



National Coalition For Men Carolinas (NCFMC)

Date: March 2, 2018

To: Betsy Trice
Attorney
Office for Civil Rights (OCR)
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-1100

From: Gregory J. Josefchuk
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National Coalition For Men Carolinas (NCFMC)
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Dear Attorney Trice:

The National Coalition For Men Carolinas (NCFMC), a chapter of the oldest men's human rights organization in the United States, is submitting this complaint on behalf of students enrolled in the University of North Carolina system (UNC) and on behalf of North Carolina taxpayers.

Educational institutions have a responsibility to protect every student's right to learn in a safe environment free from unlawful discrimination and to prevent unjust deprivations of that right. The Office for Civil Rights enforces several Federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education (ED).¹

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance.

Programs or activities that receive ED funds must provide aids, benefits or services in a nondiscriminatory manner in an environment free from discriminatory harassment that limits educational opportunities. Such aids, benefits or services may include, but are not limited to, admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, and housing.²

¹ <https://www2.ed.gov/about/offices/list/ocr/docs/howto.html>

² *Ibid*

Postsecondary institutions, both public and private, in the state of North Carolina have a rich legacy of male discrimination. One needs to look no further than the inequitable treatment and injurious bias male athletes accused of sexual misconduct received at the hands of Duke administrators and faculty in regard to the now infamous Duke lacrosse player's case in 2007.

By the time that the Duke lacrosse case was becoming a national sensation, the legal and cultural pendulums had swung so far as to invert the hallowed presumption that people are innocent until proven guilty.³ As the prominent broadcaster Dennis Prager stated in regard to the treatment the accused male students received from Duke, "Eight-eight professors, abetted by Duke's president, created a mob mentality against the young men not unlike that of a lynch mob."⁴ The Duke lacrosse case reminds us that false accusations of sex crimes do happen and that the wrongly accused are the real victims – even when affluent, white and male.⁵

Sadly, this legacy of directed hostility against accused male students, including an abandonment of the presumption of innocence for male students accused of sexual misconduct and a complete deprivation of due process is well ingrained at both private and public postsecondary institutions of higher education situated throughout the Carolinas region.

Bias directed against male students related to sexual conduct is commonplace and visible to students, faculty and university administrators as demonstrated by posters recently plastered across a Carolina university campus (illustrated in the image below).



³ Stuart Taylor Jr. and KC Johnson, *Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case* (New York: Thomas Dunne Books / St. Martin's Press, 2007)

⁴ Dennis Prager, "Duke Lacrosse Scandal: Eight Lessons", *Column*, April 24, 2007 (<http://www.dennisprager.com/duke-lacrosse-scandal-eight-lessons/>)

⁵ Cathy Young, "10 years later, the legacy of the Duke lacrosse scandal", *Newsweek*, March 14, 2016

Notice that in the narrative Jake (the male student) was drunk and so was Josie (the female student). Jake and Josie “hooked up” but only JAKE was charged with rape because as the poster clearly states “A woman who is intoxicated cannot give her legal consent for sex, so proceeding under these circumstances is a crime”.

In an article highlighting this injustice, journalist Ashe Schow points out the absurdity of the biased narrative that this poster promotes by asking “Have you ever had sex after consuming alcohol (any amount)? If so, then you're a rapist – or rape victim, depending on your sex.”⁶

It is within this context, that is of male college students experiencing bias based on their sex, along with credible evidence our organization has uncovered pointing to biased, inequitable Title IX investigations conducted by University of North Carolina (UNC) schools, that provides the backdrop for NCFMC issuing this formal complaint to the U.S. Department of Education Office for Civil Rights (OCR).

Specifically, we are requesting that OCR open an investigation into the University of North Carolina system and their respective public schools to:

1. Investigate *systemic bias based on sex* by UNC employees against male students accused of sexual misconduct or harassment.
2. Investigate why male students *accused* of sexual misconduct or harassment are routinely **denied the ability to participate in or benefit from** their school’s programs or activities.
3. Investigate why accused male students are **denied due process** in Title IX investigations and why UNC is **deliberate in their non-compliance** to interim guidance issued by OCR as provided in the September 22, 2017 Dear Colleague Letter (2017 DCL).
4. Investigate Title VII violations of **discriminatory hiring practices** based on sex against qualified males related to UNC school’s Title IX programs.

Based on information and belief, we submit that UNC has systemically, whether by design or by default, instituted policies since April 2011 related to Title IX misconduct cases that:

1. are biased in that they favor one class of student (female accuser) over another class of student (male accused),
2. deny or limit an accused male student’s ability to participate in or benefit from the school’s programs or activities,
3. fail to provide accused male students an “equitable” Title IX related investigation,
4. create a hostile environment for accused male students and
5. deny due process to any male student facing a Title IX misconduct investigation or related hearing.

We believe that the evidence will show that UNC school policies are biased against accused male students, deny accused male students due process, are non-compliant with guidance provided in the 2017 DCL and continue to deny or severely limit an accused male student’s

⁶ Ashe Schow, “Ever had drunk sex? That's rape, according to this university”, *Washington Examiner*, July 22, 2015

ability to participate in or benefit from the school's programs or activities which in itself is a violation of Title IX.

The evidence will show that even after being formally notified that their existing policies were non-compliant to the 2017 DCL, UNC intentionally chose to stay the course by keeping biased, discriminatory Title IX practices in place and would not change policy areas identified to UNC by this organization.

Through this complaint we are requesting that OCR open an investigation directed at all sixteen postsecondary institutions within the UNC system, including:

- Appalachian State University (ASU),
- East Carolina University (ECU),
- Elizabeth City State University (ECSU),
- Fayetteville State University (FSU),
- North Carolina A&T State University (A&T),
- North Carolina Central University (NCCU),
- North Carolina State University (NCSU),
- UNC-Asheville (UNC-A),
- UNC-Chapel Hill (UNC-CH),
- UNC-Charlotte (UNC-C),
- UNC-Greensboro (UNC-G),
- UNC-Pembroke (UNC-P),
- UNC-Wilmington, (UNC-W)
- UNC School of the Arts,
- Western Carolina University (WCU),
- Winston-Salem State University (WSSU).

The evidence contained within this complaint will support student statements indicating that UNC school's investigations favor one class of student (female) over another class of student (male), fail to provide male accused students an equitable Title IX investigation, create a hostile environment for accused male students and deny due process whenever a male student is facing a Title IX misconduct investigation or related hearing.

Federal regulations, namely 34 C.F.R. §106, prohibit discrimination on the basis of sex in education programs and activities that receive Federal financial assistance from the Department of Education (ED). UNC institutions receive Federal financial assistance funds from the Department and, therefore, are subject to the requirements of Title IX and its implementing regulations.

UNC institutions are required under Title IX to respond to allegations of sexual harassment or sexual violence when a school knows, or reasonably should know, about possible sexual harassment or sexual violence. In undertaking this responsibility, a school must have an equitable process that ensures that both complainant and accused students are protected, and that

“any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.”⁷

OCR’s role in investigating Title IX sexual misconduct and/or harassment allegations is to determine whether a school’s grievance procedures for the resolution of complaints are in compliance with current OCR guidance. If OCR concludes that UNC school policies provide rights, resources or opportunities that favor one class of student over another than OCR must find that school in violation of OCR guidance and seek immediate resolution on behalf of all students.

Upon information and belief UNC has systemically failed to implement several provisions of guidance provided in the 2017 DCL including ensuring that:

- “any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.”⁸
- in regard to interim measures “a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party.”⁹
- an investigator is free of bias or conflicts of interest. As noted in the 2017 DCL “A person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school.”¹⁰
- Title IX related investigations are not rushed or expected to be completed within a fixed time. The 2017 DCL guidance makes clear that “there is no fixed time frame under which a school must complete a Title IX investigation.”¹¹
- in regard to informal resolution that “the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.”¹²
- in regard to the proper application of the evidentiary standard used for Title IX related sexual misconduct cases that “the standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases.”¹³

BACKGROUND

The University of North Carolina system is the postsecondary public education system within the state of North Carolina consisting of (16) public universities and a high school for science and mathematics. The University of North Carolina’s campuses extend from the state’s mountains to the coast. Over 228,000 students are enrolled at the sixteen system universities of which the gender makeup is 56.7% female and 43.3% male.¹⁴

In 1971, the Higher Education Reorganization Act placed the 16 baccalaureate-granting institutions that make up the University of North Carolina under one governing board. The Act

⁷ Office for Civil Rights, [Q&A on Campus Sexual Misconduct](#)

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ [Source – UNC Interactive Data Dashboard: 2016 Enrollment Trends](#)

emphasized basic objectives for the University: to foster the development of a well-planned and coordinated system of higher education, to improve the quality of education, to extend educational benefits beyond campus borders and to encourage economic and effective use of the state's resources.¹⁵

Appointed in 2016, Margaret Spellings is the President of the UNC system. The UNC Board of Governors is the policy-making body charged with “the general determination, control, supervision, management, and governance” of the University of North Carolina¹⁶. Its 28 voting members are indicated below in Table 1.

Table 1 – UNC Board of Governors Board Members	
W. Louis Bisette, Jr. Board of Governors, Chairman	
Harry L. Smith, Jr. Board of Governors, Vice Chairman	
Pearl Burris-Floyd Board of Governors, Secretary	
Darrell Allison Board of Governors	
Kellie Hunt Blue Board of Governors	
Robert P. Bryan III Board of Governors	
C. Philip Byers Board of Governors	
Carolyn L. Coward Board of Governors	
N. Leo Daughtry Board of Governors	
Walter C. Davenport Board of Governors	
Thomas H. Fetzer Board of Governors	

¹⁵ <https://www.northcarolina.edu/About-Our-System/Our-Mission>

¹⁶ <https://www.northcarolina.edu/about-our-system/220-years-history>

Table 1 – UNC Board of Governors Board Members

Thom Goolsby
Board of Governors

H. Frank Grainger
Board of Governors

Tyler Hardin
Board of Governors, Ex Officio

James L. Holmes, Jr.
Board of Governors

Joe Knott
Board of Governors

W. Marty Kotis III
Board of Governors

Steven B. Long
Board of Governors

Ann Maxwell
Board of Governors

J. Alex Mitchell
Board of Governors

Wendy F. Murphy
Board of Governors

Anna S. Nelson
Board of Governors

R. Doyle Parrish
Board of Governors

David M. Powers
Board of Governors

Randall "Randy" Ramsey
Board of Governors

Robert A. Rucho
Board of Governors

O. Temple Sloan III
Board of Governors

Table 1 – UNC Board of Governors Board Members

William Webb
Board of Governors

Michael Williford
Board of Governors

Chapter 100 of *The UNC Policy Manual* provides the Code and Policies of the University.¹⁷ Section 100.2 (G) provides the Guidelines for Proposing Policies of the Board of Governors and Regulations and Guidelines by the President.¹⁸ Chapter 700 of *The UNC Policy Manual* provides the Code and Policies related to Student Matters. It is under this chapter and specifically under section 700.4 where UNC’s *Student Conduct and Discipline* policies are addressed. Section 700.4.1 covers the topic *Minimum Substantive and Procedural Standards for Student Disciplinary Procedure*.¹⁹

The 16 baccalaureate-granting institutions that make up the University of North Carolina have developed their student disciplinary policies in accordance with the Code and Policies outlined in *The UNC Policy Manual*. Put another way, it is the UNC Board of Governors and President Spellings that set the course for how public schools under the auspices of the University of North Carolina system address student disciplinary matters including the investigation and adjudication of Title IX related cases alleging student sexual misconduct.

FACTS AND ANALYSIS

1. Non-Compliance

Upon information and belief, UNC staff under the auspices of Thomas C. Shanahan, Senior Vice President and General Counsel and Jayne M. Grandes, University Compliance Director reviewed OCR’s 2017 DCL as well as the *Q&A on Campus Sexual Misconduct* and issued a Memorandum to UNC Institutions on September 29, 2017 that included their own Q&A document titled *Questions and Answers on the Effect of 2017 OCR Guidance on University of North Carolina Title IX Policies and Procedures*.²⁰

Several areas (as noted below) contained within the UNC *Questions and Answers* document²¹ point to deliberate indifference if not outright defiance to OCR’s 2017 DCL guidance, specifically:

- Q2. Is there anything in the UNC system policies that must be changed immediately as a result of the 2017 Q&A?

¹⁷ *The UNC Policy Manual* (<http://www.northcarolina.edu/apps/policy/index.php>)

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ See Exhibit 1 – UNC FOIA file (see Thomas C. Shanahan, Senior Vice President and General Counsel and Jayne M. Grandes, University Compliance Director, *Memorandum to UNC Institutions*, September 29, 2017)

²¹ *Ibid*

- No. *Section 700.4.1* of the *UNC Policy Manual* complies with the due process requirements set forth in the 2001 Guidance, and with the requirements of the newly issued guidance.
- Q7. How does the 2017 Q&A address expectations for equitable Title IX investigations?
 - Question 6 of the 2017 Q&A includes new guidance that the Department will use to determine if an investigation has been conducted in an equitable manner. *UNC Policy 700.4.1* does not establish specific requirements for staffing and avoidance of conflicts for investigations. Similarly, institutions may not have addressed such matters in detail in their written policies.
- Q8. If an institution specifically notes a 60-day time frame for investigations in its policy, does the “60-day” period need to be removed?
 - No. Question 5 of the 2017 Q&A states that, “there is no fixed time frame under which a school must complete a Title IX investigation,” it also notes that “OCR will evaluate a school’s good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.”²²

On November 4, 2017 a formal notification letter of non-compliance ²³ was issued by our organization, the National Coalition For Men Carolinas (NCFMC) and conveyed and delivered by the U.S. Postal Service via Certified Mail²⁴ to the attention of UNC system President Margaret Spellings. Copies of this letter were also distributed either by mail or electronically to the following North Carolina officials:

- Mr. W. Louis Bissette, Jr. – Chairman of the UNC Board of Governors with a written request that the letter be distributed to the (28) members that constitute the UNC Board of Governors.
- Electronically by email to the Chancellors of all (16) UNC schools.
- North Carolina Governor, the Honorable Roy Cooper.

NCFMC’s letter to President Spellings identified the several policy areas that UNC institutions were found to be non-compliant in regard to OCR’s 2017 Dear Colleague Letter, namely:

□ The 2017 OCR guidelines state that “any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.” NCFMC found UNC institution policies providing complainant students with resource opportunities but not providing equitable resources to the accused (respondent) student. We believe this to be a clear violation of the 2017 DCL.

²² See Exhibit 1 - UNC-CH FOIA file (see Thomas C. Shanahan, Senior Vice President and General Counsel and Jayne M. Grandes, University Compliance Director, *Memorandum to UNC Institutions*, September 29, 2017)

²³ See Exhibit 2 – *NCFMC Notification Letter to M. Spellings*

²⁴ See Exhibit 3 – Copy of U.S.P.S. receipt (#EL 523484994 US)

□ The 2017 OCR guidelines say that universities may facilitate an "informal resolution" such as mediation in Title IX related matters. NCFMC has determined that various UNC institutions do not allow for this option or outright forbid it.

□ The 2017 DCL states there is "no fixed time frame" under which a school must complete a Title IX investigation. Numerous UNC institution policies state that an investigation is to be concluded 60 days after a complaint is made. NCFMC is concerned about UNC institutions hurrying Title IX investigations in order to meet a 60-day deadline.

□ The 2017 OCR guidelines say that the standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases yet we have found UNC schools that have a higher standard of proof for academic dishonesty than they do for sexual misconduct. Furthermore, the 2017 DCL emphatically states that "when a school applies special procedures in sexual misconduct cases, it suggests a discriminatory purpose and should be avoided."²⁵

NCFMC notified President Spellings along with key stakeholders that if UNC did not revise their policies to come into compliance within 30 days of the issuance of our letter, that NCFMC would initiate filing a formal complaint with OCR on behalf of affected students and North Carolina taxpayers.²⁶

UNC institutions response to modifying their Title IX misconduct policies to comport to the 2017 DCL guidance is perhaps best illustrated by an internal email communication issued system-wide on September 24, 2017 by Thomas C. Shanahan, Senior Vice President and General Counsel at UNC:

"As you all know, Friday's action by the Department of Education was not unexpected. It likely will not result in any immediate material change in how we approach our cases at the universities in the UNC System."²⁷

We specifically want to draw attention to two particular areas of UNC-Chapel Hill non-compliance by pointing to highlighted guidance contained in the memorandum letter issued by Thomas C. Shanahan and Jayne M. Grandes, University Compliance Director which specifically notes in the UNC' *Questions and Answers* document that was attached to the memorandum:

"(OCR's) 2017 Q&A cautions against favoring one party over another, or providing interim measures to only one party." and,

"...the guidance references, in a footnote, that the standard of evidence for evaluating a claim of sexual misconduct "should be consistent with the standard the school applies in other student misconduct cases," and that applying a lower standard of evidence for sexual misconduct "suggests a discriminatory purpose and should be avoided."²⁸

²⁵ Office for Civil Rights, [Q&A on Campus Sexual Misconduct](#)

²⁶ See Exhibit 2 – NCFMC Notification Letter to M. Spellings

²⁷ See Exhibit 1 – UNC-CH FOIA file (see Thomas C. Shanahan email of September 24, 2017)

²⁸ See Exhibit 1 - UNC-CH FOIA file (see Thomas C. Shanahan, Senior Vice President and General Counsel and Jayne M. Grandes, University Compliance Director, *Memorandum to UNC Institutions*, September 29, 2017)

We direct your attention to this evidence as it shows that administrators at the flagship institution in the UNC system, that is the University of North Carolina at Chapel Hill (UNC-Chapel Hill) took notice of these areas of the 2017 DCL. Shortly after the Shanahan & Grandes memorandum is received by administrators at UNC-Chapel Hill, Christi Hurt, Assistant Vice Chancellor/Chief of Staff for Student Affairs sends a particularly noteworthy email on September 29, 2017 addressed to Kara E. Simmons Associate Vice Chancellor and Senior University Counsel that provides insight into how UNC-Chapel Hill plans to respond:

“Thanks, Kara. I also noted, immediately prior to that instruction, the Q&A asks institutions to **refrain from making changes to the standard of evidence** (emphasis added) "until we learn more."²⁹

Refrain they did. Upon information and belief, UNC-Chapel Hill policies regarding “academic dishonestly” provide accused students “the right to have an alleged offense proven by evidence that is clear and convincing, where ‘clear and convincing’ means that the evidence is substantially more likely to be true than not,”³⁰ yet UNC-Chapel Hill applies a preponderance of the evidence standard for sexual misconduct³¹ cases when making a determination which is clearly a “lower standard of evidence” violating both OCR’s 2017 DCL and UNC’s guidance.

It is this specific area of the 2017 DCL that caught the eye of Katie Nolan, Associate Director of Title IX Programs and Special Projects at UNC-Chapel Hill. Nolan flags a potential area of concern in her September 25, 2017 email communication sent to UNC-Chapel Hill colleagues Christi Hurt - Assistant Vice Chancellor/Chief of Staff for Student Affairs, Adrienne Allison - Title IX Compliance Coordinator, Becci Menghini - Senior Associate Vice Chancellor for the Division of Workforce Strategy, Equity, and Engagement, and Kara E. Simmons Associate Vice Chancellor and Senior University Counsel:

“May a university maintain the preponderance of the evidence standard for sexual misconduct cases if the university has multiple student conduct disciplinary processes that address different types of behavior, some of which require a clear and convincing standard and some of which require a preponderance of the evidence standard?”³²

In light of this email gained through a FOIA request by our organization, it is clear that several senior administrators at UNC-Chapel Hill were well aware that using the clear and convincing standard for academic misconduct cases and the lower preponderance standard for sexual misconduct cases violates the 2017 DCL guidance. UNC-Chapel Hill deliberately chose not to modify their disciplinary processes to comply with the 2017 DCL so that they could continue to tilt Title IX investigations and disciplinary outcomes in favor of the complainant student.

As of the filing of this complaint, over 100+ days have passed since NCFMC’s notification letter of non-compliance was delivered to the office of UNC President Margaret Spellings yet UNC

²⁹ See Exhibit 1 - UNC-CH FOIA file (see Allison email September 29, 2017 at 1:03 PM)

³⁰ P. 18, [Instrument of Student Judicial Governance for the University of North Carolina at Chapel Hill - Effective September 18, 2017](#)

³¹ P. 16, [Procedures for Reporting and Responding to Complaints of Discrimination, Harassment, and Related Misconduct Involving a Student as the Responding Party](#)

³² See Exhibit 1 - UNC-CH FOIA file (see Katie Nolan email of September 25, 2017).

has willfully chosen not to change or modify school policies even as their own counsel raises potential areas of concern between school evidentiary standards and the 2017 DCL guidance.

As OCR notes in the 2017 DCL, “The 2011 and 2014 guidance documents may have been well-intentioned, but those documents have led to the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate resolution of their complaints. The guidance has not succeeded in providing clarity for educational institutions or in leading institutions to guarantee educational opportunities on the equal basis that Title IX requires. Instead, schools face a confusing and counterproductive set of regulatory mandates, and the objective of regulatory compliance has displaced Title IX’s goal of educational equity.”³³

Non-compliance with the 2017 DCL puts all UNC university students at risk by failing to address sexual misconduct complaints in the manner consistent with the requirements of fundamental due process. For the reasons enumerated within this document we are requesting that OCR open an immediate investigation at UNC.

2. Due Process and Equitable Investigations

We assert that when conducting a Title IX investigation into sexual misconduct by an accused male student, UNC institutions systemically:

- deny or limit accused male students the ability to participate in or benefit from the school’s programs or activities,
- demonstrate bias by favoring one class of student (female accuser) over another class of student (male accused),
- fail to provide accused male students an “equitable” Title IX related investigation,
- use interim suspensions as a weapon to remove and punish male students accused of sexual misconduct,
- create a hostile environment for accused male students,
- deny due process to male students facing a Title IX misconduct investigation or related hearing, and
- conduct Title IX investigations that are prosecutorial in nature geared towards proving guilt rather than searching for evidence of innocence.

Based on information and belief the overwhelming majority of complainant college students are female and the overwhelming majority of accused college students are male. This is noteworthy in regard to 34 C.F.R. §106 because schools need to prohibit discrimination on the basis of sex. We contend that UNC perpetuates sex bias system-wide in favor of complainant female students over accused male students thereby impacting the impartiality of Title IX school investigators.

Upon information and belief there exists a default sex bias by UNC officials *to believe* female accusers alleging sexual misconduct by a male student thereby rendering it nearly impossible for an accused male student to be accorded impartiality. An indoctrination of anti-male bias

³³ 2017 Dear Colleague Letter (<https://www.cmu.edu/title-ix/colleague-title-ix-201709.pdf>)

perpetuated by UNC begins with the materials used in Title IX training of UNC employees, with a particular emphasis regarding those charged with conducting Title IX investigations.

Merriam-Webster defines indoctrinate as: “to imbue with a usually partisan or sectarian opinion, point of view, or principle.”³⁴ We believe this definition is appropriate to the UNC Title IX training principle of believing female accusers, viewing them as “victims” and viewing accused male students as perpetrators.

Upon information and belief, Title IX materials utilized by UNC to train investigators include demonstrably flawed “statistics” and discriminatory statements used to portray college men as deliberate sexual predators. One such example is found from Title IX related training held on February 13-14, 2013 for UNC school employees.

The training, entitled “*Title IX and Campus Security Authority Training Program*”, was presented by Steven J. Healy and Gary J. Margolis of Margolis Healy & Associates³⁵, a training organization with a dubious reputation in their training of Title IX investigators.

An examination into similar Title X training conducted by Margolis Healy of the same type of audience of Title IX investigators but which occurred at Middlebury College determined that:

“Investigators, Margolis Healy instructed Middlebury officials, must not approach the case with ‘skepticism.’ Indeed, they must ‘start by believing’ the accuser. The discussion with the accuser must not involve the investigator interrogating her; “This is not the time for ‘just the facts.’” (If not then, when?) The investigator must avoid ‘victim blaming’ questions, such as asking the accuser why she did something. ‘Use what we know’ about campus sexual assault—that the ‘non-stranger sexual offender’ says to himself, ‘I am going to have sex tonight. If it is consensual, fine. But, I am going to have sex tonight.’ While the investigator must ‘start by believing’ the accuser, the Middlebury official must begin by wondering if the accused is ‘who he said he is.’ Margolis Healy counseled Middlebury investigators against using the term ‘accuser’ (“victim” or “survivor” is preferred).”³⁶

Our examination of the Margolis Healy materials used to train Title IX investigators across UNC institutions provides a rare behind-the-scenes view of the extraordinarily one-sided training that “impartial” campus adjudicators receive. Some of the egregious and clearly biased Title IX training “facts” presented to UNC employee participants include the following statements:

- “One in four women have been victims of rape or attempted rape”
- “At last 20% of American men report having perpetrated sexual assault and 5 percent report having committed rape”
- “Alcohol and other substances are used intentionally by men who commit rape (alcohol is the “weapon of choice”)”

³⁴<https://www.merriam-webster.com/dictionary/indoctrination>

³⁵Margolis Healy & Associates, “*Title IX and Campus Security Authority Training Program*” (February 13-14, 2013) https://www.slideshare.net/margolishealy/unc-title-ix-training-seminar-feb-2013?from_action=save

³⁶KC Johnson, Weaponizing Title IX at Middlebury”, *Minding the Campus*, (September 23, 2015), <http://www.mindingthecampus.org/2015/09/weaponizing-title-ix-at-middlebury/>

- “If both parties are drinking, society often blames the victim and excuses the offender”
- “Approach a case believing that ‘something’ occurred, victims are sensitive to this”³⁷

UNC advances a sex bias through the use of discriminatory and flawed training materials provided to their employees and Title IX investigators. Misleading, biased statements and flawed statistics used in the UNC training materials that portray college men as sexually violent predators have been debunked in numerous reports, articles³⁸, conference presentations³⁹, panel discussions⁴⁰ and by data provided by government agencies such as the Department of Justice (DOJ).

Statistics surrounding sexual assault are notoriously unreliable and inconsistent, primarily because of vague and expansive definitions of what qualifies as sexual assault but also because of flawed survey methodology and analysis.⁴¹

The Bureau of Justice Statistics' "Violent Victimization of College Students" report⁴² tells a different and more plausible story about campus culture than that of the materials UNC used during the Title IX related training on February 13-14, 2013 for UNC employees (including investigators).

During the years surveyed, 1995-2002, the DOJ found that there were six rapes or sexual assaults per thousand per year. Across the nation's four million female college students, that comes to about one victim in forty students. Other DOJ statistics show⁴³ that the overall rape rate is in sharp decline: since 1995, the estimated rate of female rape or sexual assault victimizations has decreased by about 60 percent.⁴⁴

Yet UNC has purposely elected to use Title IX training materials that are discriminatory against men in order to perpetuate a sex bias that exclusively portrays college men as perpetrators. As we have seen time and again, biased training leads to biased investigations which result in biased outcomes.

The NCHERM Group, which manages the membership associations, ATIXA and NaBITA, has served over 3,000 school and college clients, and has represented more than 250 colleges and universities as legal counsel, has been troubled by the kind of institutional bias that stacks the cards against accused students by denying them their due process rights:

“Why are we systemically failing to protect the rights of all students? FIRE took a shot at higher education on January 19th, 2017, calling administrators amateurs in addressing sexual violence. If you resent that characterization, we need to stop resembling it. Sharpen the qualifications of those at your colleges who are the custodians of due process and advance the level of training that is afforded to them. Read recent decisions involving

³⁷ *Ibid*

³⁸ Blake Neff, “Major Study On Campus Sex Assault Debunked”, *The Daily Caller*, (July 28,2015)

³⁹ Linda LeFauve, “Bad Data Meets Bad Intent: The Struggle for Accuracy on Campus Sexual Assault”, (October 7, 2017)

⁴⁰ See edited transcript of Manhattan Institute's March 10, 2015 panel discussion of “The Truth about Campus Sexual Assault”

⁴¹ <http://reason.com/blog/2015/07/28/campus-rape-stats-lisak-study-wrong>

⁴² <https://www.bjs.gov/content/pub/pdf/vvcs02.pdf>

⁴³ <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>

⁴⁴ Caroline Kitchens, “The Rape ‘Epidemic’ Doesn’t Actually Exist”, *U.S. News & World Report*, October 24, 2013

George Mason University, James Madison University, and Brandeis University to realize how far we still need to come in this field. Don't be fooled by the fact that higher education wins some of these lawsuits, as the law favors institutions. The bar on due process lawsuits is high, and courts have been deferential to college disciplinary decisions, though that historical deference is eroding as judges lose patience with skewed college proceedings."⁴⁵

Upon information and belief, we believe that UNC investigators routinely fail to provide impartiality to accused male students during a sexual misconduct or harassment investigation because of sex-based institutional bias which creates "a tendency for the procedures and practices of particular institutions to operate in ways which result in certain social groups being advantaged or favored and others being disadvantaged or devalued."⁴⁶

It is our belief that since April 2011, Title IX related sexual misconduct cases across the entire UNC system have been biased against accused male students by UNC policies that favored one group (female complainant students) over the other group (accused male students) and these discriminatory, biased practices continue today across the UNC system.

"Unfortunately, OCR's relentless pressure on institutions to respond aggressively to sexual assault allegations has undermined the neutrality of many campus investigators and adjudicators by forcing them to consider the broader financial impact of their actions. In an effort to preclude a costly Title IX investigation, some institutions interrogate accused students before informing them of the specific conduct code they are alleged to have violated and many deny them access to witnesses or potentially exculpatory evidence. In the aftermath, innocent suspended and expelled students have become mired "in academic and professional limbo," impairing or destroying their access to a college education, thereby relegating them to a lifetime of diminished income and social stigmatization as sexual offenders,"⁴⁷ states a letter penned by law professors.

One has to wonder if this sentiment is what UNC-Chapel Hill Chancellor Carol Folt was alluding to when she said "There is no way to have an absolute perfect timeline, because you cannot manage all of those things and be in any way certain that you're being fair and equitable".⁴⁸

One doesn't need to look far to find validation of the bias directed against male students accused of sexual misconduct at a UNC institution. The systemic belief that one must believe without reservation the veracity of a reporting female "victim" in regard to sexual assault is validated by comments made by Jill Moffitt, Title IX Administrator at UNC-Ashville:

"When the victim says they were assaulted, they're assaulted (emphasis added)."⁴⁹

UNC is certainly not alone in perpetuating institutional bias favoring one sex over another and Federal courts are taking notice:

⁴⁵ [THE 2017 NCHERM GROUP WHITEPAPER: DUE PROCESS AND THE SEX POLICE](#)

⁴⁶ <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100005347>

⁴⁷ ["Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault" \(May 19, 2016\)](#)

⁴⁸ Jane Stancill, "Folt: Increase in sexual assault reports at UNC may warrant more staff", *The News & Observer* (September 16, 2016)

⁴⁹ Emily Henderson, "UNCA community hopes to improve reputation of sexual misconduct discussions", *thebluebanner.net*, (November 14, 2017)

“...our courts have also heard scores of cases filed by male students against colleges and universities that expelled them for sexual misconduct, and therefore Title IX has also come to stand for the idea that schools must give accused students a fair process. This evolution in Title IX’s meaning came about because courts perceived many of the expulsion procedures as unfair. Courts chose to read Title IX’s ban on sex discrimination to demand fair treatment of the accused, despite the considerable leeway that schools were supposed to have over student discipline. In a 2016 case, a male student disciplined for sexual misconduct sued Columbia University under Title IX, alleging that the investigative process was unfair; the Second Circuit Court of Appeals held that an institution’s motivation “to favor the accusing female over the accused male,” in order to shield itself from lawsuits or criticism for not protecting women from sexual assault, could be evidence in itself of unlawful sex discrimination against males.”⁵⁰

In this regard we cite the following cases:

- *Doe v. Washington & Lee*, No. 6:14-cv-00052, 2015 U.S. Dist. LEXIS 102426, *29 (W.D. Va., Aug. 5, 2015) Refusing to dismiss; alleged university was “under pressure from the government to convict male students of sexual assault, [therefore] a reasonable fact finder could plausibly determine that Plaintiff was wrongly found responsible for sexual misconduct and that this erroneous finding was motivated by gender bias.”
- *Doe v. Case Western Reserve University*, No.1:17CV414, 2017 WL 3840418, *7 (S.D.OH. Sept. 1, 2017). District court rejected school’s motion to dismiss a Title IX claim in part because the student alleged anti-male bias on the part of the university’s non-decision making Deputy Title IX coordinator
- *Doe v. The Trustees of the U of Pennsylvania*, Case 2:16-cv-05088-(E.D.Pa. Sept. 13, 2017) Padova, J. The Complaint alleges various facts that, read in the light most favorable to Plaintiff, give rise to a reasonable inference that gender bias or discrimination infected the disciplinary proceedings.
- *Harris v. St. Joseph’s Univ.*, Civ. A. No. 13-3937, 2014 WL 12618076, at *2 n.3 (E.D. Pa. Nov. 26, 2014) (“Harris II”) --found to adequately allege gender bias when it alleged that a member of a university’s ethics department and community standards board specifically stated to a plaintiff’s father that the university had “adopted a policy favoring female accusers as [the university] was concerned about Title IX charges by female students.”
- *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 189 (D.R.I. 2016). Complaint was found to sufficiently allege gender bias where it alleged that (1) a former University employee stated that the university treats male students as “guilty, until proven innocent” and “operate[d] under the assumption that it’s always the ‘boy’s fault,’” (2) a University professor stated that there is “overwhelming” gender bias in sexual misconduct cases at the University, and (3) a University professor agreed that the “culture of thinking” on the campus is that males are bad and females are victims.
- *Prasad v. Cornell Univ.*, No.5:15-cv-322, 2016 WL 3212079, *16 (N.D.N.Y. Feb. 24, 2016) Rejected motion to dismiss; “presents facts plausibly suggesting that considerations of his gender motivated Cornell’s actions in his disciplinary proceeding.”

⁵⁰ Jeannie Suk Gersen, “The Transformation of Sexual-Harassment Law Will Be Double-Faced”, *The New Yorker*, (December 20, 2017), <https://www.newyorker.com/news/news-desk/the-transformation-of-sexual-harassment-law-will-be-double-faced>

- *Doe v. Bd. Of Regents of the Univ. Sys. of Ga.*, case no.1:15-cv-4079, Docket 40, pgs.9-10 (D.GA. 2015-16) Rejected motion to dismiss; “two year old news reports” that suggested defendant university’s “motive to discriminate on the basis of gender.”
- *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 768 (D. Md. 2015) Rejected motion to dismiss; university possessed communications evidencing their erroneous discipline was causally linked to university’s desire to demonstrate to DOE that the university would aggressively discipline male students.
- *Doe v. Amherst Col., No. 3-15-3009 (MGM), 2017 WL 776410, *17 (D. Mass. Feb. 28, 2017)* These are specific factual allegations that the College responded differently to similar reports when the genders of the potential victims and aggressors were different. They provide a foundation from which a court can infer gender-based discrimination may have played a role in the College’s responses.
- *John Doe v. Brandeis University*, No. 1:15-CV-11557 (D. Mass. Apr. 9, 2015) MTD, J. Saylor (March 31, 2016). But surely “basic fairness” requires more than the rote recitation of generalizations about the way some victims of sexual misconduct sometimes react.
- *Collick v. William Paterson Univ.*, No. 16–471(KM)(JBC), 2016 WL 6824374, *12 (D.N.J. Nov. 17, 2016), appeal pending Refused to dismiss; alleged DOE pressure may have caused defendant university to erroneously discipline plaintiff to show it would sanction males accused of sexual misconduct.
- *Doe v. Ohio State Univ.*, No. 2:16-CV-171, 2017 WL 951464, *15 (S.D. Ohio Mar. 10, 2017) Rejected motion to dismiss; alleged “pressure from the executive branch of the Federal government motivated [his] discipline.
- *Doe v. Regents of Univ. of California*, 2:15-cv-02478-SVW-JEM (June 8, 2017, C. Dist. CA) (unreported) Rejected motion to dismiss; university faced “growing local and national pressure” to discipline male students which was generated in part by female students OCR complaints alleging the university “failed to adequately handle their complaints of sexual assault.”
- *Neal v. Col. St. Univ.*, No. 16-cv-873-(RM)(CBS), 2017 WL 633045 (D. Col. Feb. 16, 2017)(rejecting motion to dismiss Title IX claim in part because male plaintiff alleged his erroneous outcome occurred in part defendant university “bow[ed] to DOE/OCR pressure to discipline males);
- *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 747, 751 (S.D. Ohio 2014)(rejecting motion to dismiss Title IX claim in part because male plaintiff alleged defendant university made him a “scapegoat” in reaction to DOE investigations of the university).
- *Doe v. Lynn Univ., Inc.*, No. 9:16–cv–80850, 2017 WL 237631, *4 (S.D. Fla. Jan. 19, 2017)(refusing to dismiss a Title IX claim where male plaintiff alleged his erroneous discipline occurred in part because of pressure related to: (a) DOE directives interpreted by defendant university as mandating discipline of male students accused of sexually assaulting female students; (b) criticism of defendant university for its handling female students’ sexual assault complaints against males; and (c) university’s awareness of said criticism).

While skewed statistics and statements that view male students as perpetrators of rape used to train Title IX investigators support our belief that UNC institutions favor the accusing female over the accused male, a recent lawsuit involving a UNC school illustrates this reality (Note: due

to FERPA restrictions Title IX related misconduct cases are not available for public review therefore we are relegated to citing recent lawsuits).

In an eerily similar case to the Columbia case mentioned above, a lawsuit was filed on behalf of Gregory Painter Jr.,⁵¹ a male student accused of sexual misconduct while enrolled at UNC-Charlotte (UNC-C). In his lawsuit, Painter alleged that UNC-C investigators examination into the female accuser' "allegations was poisoned by their gender bias"⁵², accepted and treated the accuser' "allegations as true"⁵³, "failed to conduct an adequate investigation"⁵⁴ and excluded exculpatory evidence from being placed into the investigation report.⁵⁵

Here's what the District Court for the Western District of North Carolina (W.D.N.C.) had to say about this issue "*It is, however, troubling that an accused person could not place the actual texts in front of the tribunal, which raises a genuine issue of material fact as to whether plaintiff was denied Due Process.*"⁵⁶ Given the Court's comments it's not surprising UNC-Charlotte moved quickly to settle the claims by Painter against the university.

Upon information and belief, we assert that Appalachian State University in particular has a legacy of demonstrating not merely a fondness in denying accused male students due process when adjudicating Title IX cases but an egregious and arbitrary abuse of power.

Once again, we need to look to a student lawsuit this one filed by Lanston Tanyi ("Tanyi"), an African-American male student athlete, enrolled at Appalachian State University⁵⁷. Tanyi brought his suit on February 24, 2015, alleging violations of his Fourteenth Amendment procedural due process, substantive due process, and equal protection rights under 42 U.S.C. § 1983, as well as gender discrimination in violation of 20 U.S.C. § 1681.

It is noteworthy and instructive to read the Court's opinion in denying ASU's Motion to Dismiss the § 1983 claim based on substantive due process:

In order to state a § 1983 claim based on substantive due process, Tanyi must demonstrate that Gonzalez' actions in granting Student B's appeal amounted to an arbitrary abuse of executive power so egregious that it "shocks the conscience." *Cnty. Of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Further, Tanyi must have suffered a deprivation resulting from the substantive due process violation. See *McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887, 945 (M.D.N.C. 2011). Regarding the deprivation requirement, Defendants contend that Tanyi cannot bring a substantive due process claim for the reopening of Student B's rape allegations because he was eventually exonerated on those charges. Tanyi, however, was suspended for twenty days while awaiting the second Student B hearing, thus suffering a deprivation. (2d Am. Compl. ¶¶ 89, 96). His eventual exoneration of the rape allegations has no bearing on Tanyi's ability to bring a

⁵¹ Painter v University of North Carolina Charlotte lawsuit (Civil Action No. 3:15-cv-369)

⁵² *Ibid* at 101

⁵³ *Ibid* at 102

⁵⁴ *Ibid* at 108

⁵⁵ *Ibid* at 116

⁵⁶ Motion for Summary Judgment (Civil Action No. 3:15-cv-369)

⁵⁷ Tanyi v. Appalachian State University lawsuit (Civil Action No. 5:14-CV-170RLV), Defendants' Motion to Dismiss (Doc. 30)

claim for the re-opening of those charges. The critical inquiry, then, is whether Gonzalez' decision to grant Student B's appeal was arbitrary and shocking to the conscience.

The Supreme Court has repeatedly held that "only the most egregious official conduct can be said to be `arbitrary in the constitutional sense.'" *Cnty. of Sacramento*, 523 U.S. at 846 (1998) (quoting *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 129 (1992)). Further, "conduct intended to injure in some way unjustifiable by any governmental interest" is most likely to rise to the conscience-shocking level. *Id.* at 849. In the student disciplinary context, a student must show that a university official's decision lacked any rational basis, or "was motivated by ill will or bad faith." *Tigrett*, 137 F. Supp. 2d 670, 678 (W.D. Va. 2001).

Tanyi alleges that Gonzalez acted arbitrarily and in bad faith, motivated solely by the negative publicity generated by Student A's Facebook post. (2d Am. Compl. ¶ 135). Defendants contend that Gonzalez' actions do not shock the conscience, and were neither arbitrary nor unjustifiable, pointing to the Department of Education's "Dear Colleague" letter on Title IX, which directs universities to allow appeals by both parties in sexual assault cases. (Doc. 31-1 p. 12). The Department of Education does not dictate, however, that new hearings be granted in all cases. Indeed, beyond the unusual contention that a second hearing was required because ASU did not adequately prove its case against Tanyi, Gonzalez provided no reasoning for her decision to grant a re-hearing of Student B's rape allegations. (2d. Am. Comp. ¶ 90).

Although "it is not the role of the federal courts to set aside decisions of school administrators . . . lacking a basis in wisdom or compassion," a decision may nevertheless be "so extreme as to violate due process." *Wood v. Strickland*, 420 U.S. 308, 326 (1975); *Board of Education v. McCluskey*, 458 U.S. 966, 970 (1982). In *Evans v. Bd. of Regents of West Virginia*, for example, a medical student was granted a medical leave of absence for one year, but, upon reapplying, was refused re-admittance without any explanation whatsoever. 165 W.Va. 780, 781 (1980). There, the court found a violation of the plaintiff's due process rights. Taking Tanyi's allegations as true, Gonzalez' decision here was similarly arbitrary, and motivated by bad faith. As a result, Tanyi's substantive due process claim will survive Defendant's Motion to Dismiss.⁵⁸

That the following headline appeared in the local newspaper shortly after the Court's rationale explains how ASU ultimately reacted to the court order:

ASU paid \$100K to settle with former athlete⁵⁹

One would think that following a six-figure settlement that ASU would have learned an important, albeit costly lesson about providing due process to accused students. However, upon information and belief, UNC investigators continued their discriminatory practice of routinely failing to provide impartiality to accused male students during a Title IX investigation this time

⁵⁸ Tanyi v. Appalachian State University lawsuit (Civil Action No. 5:14-CV-170RLV), Defendants' Motion to Dismiss (Doc. 30)

⁵⁹ Anna Oakes, "ASU paid \$100K to settle with former athlete", *WataugaDemocrat.com* (Jan. 6, 2016)

by focusing attention singularly on collecting evidence that supports a predisposed finding of responsibility and refusing to gather and/or allow the introduction of exculpatory evidence.

In yet another plaintiff male student lawsuit that made its way to the District Court for the Western District of North Carolina (W.D.N.C.) this time in which a Fourteenth Amendment Procedural Due Process Claim was asserted against Appalachian State University (ASU)⁶⁰ the Court, in denying Defendant's Motion to Dismiss, reminded ASU that directing a biased investigation violates a student's right to due process:

“To this point, while due process does not require absolute neutrality on the part of university officials tasked with investigating and administering disciplinary hearings, a university official crosses the line when he or she directs the investigation or hearing with the primary purpose of obtaining a conviction rather than seeking out the truth.”⁶¹

The Court went further:

“While any one of these allegations, when viewed in isolation, would be insufficient to sustain a due process claim, when the allegations are viewed in total it is reasonable to conclude that the alleged conduct of the university officials significantly impugned the fairness of the disciplinary proceeding in that the proceeding was intentionally structured in a manner to deter the pursuit of the truth on the unlawful entry charge in favor of obtaining a verdict adverse to Plaintiff. Further, the allegations suggest far more than a mere failure to turn over exculpatory evidence and instead are emblematic of a cover up by university officials...”⁶²

It will be interesting to see if ASU moves quickly to offer up another six-figure settlement to yet another aggrieved ASU male student given District Court Judge Richard L. Voorhees's ruling that “As this Court has already concluded that Plaintiff alleged sufficient facts to sustain a due process claim...”⁶³

That institutions of higher education like those in the UNC system are doing a poor job in handling Title IX related disciplinary cases is well recognized. A recent study conducted by Proskauer's Higher Education Group reviewed 130 federal and state court complaints filed by students across the country between January 2011 and December 2016 who claimed violation of their rights during a Title IX investigation and/or adjudication.⁶⁴ The 130 cases provide a look at where schools allegedly made mistakes:

- Violations of disciplinary procedures = 3.8%
- Insufficient/improper interim measures = 4.6%
- School made inappropriate public comments re: accused/incident = 6.9%
- Insufficient notice to accused of hearing/charges = 10%
- Insufficient/improper training of school personnel = 11.5%

⁶⁰ Gulyus v. Appalachian State University lawsuit (CASE NO. 5:16-CV-00225-RLV-DCK), Defendants' Motion to Dismiss (Doc. 27)

⁶¹ Ibid, p 4

⁶² Ibid, p 5

⁶³ Ibid, p 5

⁶⁴ Title IX Report: The Accused, Proskauer, <http://www.proskauer.com/files/uploads/Documents/Title-IX-The-Accused.pdf>

- Improper use or exclusion of witness testimony at hearing or in investigation = 12.3%
- Evidence of gender bias in investigation and/or hearing = 15.4%
- Improper/insufficient policies, or failure to conform to recorded policies = 17.7%
- Other failures in hearing (evidentiary issues, failure to follow hearing protocol, impartiality of hearing board members) = 46.2%
- Failures in the investigation = 46.9%⁶⁵

The Prokauer report concludes by stating “Institutions need to understand their roles and responsibilities related to Title IX processes and procedures. From reputational damage and financial loss to the actual harm experienced by students, the cost of non-compliance or even perceived non-compliance is significant.”⁶⁶ We could not agree more with this statement.

Another recent study, this one done by the Foundation for Individual Rights in Education (FIRE) rated the top 53 universities in the country⁶⁷ (according to *U.S. News & World Report*) based on ten fundamental elements of due process.

The findings are dire:

- Nearly three-quarters (73.6%) of America’s top 53 universities do not even guarantee students that they will be presumed innocent until proven guilty.
- Fewer than half of schools (47.2%) require that fact-finders—the institution’s version of judge and/or jury—be impartial.
- 45 out of the 53 universities studied receive a D or F rating from FIRE for at least one disciplinary policy, meaning that they fully provide no more than 4 of the 10 elements of a fair procedure that FIRE rated.
- Most institutions have one set of standards for adjudicating charges of sexual misconduct and another for all other charges. 79 percent of rated universities receive a D or F for protecting the due process rights of students accused of sexual misconduct.⁶⁸

In analyzing each set of disciplinary procedures, FIRE looked for 10 critically important procedural safeguards. For each element, institutions received zero points if the safeguard was absent, was too narrowly defined to substantially protect students, or was subject to the total discretion of an administrator; one point if the policy provided some protection with respect to that element; and two points if the safeguard was clearly and completely articulated.⁶⁹

FIRE’s criteria are as follows:

- A clearly stated presumption of innocence, including a statement that a person’s silence shall not be held against them.
- Adequate written notice of the allegations. Adequate notice should include the time and place of alleged policy violations, a specific statement of which policies were allegedly

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ SPOTLIGHT ON DUE PROCESS 2017, *Foundation for Individual Rights in Education (FIRE)*, <https://www.thefire.org/due-process-report-2017/>

⁶⁸ Ibid

⁶⁹ Ibid

violated and by what actions, and a list of people allegedly involved in and affected by those actions.

- Adequate time to prepare for all phases of the disciplinary process, including notice of the hearing date at least seven business days in advance, and access to all evidence to be considered at the hearing five business days in advance. If the accused student is required to respond to the allegations before the hearing, he or she must receive notice at least five business days in advance.
- A prohibition on conflicts of interest that could compromise the integrity of the process (i.e., advocates cannot serve as investigators or fact-finders, and fact-finders must not hear the appeal).
- The right to impartial fact-finders, including the right to challenge fact-finders' impartiality.
- Access to and the right to present all relevant inculpatory and exculpatory evidence at hearing.
- The ability to pose relevant questions to witnesses, including the complainant, in real time, and respond to another party's version of events. If questions are relayed through a panel or chairperson, there must be clear guidelines setting forth when questions will be rejected, and the reason for refusing to pose any rejected question should be documented.
- The active participation of an adviser of choice, including an attorney (at the student's sole discretion), during the investigation and at all proceedings, formal or informal.
- The meaningful right of the accused to appeal a finding or sanction. Grounds for appeal must include (1) new information, (2) procedural errors, and (3) findings not supported by the record. Appeals must not be decided by the investigator or original fact-finding panel.
- Unanimity of panel must be required for expulsion.⁷⁰

We highlight these reports to provide context of how far university administrators have strayed from providing any kind of reasonable attention to due process. In this regard, it's appropriate to explore how well UNC's flagship institution for higher education, the University of North Carolina at Chapel Hill rated with student sexual misconduct due process.

Given the discriminatory bias of training materials provided to their employees, it should not be surprising to see that UNC-Chapel Hill received a D rating from FIRE for the lack of due process and fairness in its handling of sexual misconduct cases.

FIRE examined "10 fundamental elements of due process," finding that UNC-Chapel Hill's Title IX proceedings lacked five of these key elements and that three other were only partially present as indicated in the illustration provided in Table 2.⁷¹

⁷⁰ Jeremy Bauer-Wolf, Fairness Questioned, *Inside Higher Education*, September 5, 2017

⁷¹ SPOTLIGHT ON DUE PROCESS 2017, *Foundation for Individual Rights in Education (FIRE)*, <https://www.thefire.org/due-process-report-2017/>

Table 2 – Due Process Rating at UNC-Chapel Hill

Institution	Total Score of 20	Presumption of innocence	Written notice	Time to prepare	No conflicts of interest	Impartial fact-finders	Access to all evidence	Cross-examination	Right to counsel	Right to appeal	Unanimity for expulsion
University of North Carolina-Chapel Hill, sexual misconduct	D 7 / 20	✘	✘	✘	✓	✓	✘	✓	✓	✓	✘

Having established that UNC has systemically removed fairness and impartiality from Title IX related investigations dating back to the 2011 DCL, we can now turn our attention to the matter of whether or not UNC Title IX policies are aligned with the 2017 DCL guidance.

OCR’s 2017 DCL guidance asks and then answers the following question “What constitutes an “equitable” investigation?”⁷² The answer identifies three criteria that must be satisfied during a Title IX equitable investigation:

- A. **No Bias or Conflict of Interest:** A person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school. Schools should ensure that institutional interests do not interfere with the impartiality of the investigation.⁷³
- B. **An Impartial Fact-Finder:** An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.⁷⁴
- C. **Equal Terms:** Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms. Restricting the ability of either party to discuss the investigation (e.g., through “gag orders”) is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable.⁷⁵

Based upon information and belief, UNC institution sexual misconduct related policies routinely violate the 2017 DCL equal terms test by providing rights or opportunities to one party during the investigation but not making those rights or opportunities available to the other party on equal terms. A set of examples is indicated below.

- Elizabeth City State University (ECSU) policies⁷⁶ fail both the bias and equal terms test. ECSU policies automatically bestow the status of *victim* on the reporting (complainant) party and likewise place the stigma of *perpetrator* on the accused student prior to a Title IX investigation being conducted.

While some terms such as “victims” or “survivors” may be appropriate at certain stages, such as post-conviction, those terms are inappropriate at other stages, such as during an investigation. These terms are appropriate when delivering medical treatment to a victim or

⁷² Office for Civil Rights, *September 2017 Q&A on Campus Sexual Misconduct*

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ *Elizabeth City State University Sexual Misconduct, Stalking and Dating Violence Policy (Adopted 09/09/14)*

remedial services to survivors of rape or sexual assault in a post-conviction context. They are not appropriate, however, in regulations dealing with campus disciplinary processes or during the investigatory phase of an anticipated administrative proceeding, where the truth is not yet known and the use of such terms could skew the investigation and the proceedings. In these contexts, the terms “complaining witness” or “accuser” are more appropriate.⁷⁷

Additionally, ECSU policies provide a list of accommodations provided to the *victim* (reporting student) only. Per ECSU policy, accommodations arranged by ECSU for “*victims*” include making: “...any reasonable available change to a victim’s academic, living, transportation, and or working situation.”⁷⁸ As no such accommodations are provided in ECSU policy for the accused student, ECSU policy violates the equal term test of the 2017 DCL guidance.

Another particularly egregious violation is contained in ECSU’s policy regarding the investigative report compiled by the Title IX Investigator in which *only the written statement of the Complainant* is collected and included in the Investigators report.

Here’s what the policy states:

...the investigation report compiled by the Title IX Investigator shall contain the following information:

- i. the name and sex of the alleged victim and, if different, the name and sex of the person reporting the allegation;
- ii. a statement of the allegation, a description of the incident(s), and the date(s) and time(s) (if known) of the alleged incident(s);
- iii. the date that the complaint or other report was made;
- iv. the date the accused was interviewed;
- v. the names and sex of all persons alleged to have committed the alleged harassment;
- vi. the names and sex of all known witnesses to the alleged incident(s);
- vii. the dates that any relevant documentary evidence (including cell phone and other records as appropriate) was obtained;
- viii. any written statements of the complainant (or victim, if different from the Complainant); (emphasis added)**
- ix. the date on which the University deferred its investigation and disciplinary process because the complainant filed a law enforcement complaint and, as applicable, the date on which the University resumed its investigation and disciplinary process; x. the outcome of the investigation and, if any,
- x. Findings and a determination as to whether or not there was a violation of university policy⁷⁹

⁷⁷ Hans von Spakovsky, “Campus Sexual Assault: Understanding the Problem and How to Fix It”, *The Heritage Foundation LEGAL MEMORANDUM* No. 211, July 25, 2017

⁷⁸ *Elizabeth City State University Sexual Misconduct, Stalking and Dating Violence Policy (Adopted 09/09/14)*

⁷⁹ *Ibid*

North Carolina Agricultural and Technical State University (hereafter “A&T”) likewise stacks the deck against the accused student by allowing the Complainant a unique right to introduce an Impact Statement reserved only to the Complainant during the hearing process.

- A&T sexual misconduct policy states the following:

“The Complainant will be allowed the opportunity to write or verbally give an Impact Statement of how the incident may have affected her/him. The impact statement shall be presented during the hearing.” (emphasis added)⁸⁰

Another example of a UNC institution’s sexual misconduct policy that favor one party over another can be found at the UNC flagship institution, the University of North Carolina at Chapel Hill.

- The University of North Carolina at Chapel Hill sexual misconduct policy show’s bias toward the *Reporting Party’s* preference as indicated below:

“Where possible based on the facts and circumstances, the Equal Opportunity and Compliance Office or the Title IX Compliance Coordinator will seek action consistent with **the Reporting Party’s expressed preference for manner of resolution** (*emphasis added*)...”⁸¹

Additionally, under the section entitled *Voluntary Resolution*,

“Voluntary Resolution, when selected by the Reporting Party and deemed appropriate by the Equal Opportunity and Compliance Office or the Title IX Compliance Coordinator, is a path designed to eliminate the conduct at issue, prevent its recurrence, **and remedy its effects in a manner that meets the expressed preference of the Reporting Party...**” (*emphasis added*)⁸²

and

“If a Reporting Party requests Voluntary Resolution, and the Equal Opportunity and Compliance Office or Title IX Compliance Coordinator concludes that Voluntary Resolution is appropriate based on the factors outlined in the Initial Assessment, members of the Response Team will take appropriate action by imposing individual and community remedies **designed to maximize the Reporting Party’s access to all employment, educational, and extracurricular opportunities and benefits at the University and to eliminate a potential hostile environment.**” (*emphasis added*)⁸³

⁸⁰ North Carolina Agricultural and Technical State University Student Sexual Misconduct Policy, Page 15.

⁸¹ UNC-Chapel Hill Procedures for Reporting and Responding to Complaints of Discrimination, Harassment, and Related Misconduct Involving a Student as the Responding Party, Page 10.

⁸² UNC-Chapel Hill Procedures, 11.

⁸³ UNC-Chapel Hill Procedures, 12.

These examples are but a handful of one-sided, preferential opportunities provided to the accusing (female) complainant student but not to the accused male student found in UNC school policies.

We have advanced the argument that in order for due process to be available to both accuser and the accused, an equitable investigation must provide three essential elements: equal terms, no bias and impartiality of the investigator. However, evidence clearly shows that UNC has systemically, violated the concept of providing equitable investigations of sexual misconduct for accused male students.

3. Ability to Participate

UNC does not guarantee educational opportunities on an equal basis which Title IX requires. Federal regulations, namely 34 C.F.R. §106, prohibit discrimination on the basis of sex in education programs and activities that receive Federal financial assistance from the Department of Education.

Upon information and belief UNC discriminates on the basis of sex by weaponizing suspensions as a tool purposely used to remove *male* students accused of sexual misconduct from campus thereby depriving them of their right to education programs and activities.

We cite again the *Tanyi* case in which the Court recognized that “*Tanyi, however, was suspended for twenty days while awaiting the second Student B hearing, thus suffering a deprivation.*”⁸⁴

Upon information and belief UNC deliberately and routinely removes *male* students *accused* of sexual misconduct from UNC campuses by interim suspension usually under a pretext of “determining if the accused may present a danger or threat of safety to self or others” and even in the absence of any evidence of threatening behavior associated with the accused student exists.

In a recent case originating at Wesley College⁸⁵, OCR found that Wesley College violated Title IX by failing to provide accused students with essential procedural protections. Among the violations, OCR held that “While a school must assess whether the accused may present a danger or threat to the safety of self and others, an interim suspension was imposed the same day as the college received the report against the student even though the college had not interviewed the student.”⁸⁶

The issuance of an interim suspension is a destructive and intentional tactic used by UNC schools to deprive accused male students the ability to participate in school programs or activities and is well entrenched in the UNC system as supported by student affidavits contained in Exhibit 4. Please note that many other accused male students who spoke to us, told us that they feared retribution by the UNC school they were enrolled in if they executed an affidavit like those in Exhibit 4 and so declined to do so.

⁸⁴ *Tanyi v. Appalachian State University* lawsuit (Civil Action No. 5:14-CV-170RLV), Defendants' Motion to Dismiss (Doc. 30)

⁸⁵ Wesley College Complaint No. 03-15-2329

⁸⁶ <https://www.ed.gov/news/press-releases/students-accused-sexual-misconduct-had-title-ix-rights-violated-wesley-college-says-us-department-education>

4. Hiring Bias

Title VII of the Civil Rights Act of 1964 (Title VII) makes it illegal to discriminate against someone on the basis of race, color, religion, national origin, or sex. Women have alleged for decades that hiring discrimination against females exists in institutions of higher education.

But a new study by Cornell psychologists suggests that era has ended, finding in experiments with professors from 371 colleges and universities across the United States that science and engineering faculty preferred women two-to-one over identically qualified male candidates for assistant professor positions.⁸⁷

The data contained in Table 3 indicates that a disproportionate number of women are hired by UNC system-wide to serve in the roles of Title IX Directors, compliance officers and investigators. This data appears to support systemic sex discrimination in UNC hiring practices related to Title IX personnel that has a deliberate and disparate impact on the hiring on qualified male applicants. OCR needs to conduct a Title VII investigation into this practice.

Table 3 –Title IX Hiring Makeup at UNC School’s

University	# in Title IX office	# women	# men	Head of Title IX Office (Name)
Appalachian State University	5	4	1	Jordyne Blaise (F)
East Carolina University	5	5	0	LaKesha Alston Forbes (F)
Elizabeth City State University	3	2	1	Rafael Bones (M)
Fayetteville State University	3	3	0	Patricia Bradley (F)
North Carolina A&T State University	3	2	1	Linda Mangum (F)
North Carolina Central University	11	9	2	Ann Penn (F)
North Carolina State University	4	4	0	Linda McCabe Smith (F)
UNC Asheville	2	2	0	Jill Moffitt (F)
UNC Chapel Hill	16	15	1	Adrienne Allison (F)
UNC Charlotte	7	6	1	Jennifer Newell (F)
UNC Greensboro	4	3	1	Murphie Chappell (F)
UNC Pembroke	5	3	2	Ronette Sutton Gerber (F)
UNC Wilmington	4	2	2	Amber Resetar (F)
UNC School of the Arts	4	2	2	Delores Harrison (F)
Western Carolina University	4	3	1	Wes Chancey (M)
Winston-Salem State University	2	2	0	Aishah Casseus (F)
Total Employees	82	67	15	
	Percentage	82%	18%	

⁸⁷ Ted Boscia, “Women preferred 2:1 over men for STEM faculty positions”, *Cornell Chronicle* (April 13, 2015)

Based on information and belief, we believe that a disparate impact claim can be made against UNC. Disparate impact is not a matter of an employer's *intent* to discriminate, but whether the outcome of some policy *or practice* results in discrimination against individuals in a protected class. This would include any practice that has a different, negative effect on protected persons such as men (males) applying for jobs in a UNC school's Title IX office.

One would reasonably expect that to remove any taint of bias based on sex (gender), university Title IX offices would reflect at minimum a balance of sex (gender) makeup that closely reflects the UNC student community at large. As previously noted, students enrolled at the sixteen system universities sex makeup is 56.7% female and 43.3% male.⁸⁸ However, the sex makeup of leadership positions at Title IX offices distributed across UNC system institutions is disturbingly skewed 89% female and 11% male while the overall sex makeup of employees having Title IX functional responsibilities is 82% female and 18% male.

The evidence shows that UNC systemically and disproportionately favors and employs women to head Title IX offices and also to be the majority of Title IX investigators. We are requesting OCR assistance in referring this portion of our complaint to the proper government agency to determine if UNC has violated Title VII by employing discriminatory hiring practices that favor one sex (female) over another (male) related to UNC schools Title IX offices.

SUMMARY

The cases noted in this document represent a small sampling of the approximately 200+ lawsuits filed against universities in which male student plaintiffs allege being denied due process, subjected to what can only be described as kangaroo court processes and summarily expelled as a direct result of discriminatory practices used by universities to remove accused male students.

Accused male students routinely are denied fundamental due process rights such as witnesses appearing on their behalf, the introduction of exculpatory evidence, and the ability to question or cross examine the accuser's account. Equally troubling is that, with young lives hanging in the balance, attorneys are often barred from fully participating in Title IX disciplinary hearing. Increasingly students are turning to the courts for redress and not surprisingly state and federal courts are siding with student plaintiffs resulting in schools (and taxpayers) paying the bill.

Universities are not the proper institution to prosecute a rape case. In that regard, we would point to testimony provided to the U.S. Senate Health, Education, Labor and Pensions committee by Molly Corbett Broad, President of the American Council on Education, who stated:

“Conducting education and providing information is an area where college officials have vast experience. We must redouble our education efforts on sexual assault, and as I noted earlier, institutions are moving aggressively to do this. But performing investigations and adjudicating cases is a far more difficult challenge. We lack the authority to subpoena witnesses, control evidence and impose legal standards. Our disciplinary and grievance procedures were designed to provide appropriate resolution of institutional standards for

⁸⁸ [Source – UNC Interactive Data Dashboard: 2016 Enrollment Trends](#)

student conduct, especially with respect to academic matters. They were never meant for misdemeanors, let alone felonies. While we take our obligations to the victims/survivors of sexual assault very seriously and are fully aware of our responsibilities with respect to sexual assaults, our on-campus disciplinary processes are not proxies for the criminal justice system, nor should they be.”⁸⁹

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance.

UNC’s policies and procedures are not compliant with the regulation implementing Title IX, at 34 C.F.R. Part 106 in that they deny due process to male students, demonstrate a bias against male students accused of sexual misconduct, favor one party over another, provides interim measures to only one party, use interim suspensions as a weapon to remove accused male students thereby denying those male students the benefit of educational programs or activities and fail to provide equitable responses.

UNC non-compliance means that accused male students facing a Title IX misconduct investigation will continue to be subjected to a hostile environment, denied the ability to participate in or benefit from the school’s programs and will be harmed by inequitable treatment at the hands of UNC administrators. For these reasons we confidently submit this complaint and request an investigation across all 16 public institutions in the UNC system.

Recent Cases Granting Preliminary Injunctions to Students⁹⁰

In a number of recent cases federal courts have granted injunctive relief prohibiting schools from implementing discipline against students accused of sexual assault. Examples of such cases are:

- In *Nokes v. Miami Univ.*, S.D.Ohio No. 1:17-cv-482, 2017 U.S. Dist. LEXIS 136880 (Aug. 25, 2017), a Court in this District granted a preliminary injunction prohibiting a public university from suspending a student who had alleged that the school had acted in violation of his constitutional due process rights to notice and confrontation of adverse witnesses.
- In *Doe v. Pennsylvania State Univ.*, M.D.Pa. No. 17-CV-01315, 2017 U.S. Dist. LEXIS 132186 (Aug. 18, 2017), a court granted a preliminary injunction to student who had alleged that a school acted in violation of his due process right to confrontation in disciplinary proceedings
- In *Doe v. University of Cincinnati* 223 F. Supp. 3d 704 (S.D. Ohio 2016), a Court in this District granted a preliminary injunction prohibiting a public university from suspending a student who had alleged that the school had acted in violation of his constitutional due process right to confront adverse witnesses.

⁸⁹ Molly Corbett Broad, [letter to Senate Committee on Health, Education, Labor and Pensions, 25 June 2014, TS](#)

⁹⁰ We acknowledge and thank Joshua Adam Engel, Esq., of Engel & Martin, LLC for this section.

- In *Doe v. Brown Univ.*, 210 F. Supp. 3d 310, 313 (D.R.I. 2016), the court concluded that school breached its contract with a student by the manner in which it conducted his disciplinary hearing on an allegation of sexual misconduct. The school was ordered to vacate its finding and sanction against the student and expunge his record.
- In *Doe v. Univ. of Notre Dame*, N.D.Ind. No. 3:17CV298, 2017 U.S. Dist. LEXIS 69645 (May 8, 2017), the court concluded that a student facing discipline for an allegation of sexual misconduct has demonstrated “at least some likelihood of success on the merits of his breach of contract claim and of irreparable harm.” The school was ordered to stay its discipline of the student and permit him to sit for final examinations.
- In *Ritter v. Oklahoma*, W.D.Okla. No. CIV-16-043 8-HE, 2016 U.S. Dist. LEXIS 60193 (May 6, 2016), the court observed that “universities must ensure that the rights of both the accused and the accuser are protected.” The school was ordered to stay any discipline and to permit a student facing discipline for an allegation of misconduct to attempt to complete all remaining graduation requirements.
- In *Doe v. Middlebury College*, D.Vt. No. 1:15-cv-192-jgm, 2015 U.S. Dist. LEXIS 124540 (Sep. 16, 2015), the court found that a student accused of sexual misconduct had “demonstrated a sufficiently serious question regarding whether [the school] violated its policies.” The court ordered the school to not expel the student and allow him to remain enrolled in his courses.
- In *King v. DePauw Univ.*, No. 2:14-cv-70, 2014 U.S. Dist. LEXIS 117075 (S.D. Ind. Aug. 22, 2014), the court found that a student accused of sexual misconduct had demonstrated likely success on breach of contract claims against the school. The court prohibited the school from enforcing a suspension and ordered that the student be permitted to enroll in and attend the school without restriction.

These cases all represent situations where students who had credible evidence that a school employed an unfair disciplinary process has demonstrated sufficient facts to warrant the issuance of equitable relief on either a preliminary or permanent basis.⁹¹

⁹¹ A number of recent lawsuits challenging similar procedures have survived preliminary motions as federal courts expressed concern about the failure of schools to comply with their own procedures. See e.g. *Doe v. Amherst College*, D.Mass. Civil Action No. 15-30097-MGM, 2017 U.S. Dist. LEXIS 28327, at *41 (Feb. 28, 2017) (denying motion for judgment on pleadings for breach of contract for school policies enacted due to OCR pressure); *Naumov v. McDaniel College, Inc.*, D.Md. No. GJH-15-482, 2017 U.S. Dist. LEXIS 49887, at *29 (Mar. 31, 2017) (rejecting argument that Dear Colleague Letter required breach of college handbook); *Collick v. William Paterson Univ.*, D.N.J. No. 16-471 (KM) (JBC), 2016 U.S. Dist. LEXIS 160359, at *69-70 (Nov. 17, 2016) (“the Complaint sufficiently alleges that Defendants did not adhere to [the school’s] own rules, that the procedure they followed was unfair, and that the decision was not based on sufficient evidence”); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 600 (D.Mass.2016) (“the Court concludes that the complaint plausibly alleges that [the school] did not provide ‘basic fairness’ to” accused student); *Doe v. Lynn Univ., Inc.*, S.D.Fla. No. 9:16-CV-80850, 2017 U.S. Dist. LEXIS 7529, at *17 (Jan. 19, 2017) (plaintiff stated valid claims for of contract and breach of the implied covenant of good faith and fair dealing in connection with sexual assault investigation).

ADDENDUM - EXHIBITS