

REGULATORY REFORM: PUBLIC HEARINGS ON TITLE IX REGULATIONS AND GUIDANCE*

WEDNESDAY, OCTOBER 4, 2017

DEPARTMENT OF EDUCATION
400 MARYLAND AVE. SW
Washington, D.C.

In accordance with Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” the Department of Education scheduled two public hearings seeking input on regulations that may be appropriate for repeal, replacement, or modification.

The second of the public hearings was held at 9:00 a.m. in the Barnard Auditorium at the United States Department of Education Building. Present from the Department of Education were KATHLEEN SMITH, Advisor to the Assistant Secretary for the Office of Postsecondary Education and GAIL MCLARNON, Acting Deputy Assistant Secretary for Policy, Planning and Innovation.

COMMENTS OF PATRICIA M. HAMILL, ESQ.**

MS. HAMILL. Thank you, Acting Assistant Secretary SMITH and Other Distinguished Members of the Department of Education.

My name is Patricia Hamill. I’m a mother of two sons and a college age daughter; I am a feminist; and I am concerned that victims of sexual assault get the support they need on college

* Official Transcripts of the hearings will be posted to the Department of Education Website and published in the Federal Register. The Official Transcript will be available at <https://www2.ed.gov/policy/highered/reg/reform/2017/index.html>.

campuses and that their claims are taken seriously. But, I'm also concerned about fairness in the processes for all because there are no "sides" to this very important issue. I come at these issues first and foremost as an attorney who believes that everyone benefits when participants in a process both are and feel they have been treated fairly. I have seen firsthand over the last 5 years in my representation of nearly 100 college students – mostly male accused students in college Title IX disciplinary proceedings -- of the ruin that can be left behind because of deeply flawed systems.

The policies and procedures used at most colleges and universities, implemented in the wake of the 2011 Dear Colleague Letter, are seriously flawed and overwhelmingly skewed against accused students -- the vast majority of whom happen to be male. Because my time is limited, I won't discuss the specifics of any particular case, but I want to highlight what is typical in many Title IX proceedings:

As the accused student you get notice of a complaint, often with no detail. You may be moved out of your dorm or banished from campus before any opportunity to be heard. The University appoints a single investigator to serve as police, prosecutor, judge, and jury regarding the complaint against you. The investigator NEVER, NOT ONCE tells you what you are accused of or tells you only in very general terms. You never get to face your accuser or hear what she or he has to say firsthand. Or, if you do, you are severely restricted in your ability to cross examine or challenge your accuser's claims. You're found responsible and sanctioned with a lengthy suspension (often until at least your accuser graduates) or, worse, you are expelled. You try to transfer to another school but now you've been branded a sexual predator and no other school will take a chance on you. If you're lucky enough to be able to continue your education you will still have to disclose to every law or grad school you apply to that you have a disciplinary record and that you were found responsible for sexual misconduct.

This is the world we find ourselves in, whether it involves two men, a man and a woman, two women, a long term relationship, a casual hookup, or whether it's at a private school or public university.

The question that arises from this world was aptly summed up by the federal judge in a case involving our client, an accused male student, in a suit he brought against Brandeis University. The judge stated: "The goal of reducing sexual assault, and providing appropriate discipline for offenders, is certainly laudable. Whether the elimination of basic procedural protections – and the substantially

increased risk that innocent students will be punished – is a fair price to achieve that goal is another question altogether.”

The answer to the question is, of course, no; the elimination of basic procedural protections is never acceptable.

So what can the government do in light of this Administration’s goal of reducing government overreach?

An important first step was taken on September 22d by the withdrawal of both the 2011 Dear Colleague Letter and the 2014 Questions and Answers. I am heartened that this Administration also intends to move forward through the appropriate legislative process with notice and comment before the promulgation of any further regulations or rules regarding Title IX. The September 2017 Interim Guidance provides the beginnings of a solid framework of fairness, and that Interim Guidance should serve as the foundation for any further rule making. At a minimum, there should be:

- Notice of the factual basis of the complaint
- Allowance for the school’s process to follow behind any criminal proceedings if there is a parallel criminal process
- An investigation by a well trained, competent, unbiased and impartial investigator
- A right to meaningful comment on and respond to any report prepared in connection with a disciplinary investigation
- A right to informally resolve a complaint without the need for a full blown disciplinary process
- A right to meaningfully challenge or cross examine the complaining student
- A right to adjudication before a panel of trained individuals or an outside competent adjudicator
- A right to appeal a finding of responsibility or overly harsh sanction on grounds that include a challenge to the weight of the evidence
- A right to transparency by requiring schools to report publicly but without student identifying information the outcomes of their student disciplinary matters regarding findings and sanctions.

I and my clients thank Secretary DeVos and the members of the Department of Education who are working hard on these issues, and I thank you for the opportunity to speak with you this morning.

** PATRICIA M. HAMILL of Conrad O'Brien, PC has represented dozens of college students nationwide who are subjected to campus disciplinary proceedings or who have been disciplined by their colleges for alleged sexual misconduct following such proceedings. Ms. Hamill often attempts to resolve cases behind the scenes. But where resolution cannot be achieved, she has filed lawsuits for breach of contract, violation of Title IX (or other civil rights statutes) and tort liability on the basis that colleges' investigation and adjudication procedures failed to ensure the students' fundamental due process rights, discriminated against them on the basis of sex and breached the schools' contractual obligations. Notably, Patricia was the lead attorney in *Doe v. Brandeis* in the District of Massachusetts, one of the most often cited cases in this area. Outside of the Title IX arena, Patricia is a commercial litigator who also represents clients regarding government investigations.