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IN MY OPINION (Column)

Male Students Discriminated Against in Sexual Misconduct Inquiries

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(The author is a member of the law firm of Werksmann, Jackson, Hathaway and Quinn. The following is from a petition for writ of mandate in Doe v. Occidental College, Los Angeles Superior Court No. BS 156253. The paragraph numbers have been removed, the footnotes renumbered, and references to exhibits have been deleted. Also, stars and bolding have been added.)

This case arises amidst a growing national controversy about the responses of colleges and universities to alleged sexual violence on college and university campuses.¹

The Federal Government, through the U.S. Department of Education, has been pressuring colleges and universities to aggressively pursue investigations of sexual violence on campuses under Title IX, the federal civil rights law that prohibits discrimination in education on the basis of gender, and for violations of the Clery Act, which requires all colleges and universities that participate in federal financial aid programs to keep and disclose information about crime on and near their respective campuses. Compliance with reporting sexual violence is monitored by the U.S. Department of Education, which can impose civil penalties for each infraction and can suspend institutions from participating in federal student financial aid programs. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act or Clery Act is a federal statute codified at 20 U.S.C. §1092(f), with implementing regulations in the U.S. Code of Federal Regulations at 34 C.F.R. 668.46.

On April 4, 2011, the Office for Civil Rights (“OCR”) in the U.S. Department of Education issued a “Dear Colleague” Letter on student-on-student sexual harassment and sexual violence. “Sexual violence” refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. All such acts of sexual violence are forms of sex discrimination prohibited by Title IX. Under Title IX, federally funded schools, such as Occidental College, must ensure that students are not denied or limited in their ability to participate in or benefit from the school’s educational programs or activities on the basis of sex. A school violates a student’s rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s educational program, i.e. creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to

end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. The “Dear Colleague” Letter also indicated that, in order to comply with Title IX, colleges and universities must have transparent, prompt procedures to investigate and resolve complaints of sexual misconduct. Most notably, the “Dear Colleague” Letter required schools to adopt a relatively low burden of proof —“more likely than not”—in cases involving sexual misconduct, including assault, and suggested that schools should focus more on victim advocacy. Respondent Occidental College is one of at least 74 colleges and universities under federal scrutiny for alleged indifference to “sexual violence” on campus in violation of Title IX as of May 2014.²

In April 2013 Occidental College professors Caroline Heldman and Danielle Dirks,³ in association with 36 alleged victims of rape or sexual assault at Occidental, filed a 250-page complaint with the U.S. Department of Education’s Office of Civil Rights alleging that Occidental College maintains a hostile environment for sexual assault victims and their advocates and violated Title IX laws against sexual discrimination and the Clery Act.⁴

In September 2013, Occidental College settled with at least ten of the complainants under an agreement negotiated by attorney Gloria Allred. The ten female complainants received cash payments from Occidental College and agreed not to participate in the Occidental Sexual Assault Coalition. Asst. Professor Danielle Dirks criticized attorney Gloria Alfred’s negotiated settlement stating that requiring “the women to remain silent and not to participate in campus activism could have a chilling effect at Occidental.”⁵



In January 2014, President Barack Obama, who attended Occidental College, put further pressure on colleges and universities to prevent and police sexual assaults on their campuses by creating a task force of senior administration officials, including the attorney general and the secretaries of the Education, Health and Human Services and Interior Departments, to coordinate federal enforcement efforts.⁶

In February 2014, Catherine E. Lhamon, the Assistant Secretary of Education who heads the department’s Office for Civil Rights, told college officials attending a conference at the University of Virginia that schools need to make “radical” change. According to the Chronicle of Higher Education, college presidents suggested afterward that these were “crisp marching orders from Washington.”⁷

The Federal government has created a significant amount of pressure on colleges and universities to treat all those accused of sexual misconduct with a presumption of guilt. In a Sept. 2014 article, the Chronicle of Higher Education noted that “Colleges face increasing pressure from ‘survivors’ and the federal government to improve the campus climate.”⁸ In the same article, the Chronicle noted that different standards were applied to men and women: “Under current interpretations of colleges’ legal responsibilities, if a female student alleges sexual assault by a male student after heavy drinking, he may be suspended or expelled, even if she appeared to be a willing participant and never said no. That is because in heterosexual cases, colleges typically see the male student as the one physically able to initiate sex, and therefore responsible for gaining the woman’s

consent.” Title IX sexual misconduct personnel are under pressure to act more as advocates for women and focus on validating the initial allegations of sexual misconduct, rather than arriving at a fair and impartial determination of the facts.

After years of criticism for being too lax, the pendulum has now swung far in the other direction with Occidental College discriminating against male students in order avoid federal penalties and settlement pay-outs for Occidental College’s failure to address the so-called “rape culture” and “sexual assault epidemic” on campus.⁹



This dispute is between two private parties—a private college and one of its students—concerning the college’s internal disciplinary process that terminated the student’s legal and contractual rights to complete his college education through a private administrative process controlled entirely by the private college, with no rules of evidence, no right to the evidence against him, no right to confront witnesses, no right to counsel, an internal appeal that ignores the hearing record entirely, and with the accused student labeled as responsible for “sexual assault” under the college’s policy, not under any penal code or civil code, but with similar adverse life-time consequences.

In this case, Petitioner has not been charged with any crime nor any civil wrong. Occidental College does not serve the public nor the People of the State of California. Occidental College serves its own private financial and institutional interests to protect its right to receive federal education money, and for Occidental College students to have access to federally-guaranteed student loans to pay their tuition to Occidental College, which federal money is at risk due to the pending U.S. Department of Education investigation into Occidental College’s conduct.¹⁰

Petitioner is unable to present any documents from the Occidental College Title IX process with his Petition because Occidental College does not allow Petitioner to possess copies of the investigation reports, witness statements, nor any of the evidence against him. Sharing of any documents with third parties, including filing with the California Superior Court, would subject Petitioner to further discipline by Occidental College.

1. Richard Dorment, *Occidental Justice*, (April 2015) Esquire; Teresa Watanabe, *More College Men Are Fighting Back Against Sexual Misconduct Cases* (June 7, 2014) Los Angeles Times.

2. *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, (May 1, 2014) U.S. Dept. Of Education, press@ed.gov.

3. In February 2012, Occidental College Associate Professor of Politics Caroline Heldman and Assistant Professor of Sociology Danielle Dirks founded the Occidental Sexual Assault Coalition, a campus advocacy group that has pushed the college to address what it calls the “rape culture” on campus and with a “mission is to raise awareness of the sexual assault epidemic.” (<http://oxvsexualassaultcoalition.wordpress.com/>) Asst. Prof. Danielle Dirks told a female student in another Title IX case that “[the male student] fits the profile of other rapists on campus in that he had a high GPA in high school, was his class valedictorian,

was on [a sports] team, and was ‘from a good family.’” See *Doe v. Occidental College*, LASC Case No. BS147275, petition pending in Dept 82.

4. Tyler Kingkade, *Occidental College Sexual Assault Response Subject Of Federal Complaints* (04/19/2013, Updated: 12/03/2013), www.huffmgtonpost.com.

5. Jon Wiener, *Rape Settlement at Occidental College: Victims Barred from Campus Activism* (September 19, 2013) *The Nation*.

6. Jackie Calmes, *Obama Seeks to Raise Awareness of Rape on Campus* (January 22, 2014) *New York Times*; Jason Felch and Larry Gordon, *Federal Task Force to Target Campus Sexual Assaults* (January 22, 2014) *Los Angeles Times*.

7. *Colleges Are Reminded of Federal Eye on Handling of Sexual-Assault Cases* (February 11, 2014) *Chronicle of Higher Education*.

8. *Presumed Guilty: College men accused of rape say the scales are tipped against them* (September 1, 2014) *Chronicle of Higher Education*.

9. U.S. Dept. of Education data shows that Occidental College’s reported rate of sexual misconduct is *16 times higher* than the next ten California schools combined. <http://ope.ed.gov/security/>

10. Occidental College is one of 113 colleges and universities currently under investigation by the U.S. Dept. Of Education for their handling of sexual violence cases. As April 1, 2015, 113 sexual violence cases are under investigation at 106 postsecondary institutions in the United States. Source: U.S. Dept. Education Office of Civil Rights.