

OPEN LETTER FROM MEMBERS OF THE PENN LAW SCHOOL FACULTY SEXUAL ASSAULT COMPLAINTS: PROTECTING COMPLAINANTS AND THE ACCUSED STUDENTS AT UNIVERSITIES

In response to guidelines issued by the U. S. Department of Education's Office of Civil Rights ("OCR") to enforce Title IX of the Education Amendments Act of 1972, the University of Pennsylvania has adopted new procedures for investigating and adjudicating complaints of sexual assault. Although we appreciate the efforts by Penn and other universities to implement fair procedures, particularly in light of the financial sanctions threatened by OCR, we believe that OCR's approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness. We do not believe that providing justice for victims of sexual assault requires subordinating so many protections long deemed necessary to protect from injustice those accused of serious offenses. We also believe that, given the complexities of the problem, OCR's process has sacrificed the basic safeguards of the lawmaking process and that those safeguards are critically necessary to formulate sound regulatory policy.

As law teachers who instruct students on the basic principles of due process of law, proper administrative procedures, and rules of evidence designed to ensure reliable judgments, we are deeply concerned by these developments and take this opportunity to express our views in this expanding national debate. We start by setting forth the priorities and principles that guide our views.

First, we fully recognize serious concerns about the problem of sexual assaults on college campuses. Although our comments and criticisms focus on universities' procedures for adjudicating sexual assault complaints, we recognize the far more important issue: how can universities help to change the culture and attitudes that lead to sexual assaults? Our first priority should be to reduce the frequency of assaults. After-the-fact disciplinary proceedings, while useful, cannot by themselves adequately protect our students. Universities must take more steps to deal with excessive use of alcohol and drugs, substances that all too often fuel the conditions that lead to contested sexual assault complaints. There is also broad agreement that students need clear rules defining what constitutes consensual sexual conduct, but there are too often troubling ambiguities on questions such as what constitutes valid consent, and such ambiguities leave students vulnerable to sometimes unpredictable, after-the-fact assessments of their behavior.

Second, we also recognize that there must be comprehensive protections for those who are abused and seek either criminal prosecution or University

administrative sanctions. Accordingly, we fully support procedures that ensure confidentiality in reporting incidents of sexual assault, counseling for victims, full and fair investigations by University officials trained in the dynamics of this type of offense, referral of cases to the police where such action is requested by the complainant and, where appropriate, informal resolution of complaints. Ultimately, however, a student who denies the charges is entitled to a fair hearing before being subjected to serious, life-changing sanctions. These cases are likely to involve highly disputed facts, and the “he said/she said” conflict is often complicated by the effects of alcohol and drugs.

Third, we support effective enforcement of Title IX at universities, as all agree that sexual assaults seriously interfere with students’ rights to equal educational opportunities. It is not altogether clear, however, why the federal government requires such serious cases to be handled by campus tribunals staffed by academics, instead of by professional judges and lawyers. Perhaps it is time to funnel the more serious cases through the criminal justice process and to make that process much more accessible to and supportive of sexual assault complainants.

Fourth, in addressing the issue of sexual assault, the federal government has sidestepped the usual procedures for making law. Congress has passed no statute requiring universities to reform their campus disciplinary procedures. OCR has not gone through the notice-and-comment rulemaking required to promulgate a new regulation. Instead, OCR has issued several guidance letters whose legal status is questionable. It is this guidance that purports to require universities to retreat from the clear-and-convincing standard of proof to a preponderance-of-the-evidence standard, which requires a finding of responsibility even if the factfinder is almost 50% sure that the accused student is not guilty. In addition, OCR has used threats of investigation and loss of federal funding to intimidate universities into going further than even the guidance requires.

Fifth, this lawmaking process has sacrificed the traditional safeguards that accompany traditional lawmaking procedures. Both the legislative process and notice-and-comment rulemaking are transparent, participatory processes that afford the opportunity for input from a diversity of viewpoints. That range of views is critical because this area implicates competing values, including privacy, safety, the functioning of the academic community, and the integrity of the educational process for both the victim and the accused, as well as the fundamental fairness of the disciplinary process. A formal lawmaking process would have required the federal government to deliberate, strike reasonable balances, and offer an explicit justification for its policy judgments. Formal lawmaking would have required the

federal government, as in other areas of regulatory policy, to consider explicitly the costs of its proposed policies as well as the benefits. In addition, adherence to a rule-of-law standard would have resulted in procedures with greater legitimacy and buy-in from the universities subject to the resulting rules.

With these priorities and principles in mind, we offer the following comments and suggestions about the procedures needed to adjudicate fairly those few cases that are not resolved during the investigation. In these cases, there are no good reasons to disregard the fundamental and time-tested principles that ensure reliable fact determinations. We recognize that student disciplinary hearings are not criminal trials and therefore do not require all constitutional guarantees. What is required is fundamental fairness, including (1) the right to the assistance of counsel in preparation for and conduct of the hearing, (2) the right to cross-examine witnesses against the accused student and to present defense witnesses and evidence, and (3) the right to a fair and unbiased hearing panel.

Procedures that universities have adopted in response to the threatened loss of federal funding are deficient. We are pleased that Penn, unlike many universities, has retained at least a partial hearing as a requirement for a finding of responsibility, but this hearing still falls far short of ensuring fundamental fairness. Under the new Penn protocol, an Investigating Officer (currently a former prosecutor) will review the complaint and determine whether it provides cause for a full investigation. If so, the Investigating Officer and a member of the faculty or administration (the “Investigative Team”) will conduct a full investigation. During this phase, although the complainant and the accused student are entitled to the advice of counsel or an advisor, neither side is permitted “to present statements, seek the production of evidence or question witnesses.” The Investigative Team will then provide a report with conclusions as to the veracity of the complainant (and other witnesses) and the conduct of the accused student.

For a case to reach the hearing phase, the Investigative Team need find by only a preponderance of the evidence that the accused student is responsible. Further, the report, with a narrative of all of the facts and circumstances on which the Investigative Team has made a determination of responsibility, will be provided to the panel. And although the panel has the duty to hear again from the witnesses, it is difficult to understand, particularly in light of the absence of fair hearing procedures, how a panel would not defer to the “expertise” of the Investigative Team, which has already conducted a full investigation.

More specifically:

1. The protocol prohibits a lawyer or other representative for the accused student from cross-examining any of the witnesses against the accused. Although the Department of Education's guidance strongly discourages allowing the *accused* to cross-examine the complainant personally, it permits the accused student's lawyer or other representative to do so, as long as each side has equal rights to cross-examine. Cross-examination has long been considered as perhaps the most important procedure in reaching a fair and reliable determination of disputed facts. Rather than abolishing cross-examination, it would be much fairer to impose reasonable limits, including a ban on irrelevant questions regarding the sexual history and sexual orientation of the complainant; control over unfair, oppressive, or overbearing cross-examination; and even separation of the complainant and accused during the hearing. Further, although the protocol permits the accused student to submit questions to the panel to be asked during its "interview" of witnesses, they must be submitted in advance and the decision to ask these questions is entirely discretionary. More importantly, no one should think that questioning by panel members is an adequate substitute for the far more informative and effective cross-examination by a student's representative.
2. As noted, the panel is provided with a full report that finds that the accused student has engaged in sexual assault. And even though the panel has the accused's objections to the report and is under a duty to "interview" the parties and to review all of the evidence, and may (but need not) interview other "key witnesses" and seek additional evidence if it chooses to do so, a panel of teachers and administrators is likely to defer to findings made by an "expert" Investigating Officer and a faculty member or administrator. Our legal system is based on checks and balances precisely because of the risks associated with concentrating so much power in the hands of a single investigator or Investigative Team. What is needed is a procedure that allows the accused student's lawyer or representative to challenge the Investigative Team's version of events, to ensure that the panel will hear all the evidence that is submitted by both sides and reach its own conclusions as to the veracity of witnesses and the responsibility of the accused student. And it should not be forgotten that these proceedings are conducted in the shadow of threats of a Department of Education investigation for failure to properly investigate and sanction

students for alleged misconduct. The threat of loss of federal funding risks coloring the proceedings, particularly because a hearing panel may not feel free to acquit without repercussions.

3. The hearing panel consists of three persons drawn from the University faculty as well as a non-voting Disciplinary Hearing Officer, and a decision holding the accused student responsible may be made not only by a mere preponderance of the evidence, but by a 2-1 vote. An evidentiary standard of clear and convincing evidence to convict provides a more durable safeguard against wrongful “convictions.” The preponderance standard may be required by the OCR guidance, but that mandate provides all the more reason for otherwise scrupulously fair procedures and a unanimous decision before a student can be expelled from the University and be stigmatized as a sexual offender. To require anything less than unanimity for the imposition of serious sanctions is unacceptable.
4. The protocol does not adequately protect the accused student’s right against self-incrimination in cases in which there may be a criminal prosecution. Although the protocol properly allows the University to grant a prosecutor’s request to defer proceedings that might adversely influence a criminal investigation or trial, there is no reciprocal opportunity for the accused, who may be forced to the cruel choice of defending the University charges at the risk of compromising his rights in the criminal case.

Our concerns about fundamental fairness are not academic or theoretical in nature. There are documented cases of a rush to judgment on charges of sexual misconduct at universities, including the Duke Lacrosse case and the recent events at the University of Virginia. In the criminal justice system, there have been a large number of post-conviction exonerations of persons convicted of serious crimes, including many sexual assault cases. Due process of law is not window dressing; it is the distillation of centuries of experience, and we ignore the lessons of history at our peril. All too often, outrage at heinous crimes becomes a justification for shortcuts in our adjudicatory processes. These actions are unwise and contradict our principles. We can and should provide protection and support for those who are subject to sexual abuse, and at the same time provide a fair process that is calculated to yield a reliable factual determination. Ultimately, there is nothing

inconsistent with a policy that both strongly condemns and punishes sexual misconduct and ensures a fair adjudicatory process.

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