse witnesses, even in those cases where a finding of responsibility turns on a determination of credibility.

Although not legally binding, the letter suggested that any college or university that failed to comply would put their federal funding in jeopardy. It, thus, made clear that schools should prioritize increasing the number of guilty findings over determining the truth.

Fairness and Due Process

Due process refers to the idea that disciplinary systems should be consistent and even-handed. At a minimum, this should mean that individuals accused of wrongdoing receive prompt and specific notice of the charges against them and have a meaningful opportunity to explain their side of the story to an impartial arbiter.

A number of federal courts have ruled that, where a finding of responsibility boils down to a determination of credibility, constitutional guarantees of due process require that **state colleges and universities** allow accused students to test the credibility of the accusations against them using **some form of cross-examination**.

For example, the United States Court of Appeals for the Sixth Circuit in 2018 **held** that, where a public university must decide between “competing narratives,” due process requires that the accused be allowed to question adverse witnesses in front of a neutral fact finder.

Although **private colleges and universities** do not have the same constitutional duty to provide due process as their public counterparts, many are, nevertheless, obliged by contract or state law to utilize fair and unbiased disciplinary procedures.

In fact, a growing number of courts have held that that private colleges and universities can be held liable for breach of contract if they fail to provide accused students with rights guaranteed in their handbooks or other documents. Some courts also have held that private

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institutions can be held liable for sex discrimination under Title IX if they treat accused males differently than accused females.

- A Massachusetts federal district court in 2017 **denied** a motion by **Amherst College** to dismiss breach of contract and Title IX claims by a former student whom the college expelled for receiving oral sex from a female student while both students were intoxicated. The court reasoned that the accused student, an Asian-American male known only as “**John Doe,**” plausibly alleged that the college violated its contractual obligation to conduct a “fair and reliable” investigation by failing to consider potentially exculpatory evidence. (In particular, Doe claimed that his accuser’s post-encounter activities and text messages demonstrated consent.)

The court further expressed concern that, although the college credited Doe’s account of being “blacked out” during the event, it never considered whether Doe (rather than the accuser) might have been the actual victim, given his state of unconsciousness. In response to the court’s ruling, Amherst settled with Doe for an undisclosed sum.

- A federal district court in Connecticut in 2019 **denied** a motion by **Yale University** for summary judgment in a case brought by former basketball captain Jack Montague. Yale expelled **Montague**, the son of an electrical contractor and a bookkeeper from Tennessee, midway through his senior year for allegedly having non-consensual intercourse with a female student with whom he had three prior consensual sexual encounters, at least one of which included intercourse.

Montague argued that, almost a year after the casual sexual relationship ended, college administrators heard gossip that his former paramour had a “bad experience” with Montague, after which it pressured her into letting the school file a Title IX complaint against the basketball star.

Montague further contended that Yale improperly denied him the opportunity to clear his name by prohibiting him or his representative from questioning his accuser, challenging the relevance of a previous disciplinary proceeding, and calling witnesses in his defense. The court reasoned that these procedural irregularities could support a claim for breach of contract. Like Amherst, Yale settled out of court rather than defend its actions at trial.

Restoration and Resistance

In 2017, the Department of Education **withdrew** the 2011 “Dear Colleague” letter. In its place, the Department issued **interim regulations** requiring, for the first time, that schools address claims of sexual misconduct *and* preserve the due process rights of the accused. After a public notice and comment period, the Department is expected to issue final regulations early in 2020.

The new regulations seek to balance the rights of the accuser and the rights of the accused in order to help colleges and universities ferret out the truth and impose discipline that is fair and just.

Substantively, the new regulations are expected to adopt the definition of unlawful sexual harassment found in federal law and Supreme Court precedent and reject overly-broad definitions that include all forms of offensive conduct and subjectively unwanted activity.

Procedurally, the new regulations will require schools to abide by basic notions of due process. According to the interim regulations, schools will be required to

- provide accused students with detailed, timely written notice of the allegations against them;
- preserve the presumption of innocence;
- provide both sides the opportunity to submit evidence and to test the credibility of adverse witnesses through cross-examination;
- use the same standard of proof in sexual misconduct cases that the school uses in other student misconduct cases;
- ensure that investigators are “free of actual or reasonably perceived conflicts of interest and biases for or against any party”;
- produce a written report summarizing all relevant evidence;
- allow those involved to discuss the proceedings with others if they so choose.

Unfortunately, activists are putting pressure on colleges and universities to resist these new legal obligations. Four U.S. Representatives have introduced legislation to block the regulations, and several state legislatures have introduced efforts to codify the Dear Colleague Letter’s emphasis on discipline over fairness. Several colleges and universities have announced that they have **no plans** to deviate from their current policies.

This is not in the interests of college students, male or female, who deserve disciplinary processes that treat both accusers and the accused fairly and without bias.

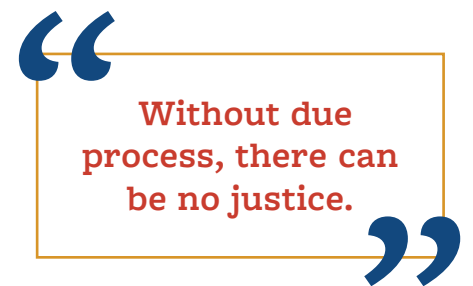
Solutions

Procedural fairness is particularly important where, as here, the allegations of wrongdoing are so serious and come with such significant consequences.

Americans must, therefore, **oppose** attempts by state and local governments to exempt colleges and universities from federal due process mandates.

More importantly, Americans must **demand** that colleges and universities review and revise their sexual misconduct disciplinary procedures to comply with the federal regulations. We must **remind** school officials that Title IX prohibits them from adopting procedures that discriminate on the basis of sex (by, for example, adopting sex-based assumptions of guilt). And we must **discourage** donations to schools that continue to utilize biased and unfair disciplinary systems.

Most of all, we must be clear that support for due process in no way contradicts support for victims. To the contrary, without due process, there can be no justice.



What You Can Do

Get Informed

For more information about this issue visit:

- [The Foundation for Individual Rights in Education \(FIRE\)](#), [Spotlight on Due Process \(2019-2020\)](#)
- [Families Advocating for Campus Equality \(FACE\)](#)
- [Office for Civil Rights](#), Department of Education

Talk to Your Friends

Help your friends and family understand these important issues. Tell them about what's going on and encourage them to join you in getting involved.

Become a Leader in the Community

Get a group together each month to talk about a political/policy issue (it will be fun!). Write a letter to the editor. Show up at local government meetings and make your opinions known. Go to rallies. Better yet, organize rallies! A few motivated people can change the world.

Remain Engaged Politically

Too many good citizens see election time as the only time they need to pay attention to politics. We need everyone to pay attention and hold elected officials accountable. Let your Representatives know your opinions. After all, they are supposed to work for you!

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Independent Women's Forum (IWF) is dedicated to building support for free markets, limited government, and individual responsibility.

IWF, a non-partisan, 501(c)(3) research and educational institution, seeks to combat the too-common presumption that women want and benefit from big government, and build awareness of the ways that women are better served by greater economic freedom. By aggressively seeking earned media, providing easy-to-read, timely publications and commentary, and reaching out to the public, we seek to cultivate support for these important principles and encourage women to join us in working to return the country to limited, Constitutional government.

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