

# Conrad O'Brien

Patricia M. Hamill  
*Attorney at Law*  
Direct Dial: 215.864.8071  
Direct Fax: 215.864.0793  
phamill@conradobrien.com

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Kenneth L. Marcus  
Assistant Secretary for Civil Rights  
Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202

*Re: Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*

Dear Mr. Marcus:

I support the Department of Education's efforts to align Title IX regulatory requirements with basic principles of justice and with rulings by many courts requiring that people accused of serious misconduct receive notice, a fair hearing before unbiased decision makers (including the ability to challenge opposing testimony directly), and a presumption of innocence.

I am a feminist, married to a woman, graduate of a women's college, mother of two teenage sons and a college age daughter, and a liberal Democrat. I am also a lawyer who in the past five years has represented more than 100 accused students around the country, almost all young men, in college Title IX/sexual misconduct proceedings and in litigation growing out of those proceedings. I have already joined a comment submitted by concerned lawyers and educators who support fundamental fairness for all parties in Title IX proceedings, and incorporate that comment here. I file this separate comment to highlight some particularly

important recommendations, and to provide representative examples of scenarios that illustrate why reforms are so sorely needed.

Overall, I emphasize that the proposed regulations take crucial steps toward addressing pervasive gender discrimination in campus Title IX proceedings: a systemic bias in favor of complainants, who are almost always female, and against respondents, who are almost always male. Bias is illustrated and perpetuated by schools that adopt pro-“victim” processes and argue in court (disingenuously but often successfully) that favoring alleged victims is not gender discrimination. Bias is further perpetuated by officials who are trained to presume the truth of a complainant’s accusations and who, in practice, go to great lengths to rationalize why such accusations are inherently credible and a respondent’s denials are not. Sometimes school officials make explicit statements exhibiting gender bias. More often, they do not. Regardless, the anti-male bias is clear, and the Department’s proposed procedural protections are essential.

***Key recommendations:***<sup>1</sup>

1. The definition of sexual harassment in Section 106.30 should be modified to include a specific definition of sexual assault, to address concerns that the regulations will unduly restrict the types of conduct schools can adjudicate under Title IX.
2. The Department should provide more guidance on what constitutes conduct within a school’s “education program or activity” (Section 106.44(a)), to ensure schools are generally consistent in their interpretation of what conduct is covered by Title IX; do not draw arbitrary lines between conduct that is and is not covered by their Title IX grievance procedures; and do not deprive students of the procedural protections of the

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<sup>1</sup> All these points are discussed in more detail in the Comment of Concerned Lawyers and Educators, with citations to relevant materials.

- proposed regulations by handling sexual misconduct complaints under other student conduct processes that do not include the same protections.
3. I support the Department's proposal to give complainants who report sexual harassment within the applicable definition a meaningful choice between a formal Title IX process or an alternative dispute resolution, and the proposed requirement that schools provide supportive, non-punitive individualized services designed to restore or preserve both parties' access to the school's education programs and activities.<sup>2</sup> As set forth in the Comment of Concerned Lawyers and Educators, the facts in many contested sexual misconduct cases are nuanced and complicated. Many parties would benefit from constructive, non-punitive approaches that would address immediate concerns while allowing them to continue their education.
  4. I support the Department's confirmation, in Section 106.45(a), that a school's treatment of either a complainant or a respondent in connection with a sexual harassment complaint may constitute discrimination on the basis of sex. This is an essential step toward correcting the view that Title IX allows (or should even be interpreted to require) procedures that are biased in favor of "victims" (again, almost always women). Title IX proceedings should be fundamentally fair to both men and women.
  5. I support the procedural protections in Section 106.45, including those obligating schools to provide adequate notice of allegations and their applicable procedures; conduct full and fair investigations; collect and evaluate both exculpatory and

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<sup>2</sup> See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, Notice of Proposed Rulemaking (NPRM), 83 FR at 61462, 61469-70, 61479.

- inculpatory evidence; provide fair hearings in front of unbiased decisionmakers; and give respondents a presumption of innocence.
6. I support the requirement in Section 106.45(b)(1)(iii) that schools train officials to conduct impartial proceedings and not to rely on sex stereotypes. As set forth in the Comment of Concerned Lawyers and Educators, the Department should provide more guidance on this. It is particularly important that training not create “presumptions” that the alleged conduct occurred or that a complainant’s account of the incident must be true. Schools should be required to publicly disclose their training materials so that students and employees understand their schools’ policies and processes.
  7. I support the requirement in Section 106.45(b)(3)(vii) that institutions of higher education must provide a live hearing and allow advisors to the parties to cross examine the other party and witnesses. This is consistent with recent court rulings and is critical to ensure that parties can fairly develop their cases and decision makers can observe and judge the credibility of the parties and witnesses.
  8. In response to the Department’s Directed Question 6, requesting comment on the standard of evidence (83 FR at 61483), I urge the Department to adopt a uniform “clear and convincing evidence” standard. Sexual misconduct charges carry the potential for life-long consequences, including permanent transcript notations that will forever impair a respondent’s educational and career prospects. As courts have acknowledged, the preponderance of the evidence standard is not sufficient to protect against unreliable determinations. The clear and convincing standard is essential to ensure that schools reach just results, not simply adopt fairer procedures on paper. Otherwise the risk is high that school officials, long steeped in a pro-“victim,” anti-

“perpetrator” approach, will continue to bow to the widespread pressure to resolve grievances against respondents, and thus perpetuate the gender bias that pervades Title IX disciplinary processes now.

9. The Department should give schools a safe harbor to revisit responsibility findings and sanctions that have been imposed in the past under procedures that did not provide the basic protections necessary to ensure a fair result.
10. More broadly, the Department should give schools the option to expunge a respondent’s records after a designated period, and should adopt a time frame after which respondents are no longer required to report an adverse disciplinary ruling on an application for admission to another school.

### *Scenarios*

The following scenarios, drawn from cases involving students accused of sexual misconduct, illustrate why the proposed protections are needed. A few are based on specific reported cases, but most represent themes I have seen again and again.

- An accused student – usually male - is called in for questioning without being given notice of the specific allegations against him. The school then takes the student’s confusion, lack of immediate specific recall, expressions of concern for the complainant, or regret about the encounter as evidence of guilt or even admissions. This is of particular concern when the parties were in a long-term relationship and the accused student does not know what specific conduct the complainant or the school found objectionable.
- Both students acknowledge they had an encounter which began as consensual, but they were both drunk, have foggy memories, and have different recollections about what happened as the encounter unfolded. The school accepts the complainant’s recollection

and rejects the accused student's even when there is no meaningful basis to accept one narrative over the other. School officials assume – often because they have been trained to do so – that the complainant's inconsistent stories or lack of recollection are evidence that her accusations are true, while going to great lengths to justify finding the accused student's denials inherently less credible.

- A school accepts evidence supporting the complainant's allegations but does not obtain or consider evidence supporting the accused student. This takes many forms, including:
  - Refusal to interview witnesses identified by the accused student – and often refusing to allow accused students to contact witnesses themselves.
  - Accepting testimony that supports the complainant and refusing to consider testimony that supports the accused student.
  - Relying on selected evidence without obtaining or considering information necessary to put it in context. We have seen cases where a complainant provided a few selected texts out of a long history of communications, and deliberately withheld other texts that contradicted her allegations. We have seen cases where a complainant said that a medical exam confirmed her allegations of assault but refused to provide the written report. Schools have allowed complainants to withhold evidence; have refused to make the common sense inference that a complainant withheld evidence because it is unfavorable; have refused to try or allow the accused student to try to get missing information; and, if the accused student manages to obtain exculpatory evidence after a finding of responsibility, have refused to accept the evidence or reconsider the finding.

- Making decisions without waiting for DNA evidence and then refusing to reconsider when DNA evidence exonerates the accused.
- A male and female student both complain about each other's conduct, and the university opens a disciplinary proceeding against the male but not against the female.
- A school official immediately tells an accused student he must be guilty, and that same official then selects and oversees investigators and decisionmakers.
- An accused student is immediately suspended with no finding that this is necessary for campus safety and no opportunity for a hearing on the suspension.
- Decisions are made by officials who have never met the parties and have not heard their testimony in person, based on a written report by a single investigator.
- The accused student is not allowed to ask questions of the complainant or other witnesses even indirectly through school officials.
- A school punishes a male for making a complaint, considering the male's complaint – but not the female's – to be retaliatory.
- A school allows a complainant and the complainant's friends to harass and retaliate against a respondent, sometimes even if the respondent is found not responsible.
- A school changes its procedures to be more favorable to complainants, and then encourages a complainant to wait for months to file a formal complaint so the new procedures can be applied. As a result, memories are unclear and evidence is lost.
- A Title IX coordinator instructs both the decision makers and the parties that the parties' previous relationship is not relevant to consent, even though the school's policy states that while consent to certain encounters is not blanket consent to others, the parties'

relationship and patterns of behavior can shed light on whether particular conduct is reasonably interpreted as consent.

- A school delays a proceeding when the complainant asks for a delay but refuses an accused student's requests for additional time to review or gather evidence.
- A school refuses to consider a complainant's statements that her reason for filing a complaint was to ruin the accused student's reputation or get him kicked out of school.
- A school considers the complainant's testimony about alleged bad conduct by the accused student that is not related to the incident under investigation, but bars the accused student from testifying about similar bad conduct by complainant, saying such evidence about her (but not the same evidence against him) is impermissible character evidence.
- A school does not allow the accused student to review the evidence before the hearing, or gives him incomplete evidence and inadequate time to review it. It is common for a school to give the accused student an investigator's summaries of witness testimony but not a transcript or detailed notes of the testimony itself, refuse to correct even clear errors, and allow the accused student a limited time to review materials in the school's offices but not to make copies, transcripts, or verbatim notes.
- A school takes months to investigate a complaint and then expels the accused student just before graduation, refusing to give the student credit for the last semester's courses or allow the student to complete course work with appropriate restrictions.
- A complainant who fully participated in or even initiated an encounter later feels uncomfortable about it and talks to school officials. They treat the situation as a sexual assault, institute formal proceedings, and find the accused student responsible based on training to "believe the victim."



- A school’s procedures say that affirmative consent can be expressed through words or conduct, but decision makers say that a specific verbal “yes” is required.

The damage to accused students in these situations is irreparable. A student may lose the degree he worked and paid for, sometimes very late in his college career. He may lose scholarships and be unable to transfer to a comparable school to complete an undergraduate degree. He may suffer overwhelming emotional distress. His reputation, educational prospects, and career/professional prospects may be permanently damaged, due to gaps in his educational career and the stigma of being found responsible for sexual misconduct. He may suffer ongoing harassment and retaliation by other students – even if he is not found responsible. And he may have a permanent notation in his academic records, ensuring that he can never move on.

*My primary point here is not whether a particular finding of responsibility or sanction was right or wrong.* The point is that the process should be fair to both complainants and respondents, to both men and women. The Department’s proposed reforms are an effort to make sure that schools give accused students proper notice and a meaningful chance to defend themselves before impartial decisionmakers, and that schools consider all the relevant evidence, not just the evidence the complainant selects. *Both* accusing and accused students have a right to be heard. *Neither* has a right to be automatically believed.

Respectfully submitted,

*s/Patricia M. Hamill*

Patricia M. Hamill, Esquire