

How Universities are Using Title IX to Adopt Discriminatory Policies to Expel Young Men for Alleged Sexual Assault

BY IRIS EYTAN
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Title IX investigations, campus sexual assault policies and the need for schools to impose harsher discipline, have dominated recent headlines.

The sentiment that all young men accused of sexual assault are guilty was questioned, albeit briefly, when Rolling Stone Magazine retraced a high-profile article fraught with inaccuracies about male students' indifference about a fraternity gang rape.

However, on Sept. 10, U.S. Rep. Jared Polis expressed his support for expelling male students accused of sexual assault regardless of whether they are truly guilty. Polis stated, "If there's 10 people that have been accused, and under a reasonable likelihood standard maybe one or two did it, it seems better to get rid of all 10 people." Expelling falsely accused young men from college without due process is discriminatory and devastating.

It is laudable that our country is highlighting the atrocious crime of sexual violence on college campuses. It really is about time. But, in the rush to judgment, our schools have failed to apply inherent fairness of process. Title IX protects against all gender discrimination, not just one gender. These Title IX commandments strip all protections that a young man should have when he is facing expulsion from a university.

Title IX is a portion of the U.S. Education Amendments of 1972. It states, in part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." This statute now serves as the very keystone for the adoption of discriminatory university disciplinary policies around the country.

Title IX was not enacted with the vision to protect women against sexual violence on college campuses. Rather, the impetus was to ensure equality in admissions, educational activities, athletics programs and to protect against sexual harassment. The lack of specificity as to what a Title IX violation entails has allowed overly broad and discriminatory application.

Now, if a female student cannot enjoy the university's program because she claims she has been sexually assaulted, universities should ensure it does not

a member of the university's investigation team. If he chooses not to participate in the investigation, he will almost certainly be expelled. Unfortunately, for falsely accused young men, the investigation "process" offers little hope of revealing the truth. There is no hearing that will be conducted pertaining to the complaint. The investigation team is comprised of victim advocates and ex-prosecutors, not neutral fact finders. There are no trained criminal investigators on the university team, and no constitutional protections afforded to the accused.

piece of paper that may resemble an accusation. He won't be able to take the documents with him or to ask questions about the redacted portions. The student will never see the details of the complaint, and thus, cannot meaningfully defend against it.

Instead of affording the accused with a presumption of innocence, the universities have adopted a presumption of guilt. The investigators are not persuaded when the complainant has chosen not to file a complaint with law enforcement, or if she has, the fact that law enforcement or the

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discriminate against her by protecting her ability to enjoy the programs (and expelling the accused). Universities have a lot at stake if they are accused of not complying with Title IX, the U.S. Department of Education will assess millions of dollars in fines against the universities and suffer Title IX lawsuits by female students.

Here's how the Universities protect themselves, deny due process to males and how the lack of due process translates. The young women will make a complaint to the Title IX compliance office. Without any physical, documentary or other corroborating evidence or proof, and only based on her complaint, the young man is typically required to move off campus immediately and is given one week to decide if he wants to meet with

The male student may not have an attorney advocate on his behalf in this meeting, nor at any stage of the grievance process. But, he can have a "support person" present with him if he chooses to give his version of events to the investigators. The support person is forbidden from providing any input, including talking, refuting false evidence, advocating or explaining anything on behalf of the student.

The student is not permitted to see the complaint or the investigation supporting, or refuting, the complaint at any time. This means that the student cannot confront the evidence against him, including asking why, when and how. And, if he demands to see it, he will be lucky if he is granted access to view a heavily redacted

prosecutor's office refuse to file a criminal action against the young man because there is insufficient evidence. In many cases, even if the victim recants her statement or attempts to withdraw her complaint, the university will proceed with the investigation, and ultimately the expel the accused.

The U.S. Department of Education recommends that all universities apply the lowest standard of proof — preponderance of the evidence — in determining whether a young male has violated the code of conduct. The University of Colorado defines this standard as "50 percent plus a feather," meaning "it is more likely than not that the alleged behavior

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STARTUPS

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planning for an eventual exit.

The early-stage questions startups have are some of the most important ones to answer. Arney said he sees a constant stream of startup clientele in the legal market, but as a lawyer, he tries to be balanced, and to keep the rest of the tech group level, about the clients the firm takes on.

“Just because we hear one person’s new idea, they do need protections and support, but that doesn’t necessarily mean each is going to turn into the next Amazon or Google,” he said. And having seen the early 2000s web bubble, he said he has a realistic view of the market.

In addition to answering the common questions startups have, Arney said it was the tech group’s goal to be mindful of the fact that its intended audience likely hasn’t engaged the firm, or any firm, for legal services. Because of that, he said they wanted to help startups navigate what it means to buy legal services and explain why lawyers are “goofy and different” in terms of the ethical rules that guide attorney-client relationships.

In providing that type of information, Arney said it’s the goal to be informative, not self-serving. Startups face choices in terms of the depth of the relationship with legal counsel — whether it’s short-term or even one-time use services that could come from an online tool or a long-term relationship where a firm helps the company

continue to grow. He said the tech group hopes to also give an overview of fee structures, what questions to ask potential counsel and what services are available.

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Ryan Arney, corporate lawyer

The tech group seeks to become a resource for entrepreneurs because of their own internal entrepreneurial attitudes. Arney said the firm’s lawyers are allowed a level of entrepreneurship themselves, and that “spirit” motivated the tech group to find a new way to connect with the startup market.

“The obvious answer was to say, ‘give them substance. ... provide the information they commonly ask,’” he said. •

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TITLE IX

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occurred.” It is difficult, if not impossible, for any young man to disprove the allegations against him because the presumption is that the accuser did not consent, because she said so.

Colorado has not yet passed a law similar to California’s new “yes means yes” law, or the affirmative consent law, applicable to all California Universities. This law demands that a woman must say yes at all stages of a sexual encounter. Colorado doesn’t have this state law, but their policies already define consent as requiring consent at every junction of the sexual encounter, and consent to some forms of sexual activity does not establish consent as to others. According to CU’s definition, “prior sexual relationships, or the existence of current relationship do not imply consent, and consent can be withdrawn at any time, “and need not be a verbal withdrawal.”

Also recently enacted in California is the law that states that if the woman is intoxicated she cannot legally consent. Colorado schools have already been subscribing to this policy for years. Therefore, if a woman files a complaint stating she was intoxicated at the time of a sexual encounter, it doesn’t matter if she says yes, no or nothing, because if she is intoxicated she cannot consent to an otherwise lawful sexual encounter. It is irrelevant whether the young man believes

she is intoxicated or whether he too, is intoxicated.

The deck is stacked, the investigation is a farce, performed by believers biased and on the same team as the complainant and no meaningful representation is permitted. There is no fairness or dignity in the process. Their own policy of treating students “fairly and with dignity” belies their conduct and treatment of all genders. And the federal government is encouraging universities to codify discrimination by denying males due process in school disciplinary proceedings.

There must be a balance between the need to protect innocent male students falsely accused of sexual assault and the interest in protecting true victims of sexual assault. Adopting discriminatory disciplinary policies is not the answer. Instead, universities should adopt policies that comport with due process and equal protection and afford both the accuser and the accused a right to a fair investigation and hearing before imposing discipline.

Once accused, and then expelled, young men become branded as sex offenders and lose: the ability to obtain a college degree elsewhere, scholarships, the ability to join the armed forces or pursuing the careers of their choice. The outcomes are not as benign as Polis stated, “We’re not talking about depriving them of life or liberty, we’re talking about their transfer to another university.” •

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