IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF PENNSYLVANIA, et al.,

Plaintiffs,

v.

Elisabeth D. DEVOS, *in her official capacity as Secretary of the United States Department of Education, et al*.,

Defendants,

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
510 Walnut St.
Suite 1250
Philadelphia, PA 19106,

INDEPENDENT WOMEN'S LAW CENTER
4 Weems Lane, #312
Winchester, VA 22601,

SPEECH FIRST, INC.
1300 I St. NW
Suite 400E
Washington, D.C. 20005,

Intervenor-Defendants.

No. 1:20-cv-1468-CJN

BRIEF OF FAMILIES ADVOCATING FOR CAMPUS EQUALITY AS *AMICUS CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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STATEMENT OF INTEREST

Families Advocating for Campus Equality (FACE) is a 501(c)(3) nonpartisan, nonprofit organization that advocates for equal treatment and due process for those affected by Title IX sexual misconduct campus disciplinary proceedings. It was founded in 2013 by several mothers of sons who had been wrongfully accused of or erroneously found responsible for sexual misconduct at their respective colleges and universities without being given an adequate opportunity to defend themselves. FACE strives to balance and protect the interests of all parties involved in campus sexual misconduct disputes. It supports accusers' rights and protections and has welcomed accused women and LGBTQ students, though the vast majority of its accused student members are men.

Organized and operated primarily by women, FACE has brought together nearly 2,000 accused students, professors, and their families from across the country who were harmed by inequitable Title IX disciplinary processes. In the wake of often traumatic Title IX campus disciplinary processes, these families provide invaluable encouragement, support, and advice to each other. Many also assist FACE in advocating for policy and legislative change.

In support of that goal, FACE Co-President Cynthia P. Garrett has served on an American Bar Association Criminal Justice Section Task Force and as a liaison on an American Law Institute sexual misconduct project, both focused on developing equitable Title IX and sexual misconduct disciplinary procedures, and both populated by people with a variety of perspectives, including victims' advocates, campus administrators, and attorneys representing both Title IX complainants and respondents.[1]

[1] American Bar Association, "ABA Task Force on College Due Process Rights and Victim Protections releases final report," June 26, 2017, https://www.americanbar.org/news/abanews/aba-news-archives/2017/06/aba_task_force_onco/; The American Law Institute (ALI) Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities, https://www.ali.org/projects/show/project-sexual-and-gender-based-misconduct-campus-procedural-frameworks-and-analysis/.

Since its founding seven years ago, FACE has been contacted by thousands of students and faculty members who have experienced result-driven Title IX disciplinary processes in which school officials have: refused to disclose details of the conduct of which they've been accused; denied them access to the evidence relied on to find them responsible; refused them the opportunity to question their accusers and witnesses; relied on hearsay and other evidence inadmissible in any other adjudicatory arena; ignored their lack of harmful intent or good-faith beliefs; and dispensed with any presumption that they may actually be innocent.

FACE knows all too well how hard it is for the accused, and especially for accused students, to defend themselves against sexual misconduct allegations. Innocent students often trust that they will be treated fairly and are told "just tell the truth and you'll be fine." In reality, students have been blindsided by experienced campus attorneys and administrators who act as prosecutors, compiling evidence and testimony to establish their guilt, while denying them access to any equivalently experienced advocate, attorney, or even a parent. Even more troubling are the constitutional implications of campus officials who sometimes solicit criminal investigators to listen in on student interviews without the latter's knowledge or legal advice.[2]

FACE is uniquely positioned to give genuine voice to the perspectives of accused students and their families. Without FACE's involvement, these voices will not be adequately heard. That is because unlike accusers, accused students will be publicly humiliated and vilified based only on an accusation. If an accused student is found responsible, he will gain little or nothing from publicly insisting that he was falsely accused; most people will simply assume the accusation alone proves his guilt. And if he is found not responsible and goes public, people will still think he did it

[2] National District Attorneys Assn., Women Prosecutors Section, White Paper; *National Sexual Assault Investigation and Prosecution Best Practices Guide*, January 3, 2018, https://www.ciclt.net/ul/ndaajustice/WhitepaperFinalDraft-SA.pdf.

and say, "he just got off." There is nothing to gain, and much to lose, by telling someone you were falsely accused of a terrible crime.

Contrast that with the incentives for accusers. If they win their case on campus, they are perfectly willing to go public, claim the mantle of victimhood, and be honored for their bravery in speaking out. If they lose their case, they can *still* claim the mantle of victimhood and accuse the school of getting it wrong. For accusers, in other words, it is "heads I win, tails you lose" when it comes to telling their stories—which is one reason that the stories of accusers, and not of the falsely accused, tend to dominate in the public sphere. Accused students, whether they prevail or not, rarely gain from publicity. Thus, FACE's participation as an *amicus*, to tell some of those stories, is one of the few ways they can be heard and the public informed.

FACE believes the new Title IX regulations (the "Final Rules") will go a long way toward restoring balance and fairness in the adjudication of Title IX cases on college campuses, and in turn reduce the number of lawsuits filed by both complainants and respondents. The fairer a process is, the less likely people will be to sue over it when it doesn't go their way.

SUMMARY OF ARGUMENT

Accusers in Title IX cases have dominated the public narrative of sexual assault on campus. Whether through accuser-focused movies like *The Hunting Ground*, credulous coverage in the national press, or self-serving narratives on social media, it is the accuser's side of the story that is most often told. That is not because the accused has no story to tell; rather, it is because going public, even after *winning* a Title IX case, will rarely benefit the accused in the way that it can benefit an accuser. FACE cannot, of course, begin to remedy that asymmetry with a single *amicus* brief, but it can at least make this Court aware that there is another side to the story that is rarely told. In so doing, it hopes to show the Court how the Final Rules are an important and necessary measure to restore basic fairness in those proceedings on campus.

ARGUMENT

I. The Final Rules Are a Laudable Effort to Restore Fairness to Title IX Adjudications

Attached in the Appendix are stories from just a small sampling of the 2,000 or so FACE families and students who have endured inequitable and result-driven Title IX procedures without adequate process—something that may have been avoided if they had been able to avail themselves of the protections afforded by the Final Rules.[3] FACE families and students submitted many comments to the Education Department's Office for Civil Rights (OCR) and met with hundreds of legislators across the country, pleading for change in how schools have been conducting Title IX disciplinary proceedings. Though silent and nameless, these students and families have been waiting and praying for that change for years, with the hope that no more students are forced to endure the soul-destroying processes to which they were subjected.

The Final Rules clarify OCR's previously "vague and inconsistent" policies on how and when schools should respond to sexual harassment.[4] They specify the scope of conduct that falls under Title IX and the methods schools must use to reach accurate and equitable resolutions of complaints. They take into account the nearly 600 post-2011 accused-student lawsuits filed over schools' flawed Title IX policies and procedures, as well as the almost 200 court decisions and rulings in favor of respondents.[5] As the Department has explained, the grievance process set forth

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[3] For readability's sake, given the short length of the stories in the Appendix, we have not provided pin cites where we quote from the stories.

[4] Jake New, "Must vs. Should**:** Colleges say the Department of Education's guidance on campus sexual assault is vague and inconsistent," Feb. 25, 2016, Inside Higher Ed, https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance; *see also* Samantha Harris and KC Johnson, *Campus Courts in Court; The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22:49, 58-60, 61-62, NYUJ Legis. & Pub. Pol'y, 2019, https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf.

[5] *See* Title IX lawsuit database maintained by KC Johnson: https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV_BBrv5NAA5z9cv178Fjk3o/edit#gid=0; *see also Minding the Campus* by KC Johnson, https://www.mindingthecampus.org/author/kcjohnson/.

in the Final Rules "effectuates Title IX's non-discrimination mandate both by reducing the opportunity for sex discrimination to impact investigation and adjudication procedures" and "by promoting a reliable fact-finding process so that recipients are held liable for providing remedies to victims of sex discrimination...." *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 FR 30026-01, at *30101 (May 19, 2020 (to be codified at 34 C.F.R. pt. 106)).

Secretary DeVos was absolutely correct in recognizing that "we can continue to combat sexual misconduct without abandoning our core values of fairness, presumption of innocence, and due process."[6] Enough *is* enough; the time for change is long overdue. We hope the stories of what some FACE families have suffered through will help make that clear to the Court.

II. FACE Family and Student Experiences

A. Student 1

Student 1 was falsely accused of sexual assault in 2015 and expelled. As his parents noted, it was "a traumatic experience for our son and entire family in which the university ignored significant exculpatory evidence in their quest to believe 'victims.'" After going through what they went through with their son, they felt "more comfortable sending our daughter to college than our younger sons." They are convinced that if they had had the benefit of the Final Rules, that "would have made a difference in the outcome of our son's case." Like so many families before them, they have concerns about the panel that decided their son's guilt. In this case, the panel "included two young female employees of the university who had been trained with [the] presumption of guilt."

The parents also believe that cross-examination would have been enormously helpful to their son. Instead of having to answer difficult questions, the accuser in his case "did not have to

[6] Erica L. Green, "DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct," May 6, 2020, *New York Times*, https://www.nytimes.com/2020/05/06/us/politics/campus-sexual-misconduct-betsy-devos.html.

answer any questions about her story, and her words were taken as fact." Finally, this family believes that having "an adviser be an active part of the hearing would have been extremely helpful to our son." Instead, they had a lawyer who was forced to be, like all lawyers under the current system, a potted plant: "She was not allowed to speak to him, witnesses, the accuser, or the hearing panel." This family hopes that the Final Rules will go into effect and make Title IX processes fair for all students.

B. Student 2

Student 2 had to suffer through a process involving the so-called "single investigator model," which "included a one-on-one interview with our son (about 45 minutes) and an interview with the complainant." Witnesses were interviewed, but there were no actual witnesses to what happened between her son and his accuser—"only the hearsay conversations." Moreover, not even one of the hearsay witnesses "heard the complainant allege any assault immediately after or within the first 48 hours." The investigator, who also served as both judge and jury, "did not pursue available physical evidence that would have corroborated our son's testimony" or "follow up or pursue numerous inconsistencies in the complainant's testimony and version of events."

Among the undisputed facts at the hearing, according to this family, were:

- "Respondent asked complainant to engage in sex.
- Complainant said 'no.'
- Respondent asked complainant to perform oral sex on him.
- Complainant performed oral sex on respondent.
- Complainant stopped performing oral sex after about 5- 10 seconds.
- Complainant and respondent resume kissing and holding for several minutes.
- Respondent's phone rang and after answering and a brief telephone conversation, respondent left."

In the end, the investigator somehow found *both* of them credible but found their son responsible. (This particular form of *doublethink* happens all the time in Title IX cases, as schools find it far easier to ruin someone's future than to call them a liar.)

This family, too, believes that the Final Rules would have made a difference in their son's case. The Final Rules require the collection and discovery of relevant evidence, whereas in this case the investigator "was not required to and was completely not interested in collecting any evidence," including "telephone and text messages (and corresponding time stamps) and key card time stamps to the dorm room." Nor, of course, did their son have a chance to cross-examine the complainant. The gravamen of her complaint was that she felt pressured. Her basis for feeling that was questionable at best, but no one ever asked her questions about it. This family said that during the course of this terribly unfair process, "we consistently wondered out loud, 'How could this happen in America?'"

C. Student 3

Student 3 "was dragged through a university disciplinary process that shocked me to my core." He was not allowed:

- "to present [his] own evidence or witnesses without arbitrary administration approval (the administration had no criteria and they provided no explanation),"
- "to question my accuser or any of [complainant's] witnesses personally or through an advisor," [or]
- "to even question parts of my accuser's story."

In addition to effectively tying his hands behind his back, "the university refused to provide any details of the accusation until after the investigation had concluded." Finally, late on the night before the hearing, the school denied all but one of Student 3's witnesses, then at the hearing refused to ask any of his pre-submitted written questions. This is exactly why the Final Rules

provide for live questioning by a student's advisor: school officials, despite the duty of care they owe *both* parties, are often reluctant to ask pre-submitted written questions of an alleged victim.

Student 3's "life and career trajectories" were "permanently altered" by this experience, which included a two-and-a-half year suspension. It took his family thousands of dollars and the intervention of a court to provide Student 3 with the rights any student in America should receive when accused of a serious crime.

D. Student 4

Student 4's family tells a story that is familiarly Orwellian to people who have been through this process. Six days after the alleged assault, the complainant told campus security that their son had sexually assaulted her. Instead of being put through a normal process, their son was "abruptly pulled out of his lab class and told he was suspended" shortly after meeting with a school dean, during which he had been told only that "there was 'inappropriate touching' and he 'did not get affirmative consent.'" Despite not even involving sexual intercourse, the charges made the news that night. What is most striking about this family's story is how the accuser's version of events seems to have evolved over time. The accuser texted her roommate that she had been "teasing him earlier that day, and I did kiss him and stuff," and she asked if what had happened between them "counted as sexual assault." The roommate then pulled up the Justice Department's definition of sexual assault, and, after they reviewed it together, they decided that it "would count." The accuser's *own mother* does not seem to have believed her daughter was assaulted. Instead, her mother told her she "just needed to be more careful with boys."

Late on a Thursday afternoon, their son was told that he only had until Monday to submit a statement responding to the allegations, despite not knowing what his accuser was actually saying he did. Instead, he was given only her "name, date, place and that he was 'charged' with 'rape' and 'inappropriate touching.'" The Final Rules, of course, would require far more notice than that and

would not force an accused student to walk so blindly into the beginning of a process. The unfairness did not end there. Her investigation consisted only of statements against their son, his accuser, and her friends. Their son "was then allowed to write one more statement in response to what he viewed." He received no hearing and did not have a chance to confront his accuser. Indeed, even the investigator herself *never verbally questioned him*. This family believes that "cross-examination would have made a difference in the outcome of this case, as it is the best tool for determining credibility." Their son was ultimately found responsible and has suffered from being stigmatized as a "sex offender." This family signed their statement "anonymous and forever changed."

E. Student 5

When Student 5 received notice that he had been accused of sexual misconduct, his first reaction was to be unconcerned. After all, though he "obviously understood that any allegation of sexual misconduct is extremely serious," he also, like many other FACE students, "(naively) believed that 'my innocence would protect me from harm. I assumed that 'the truth would set me free.'" Although Student 5 "assumed" the adjudication process would be "neutral, fair, and balanced [and] that the investigation would reveal that the allegation against me lacked merit," he was "eventually found 'Responsible' on nothing more than my accuser's word."

Even though the allegations against Student 5 involved "a sexual encounter that occurred hundreds of miles from campus, over summer break, with a girl who was not even a student at my university," the school still conducted a disciplinary process. This situation—where the complainant was not even a student, the alleged incident occurred both hundreds of miles away, and it was entirely unrelated to school activities—would never happen under the Final Rules.

Until "the last minute," the university withheld from Student 5 the fabricated evidence submitted by the complainant. As a result, Student 5 was unable to review the evidence against

him until the hearing was in process: "So there I was, a 22-year-old kid, sitting in front of a panel of university administrators, clumsily attempting to prove that the evidence was fake, but with no real way of doing so. Had I been presented that false evidence prior to the hearing, I would have had an opportunity to develop a strategy for demonstrating that it was fraudulent."

Student 5 was not permitted to have an advocate, which in retrospect he realized was "self-evidently absurd": "A student accused of a Title IX violation has his entire educational and professional future hanging in the balance. Expecting him to defend himself under such circumstances is not only cruel, but incongruous with the stated goal of a fair and effective process." Neither was he permitted cross-examination allowing him to expose his accuser's "very well documented history of pathological dishonesty." The protections promised by the Final Rules would not have let this happen—the school would have been forced to give him the evidence before the hearing and allowed an advisor to cross-examine his accuser about it.

In the end, Student 5 was forced to file a lawsuit and spend a significant amount of money to vindicate himself and restore his reputation. Unfortunately for accused students, justice often comes at a high price.

F. Student 6

In 2017, two weeks before his last final exam, this family's son was summoned to the Title IX office and told that he had been charged with sexual assault. The assault supposedly happened six months earlier, and a single investigator would be given the responsibility of deciding whether he did it or not. In this case, their son was able to produce a photograph showing the accuser smiling "immediately after her encounter with [their] son," and he was also able to show that she had told people about two other sexual encounters she had had with other people that same night.

But only their son appears to have been charged. He was found responsible simply because the single investigator found the accuser more credible. As happens every time when a single-

investigator model is used, their son had no opportunity to question his accuser and no chance to put his case before a panel of neutral factfinders. Indeed, the investigator in that case had "made public Facebook posts deriding neutrality and promoting a video likening college campus[es] to hunting grounds for sexual predators." The proceeding was also rife with irregularities. While their son's statement to the investigator "was included verbatim in the evidentiary file, only the investigator's summarized narrative of her impressions of witness testimony was presented for my son's review." He was not able to read the testimony itself and was not able to confront any of the witnesses against him, as he would have been able to during a live hearing. Their son was also only interviewed once "and was the last person to be interviewed." By that time, of course, the investigator had clearly made up her mind. Their son ultimately attempted suicide and was hospitalized. Unlike the complainant, he had to seek out and pay for his own support, and the family "had to spend $25,000 just to defend our son from an overzealous and unfair process that threatened not only my son's educational and professional future, but also his very life."

G. Student 7

Student 7's case started in September 2016, on a particularly odd note—the Title IX coordinator informed him that she had been told that he "*may* have been involved in a sexual assault involving another male student," which made little sense because he could not recall ever having met that person and was not gay. He was not particularly concerned about it, especially since he was told that the incident took place more than two years earlier. When he met with the Title IX coordinator, she told him that the school would provide an advocate for him. They gave him a victim's advocate from the women's center. After they received the investigation report, the family was certain that the case could not possibly move forward. First, the accuser could not remember whether the alleged incident took place in March or April 2014—which seems unlikely for something that supposedly rose to the level of sexual assault. Second, one of the three

witnesses put forward by the accuser told the investigator that the accuser never even characterized what had supposedly happened between him and their son as a sexual assault. Despite their hopes that the case would be dropped then and there, it went all the way to the end, and "the effects of the process [have] been life altering for our entire family"—even though their son was found not responsible.

This family strongly believes that the Final Rules would have made a huge difference in their case and spared their son the trauma of a full investigation. Among other things, their son would have had a hearing, and the accuser would have had to show up. Here, he did not even bother to do that. Moreover, there was never any chance to resolve the case informally because the school's processes prohibited that. The Final Rules, of course, would allow common-sense resolutions to all complaints, including especially stale complaints brought by people who are no longer students at the school, which was the case here.

H. Student 8

The family of Student 8 was put through the trauma of a Title IX process for an email that he never actually sent. Student 8 had been accused of sexual harassment in the email and immediately suspended from his college sports team. This family was extremely grateful that their daughter worked for another university and was able to connect them with FACE, who helped point them in the direction of a lawyer. With the help of the lawyer, their son "was able to prove almost immediately that he did not initiate the email chain where the girl said she was harassed. In fact, he was able to prove that SHE started it." Instead of calling a halt to things at that point, the case went all the way through. When they finally got to the hearing, they learned that "the people on the panel had not even read the investigator's report!" The family considers this "a broken system." They had to "pay thousands of dollars to exonerate our son from something that would have taken 30 minutes in a real investigation with people who are trained in this sort of thing to figure out."

This family concluded their statement by noting, "The havoc it wreaked and the emotional toll it took on our family and community was mind blowing to all who hear about it. There has to be a better way." And indeed, as the Department has found, there is.

I. Student 9

Student 9's story began in February of 2020, when he was falsely accused of sexual misconduct by someone who had also claimed to have previously been assaulted by five other men. His family could not afford to hire an attorney, so the father had to take off work repeatedly, book a hotel near the school, and help prepare and advise his son throughout the investigation. Despite providing a great deal of exculpatory evidence to the school, he was still charged with several serious allegations.

When a bishop in the son's church asked to be interviewed by the investigators, because he had relevant knowledge about the claimant's attempts to disrupt Student 9's engagement to another woman, the investigators refused to interview him. A disciplinary hearing was held, and still the family could not afford to hire a lawyer to help them. Before the hearing started, "the complainant harassed, stalked, and attempted to publicly humiliate our son and his fiancée." But the university did nothing about that, because they said she had a right to say it—while telling him he could not say anything publicly against her because "that would be intimidating to her."

Student 9's parents took a significant amount of time off work in the run-up to the hearing to help prepare him for it. It lasted almost 11 hours, during which he could not cross-examine his accuser and had to sit and listen while she brought in impermissible character evidence. He was ultimately found not responsible, but that has not ended the struggle this family has been through. "Even to this day, it has taken an emotional, physical, and monetary toll on our son, his fiancée, and us as a family." The family cannot afford to take legal action against the school or the accuser, but their "emotional trauma" is severe. They are deeply hopeful that the Final Rules will make

these processes fairer for all students.

J. Student 10

Student 10's story makes clear that the harm of an unfair process can be deep and lasting even if you win, because sometimes you still have to go through a process that can look an awful lot like *Bleak House*.

Student 10's case ran for an almost unimaginably long time—from October 8 of 2015, when he was first charged, to December 5, 2017, when he was finally exonerated. The Title IX office reached out to him on October 9 to schedule a meeting, but the process slowed down significantly from that point on. A single investigator was assigned to the case. Unsurprisingly, she recommended a finding of responsibility and a sanction of suspension, which automatically triggered a disciplinary hearing. Initially, and with absolutely no respect for Student 10's academic career, the hearing was scheduled for the week of final exams. It was later pushed back one month, to January 15.

Prior to the hearing, the school failed to provide all of the witness statements, including notes that the investigator had taken. Incredibly, given what was at stake, the school limited the hearing to only two hours, "with the school taking up much of the time either explaining the process or presenting the accuser's claim." That left, as one might imagine, "very little time" for Student 10's attorney to do anything. The panel had more questions at the end, but they were instructed that there was no more time. Imagine having fewer than two hours to defend yourself against a horrific accusation, only to hear that the people who held your fate in their hands had to stop asking questions.

The panel found Student 10 responsible. He had two appeals left at that point. The first was to the chancellor of the school. Between the hearing and the appeal, Student 10 had received DNA results showing that his DNA was not present on the complainant. In rejecting his appeal, the

chancellor said that he did not think the DNA test would have "made a substantial difference in the outcome." After that, one appeal remained—to the Board of Regents. Student 10 had to file this final appeal after the conclusion of his criminal case, during which he was found not guilty on January 30, 2017.

His final appeal to the Board of Regents was filed on October 1, 2017. "It was 16 pages long with 198 pages of exhibits." Repeatedly, the family showed how the accuser's story did not match the evidence, and how the school had overlooked exculpatory evidence including the negative DNA test. On October 12, 2017, the Board of Regents remanded the case to the chancellor, instructing him to "carefully review all of the new evidence presented," "expunge the disciplinary record if the discipline is not sustainable," and—regardless of what he decided—"provide a full explanation of his decision." (In other words, this time you have to look at *all* of the evidence and, if you choose to ignore some of it, explain why.) The chancellor did what he was told, but it took him almost two months. On December 5, 2017, almost two years to the day after the case began, the chancellor reversed his decision and found Student 10 not responsible.

One might wonder what Student 10 has to complain about, given that he won. But the only person who would ask such a question is someone who has never been put through a two-year investigation or seen what that kind of thing can do to a person. "My son struggles dealing with the false accusation," his mother says. "What my son went through, no one should have to go through, the depression caused by the process is heart wrenching." She recounts holding her son for two hours while he cried without ceasing on Christmas Eve of 2016. He lost his friends and many educational opportunities, and defending the baseless charges cost them $150,000. To be sure, the Final Rules cannot prevent all harms, but they will stop the single-investigator process. They will also force schools to admit and consider exculpatory evidence, and they will give people like Student 10 a chance to defend themselves without having to spend almost two years in the Title IX

process.

K. Student 11—Elliott Pitts

Elliott Pitts is the exception that proves the rule when it comes to going public in these cases. That is because he was a student athlete. When student athletes are charged, they are usually suspended from the team immediately. When you are a basketball player at a Division I school, like Elliott was at the University of Arizona, that makes it impossible for you to disappear quietly. So his case became public quickly, which is why he is the only student who was willing to identify himself by name in this brief.

Elliott was in his junior year, hoping to potentially go professional and coach one day, when everything started to fall apart. On the morning of December 6, 2015, he came home after the team had a big road win against Gonzaga. As college students tend to do, they celebrated with a party. One of the people at the party was a female volleyball player who Elliott had been flirting back and forth with over the past several months. At the party, she "proceeded to sit down next to the Elliott on the couch" where he was playing video games, and "put her hand on his crotch." They started kissing and ultimately went back to his room. She then asked him to get a condom, which he did, and he put the condom on. She then proceeded to get on top of him and participate enthusiastically in sex. After it was over, Elliott left the bedroom, leaving the accuser to fall asleep in his bed while he slept on the couch in the front room. When the accuser's brother found out that Elliott and his sister had left the party together, "he came back to their apartment in a rage, found [his sister] naked in Elliott's bed, and proceeded to take her to the dorm room where he left her in her bed." He then began to claim that Elliott had raped his sister.

The Tucson police opened a criminal investigation. During that investigation, it came out that the complainant had said, "It was consensual," and claimed another time that she did not actually remember what happened. The criminal investigation was, unsurprisingly, closed without

any charges being filed.

Little did Elliot know that the Title IX process would be much worse.

The Title IX process that followed is almost too bizarre to summarize sufficiently here. One fact that stands out is that the Title IX officer *herself* added charges to the investigation that even the complainant had not brought forward. Ultimately, Elliott was faced with a terrible decision shortly before the hearing—go forward, and rely on what the family perceived to be a terribly unfair investigative process, or accept the functional equivalent of a plea offer, which would allow him to finish the semester, take a one-year suspension, and preserve his NCAA eligibility. Like many defendants, he took the deal.

Unfortunately, preserving his eligibility did not help him: "Little did we know, that although 18 Division I colleges were approached regarding Elliott being available for transferring to play basketball, 100 percent of these colleges passed, due to the current climate. The college administrators didn't want any negative attention that might come with Elliott's transfer." The family's story did not stop even there. The accuser's family has "publicly outed the agreement Elliott signed with the family and the school. They sent it to hundreds of U of A basketball alumni and parents, as well as reaching out to Tucson journalists on ESPN to tell their side of the story."

ESPN ultimately declined to run a story after hearing Elliott's version of events, but the efforts alone have been extraordinarily traumatic for the family. Elliott ended up finishing college at a community college and had to watch the Arizona Wildcats win the Pac-12 championship without him in February of 2017. His life has never been the same, and the difference that the procedural protections promised by the Final Rules would have made in his case, and in his life, are impossible to overstate.

CONCLUSION

FACE hopes that, through its telling of stories that too rarely get told, this brief has helped inform the Court's analysis of what is at stake if the Final Rules are delayed further. The Final Rules must be allowed to become law; too many students' futures are dependent upon correcting the way our schools conduct Title IX disciplinary hearings. FACE students, who range in age from six on up, have suffered and hoped for change long enough.

For the foregoing reasons, FACE thus respectfully urges this Court to deny the Plaintiffs' motion to enjoin the Final Rules.

Respectfully submitted,

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EXHIBIT 2

Student 1 **July 2020**

I am a parent of four children, three boys and one girl between the ages of 19 and 26, all of whom have attended college or are still enrolled. Our oldest, a son, was wrongly accused of sexual assault in 2015 and expelled from school. It was a traumatic experience for our son and entire family in which the university ignored significant exculpatory evidence in their quest to believe "victims". In the wake of this experience my husband and I felt more comfortable sending our daughter to college than our younger sons. We were pleased to hear that first steps have finally been taken to begin bringing due process to campus sexual assault cases. I believe that some of the new regulations, had they been in place in 2015, would have made a difference in the outcome of our son's case.

One of the new regulations is the requirement of a "presumption of innocence" letter that will be sent to the accused. This letter lays the groundwork for investigations where presumption of innocence has been completely missing when it comes to disciplinary hearings involving sexual assault on college campuses. Title IX offices have been staffed with people and have educated people to presume guilt. Our son's hearing panel included two young female employees of the university who had been trained with presumption of guilt. They chose not to look at evidence they had access to that was exculpatory for our son. By starting with a presumption of innocence, it at least reminds people hearing these difficult "he said she said" cases that we must presume a person is innocent. Without this, our entire American approach to determining someone's guilt or innocence is up-ended.

Another change that I believe would have affected the outcome of our son's hearing is allowing for cross examination. His accuser did not have to answer any questions about her story and her words were taken as fact. I understand it is traumatic for a true rape victim to relive the details of a rape, but unfortunately this is a necessary evil that upholds presumption of innocence. Furthermore, allowing each party to have an advisor be an active part of the hearing would have been extremely helpful to our son. While his accuser took part in the hearing via phone with her advisor by her side (most likely speaking and giving advice) our son was only allowed to have an attorney there for support – she was not allowed to speak to him, witnesses, the accuser, or the hearing panel. Our 21 year old son had to navigate this highly stressful and critical proceeding on his own. There were several areas of dispute that his attorney would have known how to address given the opportunity, but our son didn't have the knowledge or experience to do so.

These new regulations are a good start to change the adjudication process on college campuses, but there is still more work to be done. We need to ensure that our Title IX offices are a place of fairness for all students. I am asking for your support in ensuring these new regulations go into effect in August.

Student 2 **July 2020**

The path and outcomes our son experienced under the Obama-era "guilty upon accusation standard" is extraordinarily, and tragically, different when compared to what would have occurred under the current new rule of how colleges investigate and respond to allegations of sexual harassment and assault.

The single investigator model included a one-on-one interview with our son (about 45 minutes) and an interview with the complainant. Interviews were conducted with "witnesses" but NO witnesses were witnesses to the alleged event – only to hearsay conversations. In addition, none of the hearsay witnesses heard the complainant allege any assault immediately after or within the first 48 hours. The single investigator did not pursue available physical evidence that would have corroborated our son's testimony. Nor did the Investigator follow-up or pursue numerous inconsistencies in the complainant's testimony and version of events.

From the investigation, thirty-six undisputed facts and one "disputed" fact were generated. The disputed fact was "whether complainant affirmatively consented to perform oral sex on respondent." Non-disputed facts include the following:

- Respondent asked complainant to engage in sex.
- Complainant said "no."
- Respondent asked complainant to perform oral sex on him.
- Complainant performed oral sex on respondent.
- Complainant stopped performing oral sex after about 5- 10 seconds.
- Complainant and respondent resume kissing and holding for several minutes.
- Respondent's phone rang and after answering and a brief telephone conversation, respondent left.

Through the investigative process, the single investigator proclaimed both complainant and respondent were deemed "credible, responsive and non-evasive."

The single investigator was given the authority to adjudicate and found in favor of the complainant based on two apparent items:

1) Our son spoke to fewer people immediately following the encounter (he spoke to only one person after he had left the encounter because a friend has become very ill at a party and he was asked to assist in care). The investigator found that while the complainant never alleged assault to the "witnesses" and none of the witnesses could recount any wrongdoing by the respondent, the complainant's allegations were more credible because, in the end, more people were spoken to.
2) While the complainant was able to say "no" to sex and stopped performing oral

sex after 5-10 was never found or proven that our son exerted pressure – only that the complainant could claim after the fact that pressure was felt..

The process adhered to – which Betsy De Vos called a "kangaroo court" which follows arbitrary rules and offers inadequate protections to the involved – combined with the "guilty upon accusation" culture on our son's college campus, resulted in an experience that can only be described as "un-American." During the harrowing experience we consistently wondered out loud "*how could this happen in America?*"

Our son's case would have followed a completely different trajectory and outcome if the new rules had been in place at that time because the new rules would have provided for the following:

- The accused (and accuser) are allowed to submit evidence. The investigator in our son's case was not required to and was completely not interested in collecting any evidence. Evidence which was available and never sought/accepted included telephone and text messages (and corresponding time stamps) and key card time stamps to the dorm room.
- Participation in live cross examinations. The complainant never elucidated how she was "pressured" into performing oral sex on our son and the investigative report could not provide any description of our son's actions leading to "pressure." A cross-examination process would have quickly revealed that there had been no malfeasance in our son's actions. It also would have made clear that consent was given in the form of acquiescing to our son's request for oral sex to be performed on him.

The above notwithstanding, absolutely and without a doubt, the single biggest hindrance to a fair process was the lack of transparency. The process was hidden as the single investigator performed a superficial and flawed investigation and allowed to adjudicate and determine guilt or innocence based on an extremely cursory and indefensible assessment of "evidence." To be in a process in which the accused cannot speak for himself beyond what the investigator allowed during a short interview performed at the onset of the process and not be allowed to present evidence that would refute the claims of the complainant is abjectly un-American. The process unfolded hidden and essentially drew its power from the phenomenon – if Americans, legislators, governors, council-persons and even college professors had an inkling of how these investigations really proceed, it would be a stunning revelation.

Student 3 **July 2020**

I was an accused male student at a private university. I was falsely accused, and was dragged through a university disciplinary process that shocked me to my core. I was not permitted to present my own evidence or witnesses without arbitrary administration approval (the administration had no criteria and they provided no explanation), I was not allowed to question my accuser or any of her witnesses personally or through an advisor, I was not allowed to *even question* parts of my accuser's story, and the university refused to provide any details of the accusation until after the investigation had concluded. Furthermore, the university violated its own policies by denying all but one of my fact witnesses late on the night before the hearing, while allowing her character witnesses (prohibited by the policy) to testify. The university also declined to ask any of my hundreds of pre-written questions.

I am innocent, and I could have proven my innocence in the campus proceeding had the Regulations been in effect at the time. I could have cross examined my accuser (through my advisor) and her witnesses and called attention to clear inconsistencies and outright lies that permeated her allegations. I could have presented my own witnesses that would have contradicted by eyewitness testimony key portions of her allegations. I would have received notice of the details of the allegation when I was interviewed, so I could more effectively rebut her false claims. But I was not able to do any of these things, and I was erroneously suspended for two and a half years, a punishment that permanently altered my life and career trajectories.

It took thousands of dollars and the intervention of a court to vindicate the rights I should have received from my school.

Student 4 **July 2020**

A young woman (Jane) walks into campus security at 10:45pm on a Sunday night and makes an accusation that she was sexually assaulted six days prior. She was offered medical attention, to talk with the police and refused both. She was allowed to have her previous boyfriend and friend(s) with her for support. The counselor on call was contacted and spoke with the young woman. Various people she interacted with offered her more help/counseling on multiple occasions through that night and the next day, which she refused.

This was a he said she said case, no drugs, no alcohol, no sexual intercourse. A no contact order was delivered to John Doe in the middle of the night. The next morning the young man met with Associate Dean of Students/ Senior Deputy TIX director's in his office. The dean said, "you are being charged with sexual misconduct" and you can make a statement at a later date. We know this to be true because this call was legally recorded four days later when the Dean reiterated what he previously had said. He then explained to John there was "inappropriate touching" and he "did not get affirmative consent."

Shortly after this meeting John was abruptly pulled out of his lab class and told he was suspended. He was escorted to his room by three security men to gather his belongings, while signs are being hung on all the buildings that there was a campus sexual assault. A mass email warning was sent to everyone on campus, asking them to report information.

That night the assault was on the news and in the newspaper. John was treated as guilty the moment he was accused! This was not the fair and equal process the college promised. Imagine how you would feel, your friends watching you be escorted away like a criminal. You don't even know why this is happening, you only know an accusation was made and no one wants to hear your side of the story.

Jane's roommate's statement talked about the night of the supposed incident. Her roommate reported Jane "was mostly annoyed" "upset and frazzled ... The roommate states the next day Jane "told me that she had been thinking about the night before and she told me the more she had been thinking about it the more it bothered her...She was not thinking about reporting it at that point and I brought up the counseling center. She wasn't opposed to it but she didn't think she would need the counseling center.

The next day everyone was home on break and Jane texted her roommate:

- Jane; "I tried to talk to my mom today about the John thing. That conversation did not go how I thought it would."

- Roommate; “what happened?”
- Jane; “She told me I need to be more careful with guys.”
- Roommate; “I’m sorry she didn’t react well sometimes parents need time to process before they come to terms and react the way you want.”
- Jane; “I thought she would get upset or mad or something like that but instead she made it seem like it was my fault. You know it wasn’t right?”
- Roommate; “I am sorry she did not react well…”
- Jane; “I was teasing him earlier that day and I did kiss him and stuff…” “Does this count as sexual assault?”
- Roommate; “According to Department of Justice: Sexual assault is any type of sexual contact or behavior that occurs without the explicit consent of the recipient. Falling under the definition of sexual assault.”
- Jane; “So Yes?”
- Roommate; “Honestly, yes I would think it would count.”

The incident report states Jane “tried to tell her mother that she had been sexually assaulted.” And she reported her mother told her “that because it was not rape, Jane just needed to be more careful with boys.”

John and his father were allowed to return to the campus pick up more belongings two days after the accusation. They spoke with the Title IX director about the unfair treatment, being labeled guilty without any presumption of innocence, and the fact that no one wanted to hear his side of the story. They asked how was it that he was just suspended and they simply believed her? How is it that she alleged something happened and was immediately given the title “victim/survivor” What process had already determined she had “survived” something? **The Title IX director stated, “There was a lot of pressure from the Federal Government and that this is just how things work.”**

John and his father started to drive home with most of his belongings when the Title IX director called less than thirty minutes after they left. She said John could return now to the college to attend classes but he could not return to his townhouse. This one interaction, John and his father talking reasonably with the Title IX director seemed to make a difference in how John was perceived. Maybe he was not the “serial rapist” they were treating him as. This was the only glimmer that John might be heard. It did not last long.

The school said there would be an investigation. Shouldn’t an investigation occur before someone is charged? In this case the college had it covered, when deciding if they would be moving forward with a case they only accepted “evidence in support of the complaint.” It definitely seemed like John’s guilt was predetermined.

John was told on a Thursday afternoon at 4:30pm he had to submit a statement no later than Monday

knowing only the accusers name, date, place and that he was “charged” with “rape” and “inappropriate touching.” While this was “only an educational process” per the college you still have to consider anything you say can be used against you in a court of law. It was clear the college itself had not treated John fairly and there was no presumption of innocence.

Try to find a lawyer in one day.

A few other key facts learned along the way;

- Jane’s story changed and the story grew worse with each person she spoke. When she finally reported she would only do it with the ex-boyfriend at her side ...

- The Title IX director’s summary of events falsely stated that the “complainant indicated that she was very angry and when respondent texted her and said “I had fun tonight” that Jane’s responding text was, “you can’t do that stuff. You can’t hold me down and force yourself on me.” The only text messages that were supplied at all for evidence were from John and the actual text on the night in question after he walked her back to her dorm was, “I really enjoyed spending time with u (smiley face emoji) and Jane’s response to that was “Thanks”

The Dean/Deputy "Selects, trains and advises the student Conduct Review Board" but it was the Dean/Deputy who had decided John was guilty by accusation ... The Dean/Deputy was trained to “believe the victim,” a trauma informed approach that is “based on flawed science,” “loosely constructed,” and “makes unfounded claims about its effectiveness, and has never once been tested, studied, researched or validated.”1

- The investigating officer’s daughter was a friend with the complainant. This officer also wrote a chapter in the Previous Title IX directors book who showcased John’s college campus as a premier example of how a college can “eradicate” sexual violence.” 2

- 10 days after the accusation John’s roommate received notice that he would be getting a new roommate. Its sure feels like the school predetermined John’s guilt.

John submitted his statement and waited. After some time he was allowed to view what we think was most of the “investigative” materials. The investigation only consisted of statements against John by Jane and her friends. John was then allowed to write one more statement in response to what he had viewed.

John had NO hearing to attend, NO cross-examination in person or written, John was not allowed to know who was on his hearing panel judging him. There was no verbal questioning of John by the college or the investigator at any time. How does a hearing panel make a life

altering decision without ever meeting, talking, or interacting with the accused? They made a judgment based solely on information that the college required be supportive of the complainant.

Even within a system that states it is “educational,” it seems when you are labeling someone as a “sex offender” or “rapist” it would be important to hear him or her speak
... how do you come to a conclusion without ever meeting or interacting with one side?

I do believe cross-examination would have made a difference in the outcome of this case, as it is the best tool for determining credibility! Written questions are never an effective substitute for live cross-examination. I think this case is a prime example of why cross-examination is a needed requirement in the new Title IX regulations.

John was found responsible by the college. The effects and impact of being wrongly accused are real. The stigma and vilification of being labeled a “sex offender” cannot be underestimated. The inability to fully clear one’s name can cause extreme pain and embarrassment. Being accused changes your ability to return trust and it is difficult to return to being the valued person you were before the accusations. There are definably changes in personality and social behavior due to the loss of a previously untainted reputation, a loss that cannot be repaired in the absence of clear exculpatory evidence of innocence. Self-blame, suicidal thoughts, paranoia, anxiety, mistrust, social withdrawal and isolation are all commonly seen in many who have gone through similar “educational processes. “It is not only the person accused that suffers this is a life altering event for the whole family and even friends.

Please ask yourselves What is the difference between being labeled “guilty” in a civil or criminal proceeding or being found “responsible” on your college campus of “rape?” Because the consequences of being suspended or expelled, having marks on your records, being judged and labeled by your college campuses has caused irrevocable harm to many students!

Betsy DeVos has taken the time and done her homework on this! It is clear the previous system was broken. Please be supportive of the new regulations and give them the opportunity they deserve!

Sincerely,

Anonymous and forever changed

1. http://www.prosecutorintegrity.org/sa/trauma-informed/
2. Sexual Harassment in Education and Work Settings Current Research and Best Practices for Prevention by Michele A, Paludi, Jennifer L Martin, James E, Gruber and Susan Fineran and Bullies in the Workplace by Michele A. Paludi) Praeger (August 26, 2015)

Student 5 **July 2020**

My name is John Doe. I am 28-years-old. I was falsely accused of sexual assault during my senior year of college. I will never forget when I first received the email notifying me of the allegation against me.

Although receiving this news was predictably jarring, I was actually not overly concerned or worried about entering the investigative process. I obviously understood that any allegation of sexual misconduct is extremely serious, but I (naively) believed that my innocence would protect me from harm. I assumed that "the truth would set me free." I assumed that I was entering an adjudication process that was neutral, fair, and balanced. I assumed that the investigation would reveal that the allegation against me lacked merit, and that the case against me would eventually be dismissed. I even attended my first meeting with the school's investigator without a lawyer! However, despite overwhelming evidence supporting my innocence, I was eventually found "Responsible" for sexual assault and suspended from school for the rest of the year.

While I was eventually able to prove my innocence in a court of law after spending thousands of dollars, the impact of this ordeal on my life and my psyche cannot be overstated. After I was found Responsible and removed from campus, I quickly descended into what my good friend Joseph Roberts described in his recent article in *USA Today* as the "all-too-familiar pattern for the falsely accused: isolation from friends and family, loss of reputation, depression, substance abuse, [and a] suicide attempt." It took me five long years to clear my name. That's half a decade of total professional stagnation and unrelenting psychological turmoil. And even after winning my lawsuit against my university, much of the damage to my reputation and spirit remained. One spurious allegation and a small handful of complicit university administrators was all that it took to irreparably alter my life trajectory.

Education is a civil right, and thus no one should be denied access to education without meaningful due process. The updated Title IX regulations are a historic step in the right direction to ensuring due process for all students. Had this new guidance been in place when I went through the adjudication process, it is possible that I would have been spared this injustice. I have outlined five specific provisions of the new regulations that might have protected me from the false accusation.

1. MORE DISCRETION IN WHICH CASES THE SCHOOL INVESTIGATES

Under the previous guidance, schools were required to investigate virtually every allegation of sexual misconduct – regardless of where the conduct occurred, whether the individuals involved were students at the school, or even if those allegations were received second-hand. For example, the

allegation against me was made in relation to a sexual encounter that occurred hundreds of miles from campus, over summer break, with a girl who was not even a student at my university. Considering that Title IX is ostensibly about protecting access to education, it is very difficult to understand how this kind of conduct was investigated and adjudicated under the auspices of Title IX. The new guidance is a step in the right direction because it allows schools to focus on incidents that actually pose a threat of interfering with the campus environment and students' access to education.

2. STUDENTS ARE ENTITLED TO REVIEW ALL EVIDENCE

The ability to review the adverse evidence/testimony is absolutely essential to crafting an effective defense. In my case, my accuser submitted fabricated evidence to the hearing panel in order to bolster her false claims. Unfortunately, that fabricated evidence was withheld from me until the very last minute, so I didn't even get to review it until I showed up for my hearing, and thus I had no way to defend myself. So there I was, a 22-year-old kid, sitting in front of a panel of university administrators, clumsily attempting to prove that the evidence was fake, but with no real way of doing so. Had I been presented that false evidence prior to the hearing I would have had an opportunity to develop a strategy for demonstrating that it was fraudulent.

3. STUDENTS ARE ENTITLED TO REPRESENTATION AT THE HEARING

When I went through this, the norm on college campuses was that students were required to represent themselves during the adjudication process. This rule did not only apply to accused students like me, but also to accusing students. First of all, the idea that a complaining student who has come forward with an allegation of *rape* would have to represent himself or herself in an adversarial process is self-evidently absurd. Furthermore, the idea that accused individuals should have to represent themselves is equally inappropriate. A student accused of a Title IX violation has his entire educational and professional future hanging in the balance. Expecting him to defend himself under such circumstances is not only cruel, but incongruous with the stated goal of a fair and effective process.

I remember during my hearing I was very concerned with coming off as polite and amicable to the hearing board. I did not want to come off as insensitive or aggressive. However, I believe that this prevented me from vigorously defending myself. I would have been much better off with a trained representative advocating on my behalf. A system in which both accusing students and accused students have representation allows for a fairer process for everyone involved.

4. LIVE HEARING WITH CROSS-EXAMINATION

The new regulations require that there be a hearing that includes an opportunity for some form of "live cross examination." This is one of the more controversial provisions of the new regulations, but it is absolutely necessary. It is not a coincidence that the appellate courts are increasingly requiring schools to allow some kind of live cross-examination in cases where credibility is at issue – it is because, as described by the Supreme Court, cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." In my case, my accuser had a very well documented history of pathological dishonesty.

However, because there was no opportunity for live cross-examination, I was severely limited in my ability to raise this issue during the hearing. Had I been able to explore this line of questioning, it is very possible that I would not have been found Responsible.

5. PRESUMPTION OF INNOCENCE

The presumption of innocence is the bedrock of our justice system. However, for the last several years, university students accused of sexual misconduct have regularly been denied this right. Misguided (albeit well-intentioned) policies such as "affirmative consent" and "trauma-informed investigations" have resulted in the reversal of the presumption of innocence and created an environment where accused individuals are presumed to be guilty and then expected to prove their innocence. The new regulations ensure that all accused individuals are presumed to be not guilty until the evidence demonstrates otherwise.

In my case, the evidence overwhelmingly supported my innocence. My accuser claimed that she was unable to consent due to incapacitation. However, throughout the entire disciplinary process, there was not a single piece of evidence presented to corroborate this claim. There were roughly a dozen witnesses who interacted with my accuser in the moments leading up to our encounter, including two of her best friends who were literally in the room with us during the encounter, and every single one testified that nothing in my accuser's behavior/demeanor indicated that she was blacked out, incapacitated, or otherwise unable to consent. However, despite this total dearth of corroborating evidence, I was still found "Responsible" on nothing more than my accuser's word. The codification of the presumption of innocence would have ensured that students like me were not denied access to our education until the evidence firmly demonstrated that he was guilty of misconduct.

Student 6 **July 2020**

In April 2017, 2 weeks before his last final exam, my college age son was summoned by the Title IX office and informed that he was "charged" with sexual assault contact and sexual assault intercourse. The charge stemmed from a consensual encounter that occurred 6 months prior and was determined by the person who was to investigate and make the ultimate decision of responsibility. In this single person, the university Title IX officer, lay my son's academic and professional future, as well as much of his emotional and psychological stability.

Under the regulations promulgated by the current Department of Education, this would have never been acceptable. The presumption of innocence, a basic right for all people, would have precluded a situation where a person was charged, thus presumptively responsible in the charging body's eyes, for an offense, before an investigative process even commenced. A presumption of innocence throughout the process, with the burden of proof on the school, requires that there be evidence upon which a decision is based, and that the accused be given the opportunity to know and challenge the evidence in his or her own defense.

In my son's case there was no reliable independent evidence upon which to base a decision. There was no physical evidence indicating assault; on the contrary, all available physical evidence, including photographs, show a smiling young lady immediately after her encounter with my son and before her personally recounted 2 other sexual encounters that same night.

The only 'evidence' held against my son were the statements of the accuser and her friends, which contained many contradictions and indications of unreliability. Nonetheless a decision of responsibility was made on the sole basis of 'credibility.' The decision was made through a single-investigator model in which the investigator makes a decision regarding responsibility in lieu of a hearing before a neutral panel of decision makers. This injustice was compounded because the investigator was accountable to no one but herself as she was also the Title IX director and coordinator. Having made public Facebook posts deriding neutrality and promoting a video likening college campus to hunting grounds for sexual predators, there was little chance she would conduct a fair process.

My son was charged, investigated, and questioned without ever having been informed of the allegations made against him and given the opportunity to respond. The new regulations would have ensured his right to defend himself against allegations by requiring he be informed with sufficient precision of what he was accused of. Without a hearing and the ability to cross examine adverse

witnesses and testimony in real time, he had no means to defend himself against false accusations.

The regulations requiring equal opportunity for parties and their advisors to review the evidence would have protected my son's rights in the same measure as those of the accuser. While his statement was included verbatim in the evidentiary file, only the investigator's summarized narrative of her impressions of witness testimony was presented for my son's review. He had no opportunity to hear or even read the actual testimonies of the parties to challenge them and assert his credibility in contrast to theirs. It was obvious from the reported summarized statements that either the accuser was given access to my son's statement before she "finalized' her statement (after the investigation concluded) or that the investigator, in her summaries and reports, manipulated the accusers statement to address my son's statement regarding the encounter. With a live hearing this could not have happened.

In the whole process, my son was interviewed once, and was the last person to be interviewed. How would an investigator be able to examine claims of the accuser against those of the respondent if without questioning her considering the respondent's statement? My son was branded a sexual predator, with no live hearing or impartial decision making panel, on the mere whim of a biased and incompetent employee who, despite her law degree indicative of knowledge of basic rules of evidence and procedural fairness, violated the governing guidance issued by the OCR in September of 2017, as well as institutional procedures and promises of fairness, timeliness and adherence to obligations to Title IX and the Cleary Act. There was no semblance of investigative thoroughness, neutrality, opportunity to prepare a defense, procedural due process guaranteed to both parties.

My son was subject to retaliation in the form of another accusation by one of the accuser's friends for having presented an appeal that raised procedural irregularities and was subject to another equally flawed and procedurally corrupt process. The realization of what was happening to him provoked a suicide attempt. He was Baker Acted and hospitalized for 3 days.

Unlike the female complaint who had the free support and advisory services of Project Safe, under the direction of a self-proclaimed feminist activist juris doctor, our single income family had to spend $25k to defend our son from an overzealous and unfair process that threatened not only my son's educational and professional future, but also his very life.

Student 7 **July 2020**

My son went through the TIX process while he was a college student and the experience has forever changed our entire family. Compared to other accused students we have come to know, he was one of the fortunate ones. It was the *process* that was the most devastating and life altering. I will try to be brief in giving you key details and how the Department of Education's new regulations would have provided for a fair process for both my son and his accuser. I have included in red text parts of the new regs that would have had a positive impact on how the process played out.

My son was on the track and cross country teams. In September 2016, he received an email from the TIX coordinator stating that she had gotten notice that he *may* have been involved in a sexual assault involving another male student (a person my son has never met and my son is not gay). He had no idea what this was about and thought it must be a mistake, so his reply was "I don't understand. Have I done something wrong?" At this point, he was not overly concerned. The response to him said that his name was given as the perpetrator and the incident took place in 2014- OVER TWO YEARS FROM THE TIME HE GOT THIS NOTICE. My son was told he needed to meet with the TIX coordinator and the school would provide an advocate for him.

The coordinator was an employee of the school's women's center and a victim's advocate. The new Title IX regulations would have required that the coordinator, investigator or any person designated to facilitate an informal resolution process to be free from conflicts of interest or bias for or against complainants or respondents.

My son received the investigative report, which he sent to me. We were confident that this could not move forward. I will highlight some of the reasons why:

- The report said the alleged sexual assault took place between March and April of 2014. Due to the broad range of dates and two years that had passed, this made it impossible for my son to have any witnesses or an alibi. How can this even make sense? A person has a traumatic experience and they can only narrow it down to a TWO MONTH time period?

- No investigator could pursue this as a legitimate claim, so we thought. However, we did not realize the money the school could lose by dismissing this claim.

The accuser offered 3 witnesses, 2 of whom stopped responding to the TIX investigator. The 3rd "witness" was a past friend and stated in the interview that the accuser DID NOT CALL THE ENCOUNTER A SEXUAL ASSAULT. The interviewer asked what the perpetrator's name was and his reply was that he did not remember. THE INVESTIGATOR THEN ASKED THIS WITNESS IF THE NAME WAS "JOHN DOE". THE WITNESS SAID-YES THAT SOUNDS RIGHT. This is leading the witness to get a desired response. The new regs require training on how to conduct an investigation, how to serve impartiality, including how to avoid prejudgment of the facts, conflicts of interest and

bias. There must be a presumption of not responsible.

This is just a small portion of what we went through. Can you imagine a 20 year old having to read a report to his mother about a completely fabricated event that contained details of a sexual encounter with another male? My son is not gay; this was humiliating.

However, we live in the United States where there is supposed to be due process. We did not see any way this could move forward. How can anyone be expected to defend themselves from an incident that allegedly occurred almost 2-1/2 years prior in a two month time period?

I called a local attorney to reassure myself that we indeed did not need legal counsel. My heart dropped when he told me that schools care about losing hundreds of thousands of federal dollars more than they do about the students & that he would not be able to speak at the hearing, so we would be wasting our money to hire an attorney. It's a hopeless feeling knowing that the truth is not a priority. The new regs require that the decision maker must permit each party's advisor to ask the other party and witnesses all relevant questions & follow up questions, including those challenging credibility. Parties can be in separate rooms and only relevant questions may be asked.

We were extremely fortunate that the accuser did not show up at the hearing and we learned that he was not even a student at the college at the time. My son was found not responsible, but the effects of the process have been life altering for our entire family. He could not have the option for dismissal or mediation of his complaint. The new regulations provide for dismissal of a formal complaint, at the school's discretion, if the complainant informs the TIX coordinator in writing that he/she desires to withdraw the formal complaint or allegation. The new regs also have the option of mediation.

I appreciate your time and would be more than willing to speak with you or provide additional information. I am hopeful that because of the changes made by the department, all parties will feel that they had a fair process.

Because my son's investigator was a victims' advocate for the Women's Center, there was bias from the beginning. Had the new regulations been in place, my son would have at the least been on an equal playing field. The new regulations require that the coordinator, investigator or any person delegated to facilitate an informal resolution process must be free of conflicts of interest or bias for or against complainants or respondents. This protects all students.

My son has given his consent to tell this story anonymously.

Sincerely,

A Mom

Student 8 **July 2020**

I am writing on behalf of my family to express our deep concern for the process by which the Title IX violations are handled. I say on behalf of my family because it didn't just affect my son but included siblings, aunts, uncles, cousins and grandparents. It also included his friends, teammates both past and present and all of the parents who have been following him for years. This is a big deal and not just for our son.

As with most of the other families in this situation, it began with an early morning phone call with our son in tears. His coach text him to say he was suspended from this team for a sexual harassment complaint and that he could not tell him any more information. Needless to say, he was blown away.

Thank god my daughter works for another university and was privy to a flier on the subject of sexual harassment that included a link to the FACE website. I called to find out if I needed to talk to a lawyer before or after the school rendered a decision. They strongly advised I find someone immediately.

Again, thank god we did because our lawyer was a lifesaver for us and our son.

My son was able to prove almost immediately that he did not initiate the email chain where the girl said she was harassed. In fact, he was able to prove that SHE started it but, as we came to find out, with the kangaroo court that handles these complaints at the university level, there is no common sense allowed in the process.

The people at the university that handled the situation were all 'interim' ; we never knew what was going on, when he met with the 'investigator' for the first time the advocate assigned on his behalf told him he was 'screwed'. Once we hired an attorney the proceedings were amazingly elevated to a school lawyer showing up at the 'hearings' but only to protect the university and still not a process you would find in a real court of law. As it turned out, when it came down to the final 'hearing' the people on the panel had not even read the investigator's report!

It is a broken system. I do not expect that sexual harassment and other sexual violations were what was expected when Title XI was implemented. We never expected to pay thousands of dollars to exonerate our son from something that would have taken 30 minutes in a real investigation with people who are trained in this sort of thing to figure out. The havoc it wreaked and the emotional toll it took on our family and community was mind blowing to all that hear about it.

There has to be a better way.

Student 9 **July 2020**

We are writing to you about the violation of both civil and constitutional rights occurring to many of our outstanding male students on college campuses nationwide due to the Obama administration's Department of Education's (DoE) Dear Colleague Letter (April 4, 2011), which lowered Title IX standards for colleges to receive federal funding. In order to receive federal funding, this DoE guidance (in reality a directive) forces colleges to aggressively pursue sexual misconduct allegations, strips the accused of both their civil and constitutional rights, and lowers the standard of responsibility from beyond a reasonable doubt to only "a preponderance of the evidence/information"; however, how the standard is being applied, with a lack of due process, it is even lower than preponderance of the evidence/information, i.e., you are assumed guilty or responsible until you prove your innocence.

In February of this year, our son was falsely accused of serious sexual misconduct allegations by a disturbed and delusional lesbian girl who has been documented as having intrusive thoughts and memories and has claimed the same sexual misconduct allegations concerning five other men. These false allegations against our son were claimed to have occurred off-campus; however, the University's Dean's office (a.k.a., Title IX Office) informed our son that he was being investigated for potentially violating their Code of Student Conduct prior to having official approval to investigate by the University's Vice President of Student Affairs.

University "investigators" summoned our son to appear before them for questioning. An advisor of his choice could be present during the questioning, but could not speak during the process. The cost of legal representation for this ranged from $5,000 to $25,000 just for the attorney to be present during the "investigation" or, as the attorneys kept calling it, a "kangaroo court." Being a middle class family, we could not afford legal representation; therefore, our son's father, had to take off work, travel to the school, get a hotel, and assist him in preparing for and advising him during the investigation.

Despite our son having receipts, character statements, information from his fiancée, and other items to prove his innocence, and the fact that his accuser, the complainant changed her story drastically three times during the investigation process (which we learned through the investigator's report), the university charged our son with serious sexual misconduct allegations (sexual contact, sexual harassment, and physical abuse, which was later changed to dating violence) just to, as the Title IX officer said, "be fair to her." Additionally,

our son's bishop (we are members of the Church of Jesus Christ of Latter-Day Saints) knew the story and the truth about the complainant (as she went to our son's bishop with the intent to create issues between our son and his fiancée) and the bishop requested to be contacted by the investigators. The investigators stated in their report that they saw no need to contact the bishop. As our son's accuser said, as we discovered during this time, her "words are proof enough" as to what she was falsely accusing our son of doing.

Despite the fact that the complainant drastically changed her story and the fact that our son presented hard evidence to prove the accusations were false, our son was summoned to appear before a Disciplinary Panel. Between the time of the investigation and the Disciplinary Panel, the complainant harassed, stalked, and attempted to publicly humiliate our son and his fiancée, while the university was unwilling to address this conduct with her because "that is her right"; however, our son was not allowed to address her behavior because "that would be intimidating to her."

With the Disciplinary Panel, again, an advisor of our son's choice could be present during the conduct panel, but could not speak during the process. And, again, the cost of legal representation for this ranged from $5,000 to $25,000 just for the attorney to be present during the conduct panel, or as the attorneys (including the local County attorney's office that we later visited who called the process an embarrassment) again kept calling it a "kangaroo court."

Before the panel hearing we, the mother and father, had to take off work for several days a week for several weeks, travel to the school, get a hotel, and assist our son in preparing for the conference panel and provide our son with much-needed emotional support (as well as his fiancée providing emotional support) during this entire ordeal. Due to our son facing suspension or expulsion, our son's, his fiancée's, and our health suffered (lack of sleep, the loss of appetite, as well as, the emotional and physiological stress at home, work, and school). We collected an enormous amount of evidence that would have beyond a reasonable doubt shown that our son was not responsible for any of the false charges brought against him by the complainant. All of the evidence (including character statements) that we had collected for my son to present had to be submitted to the Title IX office prior to the conduct hearing for their review.

On the day of the conduct hearing our son's father had to serve as our son's advisor; however, he was not allowed to speak during the conduct hearing. Our son, who is 19 years

old, had to represent himself while his accuser, who our son was not even allowed to face or cross-examine for “her protection” and for the “emotional stress” that would be inflicted on her, was represented by the Title IX Officer and the Title IX Attorney Coordinator, both seasoned professionals.

Three university panel members were chosen to hear and determine our son’s case. When our son was provided back the evidence (including character statements which were not allowed in the conduct panel hearing) that he had to submit to the Title IX office for review, to our surprise, a great deal of it was redacted, according the Title IX Attorney Coordinator, to provide his accuser (actually the Title IX Officer/Attorney Coordinator that represented the accuser), a “fair chance” and not have her “past reviled” (which according to the Title IX Attorney Coordinator her troubled past is irrelevant) and to “maintain her reputation” and not “assassinate her character.” Our son’s accuser, on the other hand, was given the option to present anything she desired or have the Title IX personnel to present, if she chose to. With the amount of evidence that was redacted and with what our son was not allowed to say, what should have been a very short panel hearing turned into an over 11-hour very emotional and stressful ordeal (8:00 am to approximately 7:30 pm) to convey the complainant’s lies and mental instability. It is by God’s grace alone that our son did not give up in his attempt to show he was “not responsible” for what he was being accused of and charged with.

In the end, our son was one of the few lucky individuals to be found not responsible; however, even to this day, it has taken an emotional, physical, and monetary toll on our son, his fiancée, and us as a family. The university’s lack of concern for due process resulted in my son’s civil rights being violated and his rights guaranteed by the Constitution being violated. Unfortunately, our family is not in the position monetarily to take legal action against his accuser or the university. As our son's mother says, what our son went and continues to go through is similar to the emotional trauma that a rape victim experiences. Our son is the actual victim of Title IX and the April 4, 2011 Dear Colleague Letter.

Thank you for taking the time to read to our concerns and hopefully stopping this unjust epidemic happening to our outstanding male students on college campuses nationwide.

Parents of a wrongfully accused student.

Student 10 **July 2020**

This is a hard letter to write. The accusation against my son happened on Oct 2015 and lasted till December 2017. My son was simultaneously dealing with the TIX and criminal justice processes. It is difficult to separate the two and at times may seem confusing. Imagine being a college student and parents that are not lawyers trying to navigate. A brief synopsis for context purposes; there was no alcohol, no drugs, fully clothed, and no sex, kissing, fondling. There was an unfounded accusation taken at face value. My son was found Not Guilty of a criminal charge and Not Responsible for the TIX accusation.

Flaws in the process began with the first letter. It stated someone would contact him in a few days to talk about an alleged violation. He was instructed not to contact the complainant. A few days later he was contacted by the Campus Detective. The Detective did not tell my son he was a police officer investigating a criminal complaint. My son met with the Detective a few days later with one purpose, figure out what he was being accused of. The Detective told my son that the TIX process was separate from what he was investigating. In early November the school TIX investigator finally sent the second letter to my son to schedule a meeting. This meeting was to discuss “the basis for the belief that you engaged in misconduct and afford you the opportunity to respond”. The decision of guilt was made before any attempt to get my son’s side of the story. It was 33 days, not a few days as the original letter suggested, that he was finally contacted by the TIX investigator about the policy violation in question, still nothing about the accusation itself.

The TIX process at his University included the single investigator model. The investigator’s initial finding was one of Responsibility based on her one sided “belief”. In the code of conduct, since the sanction recommended suspension, the process required a hearing. The panel would be constructed of 3 faculty and 2 students. The hearing was originally scheduled for the week of finals in December. The code of conduct stated the hearing had to be conducted within 45 days after receiving the initial Responsibility finding. The hearing was rescheduled to mid-January. In a strange move, the University scheduled a pre-hearing meeting with my son, his attorney, the Dean of Students, and the University Lawyer to review how the TIX hearing was to be conducted.

Prior to the school hearing the TIX investigator did not notify or provide all witness materials, which were to be provided 5 days before. Notes written by the school investigator were shared after the hearing. At the hearing the school administrators did not follow their

own established rules. The hearing itself was a farce. My son and his lawyers were informed that it was scheduled for 2 hours, with the school taking up much of the time either explaining the process or presenting the accusers claim. The school held firm to their time commitment, leaving very little time for my son's attorney to do just about anything. As the time came to an end, the panel still had questions, but were told they were out of time. My son's accuser was in the same room with him along with her mother, her sister in law, and her school advocate. My son had his two lawyers.

It was communicated to them the Assistant District Attorney was not permitting the school to use the results from the DNA test for the TIX complaint. Due to the criminal investigation, the DNA results that led to the Felony 2 charge came back negative, exculpatory. At one point the TIX investigator used one of my son's friend's statement to represent his statement, since he had invoked the 5th and 14th amendments. When is it acceptable to use hearsay, as a statement for the respondent?

Not surprising he was again found Responsible. The school did provide a recording and we paid to have the recording transcribed. My son now needed to appeal to the University his rejection of the appeal went as far as to say: "I accept the investigating officers' argument that In 2016 my son's school's TIX process had one more appeal to the Board of Regents, it was not time bound. We waited until after his Not Guilty finding in January 2017 to work on this final appeal. It took till October 2017 to file this last appeal to clear his name. It was 16 pages long with 198 pages of exhibits. Every element of her salacious accusation was disputed with evidence. DNA was on our side. The inconsistencies, the omissions of attempts to destroy evidence, the lies or mis-representations to police officers and SANE nurse was included. All the evidence overlooked and disregarded by the school administrations.

On Oct 12th, 2017 the Chancellor was contacted by the Board of Regents "I am remanding this matter to Chancellor for reconsideration. I am requesting Chancellor to carefully review all of the new evidence presented and determine whether the discipline met the standards required by [university] chapter_. The Chancellor should expunge the disciplinary record if the discipline is not sustainable. Regardless of outcome, Chancellor must provide a full explanation of his decision. [My son] may seek the Board's discretionary review of Chancellor Schmidt's reconsidered final decision." – signed by Regent.

In December 2017 – the Chancellor's final decision: "In addition, the DNA evidence,

which was unavailable at the time of my 2015 decision, raises new questions, and does not lend additional credibility to the complainant's account. Upon reconsideration, I am unable to find by a preponderance of the evidence that [my son] sexually assaulted the complainant. Similarly, I am unable to find, by clear and convincing evidence that [my son] engaged in dangerous conduct."

My son struggles dealing with the false accusation. The arrest record does not go away, nor can the stain on his character be erased. What my son went through, no one should have to go through, the depression caused by the process is heart wrenching. On Christmas Eve 2016 I held my son why he cried non-stop for 2 hours after he left work due to his anxiety, he lost his job a week later. He lived in fear while being on bond for 15 months. Fear of people finding out. He lost all his friends and his educational opportunities. It was the rush to believe by the college TIX administrators, Dean of Students office, and the Campus Police that caused my son and my family to live the surreal experience of facing a criminal trial while concurrently dealing with a TIX kangaroo court.

It was the willingness to disregard hard evidence and deceitful behavior of the accuser that led to $150,000 in direct costs to my family. My son was firm in his innocence from the beginning. At every step, there was another person not following their own rules. On one of the challenging days, he asked why was he the only one following the rules.

This process has cost us in so many ways; our health, welfare, trust, happiness, and a significant financial set back.

With humble regards,
A Mother

Student 11 **July 2020**

He was a junior when subjected a Title IX investigation for violation of the Student Code for Sexual Misconduct. The initial charge was digital penetration without consent alleged to have happened in her dorm room on campus. They were in a consensual and on-going sexual relationship for approximately seven months. It was when the relationship was ended that the upset young lady filed the complaint. The incident in question occurred a month in to that seven month relationship.

Our son when contacted by the Title IX Office responded immediately and was interviewed by an investigator the next morning. He was certain that it was a misunderstanding and therefore felt no danger in being interviewed. Bad decision.

The process at the school is the single investigator model with investigators using informed trauma methods. The accuser and her story were never vetted. She was assumed to be telling the truth the entire time. Further, we believe she had undiagnosed/untreated PTSD as her parents died as a result of a violent murder/suicide.

He was not once assumed to be innocent of the allegations. His interview, conducted by a professionally trained former prosecutor (a licensed attorney,) was recorded for the record and was not permitted to be amended, whereas the accuser's story and key facts changed multiple times during the course of the investigation. Witness interviews in support of him were entered as "interpretations " by the investigator rather than actual transcripts. Some key witness testimony was left out until we found out and complained.

The "advocate" assigned to the accuser helped craft a story to meet her often changing memory of events. In fact, when the accuser found out that we retained legal counsel she added a second charge of rape the was alleged to have occurred at my son's off-campus apartment. The accuser's language went from initially suggesting that she wanted no discipline for our son to "he is a monster and needs to be expelled".

These scurrilous allegations and resulting investigation have wreaked havoc on my son and family's life. The investigation, according to the university’s handbook, was to be adjudicated in 60 days, however it took just over 8 months and tens of thousands of dollars in attorneys' fees.

He was ultimately found responsible for the initial charge. In the second charge the accuser was not deemed credible. We appealed the decision and lost.

He was given a one semester suspension, in the middle of Spring semester. The result of which meant the 18 credits he was currently taking were to be lost and he was not welcome back to campus until 01/01/2020, essentially a 3 semester suspension if you include the summer courses/lab job he had lined up for that summer.

We appealed the sanction and sort of won. He was given a deferred suspension where he could have full access to the campus and follow a program instituted by the Title IX office. He successfully completed the program and graduated a semester early in December of 2019.

The whole process resulted very significant costs, in addition to the money we put out travel, hotel and legal fees. He has been suicidal, withdrawn, angry, sad, embarrassed, isolated, and shocked that a relationship turned sour could potentially ruin his life. We are absolutely shocked and outraged with this entire process.

Student 12 **July 2020**

A year ago I was preparing to go back to college. I was recruited to a D-III athletic team, fulfilling a long time personal goal of playing sports on a collegiate team. I was going to be a Resident Assistant, and was thinking about long term aspirations such as a masters' program, a potential Juris Doctorate, and thoughts as to what I may want to do after college. I (admittedly) lacked clarity as to what I wanted to do, knowing only that I wanted to help people. I was outgoing, a strong public speaker, and, if I'm allowed to be a touch self-aggrandizing, an intelligent political science student, who had had professors base multiple classes off of research papers I had written. I had worked hard for everything I accomplished, and prided myself upon that.

These aspirations came to a shocking halt mere weeks after my return to school. I heard I was going to be involved in a Title IX investigation not from the school itself, nor from the other party involved, but instead through my friends. Indeed, it appeared that I was one of the last people on campus to be notified ...

What followed were two weeks of personal hell. I was threatened, assaulted, cut off, and ostracized. My friends were stopped by people I hardly knew in the cafeteria, and still other friends refused to hang out with me in public, specifically citing fear of social retribution. I left the school, and returned home, not out of guilt but out of a fear I have not experienced before or since. I have spent the past 10 months trying to bring my life back together. Despite the promise from the school that the process would only take 45 days max, it took eight months. Eight months of waiting, interviews, written statements, and a deep, lasting trauma. Trauma that drove me towards substance abuse, suicide, and an ingrained fear in my psyche. I am no longer a fearless public speaker, nor is a masters' program likely on the table. Instead, everything I worked so hard for was destroyed the moment I left the school.

I was found responsible at the start of quarantine. I stand by my innocence, and will do so for the rest of my life, but I am not going to argue the specifics of my case. Every time I talk about the case I am in a state of perpetual anxiety for days, and the more specific I get the worse it is.

I am shaking writing just this.
I became a political science major for one reason: I knew where my skills lie, and I want to help people. I saw political science as the best track to line those two facts towards a successful career of doing good. In class, we learned about justice being blind, about the unerring neutrality of the American justice system. After all, isn't that fundamental to American ideals? That no matter how

distasteful the statement, the act, the alleged crime, you will be guaranteed a fair hearing. The Title IX process shatters that illusion.

The head of Title IX was actively unhelpful, to a degree which would shock even those who wish to revoke the new Title IX changes. He broke policy on multiple occasions to allow my accuser to write a character assassination against me, in which she attempted to deeply analyze my supposed character flaws, theorizing how these led to me committing the supposed act. That is not justice, it is not even a poor facsimile of the word. It is instead a pipeline, a system which funnels in young men, disregards any and all legitimate claims to innocence, and equates a homogenous end result of expulsion or severe punishment with a fair process.

Title IX is one of the most important pieces of American legislation for equity in colleges ever introduced. It has allowed women who have experienced the horrors of assault to speak their truths in a comfortable, safe environment. As a survivor of rape and a victim of sexual assault as a 12 year old I see the importance of Title IX, and had either of these situations occurred between myself and a college classmate, I promise you I would have used Title IX. But it is unacceptable to allow Title IX to continue the way it has.

Had [the Final Rules] been introduced when I was going through this process, I would have been able to defend myself, I would have been able to speak my truth, and I would have been presumed innocent, something which is a cornerstone of any developed nation's justice system. I don't deal with what ifs, so I will not say that the final outcome would have been different, because I simply do not know, and doubt I ever will. However, what I can say is that I would have been able to stand on my own two feet, speak my truth, and defend myself the way every person deserves a right to do.

Justice is not Title IX, but it can be and should be, for those accused, but more importantly for those who have been raped and assaulted on campuses, because it will allow them to speak their truths without existing in a phony court, so that they can leave a Title IX hearing with the full confidence that, no matter what, the decision made was just.

Student 13 - Elliott Pitts **July 2020**

TITLE IX INJUSTICE ON CAMPUS
Andrea Pitts (Mother), Elliott Pitts (Falsely Accused) Dublin, CA

The details I've chosen to bring to your attention regarding my son's situation are important. It will make this letter longer than others you may receive, but it's important for you to read about the event in question, the pursuit of my son by the accuser during this event, and the resulting action taken by a biased and over-reaching Title IX Administrator. Individual circumstances matter greatly, and I appreciate your time and attention to the last 18+ months of our family's life. If it wasn't so personal, it might make for a great novel. Unfortunately, it's non-fiction.

Elliott was in his 3rd year as a 4-year Scholarship Athlete (Basketball) at the University of Arizona. It was his dream school and one that would prepare him for a professional career in basketball and eventually coaching. During the pre-season of his Junior year, in the early morning of December 6th, 2015, the team arrived back from Spokane, WA, after a huge win against Gonzaga. Elliott's roommates were throwing a party in their off-campus apartment. Most of the basketball team arrived at the party. There were also members of the female Volleyball team in attendance. One of these volleyball players was the sister (call her 'Jane') of Elliott's roommate. These siblings were also part of a family we had become very good friends with. Everyone was drinking, having a good time – typical college party. Elliott was sitting on the couch playing video games with one of his teammates. The sister and her teammates were socializing around the apartment, joking with the guys, again, typical college party.

Witnesses told investigators that Jane had been pre-drinking prior to arrival of the party, and Jane admits to having multiple drinks (4-5) prior to the party, and said she normally drank more. Witnesses also claim Jane was very flirtatious with some of the players, eventually flirting with Elliott, who took the bait. They had been flirting over the past many months; however, for various reasons, had decided to not 'hook up'. At this party, however, Jane proceeded to sit down next to Elliott on the couch (where he was playing video games with his buddy), and put her hand on his crotch. They started kissing, and he suggested they take this to his room, which she agreed to. She then asked him to get a condom, which he did, and he put the condom on. She then proceeded to get on top. They had sex, which during the act, Elliott claims she was an active and verbal participant. Once the act was complete, Elliott left the bedroom where Jane proceeded to fall asleep and he fell asleep on the front room couch.

The brother, partying at another bar, found out Elliott and Jane were hooking up. He came back to their apartment in a rage, found Jane naked in Elliott's bed, and proceeded to take her to her dorm room where he left her in her bed. He called his mom to let her know what was happening and the mother told him to go back and sit with his sister until she could get there. The brother tried to get back in the dorm, but the Resident Assistant wouldn't let him – dorm rules - if Jane wasn't available to let him in herself. That is when this brother said the words, "I have to see my sister, Elliott Pitts just raped her".

As you might imagine, this started a ball rolling that we couldn't have ever imagined would happen. What then proceeded, I will sum up, until we get to the point that the Title IX Administrator gets involved. The R.A. reported this to the University police as well as the Tucson police. Elliott could stay on the team but not play while the criminal investigation was taking place, which would eventually lead to Elliott leaving the team because of the emotional and mental anguish and anxiety he would suffer. Elliott was criminally investigated and after 20+ interviews, review of the U of A camera interview of Jane where she said 'it was consensual….', a rape kit being done with no findings of rape, and eventually Jane telling police she didn't remember what happened, Elliott was not charged. This was a huge load off our minds; however, little did we know, the worst was yet to come with the Title IX process.

The criminal finding of not-responsible came early January. During this time, we met with the Title IX Administrator, Susan Wilson, 2 different times to try and understand the process she would be following because it did not match the U of A Disciplinary Procedures we found on- line. The most notable items to highlight during these meetings were: 1) We questioned the actual Charge Letter sent to Elliott with a link to the U of A Disciplinary Procedures (Policy 5- 403). There were clear time-lines to be followed regarding giving Elliott the actual charges and allowing him to respond. These dates had come and gone. When we asked Ms. Wilson about this, she said that because …**" *she was representing Title IX, she didn't have to follow these dates/timelines and would proceed without these limitations in her investigation process. "***

I shared with her our frustration in this because it's not what the Charge Letter stated. ***Her response was (verbatim): "I know, it is a bit confusing***".

At our 2nd meeting with her, I brought out a copy of the Charge letter and told her we had some questions on the charges – ***specifically Codes of Conducts 2, 17, and 20 (regarding stalking, etc.). I asked her if in fact, Mia stated Elliott had done these things or that she had in fact through her interviews with others, if they had seen Elliott do any of these***.

She specifically said "no". She told us that in cases like this, where there was possible Sexual Misconduct or assault, quite often, these other actions do come out in her investigation process, so she will (verbatim) "add these to broaden the scope of her investigation".

During this very emotional time – even after the Toxicology report came back – we asked our lawyer**…" How was Elliott to know she was that drunk? SHE approached him…. . SHE was chatty and social in the party…. SHE asked him to get a condom… SHE mounted him……. How was he to know?".** Our lawyer's answer was something like: "She could have been doing perfect cartwheels and somersaults throughout the apartment, but it would not have mattered…". The fact is, they should both be held accountable for their actions, but drunk sex does not equal sexual misconduct / assault.

As the deadline for the appeal Hearing approached, and after finally seeing Ms. Wilson's personal notes from the interviews, and her corresponding biased opinions, as well as other actions (i.e. denial

of our objections of the 2 student's on the panels due to extreme bias; Susan Wilson's continued inclusion of 3 of the 4 un-proven charges in the final violation charge as well as the other egregious examples of Elliott's rights being non-existent), we felt Elliott had no choice but to accept a 'plea' opportunity he was given by the accusers family and U of A, to finish out the semester, agree to the 1 year suspension, and not lose his NCAA eligibility to play elsewhere and move on with his life. As part of the Plea deal, these charges would not appear on his transcripts and only would be available if Elliott gave permission. Little did we know, that although 18 Division I colleges were approached regarding Elliott being available for transfer and to play basketball, 100% of these colleges passed, due to the current climate. The college administrators didn't want any negative attention that might come with Elliott's transfer.

Since this time, the accuser's family has publicly 'outed' the agreement Elliott signed with the family and the school. They sent it to hundreds of U of A basketball alumni and parents, as well as reaching out to Tucson journalists and ESPN to tell their side of the story. The story has appeared in more 'local' papers as recent as last weekend, but ESPN declined to run the story once they heard Elliott's side of things. Still, at this time, it is the #1 search result when someone search's Elliott's name and the University of Arizona. Only recently has Elliott been comfortable to be more social and start hanging out with friends; although, he is very cautious about trusting girls and dating again.

Other notable items looking back:

1- We were never aware we could open an OCR claim against Susan Wilson, the Title IX Administrator. Once we had heard from other families about this, the time-frame was well past the 180-day limit.
2- Our lawyer is the lawyer brought in to meet with each in-coming male athletes for every team, to talk with them about behavior, sexual conduct and so on. He has represented previous male athletes caught up in the Title IX system, and felt based on Elliott's situation, in comparison to these others, Elliott would likely be found non-responsible, but might have to give up a summer session; thus, he was flabbergasted, as were we, when a 1-year suspension was the charge Elliott was given.

At this time, my son is finishing up Community College and had to watch his beloved team win the Pac 12 Championship in February 2017, without him. He would have been a Senior and starting #2 guard. Instead, he was doing his Community College homework on our couch at home. This has been devastating to our son, our finances (~178k spent so far), and our family. We hope and pray that you, and those around you that can change this madness, have the strength and resolve to do so.

Thank you again, Andrea Pitts

1 RELEASE OF THIS LETTER TO ANYONE PERSON(S) OUTSIDE OF THE OFFICE OF CIVIL RIGHTS OR FACE REQUIRES PRE-APPROVAL BY THE PITTS FAMILY – ANDREA & JAMES PITTS, DUBLIN CA.

Shelley Dempsey, FACE Vice President **July 2020**

The Final Rule amending Title IX of the Education Amendments of 1972, 34 CFR Part 106, must go into effect, as promulgated, on August 14, 2020.

My concerns are both personal and professional, since I write not only as the parent of a son who was falsely accused and then cleared during the 2010/2011 academic year at a top university, but also, as a former federal regulatory attorney for the Federal Communications Commission and later as an attorney in private practice for a large DC firm with regulatory matters before the FCC, EPA, FERC, and EEOC.

Currently, I serve as the Vice President and Intake/Outreach Chair for Families Advocating for Campus Equality (FACE) a 501 (c)(3) Non-Profit Organization that supports and advocates for equal treatment and due process for those affected by inequitable Title IX campus disciplinary processes. Consequently, I followed closely the Notice of Proposed Rulemaking, submitted personal Comments and eagerly awaited the Department of Education Office of Civil Rights' Final Rule.

Neither the 2011 Dear Colleague Letter (DCL) nor the 2014 Guidance under the prior Administration were subject to rigorous public debate through statutory notice and comment requirements under the Administrative Procedure Act (APA); they also lacked the force of law.

Prior guidance created a draconian punitive system holding students responsible for myriad minor infractions or other ill-defined offenses deemed sexual harassment or misconduct. The quasi-judicial “campus courts” became a dragnet that ensnared many innocents falsely or wrongfully accused students while never satisfying “survivors” nor actually tackling the root causes of sexual harassment and sexual misconduct on campus. Lives have been irreparably harmed with life altering consequences on both sides of this debate. While this Final Rule is not perfect it goes a long way toward correcting the confusing and unfair past guidance that dissatisfied complainants and respondents alike.

In my role as Vice President of FACE and especially as Chair of the Intake/Outreach Committee, I am privy to the stories of hundreds of families whose children have been through horrific experiences at the hands of biased campus administrators resulting in life altering consequences and debilitating ongoing critical emotional health issues. You doubtless will be reviewing many of these stories. The number of families reaching out to FACE has increased exponentially. Since September of 2014, we have been contacted by nearly 2000 families. All of these families have been caught in the DCL web of ridiculously vague definitions of sexual misconduct, lack of due process and low burden of proof and often investigated, judged and sanctioned by a single individual.

Educations have been lost, job offers and admissions to graduate schools rescinded and professional licenses unattainable even in cases where the accused student ultimately is found not responsible. Many of the FACE families are unable to afford legal counsel and, for those who can, the cost of defending against a false accusation in a Title IX disciplinary proceeding can prove financially devastating. Without counsel or a specially trained Title IX experienced advocate, the chances of a falsely accused student being found not responsible is frighteningly low. Frankly, it has been absolutely heartbreaking to hear these stories day after day.

While numerous groups supporting the rights of survivors abhor the new regulatory scheme and falsely assert that instances of false or wrongful accusations are "exceedingly rare", FACE knows from documented experience that there is another equally compelling argument that false/wrongful accusations are actually quite common and hopefully will be better addressed under the Final Rule. The DCL and its vague definitions of sexual misconduct and harassment resulted in myriad Title IX complaints for conduct ranging from innocent hugs or kisses without prior permission even if well meaning, to regretted sexual encounters, to coverups for infidelity, to revenge for difficult relationship breakups, to foggy memories due to drug or alcohol use, to failure to ask for consent for each and every act according to unworkable affirmative consent rules, etcetera, often days, weeks, months, or years after they actually occurred.

FACE Experience With Families of Students Subjected to False or Wrongful Accusations and Resulting Life Altering Consequences

FACE Intake Vetting Process: FACE has a rigorous vetting process for families who call or email the organization for support requiring personal contact information and a statement of their situation before gaining access to its information and outreach. The stories almost always follow a pattern of accusations as described above and disciplinary processes that are utterly lacking in due process or fairness as well as sanctions that often clearly are entirely out of line with the behavior alleged by the complainant. While there have been a few instances where FACE has declined support, the vast majority of cases d0 have the hallmarks of false or wrongful accusations.

FACE by the Numbers: Face receives call or emails from accused student families at an average rate of 4-5 per week. Following new student orientation (Sept/Oct), Finals weeks (December/May), Take Back the Night activities and events (January), Sexual Assault Awareness Month activities (Late Mar/Apr) FACE can tally up to 20 new families per week. While the heightened awareness from these programs encourages reporting for all the right reasons, it also leads to reports that are misleading, false or wrongful. Since the release of new guidance and rescission of the DCL, hundreds of lawsuits have been filed against

Colleges and Universities and numerous courts have and are continually ruling in favor of accused students whose rights have been denied. In some cases, the complainants have been held civilly or criminally liable for false accusations. Since 2017, nearly 1000 new families have sought FACE support with over 100 since January 3, 2020.

Title IX Accusations at the K-12 Level: Before 2016, FACE was aware of perhaps a dozen cases of younger students accused, suspended or expelled for behavior that never should have risen to such procedures or sanctions. Since that time over 100 families of K-12 students have sought support from FACE. These stories, too, are heart wrenching, and currently average 4 or 5 contacts per month. These cases have involved students as young as 6 where typical playground games have been recast as disturbing accusations of sexual misconduct. " Tag" and "Hide and Go Seek " can suddenly become described as sexual assault and stalking and, as ridiculous as that sounds, these cases actually exist at FACE. At the high school level, the allegations are very similar to those in Higher Education and similarly the schools have provided little to no due process and generally are biased in favor of complainants. The #Metoo era and "Start By Believing" campaigns have led to unfair outcomes for this generation of students resulting in damage to reputation, education and emotional/mental stability. The Final Rule should lead to better and more equitable procedures and protection for both complainants and respondents at the K-12 level.

Students with Disabilities: Another disturbing trend in FACE intake cases involves students with various disabilities (ADD, ADHD, Autism Spectrum) who are accused of harassment, stalking, unwanted touching, or simply being "creepy", thus leading to complainants making accusations of feeling uncomfortable or unsafe on campus. Under the prior guidance and school procedures, these students often were subjected to processes they could not navigate without coordination with advocates trained under the Americans With Disabilities Act (ADA) and in compliance with the Individuals with Disabilities Education Act (IDEA) requirements. FACE families have experienced extraordinarily difficult procedures that almost ensured that their student would face crushing sanctions and untold emotional distress. The new rules provide for compliance when there is an intersection of provisions of the Civil Rights Act of 1964, the ADA and the IDEA that should protect these students and ensure fair procedures.

Diversity, Equity and Inclusion (DEI): The prior Title IX regime and current arguments against the Final Rule actually fly in the face of DEI. Cases at FACE have taught us that students of color, first generation students for whom English is not their first language, international students who are accustomed to varying and unfamiliar cultural norms, as well as students in the LGBTQ+ community are more likely to be disadvantaged by not implementing the Final Rules. Without access to advocates who can actively participate and guide them through their often complex fact sets achieving a fair outcome is extremely difficult.

Students enrolled in Graduate or Professional Schools: False accusations or flawed procedures leading to wrongful sanctions under Title IX have disastrous consequences for students whose graduate educations have been earned over many years and are subject to licensing authorities for entry into their chosen fields. Title IX notations on their academic records are often an absolute barrier to entry into their careers. Therefore it is imperative that any accusations are subjected to rigorous investigation and ability to judge credibility before causing life altering and career ending consequences. FACE receives call and emails from numerous students each year whom are at the end of their educational paths and even days before graduation or taking professional exams are suddenly upended by unwarranted accusations under Title IX.

Faculty, Employees, Administrators accused of Title IX and Title VII Violations: At both K-12 and College/University institutions, faculty members, teaching assistants, coaches and administrators have been accused of Title IX misconduct and subjected to the same flawed procedures under prior guidance. While horrible stories of abuse have made headline news over the past few years by a few members of this cohort, there is also another side of this issue that has largely been ignored by media and social activists. Title IX (often accompanied by Title VII issues) disciplinary proceedings involving this group of accused have been equally flawed and have resulted in life altering career ending consequences following biased, unfair procedures under the prior guidance. FACE has been contacted by dozens of these accused individuals and their numbers are now exploding in the #Metoo era and especially now among those who seek to "cancel" individuals with whom they disagree and claim that such disagreements create hostile educational or unsafe environments under Title IX. FACE expects to see a flood of new cases involving this group of accused individuals.

After 10 years of personal and professional experience with the adverse effects of flawed campus disciplinary proceedings, educational harm, reputational harm and potential lifelong effects on future employment, I am passionate about the need for final implementation of the Final Rules amending Title IX of the Education Amendments of 1972. It is clear that the DCL and guidance recommended under the Obama Administration served neither complainants nor respondents. Rules that require equitable procedures, rigorous investigations and the ability to test credibility of all parties according to the rule of law are urgently needed. Therefore, I urge removing any barriers to the August 14, 2020 effective date for implementation of the Final Rule.

Respectfully,

Shelley S. Dempsey