

Campus Sexual Assault Investigations Need Greater Fairness for All Parties, Trial Lawyers Group Says

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The ***American College of Trial Lawyers (ACTL)*** has released a White Paper on Campus Sexual Assault Investigations aimed at improving the process employed by universities to address campus sexual assaults.

Concerns over sexual assaults on college campuses had prompted the U.S. Department of Education's Office for Civil Rights (OCR) to issue a Dear Colleague Letter, as well as a subsequent 2014 clarification, significantly expanding the federal government's interpretation of Title IX by establishing new procedures for colleges and universities to respond to allegations of sexual harassment and assault.

Members of law school faculties have opined that the accused in such assault cases are being denied fundamental rights.

State and federal court cases also similarly highlighted concerns about fairness during the investigative process.

The ACTL White Paper calls for the inclusion of due process mechanics during the investigative process. Recognizing the issues faced by universities at risk of losing federal funding for failure to comply with Title IX, the Paper notes, "These not-so-subtle pressures may contribute to partially discriminatory investigations and the absence of protection for the accused."

The ACTL advocates for encompassing essential elements of due process, including a fair and impartial investigation and hearing by qualified factfinders, the right to counsel for both parties, access to evidence, notice of allegations, and some form of cross-examination.

The White Paper focuses on the rights of the accused, suggesting they be provided:

- (1) a hearing with due consideration for partiality that could arise from the factfinders' other responsibilities;
- (2) timely details of the allegations;
- (3) notice of their right to counsel and right to be accompanied by counsel at all phases;
- (4) access to all evidence at a meaningful time and manner so they may respond adequately; and
- (5) written findings of fact on completion of the investigation sufficiently detailed to permit meaningful appellate review.

The Paper also suggests the accused should be found liable for such conduct only if the evidence satisfies the “clear and convincing” standard of proof. According to the ACTL, this more stringent standard is a compromise between the “preponderance of the evidence” standard, recommended by the OCR, and the “reasonable doubt” standard applicable in criminal proceedings.

The due process recommendations may prove especially useful in view of reported increases in college athlete assault and harassment investigations that have been widely covered by major media outlets. The same concerns also apply where coaches are accused of harassing or assaulting student-athletes. ACTL notes that the public's instinct to credit alleged victims, especially where such a power differential exists between the accused and the student, highlights how the proposed due process mechanism during the investigative process may help.

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