



How to Talk About:
**TITLE IX, SEXUAL ASSAULT, AND
DUE PROCESS ON CAMPUS**

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Five Key Points

About Sexual Assault On Campus

- 1** **Title IX does not mention sexual violence, but the Supreme Court has held that a school's failure to address sex-based harassment can violate the statute.** Title IX prohibits sex discrimination that infringes upon the ability of either sex to receive an equal education. In *Davis v. Monroe County Bd. of Ed.*, the Court held that, when a school is deliberately indifferent to sexual harassment or assault that limits a victim's educational opportunities, the school can be liable under Title IX.
- 2** **Colleges rely on expansive interpretations of the Court's rulings to justify the creation of massive sexual misconduct bureaucracies.** Often these bureaucracies prohibit **broad categories of sex-related behavior** that go well beyond conduct prohibited by law. For example, some colleges prohibit any sex that takes place under the influence of alcohol; others prohibit "manipulating" a person into having sexual relations.
- 3** **Title IX bureaucracies often stack the deck against the accused.** Many colleges do not honor the **presumption of innocence**, give accused students timely or specific notice of the charges against them, or allow them to **rebut the allegations** by submitting exculpatory evidence or questioning their accusers.
- 4** **Such procedures violate basic notions of due process.** **Due process** is the simple idea that disciplinary systems should be consistent, even-handed, and provide the accused with a meaningful opportunity to explain his or her side of the story to an impartial arbiter.
- 5** **The denial of due process harms those who are accused and hurts the community at large.** Denials of basic due process inevitably lead to numerous **miscarriages of justice**. Punishing students for sexual assault when they have committed no crime also hurts survivors and the community at large by undermining the legitimacy of all disciplinary actions.

New Title IX Regulations: Top Takeaways

THE PROBLEM:

- 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.
- In recent decades, however, the pendulum has swung too far in the opposite direction. Today, most colleges and universities operate massive sexual misconduct bureaucracies that investigate broad categories of sex-related behavior—both lawful and unlawful— and deny accused students basic due process protections.
- These policies have increased school discipline rates, but they have done little to support victims and have resulted in **numerous** miscarriages of justice.

THE SOLUTION:

On May 6, 2020, the Department of Education released new Title IX regulations that aim to restore due process in campus disciplinary proceedings *and* strengthen protections for victims of sexual harassment and sexual assault.

WHAT THE REGULATIONS DO:

1. The regulations—for the first time—codify the obligation of schools to address sexual misconduct consistent with Supreme Court precedent;
2. The regulations also codify precedent requiring colleges and universities to provide basic due process protections when investigating such claims;
3. The regulations prohibit schools from initiating Title IX investigations if the alleged victim is uninterested in filing a formal complaint;
4. The regulations require schools to abide by the presumption of innocence;
5. The regulations require schools to give accused students time to review the specific claims against them in order to prepare for interviews and hearings;
6. The regulations require schools to allow accused students an opportunity to present their side of the story in a live hearing before neutral arbiters;
7. The regulations require schools to allow accused students to cross-examine their accusers through a representative;

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8. The regulations shield alleged victims from having to come face-to-face with the accused during hearings and from answering questions posed personally by the accused;
9. The regulations ensure that alleged victims are not required to divulge any medical, psychological, or similar privileged records;
10. The regulations require schools to offer supportive measures (such as course adjustments; schedule changes; counseling; no-contact orders; dorm room reassignments; and/or leaves of absence) for all alleged victims, even those who choose not to file a formal complaint;
11. The regulations require schools to make their Title IX training materials available online.

WHAT THE REGULATIONS DO NOT DO:

1. Although the regulations limit the scope of actionable sexual harassment in accordance with the Supreme Court precedent, they do not prohibit schools from going further. Colleges and universities, thus, remain free to define sexual misconduct broadly and to continue policing student relationships—even where the conduct at issue is legal;
2. Although the regulations require schools to apply one consistent disciplinary standard, they do not prevent schools from adopting the lowest possible burden of proof—the “preponderance of the evidence” standard—for all disciplinary matters.

Misperceptions v. Facts

1. MISPERCEPTION: One in four women will be sexually assaulted during college.

FACT: This statistic is based on **flawed surveys** that lump together a variety of sex-related behaviors. Such surveys ask students not whether they were sexually assaulted, but whether they have had certain experiences, such as being touched without consent or having sex while under the influence of alcohol or drugs. If a student responds in the affirmative, that student is labeled a survivor of sexual violence, even if that person does not consider herself to have been assaulted.

FACT: According to data from the **Department of Justice**, the number of college women who are raped or sexually assaulted is closer to **1 in 53**. Although no incident of assault is acceptable, and the DOJ figure does not account for unreported cases, the number of sex crimes that occur on college campuses remains nowhere near the number claimed by activists.

FACT: Studies show that women who attend college are far **less likely to be raped** than women of the same age who do not attend college.

2. MISPERCEPTION: When it comes to sexual assault, college administrators are looking out for students.

FACT: Although they claim to serve students, the primary job of college administrators is to **protect the college** by avoiding bad publicity, handling

claims quietly and quickly, and increasing student discipline rates to convince stakeholders that they are addressing the problem of sexual assault on campus.

3. MISPERCEPTION: Students expelled from college for sexual assault are rapists.

FACT: Many colleges **define** sexual assault **broadly** to include everything from accidental touchings to drunken couplings to forcible rape. Thus, even where the allegations are true, students expelled for “sexual assault” are not necessarily guilty of a sex crime.

Nevertheless, a student expelled for sexual misconduct wears a scarlet letter that inflicts serious, tangible, and long-term harm, including lost scholarships, lost educational and job opportunities, and permanent reputational damage.

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4. MISPERCEPTION: Due process only applies to criminal cases in court.

FACT: The United States Constitution prohibits the government (including state colleges and universities) from denying **due process**.

FACT: Although private colleges and universities do not have the same constitutional duty to provide due

process, many are **obliged by contract or state law** to utilize fair and unbiased disciplinary procedures.

FACT: A fair process protects the legitimacy of the proceedings, which is beneficial for survivors and for the community at large.

5. MISPERCEPTION: Sexual assault often occurs behind closed doors, where there are no witnesses. Therefore, in a "he said-she said" situation, we must believe victims.

FACT: It is true that sexual assault cases often lack witnesses or other evidence. But this does not mean that we should assume that accusers are always telling the truth. Rather, we must carefully assess

the credibility of both parties in order to determine the truth. And where it is not clear that a crime has been committed, we should refrain from assigning blame and forever labeling students as sexual predators.

6. MISPERCEPTION: New Title IX regulations favor the accused.

FACT: Disciplinary procedures at most colleges and universities currently stack the deck *against* the accused. New

regulations will **restore balance** and protect the rights of all parties.

7. MISPERCEPTION: Allowing cross-examination will re-traumatize victims.

FACT: Cross-examination is an important component of due process and has been called "the greatest legal engine ever invented for the **discovery of truth**."

FACT: In college administrative proceedings, cross-examination can be conducted subject to certain "rape shield" protections, such as putting the parties

in separate rooms and/or prohibiting questions about an accuser's unrelated sexual history. Allowing cross-examination to proceed in this way would provide maximum protection for accusers without sacrificing the ability of the fact-finder to assess the credibility of the parties and the veracity of the allegations.

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8. MISPERCEPTION: New Title IX regulations will lead to increased litigation.

FACT: Hundreds of students disciplined by Orwellian sexual misconduct tribunals have already sued their schools, claiming unfair treatment. Federal courts have issued more than 100 decisions favorable to the accused, and colleges and universities have settled scores of

other cases prior to any final judgment. Because new regulations require that schools provide due process, the number of lawsuits is likely to decline—assuming, that is, that colleges and universities comply with federal mandates.

9. MISPERCEPTION: New Title IX regulations will silence survivors.

FACT: New regulations require that schools investigate claims and provide supportive measures for students who report sexual misconduct. Allowing students to see the specific claims against them and providing them an

opportunity to tell their side of the story in no way silences others. To the contrary, such protections legitimize findings of responsibility and, thereby, support survivors.

10. MISPERCEPTION: Issuing new Title IX regulations during the COVID-19 pandemic wastes scarce educational resources and leads to confusion and uncertainty.

FACT: Colleges cannot **hide behind the pandemic** to justify the continuation of abuses in campus Title IX proceedings.

FACT: The proposed Title IX regulations were first published on Nov. 29, 2018, which means that colleges and universities have had plenty of time to consider potentially necessary policy revisions.

FACT: The sooner the proposed regulations are finalized, the sooner all stakeholders will have certainty about what to expect in Title IX disciplinary proceedings.

Quiz: Sexual Assault on Campus

1 How big a problem is sexual assault on campus?

- A. College is a dangerous place where one in four female students are sexually assaulted.
- B. Campus sexual assault is a serious problem, but women in college are far less likely to be raped than women the same age who are not in college.
- C. Sexual Assault rarely happens on college campuses.

2 Why do many American colleges maintain large sexual misconduct bureaucracies?

- A. Colleges and universities maintain large sexual misconduct bureaucracies simply out of concern for the safety of their students.
- B. Federal law requires colleges and universities to take action to combat campus sexual assault. Maintaining large campus bureaucracies and defining sexual assault broadly allow colleges to increase their discipline rates so as to appear compliant.
- C. Colleges maintain large sexual misconduct bureaucracies as part of the overall cultural response to the #MeToo movement.
- D. B and C

3 Investigatory procedures adopted by campus sex bureaucracies often:

- A. Treat students accused of sexual misconduct as innocent until proven guilty.
- B. Deny students accused of sexual misconduct the right to see the specific charges and evidence against them.
- C. Allow students accused of sexual misconduct the right to cross examine witnesses and submit exculpatory evidence.
- D. All of the above.

4 Allowing students accused of sexual assault to cross-examine witnesses:

- A. Will re-traumatize survivors.
- B. Is not necessary because campus disciplinary hearings are not criminal proceedings.
- C. Is critical to ascertaining the truth, particularly in “he said-she said” cases, where a determination of guilt depends largely on the credibility of the witnesses.

5 New (2020) Regulations from the Department of Education will:

- A. Restore balance and due process to campus sexual misconduct proceedings.
- B. Favor the accused and silence survivors.
- C. Lead to an onslaught of expensive lawsuits.
- D. All of the above

Quiz Answers

Q1 ANSWER: B

According to data from the [Department of Justice](#), the number of college women who are victims of rape or sexual assault is approximately **1 in 53**. Although no incident of assault is acceptable, and the DOJ figure does not account for sexual assaults that go unreported, the number of sex crimes that occur on college campuses remains nowhere near the 1 in 4 statistic bandied about by activists. And [studies indicate](#) that women who attend college are far less likely to be raped than women of the same age who do not attend college.

Q2 ANSWER: D

Although many campus administrators undoubtedly care about students, the driving force behind the creation of large sexual misconduct bureaucracies is not concern for [student safety](#), but rather concern for the institutions themselves. The [Supreme Court](#) has long held that a school's failure to address adequately sex-based harassment (including sexual assault) can constitute discrimination under Title IX, which puts a school's federal funding at risk. In response, colleges and universities have [developed massive bureaucracies](#) to police and to discipline broad categories of student sexual behavior—both lawful and unlawful. Although the creation of

these bureaucracies predates the #MeToo movement, public pressure creates an incentive for schools to keep discipline rates high.

Q3 ANSWER: B

Although students accused of sexual misconduct face life-altering consequences, many college sexual misconduct tribunals dispense with the [presumption of innocence](#), fail to provide accused students with timely notice of the specific charges and evidence against them, and deny accused students the opportunity to cross-examine witnesses or submit exculpatory evidence. Such proceedings not only undermine our basic notions of [due process](#), they have resulted in many [miscarriages of justice](#).

Q4 ANSWER: C

Cross-examination has been called “[the greatest legal engine ever invented for the discovery of truth](#).” Where a finding of responsibility rests on witness credibility, cross-examination is critical. Recognizing this, a number of federal courts have held that public colleges and universities must allow students accused of sexual assault to test the credibility of the accusations against them using [some form of cross-examination](#).

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Q5 ANSWER: A

Disciplinary procedures at most colleges and universities currently **stack the deck against the accused**. New regulations require that schools investigate claims and provide supportive measures for students who report sexual misconduct, but they also require that schools investigate all claims fairly by, for example, providing accused students timely notice of the specific claims against them and an opportunity to tell their side of the story. These reforms do not silence anyone. Rather, they **restore balance**, protect the rights of all parties, and ensure that any finding of responsibility is regarded as legitimate. If colleges and universities comply with these new federal mandates, it is unlikely that the rules will lead to an increase in litigation.

9 Things to Know About Title IX

- 1 Title IX is a federal law that prohibits sex discrimination in education.
- 2 Title IX covers all schools that receive federal money—including public K-12 schools and most colleges and universities.
- 3 Title IX prohibits discrimination against either sex.
- 4 Title IX requires schools to provide equal educational opportunities to males and females.
- 5 Under Department of Education regulations enforcing Title IX, schools are required to investigate all complaints of sexual harassment and sexual assault.
- 6 Schools have a corresponding obligation to investigate such complaints in a “prompt” and “equitable” manner.
- 7 This means that schools must provide accused students with basic due process protections, such as the right to review the specific allegations and the right to present exculpatory evidence.
- 8 Title IX regulations also require schools to offer supportive measures to all alleged victims, even those who choose not to file a formal complaint.
- 9 Fair procedures benefit everyone. Because without **due process**, there can be no **justice**.

WHAT YOU CAN DO

Speak up! Post the below messages, videos, and graphics to social media and make your voice heard.

Tag us so we can RT/Share your post:

- @IWV (Twitter)
- @IndependentWomensVoice (Facebook)
- @IndependentWomensVoice (Instagram)

Hashtags to include:

- #StopKangarooCourts
- #InnocentUntilProvenGuilty
- #DueProcessMatters
- #IWLAW
- #NoJusticeWithoutDueProcess
- #IndependentWomensLawCenter

VISUALS: Include these visuals with any Twitter, Facebook or Instagram posts.

Video: [Due Process on Campus](#)

iwf.org/2020/04/14/lets-not-delay-due-process-on-campus/

Graphic:

the situation
CAMPUS DUE PROCESS DENIED

- Carlos and Caitlin are students at State University who meet at a party and have consensual sex.
- Carlos and Caitlin have sex on three other occasions, after which Carlos tells Caitlin that he has a girlfriend.
- A year later, Caitlin files a complaint with the University's Title IX Office, alleging that their fourth sexual encounter was nonconsensual because she was intoxicated.
- The University tells Carlos that Caitlin has accused him of sexual assault but refuses to let him see the complaint or tell him the specifics of the allegations.
- The University's investigator reports that Caitlin seems credible and recommends that Carlos be expelled.
- A University disciplinary committee, comprised of one Title IX administrator, one student, and one professor allows Carlos to make a statement but refuses to let him call witnesses or submit Caitlin's text messages as evidence of consent.
- The committee votes (2-1) to expel Carlos for sexual assault.
- Carlos's situation is not unusual. Hundreds of disciplinary committees have expelled or denied degrees to students on the basis of tenuous "he said-she said" claims without allowing the accused a chance to prove his (or her) innocence.

At a minimum, "due process" should mean that individuals accused of serious wrongdoing receive prompt and specific notice of the charges against them and be given a meaningful opportunity to tell their side of the story to a neutral arbiter.

Fairness and due process matter.

visit IWV.ORG for more information on Title IX and Due Process

iwv.org

SOCIAL MEDIA POSTS

- This policy paper from @IWF explains why new #TitleIX regulations from @USEdGov are necessary to restore #DueProcessOnCampus. #IWLAW http://pdf.iwf.org/Policy_Focus_Title_IX_Sexual_Misconduct_and_Due_Process_on_Campus.pdf
- Contrary to claims by the media, @BetsyDeVosED has NOT “rolled back” protections for survivors. Rather, FOR THE FIRST TIME EVER, @USEdGov is requiring schools to #SupportVictims of sexual assault *and* #SafeguardDueProcess.
- Campuses have an obligation to address campus sexual assault, but they have a corresponding duty to investigate claims objectively and fairly without presuming the guilt of the accused. #DueProcessMatters #StopKangarooCourts #IWLAW
- Did you know that over 71% of America’s top 53 universities do not explicitly guarantee students accused of #SexualAssault that they will be presumed innocent until proven guilty? #StopKangarooCourts #TitleIXForAll #IWLAW
- Campus sex tribunals shortchange complainants *and* the accused. New @USEdGov regs aim to #StopKangarooCourts and provide due process for all. #TitleIXForAll #NoJusticeWithoutDueProcess #IWLAW
- American colleges and universities employ massive sexual misconduct bureaucracies designed to increase discipline rates by denying #DueProcess. New @USEdGov regs aim stop the madness. #IWLAW
- For the first time ever, @USEdGov is requiring schools to #SupportVictims of sexual assault *and* safeguard the #DueProcess rights of all students. #NoJusticeWithoutDueProcess #TitleIXForAll #StopKangarooCourts #IWLAW
- Schools should not hold students responsible for crimes without #DueProcess. #StopKangarooCourts #TitleIXForAll #IWLAW

OTHER RESOURCES:

- [Foundation for Individual Rights in Education \(FIRE\),
Spotlight on Due Process 2019-20](#)
- [Families Advocating for Campus Equality \(FACE\)](#)
- [Speech First](#)