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Title IX & The Civil Rights Approach to Sexual Harassment in Education

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Keynote Speech

Title IX & The Civil Rights Approach to Sexual Harassment in Education

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Thanks very much, Caitlyn, and my thanks to the entire *Roger Williams Law Review* for inviting me to speak today. Some of you may wonder why I start a keynote address for a symposium about Title IX and investigating claims of "sexual misconduct" with photos of people, mainly women, but plenty of men, too, engaged in political protest. I do so because I want to keep reminding us that Title IX is a civil rights law, one that protects equality and equal treatment, which have been the central demands of most mass protests in the United States, including the 2017 Women's March, which is the center photo in this slide. I also start with these photos because I want to remind us that what has been happening on college campuses since about 2013 with regard to Title IX is intertwined, in countless ways, with much more recent protests happening as a result of the "Me Too" movement and the

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Kavanaugh hearings, which have also been protests about sexual harassment and violence as a form of inequality. These protesters and movements understand that, to paraphrase the Secretary-General of the United Nations, Kofi Annan, sexual harassment is both a cause and a consequence of gender inequality.[1]

Finally, I start with these photos because these protests are a reflection of resistance to a broader attack on civil and human rights by the current administration, and I think it is important to look at the proposed changes to Title IX enforcement that Secretary of Education Betsy DeVos is endeavoring to make in this larger context. Although the current administration's rhetoric is that its proposed Title IX rules advance human rights, specifically rights to due process, when we place them in the broader, proper context we can see that they are instead completely consistent with the administration's overall attacks on communities of color, on immigrants, and on religious and gender minorities, just to name a few. I will return to this point in greater detail at the end of my remarks today, but I want to emphasize here, at the outset of these remarks, that our overall failure to see Title IX policy and enforcement as connected to these other civil rights struggles shows how we have lost sight of Title IX's fundamental character as a civil rights law. Even the use of "sexual misconduct" instead of "sexual harassment" reflects this misunderstanding.

Sexual harassment is a civil rights term. It was coined by women at Cornell University in the 1970s to describe the kind of unequal treatment women faced in the workplace.[2] Sexual misconduct is about the behavior of individual people who do not know how to act right. The term sexual misconduct also brings to mind the criminal law because that is the main way that our society deals with misconduct of all kinds. In this way, the term sexual misconduct does what most of the conversation about Title IX and sexual harassment has done over the last decade: it conflates sexual harassment with criminal sexual assault or sexual violence.

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1. Press Release, Kofi Annan, Secretary-General, United Nations, Atrocious Manifestation of Continued Systematic Discrimination, Inequality (Nov. 25, 2005), https://www.un.org/press/en/2005/sgsm10225.doc.htm [https://perma.cc/8DH7-CXGJ].

2. Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 8 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003).

To be clear, some kinds of sexual harassment, especially the most severe kinds like sexual assault, are criminal. But they are not *only* criminal. They are also civil rights violations and the conflation of sexual harassment with criminal sexual violence also has specific legal implications. It influences how we investigate and resolve accusations of sexual violence, for instance. And conflating Title IX and the criminal law inevitably means importing criminal law and procedure into the Title IX context. Experience shows that this only happens in one direction; we are not importing civil rights premises or principles into the criminal law.

Importing criminal law and procedure into how we implement and enforce Title IX is a problem because civil rights laws and criminal laws are very different, with different purposes and methods for fulfilling their purposes. So, if we import criminal law and procedure into Title IX proceedings, we undermine, even eliminate, Title IX's ability to fulfill its purpose, which is to protect civil rights and ensure gender equality in our schools.

For the remainder of my remarks today, I am going to explain in more detail why I say that conflating Title IX and the criminal law is destructive to Title IX and civil rights goals and principles, before turning back to the larger context that I have just mentioned. Here I should note that almost everything I am about to say about Title IX is based on how Title IX worked prior to this administration. I focus on how Title IX worked prior to the Trump Administration because the administration's attempts to change the enforcement of Title IX are not final and are unlikely to be final for a long time, as they will almost certainly be challenged in court the minute that they are published. I also focus on how Title IX worked prior to the Trump Administration because this is how Title IX is supposed to work. This administration's attempts to change the enforcement of Title IX are, in fact, attempts to undermine Title IX's effectiveness in protecting civil rights by turning it into a quasi-criminal law.

Let me get more specific about how and why turning Title IX into a quasi-criminal law would undermine and ultimately destroy Title IX's ability to protect civil rights. I start with what I regard as the four most important of the many, many ways in which a civil rights approach differs from a criminal approach when it comes to sexual harassment. As already explained, the civil rights approach is concerned with equality, in Title IX's case with equal educational

opportunity and educational environments that are equally supportive of the learning of all students regardless of their gender identity.

The criminal system is focused on keeping the abstract community as a whole safe from violence and basically relies on incarceration of criminal actors to achieve that safety. But that incarceration needs to be just, and we cannot be depriving citizens of their liberty under the Constitution based on crimes that they did not commit. So, this means that the focus of the criminal system is on the defendant's rights, not on the victim's needs. In contrast, incarceration is not the focus of the equality-based Title IX approach, not only because schools cannot lock people up, but also because incarceration does nothing to make people more equal.

Instead of focusing on the accused perpetrator's rights not to be unjustly imprisoned, the civil rights approach is fundamentally focused on the victim because the right to be free of gender discrimination in school is the victim's right. This is one of the reasons why there is an effort to turn various civil rights laws, and Title IX in particular, into quasi-criminal laws: because doing so changes our focus from the rights of the discrimination victim to the rights of the accused harasser. This tactic allows those who are often quite powerful and privileged to claim that they are the real victim—the victim of a supposed due process violation or a "witch hunt." Psychologists have named this phenomenon DARVO, which stands for "Deny, Attack and Reverse Victim and Offender,"[3] and we can see in, for instance, Harvey Weinstein's, Brett Kavanaugh's, and Donald Trump's reactions to being accused of sexual harassment and violence just a few of the many recent examples of the DARVO phenomenon.

The second difference between the criminal and civil rights approaches deals with what each system is structured to do. Victims have an extremely wide range of needs as a result of sexual violence, and the downward spiral that victims can experience if these needs are not met can seriously derail and even ruin their lives. Sexual violence causes serious health problems, including increased risk of substance use and re-victimization, eating

3. Jennifer J. Freyd, *What is Darvo?*, U. OR., https://dynamic.uoregon.edu/jjf/defineDARVO.html [https://perma.cc/JV7P-7USP] (last visited Mar. 21, 2020).

disorders, sexual risk behaviors, pregnancy, self-harm, and suicidality.[4] These health problems then require time off and usually cause a drop in grades and educational performance.[5] Both result in economic losses to, for example, financial aid and tuition dollars and, in the worst cases, a student ends up dropping out or transferring to a less desirable school.[6] The negative impact on future earning potential is likely to be large, so students' equal employment opportunities are likely to be diminished even before they start working.[7] Like with people already working, these dynamics have a larger impact on certain students, such as first generation college students, because you need resources to create the time and space to heal and these students and their families often have fewer of such resources.[8]

All of these needs mean that to re-establish an equal education for a student victim, the school must do more than simply punish the perpetrator. Most importantly, the school must provide the victim with accommodations like changes to living, working, transportation, and academic arrangements, ordering stay-away orders, and refunding tuition or providing other relief to victims whose trauma makes it impossible for them to continue with their education in the same way as they did before the violence. The criminal law, even if it wanted to, is not structured to provide such assistance. This is true even if the criminal system worked *perfectly*, 100% of the time, and police and prosecutors never made

4. Nicole Spector, *The Hidden Health Effects of Sexual Harassment*, NBC NEWS (Oct. 13, 2017), https://www.nbcnews.com/better/health/hidden-health-effects-sexual-harassment-ncna810416 [https://perma.cc/X743-TD6X].

5. *See* Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 396 (2005) ("The end result for victims is falling grades, prolonged school absence, and for many, eventual school drop out or failure. Simply put, sexual assault is a significant barrier to equal education for young women today.").

6. Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. FORUM 281, 295 (2016) (citing Rebecca Marie Loya, Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change 93–100 (June 2012) (unpublished Ph.D Dissertation, Brandeis University) (on file with The Heller School for Social Policy and Management)).

7. *See id.* at 296 (citing Loya, *supra* note 6, at 95).

8. *Id.* at 295–96 (citing Loya, *supra* note 6, at 104–10).

any errors in doing their jobs. The criminal system is just not set up to make a victim whole in the way that civil rights law can.

The third difference between the civil rights and criminal law systems has to do with who gets to decide whether an investigation of a victim's report will happen. When people report crimes, the expectation is that their report will be investigated, but police and prosecutors are the ones who actually decide what happens with that investigation. Police and prosecutors make the decision to advance very few cases through the criminal system, as you can see from this inverted pyramid aggregating the findings of many studies that, of 100 rapes committed, only 5–20 are reported to police, 0.4–5.4 are prosecuted, 0.2–5.2 result in conviction, and 0.02–2.8 result in any incarceration.[9]

What is also clear here is that an even smaller number of survivors will even give police and prosecutors the chance to make that decision.[10] Instead, the vast majority of survivors will use the victim's veto, described by Professor Douglas Beloof when he says that "[t]he individual victim of crime can maintain complete control over the process only by avoiding the criminal process altogether through non-reporting."[11] Although this description is for crime victims generally, this analysis is completely consistent with the dynamics of campus sexual harassment. Student survivors give very similar reasons for not engaging in the criminal system and often with their campus systems, especially when the campus system imitates the criminal system, and it looks like reporting to campus officials is the same thing as going to the criminal system.

The list of major reasons given by survivors in decades of studies about campus sexual harassment and sexual violence[12]

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9. Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 157 (2012).

10. *Id.* at 156–157.

11. Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 306 (1999).

12. The reasons, as displayed during the presentation, were: fear of hostile treatment or disbelief by legal and medical authorities; not thinking a crime had been committed or what happened was serious enough to involve law enforcement; not wanting family or others to know; not wanting to get assailants who victims know in trouble; lack of faith in or fear of police, police ability to apprehend the perpetrator, court proceedings; lack of proof; fear of retribution from the perpetrator; belief that no one will believe the victim and nothing will happen to the perpetrator.

echoes Professor Beloof's list, including survivors' desires to retain their privacy, their concern about participating in a system that may do them more harm than good, and their skepticism about the ability of the system to effectively solve many crimes.[13] Equally evident in this list are victims' concerns that they are going to be treated badly by systems in which they lack the ability to exert any meaningful control over the terms of their participation in the system.[14] Many victims, especially victims of color, may also reject the model of retributive justice that the criminal law uses or have reasons to be suspicious of criminal justice system actors like police and prosecutors, especially police.[15]

In contrast to the criminal system, where police and prosecutors decide what happens with the victim's case, the Title IX civil rights approach allows the *survivor* to decide. The Office for Civil Rights in the Department of Education approved of this approach in 2014 when it recognized that schools could establish a two-path reporting system.[16] This system was basically modeled on the system that was already being used with significant success in the U.S. Military[17] and, although the 2014 guidance has been rescinded, schools can still use this structure without violating Title IX. Both the military and Title IX systems give survivors at least two choices for how to report. Under the first option, they can make an official report to a responsible employee or to the Title IX coordinator, and that person must investigate unless the victim explicitly requests that there be no investigation and the Title IX coordinator can grant that request. The Title IX Coordinator may not be able to grant the request if the Title IX coordinator has access to information, such as multiple reports naming the same accused harasser, requiring an investigation despite the survivor's request for confidentiality. Thus, the survivor takes a chance in going to the Title IX coordinator because the survivor could lose some

13. Beloof, *supra* note 11, at 306.

14. *Id.*

15. *Id.*

16. *See* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND CAMPUS SEXUAL MISCONDUCT 21–24 (Apr. 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [https://perma.cc/5EEH-C8GY].

17. DEP'T OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE 9 (2014).

control over the process. If survivors want to maintain complete control over the process, they can choose to report in a confidential path, which would get them access to services and accommodations like the ones just discussed. However, reporting in a confidential path would not result in an investigation unless the survivor later decided to report to a responsible employee or to the Title IX coordinator, a switch from the confidential to the non-confidential path that the survivor can make at any time.

What the social science research and Professor Beloof's analysis about the victim's veto also shows us is that survivors who want an investigation and therefore decide to use the non-confidential path will take into consideration in making their decision how and under what procedural rules the investigation will operate.[18] This reality brings us to the final difference between the criminal system and the civil rights approach: Title IX and all civil rights statutes use procedures that treat the parties to the proceeding equally.

Once again, this approach is a stark contrast to criminal proceedings where victims are mere "complaining witnesses" with no party status and none of the procedural protections that come with party status. Indeed, the criminal law treats accused assailants and victims radically *un*equally.[19] Because their roles are limited to that of witness in criminal proceedings, victims enter the courtroom, give their testimony, and then are often not even allowed to remain in the courtroom for the rest of the trial.[20] Their lack of party status means that victims have no legal representation in a criminal proceeding, since the prosecutor represents the State, which may have very different interests

18. *See* Beloof, *supra* note 11, at 306.

19. *See* Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 849 (1997) (noting the various procedures developed to protect defendants and that no comparable body of law has developed to protect victims).

20. *See, e.g.,* ARK. CODE ANN. § 16–90–1103(a) (West 2018) (excluding victim from proceedings when "necessary to protect the defendant's right to a fair trial"); UTAH R. EVID. 615(d) (sequestering victim witnesses from proceedings unless "prosecutor agrees with the victim's presence"); Cellini, *supra* note 19, at 849. *But see* 18 U.S.C. § 3510 (2012) (prohibiting district courts from sequestering victim witnesses during the trial of the accused); ALASKA STAT. ANN. § 12.61.010(a)(1) (West 2018) (listing the right of a crime victim to be present during any prosecution).

from the victim.[21] Further, victims do not get equal evidentiary access or privacy protections from either the prosecution or defense, neither of whom is accountable to the victim.[22] Without party status, victims also have no right to appeal.[23] The procedurally equal system required by a civil rights approach is starkly different, since it considers the victim an equal party to the proceeding and follows the principle that any procedural right provided to one party must be provided to the other.

In fact, the procedural equality of the Title IX and other civil rights systems is the closest to full fairness that any system can get. It nevertheless is experienced as unfair by those who are accused of wrongdoing because of the ongoing comparison of Title IX to criminal procedures. Whereas the civil rights system does not privilege either party, criminal procedures give so many more procedural rights to the accused than they do to the victim that the accused will, of course, experience equal rights as a *loss* of rights that seems unfair. This adds to the pressure exerted by some to turn Title IX into a quasi-criminal law, because doing so would import the privileges that the criminal system gives to the accused over the victim.

Nowhere is this pressure heavier than with the fight over the standard of evidence, which the Trump Administration's proposed rules would push schools to change from "preponderance of the evidence" to "clear and convincing evidence."[24] The preponderance standard has become such a focal point because the preponderance standard is the most procedurally equal of all standards of proof,

21. *See* RUSSELL L. WEAVER ET AL., PRINCIPLES OF CRIMINAL PROCEDURE 5–6 (4th ed. 2012) (noting the policies and authorizations that affect federal and state prosecutors in practice); Cellini, *supra* note 19, at 851 (observing that prosecutors try to use time and resources efficiently, which closely relates to defense attorneys' objective of certainty in the outcome rather than the victim's desire for justice).

22. *See* WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW §§ 1.2(e), 1.3(a) (2d ed. 2010); Cellini, *supra* note 19, at 841.

23. 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3902.1 (2d. ed. 1991).

24. *See* Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence & Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 312-317 (2019) (discussing the proposed changes to the Title IX regulations that deal with the evidentiary standard).

and therefore gives neither accused students nor student victims an advantage in the fact-finding process.

Indeed, the preponderance of the evidence standard is the only truly civil rights standard for many reasons, but I am going to discuss only the two most relevant in my comments today. First, the preponderance standard gives both parties equal assumptions of truth-telling. In contrast, the criminal standards give heavy presumptions in favor of the accused and against the victim. This signals skepticism of the victim's account and *only* the victim's account. We can see this in the very language of the clear and convincing evidence standard, which requires that the fact finder be *clearly convinced* that the victim—and again, *only* the victim—is telling the truth. Adopting a standard that signals such skepticism is arguably discriminatory on its face, but it also relies on stereotypes that victims lie about being sexually victimized, stereotypes that have been around for centuries and have been rejected by criminal law reformers as gender discriminatory for decades.[25]

Second, the preponderance standard reflects the equal stakes of the parties. The rhetoric of the administration about its proposed rules implies that criminal standards of proof are more accurate, but as all lawyers and judges know, no standard of proof is more accurate than another. Standards of proof are chosen for the *kind* of inaccuracy that they risk and that choice reflects the relative stakes of the parties and other values of the system.[26]

This is another way in which the preponderance standard is the most equal standard of proof: it balances the risks between false positives (or "wrongful convictions" in criminal law terms) and false negatives (or "wrongful acquittals"). Criminal and quasi-criminal standards tolerate a much greater risk of false negatives, reflecting the stakes of those involved in criminal proceedings. The defendant could go to jail or have to register as a sex offender. The victim is not perceived as facing any consequences at all from the criminal

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25. *See* Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victim*s, 13 NEW CRIM. L. REV. 644, 645 (2010) ("The marital rape exemption and the historical requirements in rape law of resistance, corroboration, and chastity continue to infect both statutory law and the way that actors with[in] the criminal justice system—police, prosecutors, judges, and juries—see the crime of rape.").

26. *See* Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 742–744 (2012).

proceeding. Thus, we have crafted the evidentiary standard to avoid false positives, or wrongful convictions, even if that means risking many false negatives, or wrongful acquittals.

But in a campus Title IX investigation, both students have the same stakes in the outcome. Both wish to continue attending the school of their choice and both will likely be pushed to leave if the other one stays. On the one hand, the accused harasser may be suspended or expelled, and an expulsion may affect the accused student's ability to go to school elsewhere. Now I should note that the limited research and data that is out there indicates that accused harassers are rarely expelled[27] and, when they are, I have come across no research—and I have looked fairly extensively—indicating how often, if ever, accused students are unable to transfer to another school and to complete their education. Despite this lack of evidence, I am unwilling to dismiss this possibility on that basis. Consistent with the civil rights emphasis on equality, I believe we should be concerned about this danger and bear it in mind in structuring the rules of the proceedings, including with regard to the standard of proof.

On the other hand, research does show, and has shown repeatedly over many years, that many victims will transfer schools or drop out of school entirely as a result of an accused student remaining at that institution. Because encountering someone with whom the victim has had a traumatic experience triggers the trauma over and over again, making it impossible to continue with one's education,[28] victims are compelled to leave that school. Thus, the stakes are equal in these cases. The evidentiary standard should reflect these equal stakes, and the preponderance standard is the only standard that does.

This analysis is further confirmed by the fact that the preponderance standard is also the standard of proof that schools are expected to use in investigating and resolving complaints of racial harassment. My research has established that the Office for Civil Rights in the Department of Education has enforced, in both sexual and racial harassment cases, an expectation that schools use

27. *See* Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 13–14 (2019).

28. *Id*. at 14.

the preponderance of the evidence standard when investigating any complaints of discriminatory harassment.[29] This enforcement approach dates back at least to 1995 in sexual harassment cases and was used as recently as 2014 for racial harassment cases.[30] The proposed rules that the current administration issued in November 2018 would break this consistent and equal treatment of sexual and racial harassment victims.

As you can see from the text of the proposed rule,[31] it drives schools to use a clear and convincing evidence standard in sexual harassment cases and this breaks the consistent, across the board enforcement that was done in the past with regard to discriminatory harassment cases. The proposed rules only apply to sexual harassment cases, thus presenting the immediate question: if a school uses clear and convincing evidence for sexual harassment, but preponderance of the evidence for racial harassment, what happens when a woman of color is both sexually and racially harassed? When it comes to the investigation and what kind of standard is going to be used, will the victim be a woman first or will she be a person of color first?

These are especially troubling questions because we know from decades of research that women of color are sexually harassed more—and more severely—than white women.[32] We also know that they are harassed in ways in which gender and race discrimination are so intertwined that they cannot be separated, as

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29. *Id*. at 5.

30. *See id*.

31. [I]n reaching a determination regarding responsibility, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The recipient may, however, employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61477 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

32. Cantalupo, *supra* note 27, at 45, 47–48, 54; *see also* Cantalupo, *supra* note 24, at 317.

this quote from an actual letter from a white male professor to a woman student of color shows.[33]

Despite this disproportionate targeting, women of color are also less likely to be believed when they complain of harassment because they face stereotypes that are both racist and sexist.[34] Racialized stereotypes dating back to slavery and colonialism treat women of color as prostitutes or as promiscuous, with each group of women of color, as you can see here, having its own very special stereotype of how we are all whores or sluts.[35] Then, sex stereotypes about supposedly unchaste women being essentially unrapable cause many people to assume that women of color are lying when they say that they did not consent to sexual activity.[36] As I have already explained, the proposed rules, especially the one that would push schools to use clear and convincing evidence, will make it harder for

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33. *See* Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, *in* CRITICAL RACE FEMINISM: A READER 349, 349 (Adrien Katherine Wing ed., 2d ed. 2003).

> I'll get right to the point, since the objective is to give you, in writing, a clear description of what I desire . . . . Shave between your legs, with an electric razor, and then a hand razor to ensure it is very smooth . . . .
>
> I want to take you out to an underground nightclub . . . like this, to enjoy your presence, envious eyes, to touch you in public . . . . You will obey me and refuse me nothing . . . . I was dreaming of your possible Tokyo persona since I met you. I hope I can experience it now, the beauty and eroticism.

Id.

34. *See* Cantalupo, *supra* note 24, at 317–18; Cantalupo, *supra* note 27, at 16–20, 25–26, 27–28, 30.

35. African American women are stereotyped as "Jezebels." Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates Over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185, 214 (2014). Latinas are stereotyped as "hot-blooded" and Asian Pacific Islander and Asian Pacific American women as "submissive and naturally erotic." Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 819–820 (1993). American Indian/Native American women are stereotyped as "sexual punching bag(s)." *See* Debra Merskin, *The S-Word: Discourse, Stereotypes, and the American Indian Woman*, 21 HOW. J. COMM. 345, 353 (2010). Finally, multiracial women are stereotyped as "tragic and vulnerable." *See* Jessica C. Harris, *Centering Women of Color in the Discourse on Sexual Violence on College Campuses*, *in* INTERSECTIONS OF IDENTITY AND SEXUAL VIOLENCE ON CAMPUS: CENTERING MINORITIZED STUDENTS' EXPERIENCES 42, 49 (Jessica C. Harris & Chris Linder eds., 2017).

36. *See* Anderson, *supra* note 25, at 645.

all victims to be believed. But the stereotyping that women of color face will make those additional barriers particularly damaging for survivors of color.

Many of you may be thinking: but I had heard that the proposed rules would address race discrimination against men of color because they are disproportionately accused, and falsely so, of sexual harassment on college campuses. Such a narrative has been circulating for quite a few years now, and it actually does not originate with the current administration. That narrative alleges that the wave of accusations of sexual violence on college campuses is yet another iteration of the white supremacist excuse for lynching during the Jim Crow period in the American South: white women falsely accusing black men and boys of sexual assault.

The reality is that campus investigations of sexual harassment are not public, and there is almost no data indicating what the racial demographics are of either accusers or accused in sexual harassment cases. But the little data we do have, from both the criminal system and the educational system, shows that men and boys of color are not disproportionately disciplined in *sexual harassment and violence* cases—even though they are subject to discriminatory discipline for other kinds of misconduct when that misconduct primarily harms white people.[37]

For instance, in an extensive study from the criminal system, the researchers concluded, after looking at over 40,000 cases, that only defendants of color who were accused of primarily *inter*-racial crimes, such as robbery or other property crimes, were treated more harshly than white defendants.[38] Defendants of color who were accused of primarily *intra*-racial crimes, like sexual assault, were treated more *leniently*.[39] This study echoes research with which many of us are familiar, at least in law schools, regarding the death penalty, which has shown over and over again that the most likely defendants to receive death sentences are defendants of color who killed a white person.[40]

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37. *See* Cantalupo, *supra* note 27, at 73, 78–79.

38. *See id*. at 35; *see also* Christopher D. Maxwell et al., *The Impact of Race on the Adjudication of Sexual Assault and Other Violent Crimes*, 31 J. CRIM. JUST. 523, 523 (2003).

39. *See* Maxwell, *supra* note 38, at 523.

40. *See* Cantalupo, *supra* note 27, at 16.

This insight is also corroborated by the very limited research and data that we have from the K-12 educational context. The Department of Education Civil Rights Data Collection shows that K-12 students engaging in sexual harassment are disciplined both less and without major racial disparities even when there were large racial disparities for other kinds of discipline in schools.[41]

The current administration's rhetoric around its proposed Title IX rules ignores this data and pretends that its proposed rules are going to advance racial justice by decreasing discriminatory discipline of men of color. In actuality, however, they do nothing to address the real discriminatory discipline problems that are faced by male students of color, even as the proposals enable the intersectional, racial, and gender discrimination against women of color that I have already discussed. And it is important to point out that if this administration had conceived of women of color as being common sexual harassment victims—or even victims at all—it could not possibly have created the intersectional legal conflict I've already mentioned in the first place. Only an administration that held racialized gender stereotypes and therefore did not think that women of color could be sexually victimized would have proposed such rules.

Meanwhile, as the administration takes actions in the Title IX context that expose the intersectionally racist and sexist nature of its goals, it has dismantled protections against *real* discriminatory discipline problems facing students of color. These problems are those that have been extensively documented as leading to the school-to-prison pipeline in education. In addition, they are not only problems that affect particularly African American students in large numbers, but, as already noted, they overwhelmingly do *not* involve sexual harassment. Thus, although there is simply no evidence to support claims that changing *Title IX* enforcement on sexual harassment would help men and boys of color, the administration is attempting to make such changes anyway. It is doing so while also deliberately and quietly halting *proven* methods of reducing discriminatory discipline that is well-documented, serious, and widespread.

And when I say "quietly," I mean about as quietly as the federal government can do anything. The administration announced that

41. *See id.* at 77, 78 n.440.

it was rescinding the Obama-era guidance on discriminatory discipline in December 2018, in the early evening of the Friday before the nation's longest annual holiday, with what would turn out to be the longest ever federal shutdown pending.[42] This is in contrast to how Secretary DeVos announced the rescission of the Title IX guidance, which was done via a splashy speech at George Mason University's Antonin Scalia Law School.[43] Thus, the impact of any changes to the Title IX rules would be a net loss to communities of color, particularly to African American communities. They would harm women and girls of color and then, when combined with what the Department of Education is doing in the discriminatory discipline context, they would also harm men and boys of color, especially African American men and boys, although it is worth noting here that the research shows that disproportionately high numbers of African American girls face discriminatory discipline as well.[44]

So, the civil rights of students of color are under serious attack and that attack is coming from all sides despite the claims that the changes in Title IX are going to be protective. The actual solution, or at least the necessary first step towards a solution, is not changing the Department of Education's enforcement approach, but collecting more and more relevant data about what is going on in education with regard to sexual harassment, including demographic information. That way we can have a clearer and more accurate understanding of what the problem looks like so we can create the right solutions.

Most critically, we need to consider the data on who is accusing whom and who is being disciplined for sexual harassment. And it's

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42. *See* Laura Meckler, *Trump Administration Revokes Effort to Reduce Racial Bias in School Discipline*, WASH. POST (Dec. 21, 2018), https://www.washingtonpost.com/local/education/trump-administration-revokes-effort-to-reduce-racial-bias-in-school-discipline/2018/12/21/3f67312a-055e-11e9-9122-82e98f91ee6f_story.html?noredirect=on&utm_term=.8b519a6f49ec [https://perma.cc/J2XR-H65U] (explaining that the Trump Administration rescinded Obama-era guidance that put schools on notice that they could be violating civil rights laws by punishing minority students at higher rates).

43. Susan Svrluga, *Transcript: Betsy DeVos's Remarks on Campus Sexual Assault*, WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/?utm_term=.abc3866968fc [https://perma.cc/GH7V-99UB].

44. *See* Verna L. Williams, *Title IX and Discriminatory School Discipline*, 6 TENN. J. RACE, GENDER & SOC. JUST., 67, 75 (2017).

important to note that these are different inquiries. The current administration and its allies' rhetoric conflates them and, in doing so, they imply that the problem is racism on the part of the accusers, not racism embedded in the campuses that are disciplining accused harassers. Although certainly there could be a level of coordination between accusers and disciplinarians as there arguably was during the lynching period in the American South, we do not have any data to prove, or even support, *any part* of such a claim. And the data that we do have indicates that many of the accusations that are being made in this context are again being made by women survivors of color, as well as against accused individuals who are not people of color.

As already mentioned, we do not have all of this data because schools are generally not required to disclose any information about disciplinary complaints. Therefore, they don't have to tell us what disciplinary complaints they have received or what result they have reached after an investigation of those complaints. And that would obviously include demographic information about who is accusing whom and what disciplinary decisions are being made in those cases. This lack of transparency has long been a target for Title IX survivor activists who have championed, for instance, new legal requirements for mandated climate surveys. In contrast, the last fully Republican-controlled Congress introduced legislation that would prohibit the Department of Education from *ever* requiring a climate survey among their students. This opposition was mounted even though the rhetoric that there are widespread false accusations directed at college men of color by white college women could be tested by requiring more transparency such as mandated climate surveys. As such, it must increase our skepticism of such rhetoric. We have to ask: why on earth would you oppose collecting data that would prove your point if you believe your point is actually accurate?

As all of this evidence shows, the proposed Title IX changes have nothing to do with advancing racial justice or gender justice. They are not only discriminatory in terms of gender, but they are also discriminatory in terms of race and, therefore, anyone who cares about either or both racial and gender justice should oppose them. Thank you.

BALANCING THE SCALES: STUDENT SURVIVORS' INTERESTS AND THE MATHEWS ANALYSIS

SAGE CARSON[1] AND SARAH NESBITT[2]

In response to activism by student survivors of sexual violence beginning in the early 2010s, respondents—those students named as abusers and harassers in sexual misconduct cases—and their advocates have recently turned to the courts. To date, respondents have filed over 500 due process claims to challenge the fairness of their schools' sexual misconduct disciplinary proceedings. Courts assessing these due process claims apply the Mathews v. Eldridge balancing test, the governing procedural due process framework. The Mathews balancing test instructs courts to weigh: 1) the private interests at stake; 2) the risk of erroneous deprivation using current procedures; and 3) the public interests at stake. The underlying facts in Mathews concerned two parties—the party facing a deprivation and the charging institution. But Mathews did not contemplate the structure of cases where one student has allegedly harmed another, meaning there is an additional party to consider: a complaining student. Sexual misconduct cases, like other harassment, discrimination, and violence cases, have this unique three-party structure. By applying the Mathews balancing test—a due process framework built on a two-party case—to what are in fact three-party cases, courts fail to adequately account for all of the interests at stake. As a result, student survivors have been pushed off the scales of justice when courts consider what process is due to student respondents. But the Mathews framework, when properly applied, includes universities' broader goals as well as survivors' interests. To preserve the rights and respect the interests of all respondents, survivors, and schools alike, the courts must adequately balance all of the interests at stake, accounting for survivors' interests in the realms of education, reputation, and future prospects under the third Mathews factor. While there are legislative, administrative, and institutional ways to pursue fairness in campus sexual misconduct disciplinary proceedings, the courts are the constitutional backstop for each of these avenues. Only once survivors' interests have been restored to the scales in Mathews analyses will advocates have the opportunity to achieve truly fair, balanced processes.

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[2] Policy Organizer at Know Your IX; Georgetown Law 2021. We would like to thank Alexandra Brodsky, Adele Kimmel, and Nancy Cantalupo for their invaluable guidance, thoughtful editing, and continued encouragement. We would also like to thank the editors of this journal, especially Virginia Wright, for being the most gracious editors we could have asked for. Finally, thank you to our friends and fellow organizers, past and present, at Know Your IX as well as to the many survivors who have shared their stories to challenge the status quo, and the many more who never will.

On September 8th, 2017, Secretary of Education Betsy DeVos announced in a speech at George Mason University that she would be rescinding the 2011 Dear Colleague Letter (hereinafter 2011 DCL)[3]—a Title IX guidance letter meant to ensure colleges and universities knew how to properly and fairly respond to reports of sexual harassment or violence. DeVos claimed she was motivated to rescind the guidance because of what she had seen as a failure of schools to uphold due process,[4] stating:

> Through intimidation and coercion, the failed system has clearly pushed schools to overreach. With the heavy hand of Washington tipping the balance of her scale, the sad reality is that Lady Justice is not blind on campuses today. . . . Due process is the foundation of any system of justice that seeks a fair outcome. Due process either protects everyone, or it protects no one.[5]

Although DeVos continuously stated she would not turn her back on student survivors, her words and her actions did not align. DeVos met with survivors and their advocates only once,[6] while she and other Department of

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[3] Susan Svrluga, *Transcript: Betsy DeVos's Remarks on Campus Sexual Assault*, Wash. Post (Sept. 7, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/ [https://perma.cc/NUQ8-3B7Z].

[4] *Id.*

[5] *Id.*

[6] Katelyn Burns, *These Groups Met with Betsy DeVos on Changing Campus Rape Guidelines. Now They're Backing Brett Kavanaugh*, Rewire.News (Oct. 3, 2018), https://

Education staff continued to meet and work with key players in the respondents' rights movement.[7] Further, DeVos replaced prior Title IX guidance with her interim guidance, which created an unbalanced system that offered special rights to respondents only[8] and was in direct conflict with the Bush Administration's persisting 2001 guidance.[9] About a year later, DeVos issued her proposed rule on Title IX that not only drastically tipped the scales in favor of respondents but also acted as a shield against liability for schools that fail to ensure survivors' access to education, contrary to the directives of Title IX.

DeVos' inability to fairly balance student survivors' rights and interests with respondents' due process rights reflects a growing and concerning trend. As the movement for respondents' rights has grown, shifting the attention of campus sexual assault from survivors to the rights of respondents, survivors' interests in their fair and equal access to education has been ignored by popular press, the Department of Education, and—most recently—the courts.

In recent years, students found responsible for sexual misconduct who believe their due process rights were violated have increasingly turned to the courts.[10] Today, more than five hundred civil suits of this kind have been filed.[11] These suits have focused on universities' alleged failure to provide

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rewire.news/article/2018/10/03/these-groups-met-with-betsy-devos-on-changing-campus-rape-guidelines-now-theyre-backing-brett-kavanaugh/ [https://perma.cc/5693-2ZJK].

[7] *See, e.g.,* Email from Gregory J. Josefchuk, President, National Coalition for Men Carolinas to Candice Jackson, Acting Assistant Secretary, Office for Civil Rights, U.S. Dep't of Educ. (Sep. 5, 2017), *in* Freedom of Information Act Response, 137–53 (Politico, 2019) (on file with authors); Email from Gregory J. Josefchuk, President, National Coalition for Men Carolinas to James Ferg-Cadima, Acting Deputy Assistant Secretary for Policy & Senior Counsel, Office for Civil Rights, U.S. Dep't of Educ. (June 23, 2017) *in* Freedom of Information Act Response, 154–56 (Politico, 2019) (on file with authors).

[8] Elizabeth Tang, *Betsy DeVos is Giving Alleged Rapist Special Rights*, Nat'l Women's L. Ctr. (Sep. 28, 2017), https://nwlc.org/blog/betsy-devos-is-giving-alleged-rapists-special-rights/ [https://perma.cc/DE6E-9VNX].

[9] *Compare* Off. for Civil Rights, U.S. Dep't Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 21 (2001) [hereinafter 2001 Sexual Harassment Guidance], https://www2.ed.gov/about/offices/list/ocr/docs/shguidee.pdf [https://perma.cc/UJV2-P2VZ] (stating that "[i]n some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.") *with* Off. for Civil Rights, U.S. Dep't Educ., Q&A on Campus Sexual Misconduct 4 (2017) [hereinafter 2017 Q&A] https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [https://perma.cc/YEY4-8FHY] (offering in contrast, "[i]f all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.").

[10] Emily Yoffe, *Joe Biden's Record on Campus Due Process Has Been Abysmal. Is It a Preview of His Presidency?*, Reason (Nov. 12, 2019), https://reason.com/2019/11/12/joe-bidens-record-on-campus-due-process-has-been-abysmal-is-it-a-preview-of-his-presidency/# [https://perma.cc/W4F8-ZXKU].

[11] *Id.*

notice of the allegations against a student,[12] the use of single investigator models as opposed to hearings,[13] and concerns that there was no opportunity for live cross examination.[14] But despite growing national conversations painting Title IX as creating systems that favor survivors across the board, the reality for student survivors is much bleaker. Survivors have been forced out of school,[15] been punished for being raped[16] or speaking out,[17] lost thousands of dollars,[18] died by suicide,[19] and been killed by intimate partners after their schools refused to take action to keep them safe.[20] Currently, about a third of survivors are forced out of school because of violence against them, coupled with their schools' indifference to their complaints.[21] Despite the harms that survivors have faced and their obvious stake in campus misconduct disciplinary proceedings, courts have largely failed to consider their interests.

In respondents' lawsuits, the courts apply prevailing precedent to balance the rights at stake in a campus sexual misconduct disciplinary proceeding and determine what process requirements are constitutionally due to respondents. They then analyze whether the process the respondents were afforded in the proceeding below meets that bar. That due process analysis is governed by the *Mathews v. Eldridge* balancing test, which instructs courts

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[12] *See, e.g.*, Harnois v. Univ. of Mass. at Dartmouth, No. 1:19-cv-10705, 2019 WL 5551743, at *8 (D. Mass. Oct. 28, 2019).

[13] *See, e.g.*, Doe v. Vanderbilt Univ., No. 3:18-cv-00569, 2019 WL4748310, at *14 (M.D. Tenn. Sept. 30, 2019).

[14] *See, e.g.*, Messeri v. Univ. of Colo., Boulder, No. 1:18-cv-2658, 2019 WL 4597875, at *17 (D. Colo. Sept. 23, 2019).

[15] *See, e.g.*, Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sep. 26, 2017), https://www.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus [https://perma.cc/X9V2-63ZX].

[16] *See, e.g.*, Nora Caplan-Bricker, *"My School Punished Me,"* SLATE (Sep. 19, 2016), https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html [https://perma.cc/H9JQ-EQGE]; Tyler Kingkade, *Girl Suspended after Being Sexually Assaulted in School Stairwell*, BUZZFEED NEWS (Sep. 22, 2016), https://www.buzzfeednews.com/article/tylerkingkade/girl-suspended-after-being-sexually-assaulted-in-school-stai [https://perma.cc/26KE-WB65].

[17] *See, e.g.*, Alanna Vagianos, *A Sexual Assault Survivor at Princeton Tried to Protest. Instead, She Was Fined $2,700*, HUFFPOST (May 16, 2019), https://www.huffpost.com/entry/sexual-assault-survivor-princeton-protests-title-ix_n_5cdad56ee4b0615b0819c2a2 [https://perma.cc/AVG3-3UCJ].

[18] *See, e.g.*, Jenavieve Hatch, *First They Told Their Stories. Now They Want Their Money*, HUFFPOST (May 12, 2019), https://www.huffpost.com/entry/usc-msu-financial-restitution_n_5cc9bd17e4b0913d078b76d9 [https://perma.cc/MDM6-7KBQ].

[19] *See, e.g.*, Tyler Kingkade, *A 19-Year-Old Killed Herself, and the Family Says Her School Could've Saved Her*, BUZZFEED NEWS (Feb. 4, 2017), https://www.buzzfeednews.com/article/tylerkingkade/a-19-year-old-killed-herself-and-the-family-says-her-school [https://perma.cc/8WJX-ZLSC].

[20] *See, e.g.*, Jeremy Bauer-Wolf, *Prejudicial Police Department?*, INSIDE HIGHER ED (July 15, 2019), https://www.insidehighered.com/news/2019/07/15/parents-slain-university-utah-student-sue-under-title-ix [https://perma.cc/G232-PXJS].

[21] *See* Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. OF C. STUDENT RETENTION 234, 243 (2015).

to weigh 1) the private interests at stake, 2) the risk of erroneous deprivation using current procedures, and 3) the public interests at stake.[22] Like those in *Mathews*, the underlying facts in *Goss v. Lopez*, 419 U.S. 565 (1975), the seminal school discipline case, concerned two parties—the student facing a deprivation and the institution charged with levying sanctions. Their interests balanced against each other to yield the process due. But those cases did not contemplate the structure of cases where one student has allegedly harmed another, meaning there is an additional party to consider: a complaining student. Sexual misconduct cases, like other harassment, discrimination, and violence cases, have that three-party structure. We posit that by applying the *Mathews* balancing test—a due process framework built on a two-party case—to what are in fact three-party cases, courts fail to adequately account for all of the interests at stake. In the process, the interests of student survivors who have come forward as complainants have been widely ignored in the balance of what process is due to respondents, yielding incomplete analyses.

But the *Mathews* framework has the capacity to accommodate those currently omitted interests through its third prong: the public interest. In this article, we set the backdrop for Title IX as the recent battleground for gender equity in access to education, overview relevant precedential cases, and delineate complainants' critical interests that are at stake in sexual misconduct cases. We conclude by offering strategies—in the legislature, the administrative state, and the courts—through which advocates can more fully promote complainants' interests in procedures constitutionally due to respondents in campus sexual misconduct proceedings.[23]

I. The Battle Over Title IX

In recent years, colleges have become entwined in a national battle over the rights of survivors of sexual violence and what is due to respondents, students named as abusers and harassers in sexual misconduct cases. Respondents' rights groups and popular press have insisted that Title IX has forced "the pendulum [to swing] too far" in the wrong direction.[24] Despite

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[22] *See* Mathews v. Eldridge, 424 U.S. 319, 335, 347 (1976).

[23] We note that a holistic *Mathews* analysis is not the only reason for considering complainants' interests in the due process analysis. There are ample reasons for such considerations, including but not limited to policy reasons of general fairness, statutory obligations under Title IX, and constitutional ones under the Equal Protection Clause. Additionally, this truncated due process analysis is not the only fairness issue complainants face in campus sexual misconduct cases, nor is the due process analysis in court the only legal remedy for those fairness issues. Complainants wronged and erased by their schools have a plethora of injuries and rights that they may be able to vindicate through the courts in other ways. We simply focus in this article on the *Mathews* due process argument set forth here.

[24] Sarah Brown, *DeVos's Rules on Sexual Misconduct, Long Awaited on Campuses, Reflect Her Interim Policy*, Chron. Higher Educ. (Aug. 29, 2018), https://www.chronicle.com/article/DeVos-s-Rules-on-Sexual/244394 [https://perma.cc/CA7L-BNRS].

the possibility for collaboration, some who advocate for respondents' rights have chosen to do so by ignoring the experiences of student survivors of sexual violence and claiming that schools favor student survivors over respondents.[25] In actuality, schools have widely denied student survivors basic educational protections and continually pushed them out of school.[26] In an effort to "balance the scales," which they believe were tipped in favor of survivors because of prior administrative enforcement and survivor activism, respondents have taken to the courts.

A. The Rise of the Student Survivors' Rights Movement

On the morning of July 15, 2013, the organizers of ED Act Now rallied outside the Department of Education, side-by-side with dozens of student survivors and their allies, in anticipation of the delivery of their petition. The organizers demanded the Department "step up to hold colleges and universities publicly accountable for complying with federal law . . . [and] protecting survivors of sexual assault like us."[27] In the preceding months, student survivors had begun to file complaints with Department of Education's Office for Civil Rights (OCR) regarding their schools' mistreatment or dismissal of their sexual harassment or violence complaints. They alleged their

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[25] Families Advocating for Campus Equality, Comment on *ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, https://static1.squarespace.com/static/5941656f2e69cffcdb5210aa/t/5ccbd44ff4e1fcdaca50141f/1556862039627/FACE+NPRM+TITLE+IX+COMMENT+Docket+No.+ED-2018-OCR-0064+ed.+copy.pdf [https://perma.cc/C4MH-9K5W] ("Previous Department guidance caused educational institutions to tilt the scales of justice in favor of complainants.").

[26] *See, e.g.*, Tyler Kingkade, *Schools Keep Punishing Girls — Especially Students of Color — Who Report Sexual Assaults, and the Trump Administration's Title IX Reforms Won't Stop It*, The74Million (Aug. 6, 2019), https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it/ [https://perma.cc/P6UK-D28M]; Caroline Kitchener, *She Reported Her Sexual Assault. Her High School Suspended Her for 'Sexual Impropriety'*, Lily (Aug. 26, 2019), https://www.thelily.com/she-reported-her-sexual-assault-her-high-school-suspended-her-for-sexual-impropriety/ [https://perma.cc/P8LX-CY7H]; Ben Chapman, *Brooklyn School Punished Intellectually Disabled Girl who Was Gang Raped by Students and Tried Keeping it Secret: Lawsuit*, N.Y. Daily News (Jan. 11, 2018), https://www.nydailynews.com/new-york/education/brooklyn-school-punished-gang-rape-victim-article-1.3750411 [https://perma.cc/U7BV-2Z6L]; Sarah Brown, *BYU Is Under Fire, Again, for Punishing Sex-Assault Victims*, Chron. Higher Educ. (Aug. 6, 2018), https://www.chronicle.com/article/BYU-Is-Under-Fire-Again-for/244164 [https://perma.cc/ZTZ9-WECG]; Tyler Kingkade, *The Woman Behind #SurvivorPrivilege Was Kicked Out of School After Being Raped*, HuffPost (Jun. 13, 2014), https://www.huffpost.com/entry/survivor-privilege-wagatwewanjuki_n_5489170 [https://perma.cc/3TUH-Y63N]; Chu, *supra* note 15.

[27] Know Your IX, Petition to *Department of Education*, Change.org [hereinafter Know Your IX Petition], https://www.change.org/p/department-of-education-hold-colleges-accountable-that-break-the-law-by-refusing-to-protect-students-from-sexual-assault [https://perma.cc/XK8N-NNK8] (last visited Feb. 29, 2020).

schools had violated federal law by failing to restore their right to an education free from sex discrimination.[28]

As courts have long recognized, gender-based violence and discrimination can gravely impact student survivors' ability to access their right to an education free from sex discrimination, as guaranteed by Title IX.[29] In short, it can be hard to learn in school if your teacher or classmates are sexually harassing you, you have to share educational spaces with your rapist or abusive partner, or a faculty member's gender bias is hindering your ability to succeed. Title IX provides: "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."[30] In the 1977 case *Alexander v. Yale University*, courts first established that under Title IX, sexual harassment constitutes sex discrimination that jeopardizes a student's access to education.[31] Later court decisions clarified schools' obligations under Title IX to respond to and remedy sexual violence,[32] and the Department of Education's Office for Civil Rights further explained schools' obligations beginning in the 1990s.[33]

In OCR's 1997 and 2001 administrative guidance, the Department explained that schools violate Title IX when they fail to take "immediate effective action" to a) stop or remedy a hostile environment created by sexual harassment or violence, or b) prevent its reoccurrence.[34] This guidance required schools to "adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination."[35] OCR investigations and findings further clarified specific procedural protections for students. For example, schools such as Georgetown University were deemed in violation of Title IX because "complaints of sexual harassment were resolved using a clear and convincing evidence standard, a higher standard than the preponderance of the evidence

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[28] *See* Rachel Axon, *Colleges Under Fire for Handling of Sexual Assault Cases*, USA Today (Apr. 24, 2014) (updated Apr. 25, 2014), https://www.usatoday.com/story/sports/college/2014/04/24/sexual-assault-colleges-jameis-winston-president-obama/8122831/ [https://perma.cc/H49U-RYTP] (discussing multiple survivors who filed complaints with OCR saying their schools mishandled sexual harassment and assault allegations, which fall within the purview of Title IX's bar on sex discrimination in education).

[29] *See, e.g.*, Alexander v. Yale, 631 F.2d 178, 182 (2d Cir. 1980).

[30] Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 235, 373 (codified at 20 U.S.C. § 1681(a) (2012)).

[31] *See* Alexander v. Yale, 459 F. Supp. 1, 4 (D. Conn. 1977).

[32] *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 648 (1999).

[33] *See, e.g.*, Off. for Civil Rights, U.S. Dep't Educ., Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (1997), https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html [https://perma.cc/UJ9Z-VFQD].

[34] *See* 2001 Sexual Harassment Guidance, *supra* note 9, at 12.

[35] *Id.* at 14.

standard, which is the appropriate standard under Title IX."[36] In 2011, OCR issued a new Dear Colleague Letter, further clarifying schools' duties to respond to sexual harassment and violence.[37]

Despite OCR's clarifications and courts' affirmations that student survivors of sexual violence were protected under Title IX, schools largely ignored their obligations to support survivors. Student survivors were forced out of school because of administrative inaction or even directly asked to leave campus until their rapist graduated. As Know Your IX co-founder Dana Bolger shared:

> On my campus alone, students who experienced sexual or dating violence were discouraged from reporting, denied counseling and academic accommodations, and pressured to take time off. When I reported abuse to my school, I was told I should drop out, go home and take care of myself, and return when my rapist graduated. All of us were denied our right to learn free from gender violence.[38]

It is because of that inaction that student activism exploded. Survivors began flooding the Department with OCR complaints,[39] and ED Act Now petitioned the Department to begin holding schools accountable to their duties to conduct timely investigations of complaints and proactive investigations of

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[36] Letter from Sheralyn Goldbecker, Team Leader, Office for Civil Rights, U.S. Dep't Educ., to Dr. John J. DeGioia, President, Georgetown University 3 (May 5, 2004); *see also* Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University 1 (October 16, 2003), available at http://www.ncherm.org/documents/202-GeorgetownUniversity–110302017Genster.pdf [https://perma.cc/4X69-7ET4] ("[I]n order for a recipient's sexual harassment grievance procedure to be consistent with Title IX standards, the recipient must draw conclusions about whether the particular conduct rises to the level of sexual harassment using a preponderance of the evidence standard."); Letter from Gary Jackson, Regional Civil Rights Director, Region X, Office for Civil Rights, U.S. Dep't Educ., to Jane Jervis, President, The Evergreen State College 8, 9 (Apr. 4, 1995), available at http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf [https://perma.cc/5RGJ-SAH9] (noting that "[t]he evidentiary standard of proof applied to Title IX actions is that of a 'preponderance of the evidence' " and concluding that the recipient's use of the clear and convincing evidence standard violated Title IX).

[37] Dear Colleague Letter from Russlyn Ali, Assistant Secretary, Office for Civil Rights, U.S. Dep't Educ. (Apr. 4, 2011) [hereinafter 2011 Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/5XRU-Z4WE].

[38] *Combating Campus Sexual Assault: Hearing on Reauthorizing The Higher Education Act Before the S. Comm. on Health, Educ., Labor, and Pensions*, 114th Cong. 1–7 (2015) (statement of Dana Bolger, Know Your IX Co-Founder) [hereinafter, Bolger Statement], https://www.help.senate.gov/imo/media/doc/Bolger.pdf [https://perma.cc/V4ZN-4TFP].

[39] *See, e.g., Title IX Tracking Sexual Assault Investigation*, CHRON. HIGHER EDUC. http://projects.chronicle.com/titleix/ [https://perma.cc/9PHG-STXN] (last updated Feb. 29, 2020) ("So far, 197 cases have been resolved and 305 remain open.").

possible bad actors.[40] Advocates also pushed broadly for transparency from the Department with respect to its investigations and enforcement actions.[41]

Beginning in 2013, student survivors organized mass actions against their schools for the institutions' failure to uphold survivors' Title IX rights. At Columbia University, Emma Solkowitz launched her iconic performance art piece, "Carry That Weight," in which she carried a mattress around campus to symbolize the weight campus sexual assault survivors carry with them as they navigate a campus shared with their rapists.[42] Solkowitz's performance grew into a national movement where students at campuses across the country began carrying mattresses in protest of their schools' mishandling of survivors' complaints.[43] Students at St. Olaf college wore shirts reading, "Ask me how my college is protecting rapists."[44] The "It Happens Here" project launched on campuses across the country provided a survivor-centered storytelling platform to expose the high rates of sexual assaults at educational institutions.[45] Additionally, students at Amherst College, inspired by

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[40] *See, e.g.*, Ed Act Now (July 24, 2013), https://edactnow.tumblr.com/post/56350266714/official-asks-to-the-department-of-education [https://perma.cc/56JY-K2T2]; Know Your IX Petition, *supra* note 27.

[41] Specifically, the organizers demanded that the Department

> [A]dvertise the Title IX complaint process and publish filings, findings and resolutions to adequately alert students to the risk of sexual violence on campus . . . Complainants should be able to track the progress of their Title IX complaint so that it is not lost or neglected. The filing, investigation, and findings of a complaint should be publicly accessible with all identifying information redacted to preserve privacy for the survivor involved. Noncompliance findings and sanctions should also be public to appropriately shame schools that have violated their federal obligations. *Id.*

[42] *See, e.g.*, Roberta Smith, *In a Mattress, a Lever for Art and Political Protest,* N.Y. Times (Sept. 22, 2014), https://www.nytimes.com/2014/09/22/arts/design/in-a-mattress-a-fulcrum-of-art-and-political-protest.html [https://perma.cc/CAG2-49XN] ("'Carry that Weight,' which is beginning its fourth week, involves Ms. Sulkowicz carrying a 50-pound mattress wherever she goes on campus . . . to call attention to her plight and the plight of other women who feel university officials have failed to deter or adequately punish such assaults.").

[43] *See, e.g.*, Alexandra Svokos, *Students Bring Out Mattresses in Huge 'Carry That Weight' Protest Against Sexual Assault,* HuffPost (Nov. 29, 2014), https://www.huffpost.com/entry/carry-that-weight-columbia-sexual-assault_n_6069344 [https://perma.cc/4KJK-PA3S] (describing Carry That Weight actions led by student activists across the United States).

[44] *See, e.g.,* Claire Lampen, *Ask This Student How Her College Is Protecting Her Rapist*, Mic (May. 3, 2016), https://www.mic.com/articles/142089/ask-this-student-how-her-college-is-protecting-her-rapist [https://perma.cc/2RB7-XLKU] ("Her shirt reads, 'Ask me how my college is protecting my rapist.' And if you ask, Madeline will tell you: St. Olaf College —a small liberal arts school in Northfield, Minnesota —is protecting him not through active shielding, but through systemic passivity.").

[45] The It Happens Here Project, http://www.ihhproject.org [https://perma.cc/8SJ3-A795] (last visited Dec. 14, 2019).

Project Unbreakable,[46] used posters to publicize their school administrators' inappropriate responses to their complaints of sexual violence.[47]

This wave of student survivor activism brought campus sexual assault into the national consciousness. Popular media including The Daily Show,[48] CNN,[49] Real Time with Bill Maher,[50] and MSNBC[51] began discussing the high rates of sexual violence in colleges and the failure of schools to properly respond. Documentaries like The Hunting Ground[52]—and, more recently, Audrie and Daisy[53]—highlighted the stories of survivors who had been wronged by their schools and local police in the wake of violence. In response, the Obama Administration launched national campaigns[54] and task forces to address sexual violence in college,[55] and schools began to change their policies and procedures in response to further Title IX guidance from the Department[56] and its enforcement by OCR.[57]

Student survivor activists had one simple ask: for schools to do their job. Mired in the status quo, however, universities resisted taking action against star athletes[58] and valedictorians accused of sexual assault[59]—and in

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[46] Project Unbreakable, https://projectunbreakable.tumblr.com [https://perma.cc/V5AV-JHNZ] (last visited Dec. 14, 2019).

[47] Dana Bolger, *Surviving, at Amherst College,* It Happens Here: Amherst (Oct. 23, 2012), https://ithappenshereamherst.wordpress.com/2012/10/23/survivingatamherstcollege/ [https://perma.cc/ASM4-ZN46].

[48] The Daily Show: The Fault in Our Schools (Comedy Central Jun. 25, 2014), http://www.cc.com/video-clips/z2b627/the-daily-show-with-jon-stewart-the-fault-in-our-schools [https://perma.cc/PT4U-GPHS].

[49] Emanuella Grinberg, *Ending Rape on Campus: Activism Takes Several Forms*, CNN (Feb. 12, 2014), https://www.cnn.com/2014/02/09/living/campus-sexual-violence-students-schools/index.html [https://perma.cc/PFG8-E83B].

[50] Real Time With Bill Maher, *Real Time With Bill Maher: The Hunting Ground (HBO)*, YouTube (Mar. 17, 2015), https://www.youtube.com/watch?v=JINxoR-S5To&feature=emb_title [https://perma.cc/4JFD-7UCA].

[51] Ending Campus Sexual Assault: A Panel, (MSNBC Dec. 14, 2014), https://www.msnbc.com/shift/watch/campus-sexual-assault-roundtable-372410947817 [https://perma.cc/VER9-Z2WU].

[52] The Hunting Ground Film (Chain Camera Films 2015).

[53] Audrey and Daisy Documentary (Netflix 2016).

[54] *The Story of Our Movement*, It's On Us, https://www.itsonus.org/history/ [https://perma.cc/7USP-JKKF] (last visited Dec. 14, 2019).

[55] White House Task Force to Protect Students from Sexual Assault, Preventing and Addressing Campus Sexual Misconduct: A Guide for University and College Presidents, Chancellors, and Senior Administrators 1–14 (2017).

[56] *See, e.g.*, Letter from the Nat'l Women's Law Center, et al. to Education Secretary John King, Nat'l Women's L. Ctr. (July 13, 2016), 1, https://nwlc.org/resources/sign-on-letter-supporting-titleix-guidance-enforcement/ [https://perma.cc/K6PR-Y4R5] ("These guidance documents and increased enforcement of Title IX by the Office for Civil Rights have spurred schools to address cultures that for too long have contributed to hostile environments which deprive many students of equal educational opportunities.").

[57] *Id.*

[58] *See, e.g.*, Marissa Payne, *Erica Kinsman, Who Accused Jameis Winston of Rape, Tells Her Story in New Documentary 'The Hunting Ground,'* Wash. Post (Feb. 19, 2015), https://www.washingtonpost.com/news/early-lead/wp/2015/02/19/erica-kinsman-who-accused-jameis-winston-of-rape-tells-her-story-in-new-documentary-the-hunting-ground/ [https://perma.cc/5UAB-BDST].

the process let lesser known student perpetrators off the hook as well.[60] They refused to respond to violence that happened off campus, regardless of its impact on the survivor's access to education, sometimes forcing survivors to drop out of school entirely.[61] They also dragged their feet when adjudicating cases of sexual violence, sometimes for years.[62] As OCR increased enforcement of Title IX in response to the increased student organizing, student survivors also pushed legislators to cement their rights.[63] The rise of student activism pushed forward proactive legislation in Congress[64] and numerous state legislatures.[65] Recently, survivor-led groups have made more formal recommendations for policy proposals on fair process in campus discipline and other potential legislation.[66]

B. The Growing Respondents' Rights Movement

In response to the rise of student survivor activism, a new group of women organizing around sexual misconduct in school joined the national

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[59] Tovia Smith, *How Campus Sexual Assaults Came To Command New Attention,* NPR (Aug. 12, 2014), https://www.npr.org/2014/08/12/339822696/how-campus-sexual-assaults-came-to-command-new-attention [https://perma.cc/ZY56-CBTJ] ("It is an abrupt turn for many schools that have treated incidents of sexual assault as teachable moments and have resisted the idea that their valedictorians or star athletes could also be predators.").

[60] *See, e.g.*, Bolger Statement, *supra* note 38, at 12.

[61] *See, e.g.,* Letter from Timothy Blanchard, N.Y. Office Director, Office for Civil Rights, U.S. Dep't Educ., to Katherine S. Conway-Turner, President, Buffalo State Univ. of N.Y. 11 (Nov. 2, 2017), https://www.insidehighered.com/sites/default/server_files/media/OCR-SUNY-Buffalo-State.pdf [https://perma.cc/85WB-UN9G].

[62] *See, e.g.,* Know Your IX, *Re: ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* 43 (Jan. 30, 2019) [hereinafter Know Your IX Comment], https://actionnetwork.org/user_files/user_files/000/029/219/original/Know_Your_IX_Comment_on_Proposed_Title_IX_Rule_(1).pdf [https://perma.cc/F7GC-3NJZ] ("It took the University of Cincinnati 519 days to expel the student I endured stalking harassment and dating violence from while I was a student there. My Title IX investigation took so long, that when I reached out to the department to follow up, my email bounced back as undeliverable. The Title IX Coordinator and her assistant had left the University without anyone follow through [sic] on my case. When the Interim Coordinator was chosen to temporarily fill the position, she had no evidence of my case existing at all; I had to start my case again from square one! All of the witnesses I provided in April 2014 were contacted in June 2016 to recall information from the 2013-2014 years.").

[63] Tyler Bishop, *The Laws Targeting Campus Rape Culture*, Atlantic (Sep. 11, 2015), https://www.theatlantic.com/education/archive/2015/09/the-laws-targeting-campus-rape-culture/404824/ [https://perma.cc/Z5YJ-BZ6Z] ("Some provisions of the federal Campus Sexual Violence Elimination (Campus SaVE) Act, the legislative outcome of years of increased attention and activism, officially went into place in July.").

[64] *See, e.g.*, Campus Save Act, http://campussaveact.org/ [https://perma.cc/W9BV-5M2G] (last visited Jan. 21, 2020).

[65] *See, e.g.*, H.B. 3476, 176th Leg., Reg. Sess. (Or. 2015). S.B. 5965, 2015-2016 Reg. Sess. (NY 2015).

[66] *State Policy Playbook*, Know Your IX, https://www.knowyourix.org/statepolicy-playbook/ [https://perma.cc/3NUN-C59W] (last visited Feb. 29, 2020).

conversation: the mothers of student respondents.[67] Following the suspension of her son from the University of North Dakota for sexual assault, Sherry Warner Seefeld was "willing to do everything and anything"—including hiring a lawyer, public-relations firm, and using her political connections as a union leader—to try and reverse her son's punishment.[68] In 2014, Warner turned her attention to the national stage, founding Families Advocating for Campus Equality (FACE) with two other mothers of student respondents.[69] The mothers argued their sons were wrongfully or falsely accused and that the campus system did not provide a fair process for respondents in Title IX cases.[70] One of the mothers, Alice True, later spun off to found a similar group called Save Our Sons (SAVE).[71] These mothers prioritized one primary concern: how treatment of sexual misconduct cases within the school system and the criminal system differed, an argument premised on the purportedly unfair idea that students could be punished by their school for criminal activity without being charged by law enforcement.[72] Further, the mothers alleged that the rise of survivor activism on college campuses had created a hostile environment for men[73] where they could be accused of sexual misconduct and have that accusation immediately believed[74] by the school.[75]

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[67] "Respondent" is the term describing the party against whom allegations of sexual misconduct are made in the context of school disciplinary process. The party who makes the complaint is called the "complainant."

[68] Anemona Hartocollis & Christina Capecchi, *'Willing to do Everything': Mothers Defend Sons Accused of Campus Sexual Assaults,* N.Y. Times (Oct. 22, 2017), https://www.nytimes.com/2017/10/22/us/campus-sex-assault-mothers.html [https://perma.cc/A9MX-5UEA] ("Seefeld said she hired a lawyer and even a public-relations firm, and used her political connections as a teachers' union leader, to try to get the University of North Dakota to reverse her son's three-year banishment after a woman accused him of nonconsensual sex. 'I was willing to do everything and anything.'").

[69] Fred Barbash, *'Toxic Environment' for Sons Accused of Campus Sex Offenses Turns Mothers into Militants*, Wash. Post (Aug. 29, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/08/29/toxic-environment-for-sons-accused-of-campus-sex-offenses-turns-mothers-to-militants/ [https://perma.cc/T7NE-DVNA].

[70] *Id.*

[71] *Id.*

[72] Tracy Frank, *Nonprofit Supports Rights of Those Accused of Campus Sexual Assault,* Bismarck Trib. (Aug. 24, 2014), https://bismarcktribune.com/news/state-and-regional/nonprofit-supports-rights-of-those-accused-of-campus-sexual-assault/article_618b01ca-2b0e-11e4-bc94-001a4bcf887a.html [https://perma.cc/NYN2-ZL46].

[73] Although respondents are not exclusively men, groups like Save Our Sons and FACE position themselves as advocating for men's rights. *See* Barbash, *supra* note 69.

[74] Although limited data is available about the rates of how many campus reports of sexual violence lead to a finding of responsibility, what is available shows that schools rarely side with survivors. For example, at the University of Michigan in 2017, eighteen complaints of sexual misconduct went through an investigation, four resulted in a finding of responsibility. Of those, only one resulted in an expulsion and none resulted in suspension. Office for Institutional Equity, *Student Sexual Misconduct Annual Report,* U. OF MICH. 14, https://studentsexualmisconductpolicy.umich.edu/files/smp/FY16AnnualReport.pdf [https://perma.cc/6DVK-835S].

[75] Barbash, *supra*, note 69.

Although FACE's website contains no formal policy recommendations, their founders, new leaders, and board members have publicly voiced concern over the standard of evidence in campus sexual misconduct cases, the lack of a guaranteed right to counsel, and the fact that some schools do not permit direct cross examination by the parties to the proceedings or their representatives.[76] In essence, FACE generally advocates for the imposition of criminal procedures and protections onto the campus sexual misconduct disciplinary process. They make this call by pushing for greater "due process" protections in Title IX.[77] However, as this article will explain, their invocations of this language often misconstrue the meaning of that legal term.[78]

FACE vice president Cythnia Garret has called for schools to use a higher standard of proof, clear and convincing evidence, rather than the commonly used preponderance of the evidence. Garret argues that the biggest difference between the campus process and the criminal process is that in the latter, "the burden is on the accuser to prove [the defendant's guilt] beyond a reasonable doubt."[79] However, she continues, the lower burden of proof in campus processes "requires the accused to have a higher burden than just raising reasonable doubt. . . . [H]e would have to show by the same preponderance"[80] as the complainant that he is not responsible.[81]

Garret has also voiced concern over schools adjudicating reports of conduct that took place "outside of their jurisdiction," such as sexual assaults that occur at off-campus bars or apartments.[82] She argues that schools would be unable to collect evidence in such scenarios since they cannot issue subpoenas, saying school administrators "don't have the same rights as in the criminal system where you can subpoena evidence."[83] Garrett has also alluded to wanting some type of cross examination in campus proceedings

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[76] *See generally* Families Advocating for Campus Equality, https://www.facecampusequality.org/ [https://perma.cc/BNV3-9DWW] (last visited Dec. 14, 2019) (calling camps disciplinary processes "inequitable" but providing no policy positions or recommendations for best practices). We use the term "direct cross examination" throughout to describe the process whereby a party to a campus sexual misconduct disciplinary proceeding is afforded the opportunity at a live hearing to pose oral questions directly to the complainant and/or witnesses. Respondents' rights groups often call for the right to direct cross examination, either by the parties themselves or by their aligned representatives.

[77] *See id.*

[78] See Section II, *infra*.

[79] Rape Hoax, *SAVE Press Conference: Cynthia Garrett*, YouTube (Apr. 28, 2015), https://www.youtube.com/watch?v=YZJdBWrlzP8 [https://perma.cc/4NP2-CRCU].

[80] *Id.*

[81] The most severe outcome of a campus case is expulsion, the deprivation of a property interest. Criminal cases can result in a complete loss of liberty through incarceration.

[82] *30 Issues: Sexual Misconduct on Campus*, WNYC (Oct. 8, 2018), https://www.wnyc.org/story/30-issues-sexual-misconduct-campus/ [https://perma.cc/BWH6-3389].

[83] In criminal cases subpoenas aren't needed for evidence collection, only a warrant or probable cause. Subpoenas are used to compel witnesses to testify. Here, Garrett conflates testimony with evidence. *Id.*

but has not made clear what she views as the ideal process for cross examination, only that it should occur.[84]

The growing respondents' rights movement gained powerful advocates, including a group of Harvard Law Professors who in 2014 wrote in opposition of Harvard's new sexual misconduct policy.[85] These professors raised concerns with lack of legal representation for respondents,[86] the absence of cross examination of witnesses,[87] and the use of a single-investigator model.[88] Vocal advocate and journalist Emily Yoffe has called for an increase in due process protections for respondents in sexual misconduct cases[89] and has attacked both Republicans and Democrats for what she sees as failures to uphold the due process rights of respondents in Title IX cases.[90] Yoffe has painted sexual assault on college campuses as drunken miscommunications instead of sexual assault[91]—a sentiment shared by the founders of FACE.[92] Lara Bazelon, a law professor who has lent her voice to the respondents' rights movement, has called for additional rights for respondents in campus sexual misconduct proceedings through comparisons to the

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[84] *Education Secretary Proposes Enhanced Protections For Those Accused Of Sexual Assault On Campus*, NPR (Nov. 18, 2018), https://www.npr.org/2018/11/18/669090016/education-secretary-proposes-enhanced-protections-for-those-accused-of-sexual-as [https://perma.cc/TSK7-U83X].

[85] Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, Bos. Globe (Oct. 15, 2014), https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html [https://perma.cc/6ZE9-NA77].

[86] We believe it is important to note that their statement did not express concern with the lack of representation afforded to survivors. *See id.*

[87] *Id.* As we will explain further in section II, *infra*, cross examination may not be a fair process for complaints and may not yield a more truthful outcome as alleged by the professors.

[88] We also share some of the same concerns raised by the professors about the single-investigator model and fear that a system that does not properly issue checks and balances could yield biased decisions against complainants.

[89] Emily Yoffe, *The College Rape Overcorrection*, Slate (Dec. 8, 2014), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html [https://perma.cc/Z99F-S4CW].

[90] *See, e.g.,* Emily Yoffe, *Does Anybody Still Take Both Sexual Assault and Due Process Seriously?*, Atlantic (Oct. 13, 2018), https://www.theatlantic.com/ideas/archive/2018/10/sexual-assault-has-become-partisan-issue/572893/ [https://perma.cc/P7GP-5DM8]; Yoffe, *supra* note 10.

[91] Yoffe, *supra* note 89 ("These generally begin as consensual encounters and, often because of alcohol and miscommunication, end up in dispute.").

[92] Hartocollis & Capecchi, *supra* note 68 ("In my generation, what these girls are going through was never considered assault. . . It was considered, 'I was stupid and I got embarrassed.'").

criminal legal system.[93] Bazelon has even called expulsion[94] the "academic death penalty."[95]

Groups like FACE and SAVE, as well as their allies, have essentially objected to school policies that differ from the rules governing criminal courts. But campus sexual misconduct proceedings appropriately do not mirror criminal processes. Schools handle all kinds of campus misconduct that may also constitute criminal conduct; respondents' rights groups' exceptionalist objection latches onto sexual misconduct as the only inappropriate exercise of school disciplinary discretion. Campus codes of conduct allow schools to adjudicate cases of arson, assault, and theft because, as courts have long recognized, schools have the right to discipline conduct—including conduct constituting a crime—that interferes with the educational environment[96] or undercuts the institution's legitimate pedagogical goals.[97] Further, the possible outcomes of campus sexual misconduct cases and criminal cases are vastly different, explaining the proportionately different procedural protections at play in each. Whereas the most severe outcome of a campus case is expulsion, the deprivation of a property[98] and a minimal liberty[99] interest, criminal cases can result in a complete loss of liberty through incarceration. Finally, as outlined in Section I(A), *supra*, schools are legally *required* by Title IX to respond to reports of sexual misconduct. This is because Title IX's statutory purpose is to restore a survivor's access to education; in short, it is hard to learn when you are forced to share a classroom with your rapist.

Although "due process" has become the battle cry of the respondents' rights movement, the content of that battle cry does not match the meaning

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[93] Lara Bazelon, *How to See Justice Done on Campus Sexual Assault,* POLITICO (Sep 8, 2017), https://www.politico.com/magazine/story/2017/09/08/devos-campus-sexual-assault-how-to-get-it-right-215585?lo=ap_c1/ [https://perma.cc/MJ5F-52CN].

[94] CBS News, *CBSN Originals presents "Speaking Frankly: Title IX"*, YOUTUBE (Nov. 22, 2019), https://www.youtube.com/watch?v=C32BorARgl0 [https://perma.cc/KBF8-73PL].

[95] We deeply disagree with the idea that expulsion is the academic equivalent of the death penalty. Losing the ability to attend a single school because of a violation of school policy is not comparable to an execution.

[96] *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (finding that the Constitution "does not prevent the school" from barring conduct that "would undermine the school's basic educational mission"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (invalidating a school's discipline of conduct without evidence of "interference. . . with the schools' work or of collision with the rights of other students").

[97] *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (holding that schools may constitutionally regulate otherwise protected speech where that regulation is "related to legitimate pedagogical concerns"); Goss v. Lopez, 419 U.S. 565, 580 (1975) ("Some modicum of discipline and order is essential if the educational function is to be performed"). These cases involve disciplinary processes circumscribed by due process in just the same way as campus sexual misconduct disciplinary proceedings.

[98] *See Goss*, 419 U.S. at 577–79.

[99] *Id.* at 574–75.

of due process[100] as determined by the courts. The command of due process precedent is flexible and balance-oriented. In contrast, the respondents' rights movement has called for baseline procedures that exceed what is legally required under due process as well as policy measures that prioritize respondents' educational interests over those of complainants. This includes the clear and convincing standard of evidence, direct cross examination, and unanimity in decision-making prior to particular sanctions.[101] Moreover, for organizations like FACE and SAVE[102] that do not offer any formal policy recommendations, the invocation of the term "due process" comes across as particularly ideological and lacking substance. Closer examination reveals that these groups are often outcome-oriented, characterizing what they believe are incorrect findings of responsibility for their sons as a lack of procedural protections for respondents more broadly. This bait-and-switch undermines the integrity of their process arguments.[103]

Gaining traction with the Trump Administration, this rhetoric and the movement for respondents' rights has led to changes in campus sexual misconduct proceedings and how Title IX is interpreted. After meeting with respondents' rights groups,[104] including FACE and SAVE, Secretary of Education Betsy DeVos rescinded previous guidance on Title IX.[105] Following that rescission, DeVos issued a new proposed rule that prioritized schools and respondents over student survivors, taking the teeth out of Title IX.[106] In response to both the respondents' rights movement and voracious higher ed-

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[100] The term due process describes the legal protections someone has the right to ensure they are not unfairly deprived of life, liberty, or property. The procedural protections an individual is due are proportional to the interests at stake. For example, the procedural protections for someone facing jail time may be different than someone who is at risk of losing money, or removal from school.

[101] *See, e.g.*, *Spotlight on Due Process 2018*, FIRE (2018), https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2018/ [https://perma.cc/PEP7-TG9V].

[102] *See* FAMILIES ADVOCATING FOR CAMPUS EQUALITY, *www.facecampusequality.org* [https://perma.cc/W7P9-JH7J] (last visited Dec. 14, 2019); SAVE OUR SONS, *www.helpsaveoursons.com* [https://perma.cc/UDS5-FQ9T] (last visited Dec. 14, 2019).

[103] *See, e.g.*, Alice True, *You Raised Your Son Right, But Don't Think He's Safe From Accusers Who Learn To Accuse For Girl Power*, HELP SAVE OUR SONS (Oct. 27, 2019), https://helpsaveoursons.com/to-moms-and-dads-you-raised-your-son-right-but-dont-think-hes-safe-from-accusers-who-learn-to-accuse-for-girl-power/ [https://perma.cc/EX88-UWDU] ("If you want to end false accusations you need to stand up for due process rights for all students.").

[104] *See* Erin Dooley, et al., *Betsy DeVos' Meetings with 'Men's Rights' Groups Over Campus Sex Assault Policies Spark Controversy*, ABC NEWS (Jul. 14, 2017), https://abcnews.go.com/Politics/betsy-devos-meetings-mens-rights-groups-sex-assault/story?id=48611688 [https://perma.cc/8V9P-V8W2].

[105] *See* David Futrelle, *Betsy DeVos's Title IX Rollback Is a Victory for Men's-Rights Groups*, THECUT (Sept. 7, 2017), https://www.thecut.com/2017/09/betsy-devos-title-ix-rollback-a-victory-for-mens-rights.html [https://perma.cc/C22V-KNCW].

[106] *See* Alanna Vagianos, *Betsy DeVos' New Title IX Guidelines Prioritize Schools Over Sexual Assault Survivors*, HUFFPOST (Nov. 16, 2018), https://www.huffpost.com/entry/besty-devos-new-title-ix-guidelines-prioritize-schools-over-sexual-assault-survivors_n_5beede5fe4b0510a1f3037cf [https://perma.cc/X7K7-BEPQ].

ucation lobbies,[107] the Department proposed severely narrowing the definition of sexual harassment,[108] limiting schools' obligation to respond to sexual violence to include only violence that occurs within university programs or activities,[109] limiting what is considered "actual notice"[110] to schools of sexual misconduct, requiring the use of the "clear and convincing standard of evidence" in place of the previously recommended preponderance standard,[111] and requiring direct cross examination by the parties or their representatives in disciplinary hearings.[112]

The movement for respondents' rights has also turned to local and state politics for traction. In 2017, California legislators attempted to codify provisions of the 2011 Dear Colleague Letter, which they believed better protected students' rights,[113] after that guidance was rescinded by Secretary DeVos. Though the bill passed the house and senate, it was vetoed[114] by

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[107] *See* Dana Bolger, *Betsy DeVos's New Harassment Rules Protect Schools, Not Students*, N.Y. Times (Nov. 27, 2018), https://www.nytimes.com/2018/11/27/opinion/betsy-devos-title-ix-schools-students.html [https://perma.cc/YQA2-635F].

[108] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61466 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. pt. 106).

[109] *Id.*

[110] For the Department of Education to enforce Title IX, Congress has required that the Department show the school had notice of the violation. When interpreting this provision, the Supreme Court has stated that "a central purpose of requiring notice of the violation 'to the appropriate person' and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures." Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 289 (1998).

[111] Title IX was "patterned after Title VI of the Civil Rights Act of 1964," a parallel civil rights statute that prohibits race discrimination in education. Cannon v. Univ. of Chicago, 441 U.S. 677, 694 (1979). The Supreme Court has long made clear that Title IX should be applied with reference to Title VI, noting that "the two statutes use identical language," and the "drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been." *Id.* at 695–96. Title VI litigation relies on a preponderance of the evidence standard, suggesting that an appropriate application of the Title IX statute should also rely on preponderance. *See, e.g.*, Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993) (holding that to establish liability under Title VI's disparate impact scheme, a plaintiff must "[d]emonstrate by a preponderance of the evidence that facially neutral practice has disproportionate adverse effect" on a protected class); South Camden Citizens in Action v. N.J. Dept. of Environmental Protection, 145 F.Supp.2d 446, 483 (D.N.J. 2001).

[112] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61498 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. pt. 106).

[113] *See* Hannah-Beth Jackson & Noreen Farrell, *Campuses Need to Protect Students Against Sexual Violence. Here's How California Can* Help, Sacramento Bee (Oct. 5, 2017), https://www.sacbee.com/opinion/california-forum/article177324971.html [https://perma.cc/E4RA-2339].

[114] Governor Brown cited the possibility of disparate impact on students of different races and ethnicities for his reasoning on vetoing the bill. We feel it important to note that less than a year earlier Brown signed legislation requiring mandatory minimums in sexual assault cases despite advocacy from national organizations urging him to oppose it because of the impact on men of color. *See* Eugene Volokh, *California Gov. Jerry Brown Vetoes Proposal to Codify Federal Regulations on Campus Sexual Harassment*, Wash.

then-Governor Brown after opposition organized by FACE.[115] In North Carolina, legislators pushed for a bill that would have required schools in campus sexual misconduct proceedings to use the "clear and convincing" standard of evidence and direct cross examination.[116] It also would have severely limited when students who committed sexual assault could be suspended or expelled for their conduct.[117] All of this ensued despite the grave potential impact on student survivors.

Some state legislators have even used respondents' rights groups' talking points for personal gain. For example, in 2019, two Missouri state legislators filed companion bills in the house and senate that would have chilled reporting and punished student complainants.[118] In the name of due process, the bill package would have created a specific cause of action allowing respondents in sexual misconduct cases to sue student complainants for "appropriate relief," including but not limited to actual and punitive damages, if the complaint was found to be unsubstantiated.[119] Further, the bill package would have required universities to use a definition of harassment limiting schools' obligation to act to only when the sexual misconduct *completely* denied, rather than denied or limited,[120] a student's access to education.[121] That means students would have been forced to endure repeated and escalat-

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POST (Oct. 16, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/16/california-gov-jerry-brown-vetoes-proposal-to-codify-federal-regulations-on-campus-sexual-harassment/ [https://perma.cc/3CBN-XSFF].

[115] Tyler Kingkade, *California's Attempt To Reject Betsy DeVos's Campus Rape Policies Just Failed*, BUZZFEED NEWS (Oct. 16, 2017), https://www.buzzfeednews.com/article/tylerkingkade/californias-governor-vetoed-a-bill-obama-title-ix [https://perma.cc/N69S-Q268].

[116] Martha Quillan, *Students at UNC Schools Accused of Sexual Assault Would Get New Protection Under New Law*, NEWS & OBSERVER (Mar. 8, 2019), https://www.newsobserver.com/news/politics-government/article227326134.html [https://perma.cc/NYE9-AYSR].

[117] *Id.*

[118] *Stop the Attack on Survivors' Rights in Missouri*, KNOW YOUR IX (last accessed Feb. 29, 2020), https://www.knowyourix.org/hb573/ [https://perma.cc/FTH6-R8TE]. *See also* S.B. 259, 100th Gen. Assemb., Reg. Sess. (Mo. 2019), https://www.senate.mo.gov/19info/pdf-bill/intro/SB259.pdf [https://perma.cc/8QF8-6YDC]; H.B. 573, 100th Gen. Assemb., Reg. Sess. (Mo. 2019), https://house.mo.gov/billtracking/bills191/hlrbillspdf/0202H.01I.pdf [https://perma.cc/QW4X-GKT2].

[119] *See* S.B. 259, 100th Gen. Assemb., Reg. Sess. (Mo. 2019), https://www.senate.mo.gov/19info/pdf-bill/intro/SB259.pdf [https://perma.cc/8QF8-6YDC]; H.B. 573, 100th Gen. Assemb., Reg. Sess. (Mo. 2019), https://house.mo.gov/billtracking/bills191/hlrbillspdf/0202H.01I.pdf [https://perma.cc/QW4X-GKT2].

[120] *See* 2011 Dear Colleague Letter, *supra* note 37 (discussing how sexual violence is a form of sex discrimination prohibited by Title IX), *rescinded by* Dear Colleague Letter from Candice Jackson, Asst. Sec'y, Off. for Civil Rights, U.S. Dep't Educ. 1–2 (Sep. 22, 2017) [hereinafter 2017 Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [https://perma.cc/8DQ4-BZYZ].

[121] *Compare id.* (explaining that harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with *or limits* a student's ability to participate in or benefit from a school's educational program or activities) *with* 2017 Q&A, *supra* note 9, at 1 (providing that harassing conduct creates a hostile environment only when it is so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from the school's programs or activities).

ing levels of abuse, resulting in total school pushout, before they could ask their schools for help.

The Missouri bills would also have barred universities from using discretion in determining what evidence could be considered in a case, opening the door for the misuse of sexual history, mental health history, or sexuality as evidence disputing the allegations.[122] Finally, the bills ensured that if a respondent felt they were denied due process, they could request a special "due process hearing" with the state's administrative hearing commission asking to have the university's decision overturned.[123] Representative Dohrman, one of the bill sponsors who called Title IX investigations "medieval,"[124] claimed his bill did not "plow new constitutional ground, it simply re-state[d] protections which every American expects and deserves."[125] The bill may not have plowed constitutional ground (because Rep. Dohrman does not have that power), but it did try to provide respondents with special rights, far beyond what is legally required, based on the outdated myth that women lie about rape.[126]

The bill gained traction in the state and garnered the support of national respondents' rights groups—until the true intention of the legislation was uncovered.[127] The lobbyist Richard McIntosh, backed by the dark money group Kingdom Principles,[128] had been working directly with lawmakers to pass

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[122] *See* S.B. 259, 100th Gen. Assemb., Reg. Sess. (Mo. 2019), https://www.senate.mo.gov/19info/pdf-bill/intro/SB259.pdf [https://perma.cc/8QF8-6YDC]; H.B. 573, 100th Gen. Assemb., Reg. Sess. (Mo. 2019), https://house.mo.gov/billtracking/bills191/hlrbillspdf/0202H.01I.pdf [https://perma.cc/QW4X-GKT2].

[123] *Id.*

[124] Rep. Dean Dohrman, *Opinion: Title IX Investigations are Medieval in Their Lack of Due Process*, Mo. Times (Jan. 23, 2019), https://themissouritimes.com/56881/opinion-title-ix-investigations-are-medieval-in-their-lack-of-due-process/ [https://perma.cc/5SL5-3D3N].

[125] *Id.*

[126] *See generally* Kathryn R. Klement et al., *Accusers Lie and Other Myths: Rape Myth Acceptance Predicts Judgments Made About Accusers and Accused Perpetrators in a Rape Case*, Sex Roles 81, 16–33 (2019), https://link.springer.com/article/10.1007/s11199-018-0950-4#citeas [https://perma.cc/BZY7-PTS5] (exploring the ways in which police officers and jurors alike rely on rape myths to justify their disbelief of sexual assault victims).

[127] Summer Ballentine, *Missouri lobbyist for Title IX changes wanted to use 'rape equals regret' as strategy*, Kan. City Star (May 2, 2019), https://www.kansascity.com/news/politics-government/article229960069.html [https://perma.cc/HK62-HZNC] (showing that a lobbyist supporting the bill, Richard McIntosh, suggested to senators that taking a "couple of shots at the rape equals regret [narrative] wouldn't hurt" and sent links to men's rights websites that insisted it is "unsatisfying sexual unions caused by regret —not rape —that is the real sex problem on campus.").

[128] Edward McKinley, *Lobbyist's Crusade to Change Title IX in Missouri Stems from His Son's Expulsion*, Kan. City Star (Apr. 23, 2019), https://www.kansascity.com/news/politics-government/article228733614.html [https://perma.cc/X73Y-6GGE] ("Shortly after his son was expelled, McIntosh started a dark money group called Kingdom Principles dedicated to changing Title IX. The group has spent an unknown amount of money underwriting a group that is polling and buying ad time. Kingdom Principles is also bankrolling 29 lobbyists in the Capitol to push the bills —an unusual show of muscle for a single issue even in a state Capitol overrun with lobbyists.").

the bills—not out of general concern for respondents' due process rights but out of concern for his son, who had recently been expelled from Washington University for sexual misconduct.[129] Had the legislation passed, the lobbyist's son would have been able to immediately appeal his sanction to the administrative hearing commission—where his mother was the presiding and managing commissioner.[130]

> "After power dad McIntosh's son was kicked out, he didn't try to grease hands at the university. . . . Instead, he began lobbying to change the law for every college and university in the state. He started a dark money group called Kingdom Principles Inc. dedicated to gutting Title IX protections for those who report sexual misconduct and assault. He got St. Louis billionaire David Steward to help fund his mission. In another made-for-TV-twist Steward is on the Board of Trustees for Washington University. The dark money group bought polling, ad time and hired 29 lobbyists, some of whom passionately framed the agenda as a way to protect the civil liberties of black men."[131]

For some student respondents and their family members, then, due process is not actually about constitutional rights; it is about enshrining their right to education regardless of whether they rape other students.

As journalist and respondents' rights advocate Emily Yoffee noted, "young men found responsible for sexual misconduct on campus have in-

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[129] *Id.* ("After his son was accused and subsequently expelled from Washington University in St. Louis last year through the school's Title IX process, a leading Jefferson City lobbyist launched a campaign to change the law for every campus in the state.").

[130] *Id.*

[131] Aisha Sultan, *How to Beat the Rap in a Title IX Investigation*, ST. LOUIS POST-DISPATCH (Apr. 24, 2019), https://www.stltoday.com/lifestyles/parenting/aisha-sultan/sultan-how-to-beat-the-rap-in-a-title-ix/article_247f155e-b892-55f7-a9dd-87f28915d0a0.html [https://perma.cc/AQ9Q-DPBH]. Survivors' and respondents' advocates alike have raised concerns with the possibility that students of color, specifically Black men, may be more likely to be disciplined for sexual misconduct as opposed to their white peers. These concerns come from the long history of racial bias in the criminal legal system, particularly the use of false accusations of rape as a means of terrorizing Black men—especially in the Deep South. As Antuan Johnson articulates, the arguments that Title IX is disproportionality harming Black men often lack an intersectional understanding:

> While the critique appears plausible on the surface, a closer examination reveals a damning gender bias. There is a history of race being used as a political tool to shut down conversations about sexual assault, even when it directly affects black women. For these critics, it is as if the question of race settles the question of gender. But race does not work alone; race can be used either to illuminate or to obscure the reality of sexual assault for women of color. Despite their apparent concern for racial minorities, many critics of the new Title IX enforcement fall prey to the latter. Without considering the implications their arguments have for women of color, they contend that the prevalence of racial bias is a reason to halt progress on Title IX reform.

Antuan Johnson, *Title IX Narratives, Intersectionality, and Male-Biased Conceptions of Racism,* 9 GEO. J. L. & MOD. CRITICAL RACE PERSP. 57, 59 (2017).

creasingly turned to the courts, filing civil suits against their schools, claiming they were unjustly punished, and their educations ruined. More than 500 such civil suits have been filed."[132] Groups like FIRE[133] and Title IX for All[134] have even launched projects to monitor the rush of lawsuits filed by respondents. The respondents' rights movement has alleged, without putting forth evidence, that Title IX and administrative enforcement has tipped the scales in favor of survivors who have come forward as complainants.[135] But respondents' strategy of leveraging due process cases, combined with courts' failure to consider the balance of rights at stake in such cases holistically, has in fact removed survivors from the scales of fairness entirely.

II. Leaving Survivors Off the Scales

Under the Fourteenth Amendment due process clause, students at public schools and universities have a constitutional guarantee against the deprivation of their right to an education "without due process of law."[136] It has long been established that courts assessing whether due process in this context has been satisfied should approach the question with a commitment to minimalism and balance.[137] In this section, we will discuss the analytical framework for due process cases brought by student respondents complaining of procedural defaults in campus sexual misconduct cases. We will begin with the seminal case in school discipline, *Goss v. Lopez,*[138] and then explore *Mathews v. Eldridge*,[139] where an identical Court outlined how additional process requirements should be assessed, according to a three-pronged test, when greater deprivations are on the table. There, we will discuss how the *Mathews* Court developed and applied this analysis in the context of two-party disputes, where only the charging institution and the charged student had interests directly at stake. However, in most campus discrimination, harassment, and violence cases—and thus in sexual misconduct cases—there is an additional set of interests: those of the complaining student. Despite this fact, courts have continued to graft the two-party origin *Mathews* framework, unchanged, directly onto three-party campus sexual misconduct proceedings. Finally, after outlining the very real interests that complainants

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[132] Yoffe, *supra* note 10.

[133] *See Due Process Litigation Tracker*, Fire https://www.thefire.org/category/due-process-litigation-tracker [https://perma.cc/LZQ2-QZPL].

[134] *See Title IX Legal Database*, Title IX For All http://www.titleixforall.com/title-ix-legal-database/ [https://perma.cc/L3Z2-Z8NX].

[135] *See* Section II, *infra*.

[136] *See* U.S. Const. amend. XIV; *see* Goss v. Lopez, 419 U.S. 565, 572–74 (1975).

[137] *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976) (explaining that determining what constitutes due process depends on the relative weight of each of the three interest factors in a given scenario); *Goss*, 419 U.S. at 579 (noting that "the nature of the hearing will depend on appropriate accommodation of the competing interests involved.").

[138] 419 U.S. 565.

[139] 424 U.S. 319.

have at stake in these cases, we will conduct a close analysis of two appellate cases, *Doe v. Baum*[140] and *Haidak v. Univ. of Massachusetts*,[141] to demonstrate how courts have missed the opportunity to account for complainants' interests in the due process calculus.

A. The Supreme Court Bedrock

The Court established the constitutional floor for due process in school disciplinary proceedings in *Goss* in 1975. After being suspended without a prior or subsequent hearing, nine Ohio high school students sued seeking a declaration that the Ohio statute permitting their suspension without a hearing of any kind violated their constitutional right to procedural due process under the Fourteenth Amendment.[142] The Court found that the suspension of a student from public school may constitute a deprivation of property and liberty interests such that the Fourteenth Amendment due process clause applies.[143] Given these established interests, the Court ruled that the due process clause affords students the fundamental minimum requirements of oral or written notice and a hearing prior to sanctioning, save exigent circumstances,[144] in the case of an up-to-ten-day suspension.

The *Goss* Court construed these requirements broadly as mandating notice and a hearing of "some kind."[145] To suffice, the hearing must afford the respondent the opportunity to review "statements in support of the charge" and to "make statements in defense or mitigation."[146] The Court identified the purpose of these requirements as twofold: 1) to preserve the transparency of the process[147] and 2) to offer the respondent the opportunity to contextualize the alleged conduct as they see fit.[148] Ultimately, this serves to "provide a meaningful hedge against erroneous action" limiting or depriving a student of access to education.[149] This hedge is critical, as it is constitutionally required, but courts' latitude to define the meaningfulness of that hedge is no-

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[140] Doe v. Baum, 903 F.3d 575 (6th Cir. 2018).

[141] Haidak v. Univ. of Massachusetts, 933 F.3d 56 (1st Cir. 2019).

[142] *See Goss*, 419 U.S. at 567.

[143] *See Goss*, 419 U.S. at 574 ("Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause").

[144] *See id.* at 572, 582–83 (affirming lower court's determination that controlling case law permits the "immediate removal of a student whose conduct disrupts the academic atmosphere of the school, endangers fellow students, teachers or school officials, or damages property," so long as a "rudimentary hearing. . . follow[s] as soon as practicable).

[145] *Id.* at 579.

[146] *Id.* at 572.

[147] *See id.* at 580 ("[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness") (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 170, 172–73 (1951)).

[148] *See id.* at 584 ("[T]he student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.").

[149] *Id.* at 583–84.

ticeably constrained: they are charged simply with ensuring that school disciplinary procedures avoid causing unfair, mistaken, or arbitrary exclusion from education.[150] Given that arbitrariness is a highly deferential standard,[151] this principle signals the *Goss* Court's judicial commitment to preserving flexibility and autonomy for schools beyond the constitutional minimum.

Importantly, *Goss's* holding was fact-bound to a suspension of ten days or fewer,[152] leaving open the prospect that "[l]onger suspensions or expulsions. . . may require more formal procedures."[153] *Goss* suggests that in especially difficult cases, schools "may. . . summon the accuser, permit cross examination, and allow the student to present [their] own witnesses."[154] The Court's deliberate use of permissive rather than prescriptive language comports with the opinion's attitude of minimalism and leaves space to account for the balance of interests at stake. To that end, the *Goss* Court deliberately declined to overextend itself beyond this constitutional floor and into the realm of legislating school disciplinary procedures.[155] Further, in a prophylactic call to steer clear of prescribing the ins and outs of school disciplinary proceedings, the *Goss* Court cautioned lower courts to exercise "restraint" and avoid "[j]udicial interposition in the operation of the public school system."[156] Only in *Mathews*, one year later, did the Court outline the factors to consider in weighing the need for increased processes in cases where a respondent faces a deprivation greater than a ten day suspension.[157]

In *Mathews*, respondent Eldridge had been receiving disability benefits pursuant to Title II of the Social Security Act for four years because of a medical condition when he received a questionnaire from the monitoring agency reassessing his health.[158] Eldridge filled out and returned the ques-

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[150] *Id.* at 579.

[151] For example, "arbitrary and capricious" review is the most deferential standard of review in administrative law. *See* Yamaha Corp. of Am. v. State Bd. of Equalization, 960 P.2d 1031, 1041 (Cal. 1998) (Mosk, J., concurring) (identifying "arbitrary and capricious" as the most deferential standard of review in administrative law).

[152] *Goss*, 419 U.S. at 584.

[153] *Id.*

[154] *Id.*

[155] *See id.* at 583.

[156] *Id.* at 578 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

[157] "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)). In *Goldberg*, the Court considered a claimant's due process challenge to the termination of his public benefits without a prior hearing and held that a hearing was generally required prior to the termination of public benefits in which the respondent had a protected interest. *Id.*

[158] *Mathews*, 424 U.S. at 323.

tionnaire to the agency, which then issued a tentative determination that Eldridge was no longer eligible for benefits.[159] The letter informed Eldridge of his right to submit a written response to this determination, which he did, but the agency affirmed its prior decision and the Social Security Administration terminated his benefits.[160] Eldridge filed suit alleging he had been deprived of his protected interest in disability benefits without due process of law.[161]

The *Mathews* Court ultimately ruled against Eldridge, finding the process provided to him constitutionally sound.[162] In assessing this, the Court enumerated the factors to be considered in the procedural due process analysis to which *Goss* had nodded. Determining the process due to a respondent prior to their deprivation of a constitutionally protected interest requires balancing the *Mathews* factors:

> (1) the private interest at stake (hereinafter the first *Mathews* factor);
>
> (2) the risk of an erroneous deprivation with the present procedures, discounted by the probable value of additional procedural safeguards (hereinafter the second *Mathews* factor); and
>
> (3) the public interest, including [but not limited to] the fiscal and administrative burdens additional procedures would entail (hereinafter the third *Mathews* factor).[163]

The first *Mathews* factor describes the stakes for the party facing an affirmative deprivation by state action. In campus sexual misconduct disciplinary proceedings, this is the student respondent, who has been named as an abuser. The second factor accounts for the comparison between the risk of erroneous deprivation to that respondent using the status quo procedures and the gravity of that same risk where additional procedures are provided. The third factor is broad-sweeping: it counterbalances the first two by accounting for the public interest at stake. This includes the costs to the charging institution of implementing the procedures requested beyond the status quo. But it is decidedly broader, encompassing also the interests of those in whose wellbeing the institution has a stake as well as broader societal goals.[164] This flexible test[165] locates fairness in balance; the deliberately broad language of the third factor renders the test applicable to analyses with

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[159] *Id.* at 323–24.
[160] *Id.* at 324.
[161] *Id.* at 323–24.
[162] *Id.* at 349.
[163] *Id.* at 335, 347.
[164] *See id.* at 347 ("the public interest. . . includes the administrative burden and other societal costs"); *see also* Lassiter v. Dep't Soc. Servs., 452 U.S. 18, 27–28 (1981) (emphasizing that the state is concerned not only with ensuring "the termination decision. . . be made as economically as possible" but also with preserving "the welfare of the child").
[165] *See, e.g.*, United States v. Raddatz, 447 U.S. 667, 677 (1980) ("In *Mathews v. Eldridge*. . . we emphasized that three factors should be considered in determining whether the flexible concepts of due process have been satisfied").

more competing interests at stake than the disability benefits case, remaining faithful to the principle of balance.

Although *Goss* outlines the procedures necessary for students prior to an up-to-ten-day suspension, courts looking for guidance in different circumstances have turned to the *Mathews* framework. Under this framework, due process requires at least notice and the opportunity to be heard, plus any additional procedures as determined by the balance of *Mathews* interests at stake in a given scenario. In essence, while the *Goss* analysis stands for minimalism and institutional deference beyond the constitutional floor, *Mathews* stands for holistic balancing. This framework guides courts exploring the uncharted waters where punishment greater than a ten-day suspension is at stake in determining what additional procedures the constitutional floor might require.

B. Opportunities for Inclusion: Universities and the Mathews *Analysis*

All discrimination and violence cases, including sexual misconduct cases, share a salient element that distinguishes them from the underlying fact patterns of *Goss* and *Mathews*: the existence of a complainant apart from the charging institution. Whereas both *Goss* and *Mathews* were concerned with balancing the respondent's interests against the public's interest, which included only the government or its proxy,[166] sexual misconduct cases present an opportunity for the third factor to account also for the interests of the complainant. Despite this critical distinction, however, courts have grafted the *Mathews* two-party analysis directly onto sexual misconduct cases, accounting for respondents and institutions and all but erasing complainants. This incongruence yields potentially inaccurate due process analyses. Recall the three *Mathews* factors:

(1) the private interest at stake;

(2) the risk of an erroneous deprivation with the present procedures, and the probable value of additional or substitute procedural safeguards; and

(3) the public interest, including the fiscal and administrative burdens additional or substitute procedures would entail.[167]

The first two factors focus squarely on the respondent, as the government contemplates taking some of that respondent's rights away. The third factor, however, considers the interests of the public at large. This factor is the elastic one, leaving space for the court as arbiter to fold in all other relevant interests.[168] In a typical campus sexual misconduct case,[169] at least one person has complained that the respondent subjected them to miscon-

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[166] *See generally Mathews*, 424 U.S. 319 (balancing private interests against the Government's interest); Goss v. Lopez, 419 U.S. 565, 579–80 (1975) (balancing the interests of students against the interests of Ohio's public-school system).

[167] *Mathews*, 424 U.S. at 335.

[168] *See* Lassiter, 452 U.S. at 27 (considering the state's "urgent interest in the welfare of the child," a non-party whose interests are implicated, under the *Mathews* analysis);

duct. This means that two students, whose accounts of the conduct at hand often conflict, both have a formal relationship to the university and similar interests in maintaining that relationship. The university is also charged with making a determination against one party and in favor of the other. The calculus of fairness in these and other discrimination or violence cases, then, is of the same family as, but slightly differentiated from, *Goss* and *Mathews*, where the court merely weighed the institution's interests against those of the party faced with the possibility of a deprivation.

The third *Mathews* factor plainly encapsulates the government or its proxy's interests—here, the university's. Schools have an interest in honoring their statutory and constitutional obligations to their students under the Constitution and statutory law as well as in cost effectiveness and efficiency, which the third *Mathews* factor specifically names. But schools also have broader policy interests at stake as well, namely: resolving cases efficiently, maintaining campus and community safety, administering a disciplinary process with integrity, achieving accurate outcomes, preserving a focus on educational attainment, and complying fully with legal obligations. Each of these university interests under the third *Mathews* factor necessarily implicates complainants as well.

Courts assessing due process should consider the universities' interests as they implicate complainants under the third prong of their analysis. Since complainants bring cases of this kind when their educational environment has been compromised by sex discrimination, efficiency in assessing for conduct violations and administering discipline is critical to remedy the possible discrimination. A university's interest in campus and community safety rests on community members' perceptions of safety; where a student must coexist with their perpetrator, this goal is severely undermined. It is further undermined where complainants—or respondents, for that matter—feel the process to which their case was subjected lacks fairness. Perceptions of bias not only decrease feelings of safety but also undermine institutional legitimacy.

Universities' interests in accuracy in outcomes and the inextricably intertwined interest in maintaining a focus on educational goals also plainly concern complainants, who are, first and foremost, students. In this vein, courts routinely acknowledge respondents' student status, regularly asserting that erroneous findings of responsibility unfairly deprive respondents of access to education at their university.[170] Although this is theoretically accurate, it fails to account for the other side of the same coin: erroneous findings

Mathews, 424 U.S. at 347 ("the public interest. . . includes the administrative burden and other societal costs").

[169] Here, we refer to student-on-student misconduct, though Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 (1972) (hereinafter Title IX), requires schools to respond to acts of sexual misconduct committed both by and against non-students in certain circumstances.

[170] *See, e.g.*, Doe v. Baum, 903 F.3d 575, 582 (6th Cir. 2018).

of *no* responsibility similarly inhibit complainants' access to education at their university, implicating the third *Mathews* factor. Finally, because schools receiving federal funding are bound by Title IX's prohibition on sex discrimination in education, the university's interest in complying with this federal law involves ensuring survivors do not experience violence or further discrimination in the wake of violence, including throughout the investigation process. The university's interests assessed under the third *Mathews* prong, then, should encompass the interests of complainants.

C. Opportunities for Inclusion: Complainants' Distinct Interests

But the third *Mathews* prong is not restricted to the university's interests, nor is it restricted to analyzing the complainant's interests as filtered through their relationship to the university. Distinct from the many ways in which universities' interests dovetail with those of complainants, complainants also have their own significant interests on the line that fall under the third *Mathews* factor as an ascertainable element of the broader public interest. These interests stand alone, related to but not subsumed by those of the university. Courts routinely highlight respondents' stake in continued access to education, the integrity of their reputation, and their future educational, professional, and financial outcomes. But an erroneous finding against a complainant also has profound and enduring consequences. To achieve truly balanced processes through analyses, deciding courts should account for complainants' interests in the realms of education, reputation, and future prospects under the third *Mathews* factor. We consider each in turn.

i. *Continued Access to Education*

All student parties to sexual misconduct disciplinary proceedings have a primary interest in avoiding unfair exclusion from school.[171] Under Title IX, complainants look to their school for assistance through the disciplinary process when their experience of gender-based discrimination or violence limits or denies them access to education.[172] Erroneous findings of no respondent responsibility, the issuance of inappropriate sanctions,[173] and

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[171] *See* Title IX, (emphasizing access to educational benefits and programs)*; see also* Goss, 419 U.S. at 579.

[172] *See* 2001 Sexual Harassment Guidance, *supra* note 9, at 2 ("Sexual harassment of a student [that] den[ies] or limit[s], on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program. . . is, therefore, a form of sex discrimination prohibited by Title IX").

[173] We use the term "inappropriate" here to refer to sanctions that fail to realize Title IX's promise of restoring access to education. This would encompass, for example, a situation where a student found responsible for assault is required to write a research paper or complete community service hours but remains in a survivor's class, prohibiting the survivor from being able to attend that class. This would not necessarily, however, encompass a situation where a respondent is suspended until after the survivor graduates rather than expelled entirely.

stalled or abandoned investigation processes may thus unfairly deprive complainants of their interest in continued access to education.

Survivors overwhelmingly experience academic hardships. Students sexually assaulted during college routinely see drops in their GPAs following their assault.[174] In fact, some evidence suggests that a rape during the first semester of college might more than double a survivor's risk of having a GPA below 2.5 in the next semester.[175] This kind of academic downturn might force them to change majors or transfer schools. Moreover, survivors go to great lengths to avoid their perpetrators, skipping shared classes, avoiding libraries or dining halls, and withdrawing from campus life.[176] Thus, those who do not receive the support they need from their schools may delay their education or barely get by, resulting in what advocates have dubbed "constructive expulsion," wherein institutional apathy leaves survivors little chance at succeeding in school.[177] Indeed, approximately one-third of survivors are pushed out of school by some combination of these factors in the wake of violence.[178]

As if the direct educational impacts of experiencing violence are not enough, the institutional betrayal many survivors face when seeking support from their schools only exacerbates those impacts.[179] When schools fail to respond adequately to reports of sexual violence—dismissing or ignoring survivors' complaints, subjecting them to harmful investigative procedures, or failing to yield meaningful outcomes—survivors' trauma symptoms worsen, interfering even more substantially with their educations.[180] The interpersonal betrayal of sexual violence and the institutional betrayal of a university's inadequate response thus operate in a vicious cycle, mutually compounding the negative effects on the survivor.[181]

Denying complainants access to an investigation or a hearing altogether gravely impacts academic success. Take, for example, Wagatwe Wanjuki, who was raped and abused by her boyfriend while a student at Tufts Univer-

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[174] Carol E. Jordan et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 TRAUMA, VIOLENCE, AND ABUSE 191, 195–96 (2014).

[175] *Id.* at 196.

[176] *See* Rebecca Marie Loya, *Economic Consequences of Sexual Violence For Survivors: Implications For Social Policy And Social Change*, 96 (2012) (unpublished Ph.D. dissertation, Brandeis University) (on file with KNOW YOUR IX).

[177] Lila MacLellan, *We're Just Starting to Grasp How Campus Rape Steals Women's Careers Before They Start*, QUARTZ AT WORK (July 28, 2018) https://qz.com/work/1334192/the-story-of-a-campus-rape-shows-how-womens-careers-can-get-hurt-before-they-start/ [https://perma.cc/Y79F-3ZYS].

[178] Mengo & Black, *supra* note 21, at 243.

[179] Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCHOLOGIST 575, 578–83 (2014).

[180] *See id.*

[181] *Cf.* Deborah Epstein & Lisa Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 447 (2019).

sity.[182] She faced excruciating trauma symptoms in the wake of the violence, and despite her report to the school, Tufts insisted it had no obligation to respond.[183] Wanjuki was left on her own to cope with the violence, the trauma in its wake, and the disruption of doing so while sharing a campus with her perpetrator.[184] The ordeal completely derailed her education; as a result of her plummeting grades in the wake of her trauma and a lack of support from the school, she was expelled from Tufts.[185] She finally earned a college degree from a different university in 2014, ten years after she first enrolled at Tufts.[186]

Granting complainants access to processes ill-suited for complaints of sexual violence similarly risks impairing their access to education.[187] In 2014, a junior undergraduate at a Midwestern university was threatened and physically and sexually assaulted by a senior student she considered a close friend.[188] Though mediation should not have been an option under federal guidance,[189] the university offered it, and the perpetrator's friend reached out to the survivor—in violation of the no-contact order—and convinced her that mediation, which took the possibility of a determination of responsibility off the table, was the best choice.[190] During the mediation, the perpetrator did not dispute the allegations against him.[191] At the conclusion of the session, he was sanctioned: directed to seek counseling and abstain from drug and alcohol use.[192] The mediator then told the survivor that based on the facts, mediation should have never been an option.[193] The survivor saw the respondent intoxicated at a party that same night.[194]

The survivor dropped out of her extracurriculars, isolated herself in her room, and had trouble keeping up with academics, even contemplating a leave of absence; her perpetrator walked around campus seemingly unscathed. Looking for support, she disclosed her experience to a friend six

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[182] Dana Bolger, *Gender-Based Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L. J. 2106, 2108 (2016).

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] Some have argued that schools are ill-equipped to handle cases of sexual violence and that they should instead be handled by the police. It is important to note that schools handle all sorts of campus conduct violations that could also be criminal behavior, such as simple assaults, arson, and theft. But rarely is adjudication of those criminal behaviors met with hostility from the public. Further, not only are schools legally required to respond to sexual violence, they can provide survivors with specific protections that ensure they are able to continue their education.

[188] Interview with Anonymous (Dec. 2018).

[189] 2011 Dear Colleague Letter, *supra* note 37, at 21 ("In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.).

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

months later, and that friend responded with her own disclosure—about the very same man. She, too, had dropped many of her extracurriculars, struggled with coursework, and withdrawn from a class to cope with her trauma. Because of the university's inappropriate offer of mediation and issuance of disproportionately mild sanctions, both the complainant in that case and this second survivor—among others—experienced continuing discrimination that compromised their educations.

Even when a complainant receives a hearing, an ineffective hearing can lead to the same sort of institutional betrayal, compounding the adverse academic effects of violence. In a sexual misconduct case at the University of Kentucky, the school mishandled the disciplinary proceedings three times over, leading the survivor, Jane Doe, to lose access to education entirely.[195] In October of 2014, Jane Doe reported that she had been raped in her dorm room by a peer.[196] She dropped out of her classes and withdrew from campus housing while her case was pending.[197] After the first hearing, Jane Doe's respondent was found responsible for sexual misconduct, and Jane Doe enrolled in courses on a different campus to continue her education.[198] But the respondent appealed, and because of procedural errors, the university granted a new hearing.[199] The respondent was found responsible again after the second hearing, again alleged procedural violations, and again was granted a new hearing.[200] After receiving notice that she would have to endure a third hearing, Jane Doe withdrew from classes entirely, citing the emotional trauma of the rehearings.[201] That hearing, too, was found to have procedural flaws,[202] and in a fourth hearing, the respondent was cleared.

The actual procedures used in disciplinary proceedings directly implicate educational access as well. Respondents alleging their universities violated their due process rights in sexual misconduct disciplinary proceedings frequently push for the ability to cross examine—either directly or through

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[195] *See* Doe v. Univ. of Kentucky, No. 5:15-CV-00296-JMH, 2016 WL 4578328, at *1–2 (E.D. KY. Aug. 31, 2016) ("Plaintiff had begun classes in the spring semester at a different BCTC campus but the notice of a third hearing caused Jane Doe's mental health to deteriorate further and was so time consuming that she withdrew from classes again on March 12, 2015") (internal citations omitted).

[196] *Id.* at *1.

[197] Doe v. Univ. of Kentucky, 357 F. Supp. 3d 620, 622 (E.D. KY. 2019) ("On October 15, 2014, Plaintiff dropped out of her classes at BCTC and withdrew from UK's campus housing").

[198] *Id.*

[199] *See* Doe, No. 5:15-CV-00296-JMH, 2016 WL 4578328, at *1 (E.D. KY. Aug. 31, 2016) ("Student B appealed the decision of the hearing panel to the University Appeals Board (the 'UAB'). The UAB issued a written ruling on December 4, 2014, finding violations of Student B's due process rights by the hearing panel and setting aside the hearing panel's decision.").

[200] *Id.* at *1.

[201] *Id.* at *1 (E.D. Ky. Aug. 31, 2016) ("Plaintiff had begun classes in the spring semester at a different BCTC campus but the notice of a third hearing caused Jane Doe's mental health to deteriorate further and was so time consuming that she withdrew from classes again on March 12, 2015") (internal citations omitted).

[202] *Id.* at *2.

their representative—the complainant in the case.[203] Some courts have recently touched on the implications of such procedures for complainants: the Sixth Circuit Court of Appeals, for example, has twice acknowledged that direct cross examination by a respondent could subject a survivor to further harassment.[204] This comports with anecdotal experience. As one survivor from Washington explained:

> If I could have been cross-examined by a representative of my assailant, I would not have reported my case. Period. It would not have been worth it. I would anticipate that process to be so traumatizing that I would have [had] a total mental-health break down and le[ft] school. I would have just stayed silent. There's no way I would have subjected myself to that.[205]

In 2017, the Sixth Circuit reasoned that adversarial cross examination may "pose unique challenges given a victim's potential reluctance to interact with" the respondent, concluding as a result that the university could balance this concern against the respondent's due process rights by providing for cross examination through the submission of possible questions to the university panel.[206] The court believed it had struck a balance between the competing rights, still acknowledging that even this workaround "may not relieve [the complainant's] potential emotional trauma" entirely.[207] Recently, however, in a decision that grossly minimized student-complainants' interests, the Sixth Circuit backpedaled on its prior reasoning. In *Baum*, that same court again recognized the risk of harm in direct cross examination but concluded, divergent from *Cincinnati*, that allowing the respondent's repre-

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[203] *See, e.g.,* Haidak v. Univ. of Massachusetts, 933 F.3d 56, 66 (1st Cir. 2019) ("Haidak claims that the hearing was nevertheless constitutionally flawed. . . [because] he was not allowed to cross-examine Gibney"); Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018) ("[Respondent] claims that because the university's decision ultimately turned on a credibility determination, the school was required to give him a hearing with an opportunity to cross-examine [complainant] and other adverse witnesses"); Plummer v. Univ. of Houston, 860 F.3d 767, 775 (5th Cir. 2017), *as rev'd* (June 26, 2017) (noting that plaintiffs asserted "they were denied. . . the opportunity to effectively cross-examine adverse witnesses"); Doe v. Cummins, 662 F.App'x 437, 442 (6th Cir. 2016) (observing that student found responsible for sexual misconduct below alleged due process violations on the grounds that he "was not permitted to effectively cross-examine adverse witnesses").

[204] *See* Doe v. Univ. of Cincinnati, 872 F.3d 393, 403 (6th Cir. 2017) (quoting Doe v. Regents of the Univ. of Cal., 5 Cal.App.5th 1055, 1085 (2016) ("'Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating' the same hostile environment Title IX charges universities with eliminating"). *See Baum*, 903 F.3d at 583 ("Universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment.").

[205] Know Your IX Comment, *supra* note 62.

[206] *Univ. of Cincinnati*, 872 F.3d at 406. While the Court ultimately concluded that the respondent's Due Process rights were violated, this part of the Court's opinion shows that courts have considered survivors' interests in their *Mathews* analysis.

[207] *Id.* at 404.

sentative to cross examine the complainant was the appropriate solution.[208] The close analysis below of Sixth Circuit case law highlights how the exclusion of complainants' interests from the *Mathews* analysis directly and significantly impacts determinations of procedural fairness.

ii. *Reputation*

Complainants, like respondents, also have reputational interests related to sexual misconduct cases, and in fact the societal deck in that realm is disproportionately stacked against complainants from the start. Because women are the gender that most commonly reports experiencing violence on campus,[209] we discuss here the dual reputational harms of stacking stereotypes of women atop stereotypes of survivors. Both face extensive discrediting regardless of the soundness of their narratives, leading to increased obstacles in help-seeking and the heightened risk of reputational harm for disclosing even provably truthful allegations.

Society's baseline disbelief of women, which scholars have dubbed the "credibility discount"—"an unwarranted failure to credit an assertion where this failure stems from prejudice"[210]—fuses with narratives about the motives behind allegations of sexual violence to tarnish the reputations of those who come forward about their experiences. In one study, 22% of college men agreed that women use allegations of sexual violence "to get back at men," and 13% agreed that "a lot of women lead men on and then cry rape."[211] In fact, one of the most prevalent rape myths that studies have uncovered is the simple but insidious belief that "[s]he lied."[212] Respondents and their supporters capitalize on this slanted social narrative by propelling forward the trope that women cry rape in retribution. In that vein, Save Our Sons founder Alice True says she believes revenge is the primary driver of what she characterizes as "false accusations" by women in particular: "[b]ased on the large number of emails I receive, I . . . sense that false accusations are common among ex-girlfriends for various reasons, but usually out of revenge or jealous[y]."[213]

One common iteration of the retributive narrative is the idea that women claim violence after having sex they regret. Candace E. Jackson, for-

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[208] *Baum*, 903 F.3d at 583.

[209] *Statistics About Sexual Violence*, Nat'l Sexual Violence Resource Ctr. (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf [http://perma.cc/D6YD-8HD5].

[210] Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount,* 166 U. Pa. L. Rev. 1, 3 (2017).

[211] Katie Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 Sex Roles 761, 767 (2011).

[212] Sarah McMahon, *Rape Myth Beliefs and Bystander Attitudes Among Incoming College Students*, 59 J. of Am. C. Health 3, 4 (2010).

[213] Lilly Dancyger, *Inside the Organizations That Support Accused Campus Rapists*, Glamour Mag. (July 14, 2017), https://www.glamour.com/story/organizations-support-accused-campus-rapists [http://perma.cc/FJ9R-JRXJ].

merly the acting Assistant Secretary for Civil Rights in the Trump Administration's Department of Education, condoned this narrative in a 2017 interview with the New York Times: "Rather, the accusations—90 percent of them—fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'"[214]

After considerable public backlash, Jackson apologized.[215] But the momentary validation of this narrative from a top civil rights official charged with protecting the rights of campus survivors is a harm that cannot be undone, as it reified a trite but insidious narrative that women deliberately conflate regrettable sex and rape. As former Know Your IX Policy Organizer Alyssa Peterson shared, "I've had sex I've regretted, and I've been raped. I know the difference."[216]

Thus, survivors find themselves subject to a self-referential narrative of malicious intent through retributive accusations: they are inherently untrustworthy, so their allegations must be vengeful, and because the allegations are vengeful, the survivors become untrustworthy. This narrative takes aim directly at survivors' reputations; even provable truthfulness cannot interrupt the cycle. Despite the fact that false reports of rape hover around the same percentages as false reports of other crimes, survivors are branded as liars in their communities and often face backlash for "false" reporting to an extent unmatched by most other crime victims.[217]

Kamilah Willingham and her friend were assaulted by Willingham's classmate while she was a student at Harvard Law School.[218] Though the original school hearing panel found her respondent responsible, a group of Harvard law professors revoked that decision—then publicly tried to discredit Willingham. She was untrustworthy, they argued, because "there [were not] even any charges that he used force,"[219] an age-old rape myth the revival of which cast the elite institution into momentary disrepute. In her raw public reply, Willingham wrote: "You—my former professors—have joined together to silence and discredit my story of sexual assault and its institutional mishandling."[220] Willingham explained that she didn't know "which [was] worse: not being believed or being believed but being valued

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[214] Erica L. Green and Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. Times (July 12, 2017), https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html?smid=tw-nytimes&smtyp=cur&_r=0 [https://perma.cc/F656-H2U3].

[215] Sarah Brown, *Ed. Dept. Official Apologizes For '90%' Remark on Campus Rape. What's the Research?*, Chron. Higher Educ. (July 12, 2017), https://www.chronicle.com/article/Ed-Dept-Official-Apologizes/240634 [https://perma.cc/XL4Q-VFZ7].

[216] Interview with Alyssa Peterson, Policy Organizer, Know Your IX (Aug. 27, 2017).

[217] *See, e.g.*, A False Report (Netflix 2019).

[218] Kamilah Willingham, *To the Harvard Law 19: Do Better*, Medium (March 24, 2016), https://medium.com/@kamily/to-the-harvard-law-19-do-better-1353794288f2 [https://perma.cc/8923-V9PV].

[219] *Id.*

[220] *Id.*

so little it doesn't matter."[221] Regardless of whether they move forward with their complaint, and regardless of whether their case yields a finding of responsibility, then, campus complainants in sexual misconduct cases face immense reputational harms.

Just as courts have asserted that universities have an interest in protecting respondents' reputations from undue damage, universities have this interest across the board, including in avoiding the improper debasement of complainants' reputations. This means that under the third *Mathews* factor, courts should consider the risk of perpetuating rape-mythical narratives of retributive women who falsely "cry rape" in the same way they consider the risk of undue reputational harm to a respondent. This myth-mongering to discredit complainants and the resulting reputational harm have very real impacts on the public at large. As Willingham put it:

> I am tired of being treated as if I don't matter. I am hurt by how much more easily you believe a man when he says 'she's lying' than a woman when she says 'he sexually assaulted me, and I deserve better'. . . But, most importantly, I am not alone. . . I'm just one of many survivors in our community whose very real pain you will have to reckon with.[222]

iii. *Professional and Financial Prospects*

These academic and reputational effects reverberate into survivors' careers but have gone unacknowledged by the courts. Although the courts have weighed the fact that a student who is found to have committed sexual misconduct "may be forced to withdraw from his classes and move out of his university housing. . . [and] could face difficulty obtaining educational and employment opportunities down the road,"[223] survivors have received little institutional acknowledgement for the same struggles—despite the fact that evidence of the negative impacts of a report of sexual misconduct on student respondents pales in comparison to that documenting the barriers survivors face in the wake of violence.[224] Student survivors frequently drop out of school, take time off, or transfer institutions in the wake of violence.[225] They may have to change their majors or their career path as a result.[226] Those who do obtain a degree still face difficulty in obtaining employment, whether due

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[221] *Id.*

[222] *Id.*

[223] Doe v. Baum, 903 F.3d 575, 582 (6th Cir. 2018).

[224] *See e.g.,* Mengo & Black, *supra* note 21, at 244 ("The dropout rate for students who had been sexually victimized (34.1%) was higher than the overall university dropout rates (29.8%)").

[225] *Id* at 242–45.

[226] *See, e.g.*, Anonymous story on file with Authors ("After being sexually assaulted my Sophomore year by three men in my department I ended up transferring majors to avoid seeing them every day. I couldn't go to class, even the ones I didn't share directly with them, because it was almost entirely impossible to enter the department building

to a spotty academic record, publicity around their assault,[227] or the persistent nature of trauma symptoms.[228] All of these factors contribute to survivors' decreased earning capacities and increased susceptibility to financial fragility later in life.[229] So long as courts consider these impacts on respondents under the *Mathews* analysis, so too should they factor them into their analyses of complainants' interests at stake in sexual misconduct proceedings.

Dropping out of college severely limits a survivor's employment opportunities; even if they do complete their degree, the academic impact is still salient, often forcing a change of career paths or reducing options for graduate or professional school. One Know Your IX activist studied music on a departmental scholarship at the University of Delaware and was forced to transfer majors or else remain in the same small program with her rapist.[230] Another Know Your IX activist declined her admission offer from her top choice law school after finding out her abuser was matriculating there.[231] These are just two instances of the career-altering impacts gender violence can have on student survivors.[232]

Adverse educational experiences can directly implicate survivors' financial wellbeing. When a survivor's academic performance declines, they may lose scholarships,[233] take semesters of leave,[234] drop out,[235] or even be removed from school like Wanjuki.[236] Each of these may result in the in-

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without seeing my rapists. This meant I lost thousands of dollars in class credits and completely changed my career path halfway through college.").

[227] Alyssa Leader & Sarah Nesbitt, *As Campus Sexual Assault Survivors, We Call on DeVos to Do Better*, VICE (Sept. 11, 2018), https://www.vice.com/en_us/article/8x79kx/betsy-devos-title-ix-sexual-assault-on-campus. [https://perma.cc/B6R4-C89Q].

[228] *See, e.g.*, Rachel Kimerling et al., *Unemployment Among Women: Examining the Relationship of Physical and Psychological Intimate Partner Violence and Posttraumatic Stress Disorder*, J. OF INTERPERSONAL VIOLENCE 450, 451–452 (2009).

[229] *See* Ross Macmillan, *Adolescent Victimization and Income Deficits in Adulthood: Rethinking the Costs of Criminal Violence from a Life-Course Perspective,* 38 CRIMINOLOGY 553, 570 (2000), summarized in NAT'L SEXUAL VIOLENCE RESOURCE CTR. (2013), https://www.nsvrc.org/sites/default/files/publications_nsvrc_research-brief_sexual-violence-workplace.pdf [https://perma.cc/3HM3-PYMY].

[230] Sage Carson, *I Was Raped at College. Here's How DeVos's New Rules Harm Survivors Like Me*, VICE (Nov. 16, 2018), https://www.vice.com/en_us/article/d3b7gq/title-ix-betsy-devos-college-rape-sexual-assault [https://perma.cc/M6LP-S3NW].

[231] Leader & Nesbitt, *supra* note 227.

[232] *See, e.g.*, Sharyn Potter et al., *Long-term impacts of college sexual assaults on women survivors' educational and career attainments*, 66 J. OF AM. C. HEALTH 496 (2018) (listing impacts on survivors' college experience, job market experience, and health as found in a study).

[233] Tyler Kingkade, *Being A Sexual Assault Survivor in College Often Comes With Huge Bills*, HUFFPOST (Jan. 13, 2016), https://www.huffpost.com/entry/cost-of-sexual-assault-in-college_n_5695c0e7e4b09dbb4bad3f4c [https://perma.cc/GN2H-F6CE0].

[234] *Id.*

[235] Audrey Chu, *Op-Ed: I Too Left Tufts — in 2015*, TUFTS DAILY (Oct. 9, 2018), https://tuftsdaily.com/opinion/2018/10/09/op-ed-left-tufts-2015/ [https://perma.cc/89UW-9TTR].

[236] Bolger, *supra* note 182, at 2108.

creased accrual of student loan debt,[237] which weighs down even young people who graduate as planned and secure gainful employment without having to cope with trauma symptoms. A survivor named Mila explained that because of her assault, she found herself buried in an additional $43,960 worth of academic costs.[238] Another survivor reported that she took time off and transferred after her assault. The increased living expenses, scholarship loss, additional tuition, and decreased work capacity drained her of approximately $100,000.[239] Therefore, on top of trauma, survivors must also contend with significant financial loss.

In addition to the obvious impact depressed grades have on employment prospects, student survivors who publicly share their stories face reputational barriers to securing or maintaining employment. These barriers, combined with student loan debt accrued during leaves of absence or through transfers, project a future of financial instability for survivors of sexual violence. Harvard survivor Alyssa Leader, for example, has written about how she was demoted at work and declined for multiple jobs because of the publicity around her assault.[240] Even once employed, survivors still see reductions in earning capacity; those who have experienced sexual assault are estimated to earn on average $6,000 less per year than their peers who have not been assaulted.[241] The unfortunate correlation between sexual violence and income loss is particularly concerning when it comes to adolescent experiences of violence, which negatively impact educational and occupational attainment.[242] Once again, institutional betrayal compounds this adverse impact.[243]

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[237] *See id. See also* Alexandra Brodsky, *How Much Does Sexual Assault Cost Students Every Year*, WASHINGTON POST (NOV. 18, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-college-students-every-year/ [https://perma.cc/Q5EM-NK6K] ("When a school denies survivor the services and support they need to recover, students may be forced to take out additional loans —or even to leave school, a semester's tuition down the drain."). *See also* Congresswoman Jackie Speier, Letter from Congresswoman Speier to Secretary Catherine Lhamon 3 (Sep 13, 2016), https://www.knowyourix.org/wp-content/uploads/2017/01/9-13-16-Speier-Letter-to-OCR-re-Sexual-Assault-Student-Loan-Debt.pdf [https://perma.cc/CZT4-Z7J6] ("The effects of sexual violence on an individual can manifest themselves in many ways, some of which can lead to financial injuries. These financial injuries can range from out-of-pocket expenses (like medical payments) to the lost value of educational services already paid for (when a survivor cannot benefit from classes). Loan interest accrued is another type of financial injury that could result from sexual violence.").

[238] Hatch, *supra* note 18.

[239] Bolger, *supra* note 182, at 2117.

[240] *See* Leader & Nesbitt, *supra* note 227; Christine Hauser, *Former Student Sues Harvard Over Handling of Sexual Crimes Complaints,* N.Y. TIMES (Feb. 19, 2016), https://www.nytimes.com/2016/02/20/us/harvard-sexual-crimes-complaints-alyssa-leader.html [https://perma.cc/6YTY-ZMEJ].

[241] *See* Macmillan, *supra* note 229, at 2.

[242] *See id.*

[243] *See* Smith & Freyd, *supra* note 179, at 576 (describing how institutional betrayal worsens psychological trauma).

These adverse professional and financial impacts on survivors of sexual violence highlight the need for holistic considerations of the student interests at stake in campus sexual misconduct disciplinary proceedings. Indeed, in a country where at least two men credibly accused of sexual misconduct[244] have been confirmed to the highest court in the land[245] where they now earn hefty paychecks[246] while writing potentially tide-shifting legal opinions, courts' tendency to recognize the educational and professional prospects of respondents but not complainants is unsurprising.

D. Prevailing Applications of Mathews

Since the decisions in *Goss* and *Mathews* nearly forty-five years ago, courts across the country have built on this precedent, exploring the due process rights of respondents in campus disciplinary hearings where a greater-than-ten-day suspension is on the table.[247] As a result of the respondents' rights movement's backlash against survivors' activism, discussed in Section I, *supra*, the courts have been flooded with such complaints.[248] Because this is previously uncharted territory, courts' decisions have a profound impact on institutional policies and the future of educational equity. As such, all parties have a vested interest in a fair application of the *Mathews* factors.

Recent appellate decisions, however, have failed to fully acknowledge the distinct ways in which disciplinary proceedings like those for campus sexual misconduct implicate the third *Mathews* factor. Two cases in particular, *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), and *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56 (1st Cir. 2019), took on the *Mathews* analysis within months of each other. The decisions of *Baum* and *Haidak* exemplify recent approaches to the *Mathews* analysis that fall into the trap of erasing complainants to different extents. In *Baum*, the court focused heavily

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[244] Mikayla Bouchard & Marisa Schwartz Taylor, *Flashback: The Anita Hill Hearings Compared to Today*, N.Y. Times (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/us/politics/anita-hill-kavanaugh-hearings.html [https://perma.cc/8UC6-9NN7].

[245] *See* Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. Times (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html [https://perma.cc/3U9D-5CFM]; R.W. Apple, Jr., *The Thomas Confirmation; Senate Confirms Thomas, 52-48, Ending Week Of Bitter Battle; 'Time For Healing,' Judge Says,* N.Y. Times (Oct. 16, 1991), https://www.nytimes.com/1991/10/16/us/thomas-confirmation-senate-confirms-thomas-52-48-ending-week-bitter-battle-time.html [https://perma.cc/869C-5LBN].

[246] *See Judicial Compensation*, U.S. Courts (last updated 2019), https://www.uscourts.gov/judges-judgeships/judicial-compensation [https://perma.cc/JS34-GLWG].

[247] *See, e.g.*, Doe v. Purdue U., 928 F.3d 652, 663 (7th Cir. 2019) ("[I]n the disciplinary context, the process due depends on a number of factors, including the severity of the consequence and the level of education.").

[248] *See* Samantha Harris & K.C. Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.Y. J. Legis & Pub. Pol'y 49 (2019) (analyzing the recent wave of litigation by college sexual assault victims).

on the first *Mathews* factor, the private interest at stake, nodding toward the second factor but hardly acknowledging the third.[249] This left both the University's broader interests and the complainant's individual interests almost completely unaddressed.

In *Haidak*, on the other hand, the court's more holistic analysis hinged primarily on the second *Mathews* factor: the risk of erroneous deprivation.[250] This opinion sufficiently explored the first factor and gave greater nuance to the third factor in terms of identifying the University's interests but still largely omitted those of the complainant. Though *Haidak* succeeded more than *Baum*, both cases problematically shirk the crucial interests of the complainant that should be considered under the third *Mathews* factor. This analytical error can lead to substantial miscalculations that threaten the future of fairness in campus disciplinary proceedings. To comport with *Mathews*' command to balance all the interests at stake, courts should fully account for universities' and complainants' countervailing interests when assessing a respondent's due process claim.[251]

Doe v. Baum

According to the *Baum* court's opinion, University of Michigan freshman Jane Roe and junior John Doe met, intoxicated, at a fraternity party.[252] Witnesses for each party provided conflicting assessments of how intoxicated Roe and Doe each were.[253] The two disappeared to Doe's room, where Doe alleges they engaged in consensual sex and Roe asserts she was raped, fading in and out of consciousness as Doe assaulted her.[254] Toward the end of the night, Roe vomited into a trash can next to Doe's bed, and at some point Doe left the room.[255] A bystander with no prior connection to either Doe or Roe found Roe "crying and 'very drunk' in Doe's bed."[256] Later that night, sobbing on the floor of her dorm room, Roe told two friends she thought she had been raped.[257]

Roe filed a Title IX complaint with the university, and the investigator[258] initially concluded that "the evidence supporting a finding of sexual

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[249] *See* Doe v. Baum, 903 F.3d 575, 582 (6th Cir. 2018).

[250] *See* Haidak v. Univ. of Massachusetts, 933 F.3d 56, 69 (1st Cir. 2019) ("As a general rule, we disagree, primarily because we doubt that student-conducted cross-examination would so increase the probative value of hearings and decrease the 'risk of erroneous deprivation'") (internal citations omitted).

[251] *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("Resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the *governmental and private interests* that are affected") (emphasis added).

[252] *Baum*, 903 F.3d at 578–79.

[253] *Id.* at 579–80.

[254] *Id.* at 579.

[255] *Id.*

[256] *Id.*

[257] *Id.* at 580.

[258] The *Baum* opinion's precedential value is constrained from the outset because the Sixth Circuit's reasoning is fact-bound use of the single investigator model in the underlying campus disciplinary process. This model involves a single investigator who is

misconduct was not more convincing than the evidence offered in opposition to it," though he did note that the student who found Roe crying in Doe's bed might have been a more credible witness, because she did not have connections to either party or to their respective Greek organizations. The investigator determined, however, that the witness was unable to speak to the relevant question of whether Roe had been intoxicated during the encounter, since she found Roe after the encounter had ended."[259] Roe appealed, arguing the investigator's findings were not supported by the evidence, and the University's Appeals Board reversed the determination below on the same underlying facts and evidence, finding Doe responsible.[260] Understanding he might face expulsion, Doe withdrew from the University.[261]

Doe filed a lawsuit against the University in federal court claiming the campus disciplinary proceeding to which he was subjected violated his rights under the Due Process Clause and under Title IX.[262] The district court granted the University's motion to dismiss in full, and Doe appealed.[263] The Sixth Circuit Court of Appeals ultimately reversed, holding that "if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross examine the accuser and adverse witnesses in the presence of a neutral fact-finder."[264] Because credibility was at issue here, and because neither the ac-

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charged with interviewing both parties, examining the evidence, and recommending a finding of whether the respondent is responsible. RRGs and civil rights groups like Know Your IX alike, however, acknowledge this model's potential for procedural deficiencies. *See Proposed Title IX Regulations: A Single Investigator is Not Enough*, FIRE (Jul. 25, 2019), https://www.thefire.org/proposed-title-ix-regulations-a-single-investigator-is-not-enough/ [https://perma.cc/2BWZ-BS4Z] ("A single investigator model is a deeply problematic and flawed system"). *See also Advice from Parents*, FACE, https://www.face-campusequality.org/advice-from-parents [https://perma.cc/8DMC-QYZR] (calling the single investigator model "a very problematic process"); Alyssa Peterson & Sejal Singh, *State Policy Playbook*, KNOW YOUR IX (2017), https://actionnetwork.org/user_files/user_files/000/016/520/original/Know_Your_IX_State_Policy_Playbook.pdf [https://perma.cc/3NUN-C59W] (highlighting as a best practice having "findings of responsibility or non-responsibility for an incident of gender-based violence determined by a panel of three to five (3-5) impartial and regularly and thoroughly trained decision makers using a preponderance of the evidence standard"); Know Your IX et al., Letter to University Presidents on Fair Process, KNOW YOUR IX (Apr. 15, 2015), https://www.knowyourix.org/letter-university-presidents-fair-process/ [https://perma.cc/7LTF-EKAC] (emphasizing "[t]he right to be heard by neutral decision-makers"). Given the growing suspicion of the single investigator model, its use in the campus disciplinary proceeding at issue limits the precedential value of *Baum*. This is because in the holistic analysis of the process due, the addition of one procedural protection may counteract the need for another. We posit that when schools use more procedurally sound methods than the single investigator model, other procedural safeguards may become inert. As such, this case is fact-bound by the investigative model used.

[259] *Baum*, 903 F.3d at 580.

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.* at 576.

[264] *Id.* at 578.

cused student nor his agent had the opportunity to cross examine Roe, the court found Doe's due process claim sufficiently plausible to survive a motion to dismiss.[265]

On the whole, the *Baum* opinion focused its analysis on the potential deprivations the respondent faced and his risk of erroneous deprivation.[266] The opinion obliquely mentioned the administrative and financial costs the University might face[267] but altogether disposed of the third *Mathews* factor beyond those costs. Further, the opinion mentioned the complainant in the case only in reference to the rights of the respondent, failing to identify how her interests dovetailed with those of the University.[268] In sum, then, the *Baum* analysis positioned the due process question as a balance between the private interests at stake and the University's financial and administrative burdens, an imbalanced approach that erased the complainant from the scales and therefore may have yielded an unreliable outcome.

The court clearly laid out Doe's interests under the first *Mathews* factor, explaining that as a result of a finding of responsibility, "[t]he student may be forced to withdraw from his classes and move out of his university housing. His personal relationships might suffer. And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled."[269] The court explained that "[b]eing labeled a sex offender by a university has both an immediate and lasting impact on a student's life."[270] (Universities do not, in fact, maintain sex offender registries or a functional equivalent, nor do we believe they should). The Court also acknowledged Doe's ultimate decision to withdraw from school after a find-

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[265] *Id.* at 581–82.

[266] *See, e.g.*, *id.* at 582 ("Doe never received an opportunity to cross-examine Roe or her witnesses—not before the investigator, and not before the Board. As a result, there is a significant risk that the university erroneously deprived Doe of his protected interests.").

[267] *See id.* at 582 ("Providing Doe a hearing with the opportunity for cross examination would have cost the university very little").

[268] *See, e.g., id*. at 582 ("And, importantly the university identifies no substantial burden that would be imposed on it if it were required to provide an opportunity for cross examination in this context.").

[269] *Id.* at 582 (citations omitted).

[270] *Id.* (citing Doe v. Miami Univ., 882 F. 3d 579, 600 (6th Cir. 2018)). As here, with the allusion to the criminal sex offender registry, the *Baum* opinion repeatedly invoked rhetoric rooted in the criminal legal system, ignoring controlling case law's clear admonishment against doing so as well as the civil nature of Title IX. *See, e.g.,* Doe v. Miami Univ., 882 F.3d at 600 (6th Cir. 2018) ("But the protections afforded to an accused, even in the face of a sexual-assault accusation, 'need not reach the same level . . . that would be present in a criminal prosecution.' "); Doe v. Univ. of Cincinnati, 872 F.3d at 400 (citations omitted) (asserting that campus sexual misconduct "hearing[s] need not 'take on . . . [the] formalities' of a criminal trial"); Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 635 (6th Cir. 2005) (". . .disciplinary hearings against students and faculty are not criminal trials, and therefore need not take on many of those formalities"). Given that defendants charged criminally by the state have the right to greater due process protections consistent with the scope of the rights at stake, this comparison is inapposite and bolsters the lopsidedness of the *Baum* opinion's analysis.

ing of responsibility, adding that he was just "13.5 credits short of graduating."[271]

With Doe's private interests established, the court proceeded to the second *Mathews* prong. It remarked that because "Doe never received an opportunity to [orally] cross examine Roe or her witnesses . . . there is a significant risk that the university erroneously deprived Doe of his protected interests."[272] "Without the back-and-forth of adversarial questioning," the court determined, Doe could not "test [Roe's] memory, intelligence, or potential ulterior motives."[273] Given that intelligence generally has little to do with the truthfulness of allegations of sexual misconduct,[274] this analysis seemed to shift the focus from Doe's risk of *erroneous* deprivation to simply his risk of deprivation, undermining the integrity of the *Mathews* analysis. Nevertheless, the court located the value of cross examination in the fact that it allows the fact-finder to assess the witness's demeanor and gives the respondent an opportunity to elevate inconsistencies in the allegations.[275] This clearly established Doe's stakes and his risk of erroneous deprivation of those stakes under the *Mathews* analysis.

In a hollow gesture toward the third *Mathews* factor, the court then focused narrowly on the minimal costs the University would have faced in allowing Doe to directly cross-examine Roe. Because "the university already provide[d] for a hearing with cross examination in all [other] misconduct cases,"[276] the court determined that the cost of providing such a procedure in sexual misconduct cases was minimal,[277] making the University's decision to deny Doe that opportunity even more troubling. This reasoning is problematic in two ways: first, from this cost analysis that is highly specific to the University of Michigan, the court extrapolated a sweeping

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[271] *Baum*, 903 F.3d at 580. Because Doe's remaining credits were irrelevant to his responsibility or to the outcome of the case, the Court's decision to mention this conveys some sense of sympathy.

[272] *Id.* at 582.

[273] *Id.*

[274] The authors' sweep of comprehensive online resources yielded no results indicating that intelligence correlates in any manner to the truthfulness of sexual misconduct allegations.

[275] *Baum*, 903 F.3d at 581 ("Not only does cross-examination allow the accused to identify inconsistencies in the other side's story, but it also gives the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted.").

[276] *Id.* at 582.

[277] *See id.* at 578 ("[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses."). From this fact-specific point, the court leaps to a sweeping conclusion conceivably applying to all universities regardless of the unique costs they might face in implementing such procedures. In addition, then, to mandating particular processes beyond those required by *Goss* in this particular case, the *Baum* court holds this out as a generalized rule of law. *See* Goss v. Lopez, 419 U.S. 565, 582 (1975) ("We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is."). This runs contrary to both the Court's express commands and the basic principles of stare decisis.

conclusion conceivably applying to all universities regardless of the unique costs they might face in implementing such procedures.[278] Second and most concerningly, this narrow construction of the third *Mathews* factor erased the University's interests in safety and accuracy in its sexual misconduct disciplinary proceedings as well as its investment in the wellbeing and fair treatment of student complainants.[279]

Universities have an interest in allowing credible complaints of sexual misconduct to proceed and ensuring those processes are fair and accurate. The *Baum* court, however, did not once ascribe these interests to the University or assess the ways in which the requested direct cross examination might inhibit such interests.[280] Its failure to do so reduced the complex interlocking interests of the University to a pure cost analysis, ignoring the educational purpose of the institution, its interest in adhering to its legal obligations under Title IX, and its general investment in the fairness and accuracy of its disciplinary proceedings.

Universities and the public also have vested interests in the wellbeing and educational access of student complainants in sexual misconduct disciplinary proceedings; the *Baum* analysis merely paid this idea lip service. The court made one concession in this realm, admitting that because "[u]niversities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment," the respondent does not always have "a right to personally confront his accuser and other witnesses."[281] Instead, the *Baum* court suggested, "the university could allow the accused student's agent to conduct cross examination on his behalf."[282] With only Doe's interests in mind, this reasoning may stand, but careful consideration reveals the ways in which this form of adversarial examination could still retraumatize survivor complainants and deter survivors from coming forward. Despite the fact that a complainant and a respondent's

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[278] *See Baum*, 903 F.3d at 578. The court has concluded, based merely upon the fact that the University of Michigan would face minimal costs in adding cross examination to sexual misconduct proceedings given that it already provides that procedure in other disciplinary proceedings, that applying the *Mathews* calculus to all schools in the Sixth Circuit would yield this same outcome.

[279] Discussed, *supra*, at 32.

[280] *See generally Baum*, 903 F.3d 575 (largely omitting Universities' interests in preventing and responding to sexual misconduct from its application of the *Mathews* factors to the requested additional procedure of cross examination).

[281] *Id.* at 583. Furthermore, in support of its assertion that "a representative aligned with the accused" can conduct effective cross examination while avoiding the potential trauma of direct confrontation by the respondent, the court cites comparatively to *Maryland v. Craig*, 497 U.S. 836 (1990), which discussed the importance of ensuring "'rigorous adversarial testing' through 'full cross-examination'" in a criminal trial. *Baum*, 903 F.3d at 583 (citing *Maryland*, 497 U.S. at 846 (1990)). That case, however, is wholly inapposite: the question presented in *Maryland* revolved around the Sixth Amendment's confrontation clause, the very text of which explicitly limits its application to "criminal prosecutions." U.S. Const. Amend. VI. The *Baum* court offered no other case law directly in support of this point.

[282] *Baum*, 903 F.3d at 583.

educational interests are fundamentally equal and that both face the possibility of an erroneous deprivation if wrongly decided against, the court gives inordinate weight to the first and second *Mathews* factors at the expense of the third.

Although cross examination has been touted as "the 'greatest legal engine ever invented for the discovery of truth,'"[283] social science research calls that proclamation into question. Findings that trauma responses undermine the accuracy of fact-finders' credibility assessments[284] decrease universities' interests in implementing such a procedure. Individuals with trauma symptoms often have difficulty answering questions fully and thoroughly in real time, as questioning about a traumatic experience may result in flashbacks or dissociation.[285] Those who suffer from trauma may have to work against trauma responses to place disorganized and fragmented memories together in real time.[286] As a consequence, a witness suffering trauma symptoms may seem less credible to a factfinder simply because they appear unable to immediately recall the details of an assault.

Cross examinations' inherent shortcomings are further compounded by trauma symptoms. Researchers have found that "a lawyer's demeanor towards the witness can prejudicially affect an observer's conclusions about witness deception."[287] For example, when interviewees "are questioned by suspicious interviewers," such as a respondent's representative, "subjects tend to view their responses as deceptive even when they are honest, which significantly increases detection errors."[288] This bias arises from two phenomena: (1) the suspicious interrogation itself warps observers' perceptions, and (2) the interrogation places the interviewee under stress, which then induces behavior likely to be interpreted as deceptive.[289] These findings are especially concerning when it comes to complainants with trauma symptoms, as the hostile questioning could exacerbate trauma responses that factfinders misread as indicators of deception. Such possibilities fall within the purview of the public's, the university's, and the complainant's interest in accuracy under the third *Mathews* factor.

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[283] California v. Green, 399 U.S. 149, 158 (1970).

[284] Epstein & Goodman, *supra* note 181, at 421.

[285] Chia-Ying Chou et al., *Cardiovascular and psychological responses to voluntary recall of trauma in posttraumatic stress disorder*, 9 Eur. J. Psychotraumatology, 1, 7 (2018) *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5990938/* [https://perma.cc/G78W-8M3F] (quantifying the frequency of flashbacks and dissociation experienced by study participants during trauma recall).

[286] Dr. Rebecca Campbell, Professor of Psychology, Mich. State Univ., Seminar Address for the National Institute of Justice Research for the Real World Series (Dec. 2012), https://nij.ojp.gov/media/video/24056 [https://perma.cc/2ZVJ-CXJS].

[287] H. Hunter Bruton, *Cross-Examination, College Sexual Assault Adjudications, and the Opportunity for Tuning Up the "Greatest Legal Engine Ever Invented,"* 27 Cornell J.L. & Pub. Pol'y 145, 158 (2017).

[288] Olin Guy Wellborn III, *Demeanor*, 76 Cornell L. Rev. 1075, 1080 (1990–91).

[289] *Id.* at 1080.

Despite recognizing that the Supreme Court "instructs lower courts to consider the parties' competing interests," then, the Sixth Circuit did not sufficiently consider how universities' non-financial interests or complainants' individual interests might inform the balance of fairness.[290] In fact, the complainant, characterized strictly as "the accuser," was mentioned almost exclusively in reference to the respondent's rights.[291] Because of this imbalance, the court's lopsided language may be construed as affording the special right of direct cross examination only to respondents based strictly on their own interests, defying basic principles of fairness and the balancing command of *Mathews*. Indeed, *Baum*'s explicit holding appears to afford the right of cross examination only to the respondent: "if a public university has to choose between competing narratives to resolve a case, the university must give the *accused student or his agent* an opportunity to cross-examine the accuser and adverse witnesses,"[292] because that process "allow[s] *the accused* to identify inconsistencies in witness's statements."[293] By the end of *Baum*, then, the due process analysis involves balancing the interest of respondents against the narrowly defined interests of universities; universities' broader goals and complainants' interests have been removed from the scales almost entirely.

Haidak v. Univ. of Massachusetts-Amherst

The First Circuit's opinion in *Haidak* came down in August of 2019, just under a year after the *Baum* decision. James Haidak and Lauren Gibney, both students at the University of Massachusetts-Amherst, were studying abroad in Barcelona when the inciting incident occurred; Gibney charges that Haidak held her down, attempted to strangle her, squeezed her pressure points, and then grabbed her wrists and used her fists to punch himself in the face.[294] Haidak, on the other hand, contends that Gibney struck him first and that he merely defended himself.[295] Shortly afterwards, Gibney disclosed the incident to her mother, and her mother then reported to the University.[296]

Pursuant to the student code of conduct, the school provided the respondent, Haidak, with notice of the charges against him and issued a no-contact order.[297] Haidak violated the no-contact order almost immediately and repeatedly, was presented a notice of charges for those violations, and

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[290] Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018).

[291] *See, e.g.*, *id.* at 578 ("[T]he university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses"), 582 ("In University of Cincinnati, we explained that an accused's ability 'to draw attention to alleged inconsistencies' in the accuser's statements does not render cross-examination futile"), 583 ("That is not to say, however, that the accused student always has a right to *personally* confront his accuser and other witnesses").

[292] *Id.* at 578 (emphasis added).

[293] *Id.* at 581 (emphasis added).

[294] *See* Haidak v. Univ. of Massachusetts, 933 F.3d 56, 61 (1st Cir. 2019).

[295] *See id.*

[296] *Id.*

[297] *Id.* at 61–62.

then proceeded to violate the order again.[298] Gibney reported this subsequent violation to the school on June 3.[299] The University took no official action.[300] On June 17, after fourteen days of inaction, the University issued Haidak a corresponding third notice of charges, this time including an immediate suspension order.[301] On September 1 of that year, still awaiting a full hearing, Haidak withdrew from the University.[302]

But Haidak did not leave; he rented an apartment in Amherst and he and Gibney continued seeing one another until two additional violent incidents that month.[303] In the first, an intoxicated Haidak called Gibney for a ride, and after an argument ensued, he "threatened to kill himself and then exited the moving car."[304] Gibney reported it to the police.[305] Roughly a week later, Haidak showed up, unwelcome, at Gibney's place of employment and was ultimately removed by security.[306] Gibney reported to the University and filed for a restraining order in state court, which was granted temporarily but which the court declined to extend after a hearing.[307]

At this point, the University offered Haidak his choice of three hearing dates, and he opted for November 22, a day he "knew that he would not be present . . . and would have to participate by phone."[308] He was notified of the school's hearing procedures in writing, and he subsequently submitted evidence he wished to be considered.[309] Haidak also submitted a list of thirty-six questions for the Hearing Board ("Board") to consider posing to Gibney, in accordance with the University's policy of screening pre-submitted questions and allowing the Board to exercise discretion in posing them.[310] The University declined to admit three of Haidak's proffered pieces of evidence and refined his list of thirty-six questions to sixteen.[311]

During the hearing, the Board "[m]ov[ed] back and forth between Haidak and Gibney . . . ultimately examin[ing] each student three times."[312] The Board did not permit direct cross examination by either party or their representatives,[313] instead posing Haidak's submitted questions in similar but not identical language.[314] Ultimately the Board found Haidak responsible for physical assault and for failure to comply with the no-contact order against

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[298] *Id.* at 62.
[299] *Id.*
[300] *Id.*
[301] *Id.*
[302] *Id.* at 63.
[303] *Id.*
[304] *Id.*
[305] *Id.*
[306] *See id.*
[307] *Id.* at 63–64.
[308] *Id.* at 64.
[309] *Id.*
[310] *Haidak*, 933 F.3d at 64.
[311] *Id.*
[312] *Id.* at 64, 68.
[313] *Id.*
[314] *Id.*

him.[315] It found him not responsible for endangering persons or property and harassment, citing evidence revealed during the hearing that much of the communication in violation of the no-contact order was mutual and non-threatening.[316] Given Haidak's two prior disciplinary violations, the University expelled him, and an administrator upheld the sanction on appeal.[317] Haidak filed a complaint in federal district court claiming the same violations as those alleged in *Baum*[318]—procedural due process errors and violations of Title IX—as well as an equal protection violation.[319] The district court entered summary judgment in the University's favor.[320]

On appeal, the First Circuit Court of Appeals assessed the due process claims and found that the expulsion hearing was procedurally sound.[321] The court found that Haidak received timely and detailed notice of the charges against him; informed him of the procedures to be used; afforded him the right to be present, to hear evidence against him, to respond directly, and to call witnesses; and notified him of his right to an attorney.[322] The court determined that the exclusion of some of his proffered evidence and the University's decision not to allow him to directly cross examine witnesses as in a criminal trial did not render the hearing process constitutionally inadequate.[323] The court reached this conclusion through a more thorough application of the *Mathews* balancing test than *Baum*,[324] though it still came up short in accounting for complainants' interests under the third factor.[325]

The court clearly recognized Haidak's right to a public education as an interest protected by the due process clause.[326] It elaborated that his primary private interest under the first *Mathews* factor was his "paramount" interest in "'completing [his] education, as well as avoiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma.'"[327] Because Haidak faced first an extended suspension[328] and ulti-

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[315] *Id.*

[316] *See id.*

[317] *Id.* at 75.

[318] Id. See Baum, 903 F.3d at 580.

[319] Haidak, 933 F.3d. at 65. The court affirmed the dismissal of Haidak's Title IX claims. *Id.* at 75.

[320] *Id.* at 60.

[321] *Id.* at 71.

[322] *Id.* at 66.

[323] *See id.* at 66–67.

[324] *Compare id.* at 66 (discussing under the third Mathews factor the fact that a school has a legitimate interest "in protecting itself and other students from those whose behavior violates the basic values of the school) *with Baum*, 903 F.3d at 582 (discussing under the third Mathews factor only the potential administrative, not safety or values-oriented, costs to the school).

[325] See *id.* at 69–70.

[326] *Id.* at 65 ("[States] must 'recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.'") (citing Goss v. Lopez, 419 U.S. 565, 574 (1975)).

[327] *Haidak*, 933 F.3d at 66 (quoting Gorman v. Univ. of Rhode Island, 837 F.2d 7, 14 (1988)).

mately a complete expulsion, those interests had most certainly been implicated.[329]

Haidak argued that the University, in denying him the opportunity to directly cross examine the complainant and excluding some of his proffered evidence at his expulsion hearing, denied him due process and was constitutionally flawed.[330] Regarding direct cross examination, the court methodically laid out the deprivation Haidak faced with the procedures provided, the contents of the additional procedures requested, and the likely deprivation that would have resulted from the use of such requested procedures.[331] Haidak had been suspended after a hearing using indirect cross examination.[332] His complaint argued an entitlement to direct cross examination, which he suggested would have decreased his risk of erroneous deprivation.[333] The court confronted this directly by pointing to a lack of evidence to support Haidak's claim: the court said it was "aware of no data proving which form of inquiry produces the more accurate result in the school disciplinary setting."[334] Further, it distinguished this case from *Baum*, explaining that the Sixth Circuit's categorical rule requiring "cross-examination by the accused or his representative in all cases turning on credibility determinations" was unnecessary in the absence of evidence that the circumscribed form of cross examination used in Haidak's underlying case was "so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation."[335] This pointed toward minimal weight under the second *Mathews* factor.[336]

Regarding the partial exclusion of evidence, the court reasoned that because the information such evidence would have introduced was either re-

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[328] *See* id. at 71–72. The court conducted a thorough analysis of the suspension hearing as well. We focus here only on the expulsion hearing, given that the court ultimately finding errors in the suspension hearing did not prejudice the ultimate result of the expulsion hearing.

[329] *See id.* at 66.

[330] *Id.* at 67.

[331] *See id.* at 68–71.

[332] Indirect cross examination for the purposes of this article means cross examination in which both parties submit to the school questions to be posed to the other party. The school then prescreens those questions and the hearing panel has discretionary authority to pose those questions to the other party. This system more closely mirrors the inquisitorial model than the American criminal adversarial one. *See* Jacqueline L. Austin & Margaret Bull Kovera, *Cross-Examination Educates Jurors About Missing Control Groups in Scientific Evidence*, 21 PSYCHOL. PUB. POL'Y & L. 252, 254 (2015) ("In many inquisitorial systems, experts are. . . cross-examined by the judge.").

[333] *See Haidak*, 933 F.3d at 68–71. ("Haidak urges us to hold that . . . due process demands that the accused be allowed to question opposing witnesses directly whenever a university disciplinary proceeding turns on the witnesses' credibility.").

[334] *See id*. at 68–69 ("[W]e doubt that student-conducted cross-examination would so increase the probative value of hearings and decrease the 'risk of erroneous deprivation' that it is constitutionally required in this setting.") (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[335] *Id.* at 69.

[336] *See id.*

dundant of other testimony that was included or was outside the scope of the hearing, its exclusion had no discernible impact on Haidak's risk of erroneous deprivation.[337] Haidak first argued the school should have admitted as evidence the transcript of Gibney's state-court restraining order hearing because it exposed the fact that Gibney and Haidak's initial contact in violation of the no-contact order was welcome and reciprocal.[338] The court explained, however, that Gibney "admitted to the Hearing Board the consensual nature of her post-order contact with Haidak," so duplicative evidence would not have increased accuracy.[339] Further, Haidak faced no deprivation with respect to such evidence, as he was acquitted on the harassment charge, rendering his argument moot.[340]

The second piece of excluded evidence, which Haidak argued violated his due process rights, was a photograph of a bite mark Gibney had allegedly given Haidak.[341] The court here made comparisons to criminal proceedings in which the burden of proof, the private interests at stake, and due process protections for the accused are the highest of any adjudicatory proceeding.[342] It ultimately determined that because even the heightened due process protections of criminal trials do not require admission of this kind of evidence, such an exclusion could not present a constitutionally unsound risk of erroneous deprivation in a school disciplinary proceeding that was civil in nature.[343] Moreover, given Gibney's concession that she had at times responded to Haidak with violence, admission of the evidence would have been redundant, zeroing out its impact on Haidak's deprivation risk.[344]

Finally, the *Haidak* court turned to the third *Mathews* factor to explore the public interest.[345] There, it accounted for the administrative and financial costs of requiring the University to allow the requested procedures, reasoning that such costs were unjustifiable.[346] But it also pushed beyond this element, clearly identifying that the public interest involved the University's broader interests beyond cost.[347] These included an "interest in protecting itself and other students from those whose behavior violates the basic values of the school"[348] and "in balancing the need for fair discipline against the

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[337] *See id.*
[338] *Id.* at 67.
[339] *See id.*
[340] *See id.*
[341] *Id.*
[342] *See id.*
[343] *See id.* at 67–68 (demonstrating that, even under the Federal Rules of Evidence, Haidak's proffered pieces of evidence could have been properly excluded).
[344] *Id.* at 68 ("And in any event, the evidence was redundant. Haidak testified – and Gibney did not dispute – that 'a lot of these instances occurred, these sort of instances where she would become violent when she was drunk'").
[345] *Id.* at 68.
[346] *See* Goss v. Lopez, 419 U.S. 565, 583 (1975) ("To impose . . . even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness.").
[347] See *id*. at 68.
[348] *Id.* at 66 (quoting *Goss*, 419 U.S. at 580).

need to allocate resources toward 'promot[ing] and protect[ing] the primary [educational] function of institutions.'"[349] Finally, the court reasoned that all parties "share[d] an interest in speed and accuracy in the adjudication of the charges."[350]

The court also acknowledged the University's interest in preserving the wellbeing of both students during the hearing process through its cross examination analysis.[351] It reasoned that when student parties to campus sexual misconduct disciplinary proceedings are allowed to directly question one another, "schools may reasonably fear that student-conducted cross examination will lead to displays of acrimony or worse."[352] This reasonable fear counterbalanced possible benefits sufficiently under the *Mathews* analysis to yield a finding that cross examination was not required.[353] In stark contrast to the *Baum* opinion, then, the *Haidak* court analyzed the University's interests beyond the narrow confines of financial and administrative costs, better adhering to the *Mathews* Court's command of balancing all competing interests.[354]

However, *Haidak* still comes up short. Recall that given the fact that campus sexual misconduct disciplinary proceedings factually differ from *Goss* and *Mathews* due to the presence of a student-complainant, the third *Mathews* factor should also account for that party's distinct interests.[355] The *Haidak* court here missed an opportunity under the third factor to consider the complainant's risk of erroneous deprivation of her access to education, her reputation, and her professional and financial prospects as affected by the violence she had faced, the continued harassment to which she was being subjected, and the potential institutional betrayal by the University.

In the end, the court concluded that the expulsion hearing did not deprive Haidak of due process,[356] and though the suspension hearing did, it ultimately caused him no actual injury.[357] Considering the holistic nature of the analysis outlined above, the outcome in *Haidak* carries greater weight than, for instance, the *Baum* opinion. But the *Haidak* court's truncated third *Mathews* factor analysis still leaves room for improvement that would lend itself to a more reliable, accurate balancing analysis. Courts concerned with faithfully applying *Mathews* and accounting for the factual differences between student-on-student discrimination, harassment, or violence cases and other forms of school-versus-student disciplinary proceedings should take care to acknowledge the layered impacts of both allegations and experiences

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[349] *Id.* (quoting Gorman v. Univ. of Rhode Island, 837 F.2d 7, 14 (1988)).
[350] *Id.*
[351] *See id.* at 69.
[352] *Id.* at 69.
[353] *See id*. at 69–71.
[354] *See* Section II, *supra*.
[355] *See* Section II(B), *supra*.
[356] *Haidak*, 933 F.3d at 71.
[357] *Id.* at 73.

of violence alike. Only when complainants', respondents', and universities' significant stakes in fair adjudication of sexual misconduct complaints are taken into account will the *Mathews* due process analysis yield a truly balanced outcome.

III. Restoring Survivors to the Scales

As with any policy issue, Title IX is susceptible to both fault and repair from a multitude of different angles. Title IX's enforcing administrative agency, the Department of Education, holds the power to issue guidance documents and promulgate binding rules interpreting the statute. Where Congress wishes to direct the course of interpretation, it may codify certain requirements or restrictions, whether under the Higher Education Act or some other legislative vehicle. Educational institutions, too, have the latitude to take a leadership role in clarifying and enforcing the command of Title IX, as it binds schools directly.

Each of these three mechanisms has its strengths and drawbacks, outlined briefly below, as a means of ensuring the integrity of Title IX—particularly with respect to the fairness concerns explored in depth in Section II, *supra*. Ultimately, however, the courts are the constitutional backstop for all of these avenues. This means sexual misconduct disciplinary proceedings are only as fair as the least fair court ruling on the question. To ensure that this bar remains high, preserving the rights and respecting the interests of all respondents, complainants, and schools alike, the courts must adequately balance all of the interests at stake. They have largely failed to do so thus far. We therefore call for a revamping of courts' analyses to comport with *Mathews*' holistic balancing approach and suggest several ways advocates for educational equity and fairness can affirmatively push for improved assessments in the courts. Only with a baseline of equity and fairness as the constitutional floor can all students expect a future in which their civil rights in education carry the full weight of their promise.

A. Department of Education

In recent decades, the Department of Education has issued guidance clarifying schools' duty to uphold Title IX and leveraged its authority to withhold federal funds[358] to enforce the law. Historically, OCR has also enforced the rights of respondents —finding schools in violation of respon-

[358] The Department of Education did not use their power to withhold federal funds until 2018. David Jackson et al., *Federal Officials Withhold Grant Money from Chicago Public Schools, Citing Failure to Protect Students from Sexual Abuse*, Chi. Trib. (Sept. 28, 2018), https://www.chicagotribune.com/news/breaking/ct-met-cps-civil-rights-20180925-story.html [https://perma.cc/7D4A-NJS8].

dents' rights for their failure to provide notice of allegations or hearings[359] and their issuance of punishment through informal resolutions.[360] Prior guidance from OCR also provided extensive procedural protections for respondents in sexual misconduct cases.[361] Since the Department serves as the enforcement mechanism of Title IX, OCR is in a position to settle the battle over Title IX by enforcing the statute's ban on sex discrimination while upholding procedural fairness for all. To increase procedural protections for all parties, the Department could work with both leaders in the respondents' rights movement and survivor advocates to issue guidance that is fair and responsive to all parties. This guidance could provide robust procedural protections to all parties by addressing issues around lack of notice, biased sexual misconduct proceedings, reasonable supportive measures and accommodations, and lengthy timelines.

Sadly, the DeVos Department of Education has largely listened only to respondents' rights groups and higher education lobbies.[362] Meeting with survivors and their advocates only once[363] and failing to properly consider legal precedent and social science, the Department in late 2018 issued sweeping proposed changes to Title IX that would drastically limit the rights of complainants and confer special rights on respondents.[364] Although hope remains that future Departments may be able to more fairly balance the interests of all parties, public perception that the Department of Education is a partisan arm of the executive projects a gloomy future in that respect.[365]

B. Legislatures

With Title IX serving as the baseline, Congress and state legislators have worked to bolster procedural protections for all parties in sexual misconduct cases, as discussed in Section I(C), *supra*. Since they are elected and

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[359] Letter from Beth Gellman-Beer, Supervisory Attorney, Philadelphia Office for Civil Rights, U.S. Dep't Educ., to Robert E. Clark II, President, Wesley Coll. (Oct. 12, 2016), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf [https://perma.cc/G9UB-XE2C].

[360] Letter from Alice B. Wender, Regional Office Director, Office for Civil Rights, U.S. Dep't Educ. to Dr. Teresa Sullivan, President, University of Virginia (Sept. 21, 2015), https://www2.ed.gov/documents/press-releases/university-virginia-letter.pdf [https://perma.cc/CQF9-XHD7].

[361] Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. Legal Educ. 822, 831 (2017) ("Yet Title IX guidance and the Campus SaVE Act are not merely compatible with due process but provide more robust procedural protections for both parties than does the Constitution—or any other federal law or regulation.").

[362] Bolger, *supra* note 107.

[363] Burns, *supra* note 6.

[364] Know Your IX Comment, *supra* note 62.

[365] Robert Shapiro et al., *American Public Opinion and Partisan Conflict: Education's Exceptionalism?,* Colum. U. 22 (April 22, 2016), https://www8.gsb.columbia.edu/leadership/sites/leadership/files/ShapiroKilibardaHarvardMay5_2016Paper%20with%20Figures.pdf [https://perma.cc/PU43-9H46].

representative of their constituents, legislatures have the opportunity to be publicly perceived as more democratic and thus more legitimate than, for example, the partisan executive. Congress and state legislators could work with all interested parties to craft bills, either through the Higher Education Act or other legislative vehicles, to prescribe a fair and balanced approach to the on-campus adjudication of sexual misconduct cases. Federally, Congress has immense opportunity to bolster schools' responses responding to sexual violence and ensure the rights of both parties are upheld and enforced. Further, given that Congress sets the parameters of what the Department may interpret, and given that courts are only able to intervene in legislative action in limited circumstances, Congress is best positioned to affirmatively provide strong procedural rights for both parties that are fixed and not subject to the whims of the shifting executive. Sadly, the likelihood of Congress doing so is slim; the 116th Congress has passed just one percent of proposed legislation and only four percent of bills have received a hearing.[366]

State legislatures also have the latitude to secure the rights of all parties to campus sexual misconduct cases at the local level. States could not only pass legislation to instruct schools on how best to implement Title IX but could also give local departments enforcement power. This could allow students who experience a violation of their rights the opportunity to file complaints locally, where a response may be more prompt and tailored to local interest, given that federally, OCR had more than 305 pending cases at the time this article was written.[367]

Although we believe state and local governments should be working to end sexual violence in their schools and uphold the rights of all parties, however, state law is not the final answer. State legislators may fold to partisan lobbyist interests in the same way as Congress and the Department. As discussed in Section I, *supra*, legislators and lobbyists have attempted to gut, rather than improve, Title IX. Finally, state law is subject to change following action from Congress and the Department, given federalism concerns, and still must comply with parameters of constitutionality as determined by the courts.

C. Colleges and Universities

Courts have historically practiced great deference—within statutory and constitutional[368] bounds—with respect to educational institutions' governing

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[366] *Statistics and Historical Comparison*, GovTracker, https://www.govtrack.us/congress/bills/statistics [https://perma.cc/F992-ZMNC] (last visited Dec. 14, 2019).

[367] *Title IX Tracking Sexual Assault Investigation*, Chron. Higher Educ., http://projects.chronicle.com/titleix/ [https://perma.cc/Q6L6-8NJZ] (last visited Mar. 30, 2020).

[368] *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 574 (1975) ("[T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.");

policies.[369] The executive and judicial branches serve as enforcement mechanisms for such policies to ensure their compliance with governing laws and constitutional principles, but this does not constrain schools from proactively enacting equity-oriented policies. Further, given the local expertise schools hold, they are best positioned to tailor institutional responses to sexual misconduct to their specific communities' needs and resources. Thus, schools committed to educational and gender equity have an opportunity to consider the full spectrum of complainant, respondent, and institutional interests at stake and to balance those appropriately against one another when developing institutional policies for sexual misconduct disciplinary proceedings.

However, schools alone cannot solve the issue of fairness. Because schools are first and foremost businesses—even if not-for-profit—they frequently act to protect their bottom lines. This often means schools defend vigorously against challenges by students in the courts and OCR. Alternatively, schools often avoid the Department's withdrawal of federal funds by coming to an agreement with OCR to reform certain policies that will bring their institution into compliance.[370] Although the voluntary compliance model incentivizes reform,[371] schools will still vigorously defend against administrative charges and civil lawsuits to avoid the threat of losing federal funds. Financial solvency, then, serves as a perverse incentive pushing schools to position themselves in opposition to students' civil rights.[372] Even schools with the fairest policies will likely face administrative and legal challenges by students—particularly from respondents, who have proven highly litigious[373]—so these accountability mechanisms must be sound to affirm schools' policies and to charge them to improve where appropriate. When bottom lines and civil rights butt heads, some outside enforcement

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Tinker v. Des Moines Community Sch. District, 393 U.S. 503, 506 (asserting that students do not "shed their constitutional rights . . . at the schoolhouse gate").

[369] *See, e.g.*, *Goss*, 419 U.S. at 578 ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . By and large, public education in our Nation is committed to the control of state and local authorities.") (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

[370] *See About OCR*, U.S. DEP'T EDUC. (last modified Jan. 1, 2020) https://www2.ed.gov/about/offices/list/ocr/aboutocr.html [https://perma.cc/5657-HT5Y] ("OCR also provides technical assistance to help institutions achieve voluntary compliance with the civil rights laws that OCR enforces.").

[371] *See id.*

[372] *See e.g.,* Arlinda Smith Broady, *Gwinnett Schools Lose Bid to Dismiss Suit Over Sex Assault Case*, ATL. J. CONST. (Aug, 27, 2019), https://www.ajc.com/news/local/gwinnett-schools-lose-bid-dismiss-suit-over-sex-assault-case/t5BivX6m4Mnx4A361srrEL/, ("A federal court has denied Gwinnett County Public Schools' motion to dismiss a lawsuit claiming that its handling of a 2015 sexual assault complaint violated a female student's civil rights. Gwinnett officials said they can't comment on active lawsuits. But the school district has denied any wrongdoing").

[373] *See e.g.*, Jonathan Taylor, *Milestone: 600+ Title IX/Due Process Lawsuits in Behalf of Accused Students*, DIGITAL J. (Apr. 3, 2020), http://www.digitaljournal.com/pr/4641224, (Outlining how over six hundred lawsuits have been filed against colleges and universities in behalf of students accused of Title IX-related offenses) [https://perma.cc/79RF-6388].

mechanism must be the safety net that catches students for whom schools fail to care.

D. Courts

In the American system of checks and balances, courts are the ultimate backstop for constitutional challenges. Because respondents' due process challenges are constitutional in nature, the courts unequivocally have the final say on these matters. This means that proactive legislative, administrative, and institutional policy efforts remain critical to promoting visions of fairness in schools' adjudication of sexual misconduct cases, but courts ultimately hold the power to affirm or undermine those efforts. Given this reality, advocates for educational equity cannot realize students' civil rights without engaging with the courts.

As explained in Section II, *supra*, the prevailing structure of the *Mathews* analysis governing due process challenges has been misinterpreted as a balancing of student respondents' interests with the public interest, construed narrowly to only encompass fiscal and administrative costs to the educational institution. In fact, universities' interests are coextensive with complainants' interests in educational access and general wellbeing, and the public interest factor should also account for survivors' interests in and of themselves. Recent case law demonstrates that courts have failed to adequately consider those interests, leaving complainants off the scales of fairness entirely.[374] Ideally, courts will begin recognizing that they must interweave survivors' interests as a matter of basic fairness and accuracy in the adjudication of campus sexual misconduct due process challenges. But unless and until they do so, we propose three main avenues for addressing this problem:[375]

1. Universities should account for general policy interests and the specific interests of student complainants in their briefing.

Universities have largely failed to set out their own policy interests and their investment in student complainants' interests as part of their reasoning in affording or restricting certain procedures in sexual misconduct disciplinary proceedings. This grievous omission gravely impacts student complainants, as courts addressing due process challenges can more easily—and even

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[374] *See* Section II, *supra*.

[375] We outline these proposals briefly below but view a fully detailed map of how exactly courts should consider these interests as falling outside the scope of this article. We do encourage legal scholars to begin to consider if courts should weigh the interests of survivors in due process cases as individuals, or as complainants more generally. As we are not litigators, we believe it is important for folks who are to consider the implications for both of these routes. Questions that come to mind include: Should courts reexamine the facts of a case when balancing a survivor's interests? Or should the complainant be involved in these legal proceedings themselves?

unintentionally—leave out critical pieces of the equation. In fact, the *Baum* court pointed to just that failure by the school as part of the reasoning under the third *Mathews* factor: "[I]mportantly, the university identifies no substantial burden that would be imposed on it if it were required to provide an opportunity for cross examination in this context."[376] Because in that particular scenario, cross examination introduced negligible administrative and fiscal costs to the university, and because the university alleged no other potential costs, the court skated over the public interest analysis, enabled by shoddy briefing.[377] This problem could have been prevented—or at least, perhaps, leveraged as grounds for reconsideration on appeal—if the university had more thoroughly briefed its interests.

2. Survivors and advocates should consider intervening in due process challenges where complainants' interests are at stake.

The option of intervening to become a party to a pending lawsuit likewise poses an opportunity for survivors and advocates to sculpt a more well-rounded understanding of the public interest at stake in sexual misconduct cases. In federal courts, parties may intervene as of right where they claim an interest relating to the transaction at issue such that the disposal of the action may impair that party's ability to protect its interest.[378] Federal courts may also allow parties to intervene where they have a claim that shares a common question of law or fact with the pending action.[379] Given the interests of student complainants laid out in this article, and given the very real way in which an erroneous finding of no responsibility for a student respondent jeopardizes the educational access of a student complainant and others on campus, survivors and advocates have ample opportunity to apply to the courts to be admitted as an intervening party in due process cases.[380]

3. Advocates should submit amicus briefs in due process challenges to ensure courts consider the full spectrum of concerns within the purview of the third *Mathews* factor.

Even where survivors and advocates cannot or do not become intervening parties, they can put forth a more thorough understanding of the public interest at stake in a campus sexual misconduct proceeding through filing amicus, or "friend of the court," briefs. Respondents' rights groups such as FIRE have done so diligently, providing courts a more detailed analysis of the interests at stake for student respondents to campus sexual misconduct

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[376] Doe v. Baum, 903 F.3d 575, 582 (6th Cir. 2018).
[377] *See id.*
[378] Fed. R. Civ. P. 24(a)(2).
[379] Fed. R. Civ. P. 24(b)(1)(B).
[380] Of course, this is not a simple process, and it is one that requires heavy resources to which many survivors may not have ready access.

proceedings.[381] These briefs bolster the first two *Mathews* prongs. Given that respondents' interests are already well-represented in courts' traditional application of the *Mathews* analysis, this effort on the part of RRGs magnifies the need for other advocacy groups to submit amicus briefs enunciating the public interest—including universities' policy interests and complainants' individual interests—encompassed under the third *Mathews* factor. Only then will courts be presented with all the relevant interests that must be balanced to yield a fair outcome.

IV. Conclusion

As survivors and survivor advocates, we know first-hand how unfair disruptions in education can have lasting consequences. That is why we believe it is essential for all parties involved to collaborate to build robust protections that ensure a fair process for all. Conversations about the future of campus sexual violence and Title IX must be rooted in a genuine commitment to accuracy, equity, and fairness; these conversations cannot be driven by nonfactual talking points or inflexible ideologies. We wholeheartedly believe it is possible to build institutional, legislative, and judicial structures that aid survivor healing, work toward safer campuses, and respect the rights of all parties involved. We implore universities, respondent interest groups, and the general public to set aside outcome-oriented thinking and engage authentically with us in a critical, nuanced discussion aimed at building that future. We recognize that this task is not an easy one, but with the stakes so high, it is a worthy one. As Secretary DeVos herself once said, "[t]he truth is: we must do better for each other and with each other."[382]

[381] *See, e.g.*, Haidak v. Univ. of Massachusetts, 933 F.3d 56, 69 (1st Cir. 2019) (citing Amicus brief filed by a Respondents' rights group).

[382] Svrluga, *supra* note 3.

Sexual Harassment & Gender-Based Violence as a Civil/Human Rights Violation

Professor Nancy Chi Cantalupo

Special Legal Doctrines for Criminal Rape

1. A general suspicion based on the fear of false claims leading to “cautionary instructions” to juries to be extra skeptical of victims’ testimony
2. A resistance requirement
3. A corroboration requirement
4. A prompt complaint requirement
5. Chastity requirement (concern with, and admissibility of, women’s sexual behavior)
6. The marital rape exception

Stereotypes about women of color, prostitution & promiscuity

- "**Jezebel**": incorporating "slavery, degradation, sexual availability and natural lasciviousness" (Williams)
- "**Hot-blooded Latin**": "readily available & accessible for sexual use" (Ontiveros)
- "Exotic, submissive, and **naturally erotic Asian woman**" (Ontiveros)
- American Indian/Native American "**sexual punching bag**" (Merskin)
- **"Tragic and vulnerable" multiracial woman,** "product of sexual and racial domination" (Harris)

Thank You!

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1. May 2020 Title IX Regulations: Overview

    a. The U.S. Department of Education ("DOE") issued a Notice of Proposed Rulemaking ("NPRM") in November 2018 to, in large part, "specify how…institutions covered by Title IX…must respond to incidents of sexual harassment consistent with Title IX's prohibition against sex discrimination." 83 FR 61462.

    b. The DOE received 124,162 comments on the proposed regulations by the close of the review period on January 30, 2019. Docket ID ED-2018-OCR-0064. The majority of comments were critical of the proposed rules.

    c. The DOE published the final regulations on May 19, 2020 and they went into effect on August 14, 2020. 85 FR 30026. The final rules are substantially similar to the proposed rules, and include the provisions many educators and advocates identified as highly problematic during the review period.

    d. The final regulations require that schools follow a specific grievance process in response to complaints of conduct covered by the regulations. The process includes a thorough investigation, a live hearing if the school is a postsecondary institution, and an appeal right. The regulations are prescriptive about the components schools must include at each of these stages. 34 CFR 106.45.

    e. The Preamble to the regulations is over 2,000 pages. Though not enforceable, it includes important substantive interpretations of the regulations.

2. Institutional Sexual Harassment Policy Objectives. Schools try to accomplish myriad objectives through their sexual harassment policies. In addition to legal compliance, these objectives may include, for example, encouraging reporting by complainants, treating participants in the grievance process both fairly and kindly, providing accountability for misconduct, and reaching outcomes that are just and reliable.

3. Conflict Between Policy Objectives and Title IX Regulations. Several requirements in the new regulations may interfere with schools' pursuit of important policy objectives. Some examples of this include:

    a. *Application of the required grievance process to complaints against employees*: The Preamble states that schools must follow the required grievance process whether the "respondent is a student or employee" (page 1261), without accounting for the extensive due process rights many school employees already have. For many schools, this means it will be more difficult and take longer to hold employees accountable

for sexual harassment under the regulations than virtually any other type of misconduct.

b. *Cross-examination requirements*: During the required live hearing, each party's advisor of choice must be permitted "to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." This questioning must be "conducted directly, orally and in real time." Before a witness answers a question, the hearing officer will determine whether it is relevant. If requested, parties may be "located in separate rooms" provided there is "technology enabling the [hearing officer] and parties to simultaneously see and hear" the person being questioned. 34 CFR 106.45(b)(6). The prospect of cross-examination of this nature is an intimidating prospect for both parties and witnesses, and especially complainants wrestling with the already difficult decision of whether to come forward.

c. *Limited Reliance on Statements:* The regulations state that if "a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility[.]" 34 CFR 106.45(b)(6). Literal application of this provision could lead to illogical results that undermine accountability. For example, this provision could preclude reliance on an admission by the respondent if the respondent declined to be cross-examined, as well as statements in police reports, SANE reports, medical reports and other records, if the individuals who prepared the reports do not participate in the hearing. Preamble, page 1181.

HJC Outline for BCCE Conference Plenary
January 29, 2021

1. Overview

    a. Colleges, universities and K-12 schools are subject to a myriad of laws and regulations – some of them conflicting – that create the possibility of lawsuits from various stakeholders.

    b. In deciding how to respond to reports of sexual misconduct, schools must not only comply with the Title IX regulations, they must also weigh these competing litigation risks.

    c. There often is no clear path that avoids the possibility of a lawsuit from either the complainant, the respondent, or in many cases, both – or the possibility of regulatory scrutiny from OCR (or, in the case of a public agency, a state regulatory body like the State Auditor).

    d. Schools therefore must have a clear understanding of what their goals are in any given circumstance so that they can choose a path that maximizes the possibility of achieving those goals. Those goals could include, for example, ensuring the protection of complainants and complainants' interests (and this may mean accepting the risk of respondent litigation).

2. Lawsuits from complainants

    a. Title IX regulations are enforced through regulatory investigations, penalties, and resolution agreements by the Department of Education (and also, most recently, the Department of Health and Human Services).

    b. The law also allows for a private right of action for damages, based on a showing of deliberate indifference by the school.

        i. The statute provides victims of sex discrimination with a private right of action against recipients of federal education funding, but only where the discrimination was caused by the recipient's own intentional misconduct. *Davis*, 526 U.S. at 636, 640-42. A showing of intentional misconduct requires that the school "itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student [or student-student] harassment of which it had actual knowledge." *Id*. at 642.

    c. The key cases are:

        i. *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274 (1998) (teacher-on-student sexual violence and sexual harassment).

        i. *Davis ex rel. LaShonda D v. Monroe Cnty. Bd. of Educ*., 526 U.S. 629 (1999) (student-on-student).

d. Generally, plaintiffs must prove five elements:

i. First, the school must have "exercise[d] substantial control over both the harasser and the context in which the [known] harassment occur[ed]." *Davis*, 526 U.S. at 645.

ii. Second, the plaintiff must have suffered harassment "that is so severe, pervasive, and objectively offensive that it can be said to deprive [the plaintiff] of access to the educational opportunities or benefits provided by the school." *Id*. at 650.

iii. Third, the school must have had "actual knowledge of the harassment," meaning that a school official "who at a minimum ha[d] authority to address the alleged discrimination and to institute corrective measures on the [school's] behalf ha[d] actual knowledge of [the] discrimination." *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000) (internal quotation marks omitted); *see also Davis*, 526 U.S. at 650.

iv. Fourth, the school must have acted with "deliberate indifference" to the harassment, meaning that the school's "response to the harassment [was] clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 643, 648.

(1) This is an "exacting standard," *Lopez v. Regents of Univ. of California*, 5 F. Supp. 3d 1106, 1122 (N.D. Cal. 2013) (internal quotation marks omitted), that requires a showing of a response that was more deficient than merely "negligent, lazy, or careless," *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006). Rather, a plaintiff must plead facts that support a plausible inference that the school made what amounts to "an official decision . . . not to remedy" the discrimination. *Id*. (internal quotation marks omitted). . . .

v. Fifth, the school's deliberate indifference must have "subject[ed] [the plaintiff] to harassment," i.e., "cause[d] [the plaintiff] to undergo harassment or ma[d]e [the plaintiff] liable or vulnerable to it." *Davis*, 526 U.S. at 645 (internal quotation marks omitted).

i. Pre-Assault Theory

(1) *Simpson v. Univ. of Colorado*, 500 F.3d 1170 (10th Cir. 2017). In *Simpson*, the school was told by multiple sources—including the local DA—that it needed to develop policies to supervise recruits and implement sexual-assault-prevention training for football players. 500 F.3d at 1171. Rather than change its policies, it continued to support and fund events that it had been specifically warned created a risk of sexual assault. *Id.* at 1173, 1177.

(2) *Karasek v. Regents of the Univ. of Cal.*, 948 F.3d 1150, 1169 (9th Cir.), *opinion amended and superseded on denial of reh'g sub nom. Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093 (9th Cir. 2020).

(a) The Ninth Circuit held that to plead a pre-assault Title IX claim, plaintiffs must allege that "(1) a school maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment that was known or obvious (3) in a context subject to the school's control, and (4) as a result, the plaintiff suffered harassment that was 'so severe, pervasive, and objectively offensive that it can be said to [have] deprive[d] the [plaintiff] of access to the educational opportunities or benefits provided by the school.'" *Karasek*, 956 F.3d at 1114 (quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 645 (1999).

e. Tort claims

i. Vicarious liability for the sexual violence or sexual harassment or ratification of it

ii. Direct negligence claims premised on failure to train, failure to warn, failure to prevent the sexual violence or sexual harassment

f. Employee complainants also can raise statutory claims such as Title VII and FEHA.

3. Faculty and student respondent litigation

a. Writs

i. In some jurisdictions, including California, faculty and student respondents may seek to vacate the findings and sanctions against them by filing a petition for writ of administrative mandate.

ii. These cases challenge a School's findings and sanction on a number of grounds:

(1) The School failed to provide a fair hearing or due process

(2) The School failed to follow its own policies (and therefore acted in excess of its jurisdiction)

(3) The findings are not supported by substantial evidence

(4) The sanction was too severe

iii. In the Ninth Circuit, based on the principle of judicial exhaustion, a School's disciplinary proceedings must be challenged via writ proceeding first (in state court) before a respondent may seek money damages based on the same arguments. *Doe v. Regents of the University of California*, 891 F.3d 1147 (9th Cir. 2018).

iv. In the past year or so, a group of respondent counsel have attempted to file class action lawsuits against Michigan State, UC, and California State University challenging, on a classwide basis, the universities' investigation and adjudication procedures for sexual misconduct. The class allegations in the cases against UC and Cal State have been dismissed, and those cases are on appeal.

b. Claims for damages (breach of contract, Title IX gender discrimination)

i. Breach of contract

(1) Respondents often will claim that the school failed to follow its own student or faculty handbook or other disciplinary procedures for sexual misconduct cases.

(2) Many of these cases ultimately fail because courts seldom expect perfect internal processes. Still, these cases can be drawn out and costly to defend.

ii. Title IX gender discrimination

(1) Can be premised on either (a) erroneous outcome or (b) selective enforcement

(2) Different tests in different circuits. In the Second Circuit (see *Doe v. Columbia*), the test is the following. This test was followed by the Ninth Circuit in Austin, though not formally adopted – and the Ninth Circuit subsequently adopted a different standard.

(a) A plaintiff must plead "nonconclusory allegations plausibly linking the disciplinary action to discrimination on the basis of sex," *Austin v. Univ. of Oregon*, 92 F.3d 1133, 1138 (9th Cir. 2019), which he wholly fails to do.

(b) To state a selective enforcement claim, plaintiff must plead "male students were treated . . . differently than similarly situated female students based on sex." *Id.*

(c) If the pleadings survive a motion to dismiss, the plaintiff must satisfy the three-step *McDonnell Douglas* burden-shifting framework in order to withstand summary judgment. *See Emeldi v. Univ. of Oregon*, 698 F.3d 715,

724 (9th Cir. 2012) (applying *McDonnell Douglas* framework to Title IX claim). Under this framework, Plaintiff must first establish a prima facie case of gender discrimination. If he succeeds in making this showing, then the burden shifts to the University to show non-discriminatory intent. Finally, Plaintiff must prove that the University's proffered reason is pretextual and that its true motivation was discrimination. *Id.*

(3) The Third, Seventh, and Ninth Circuit have adopted the following test: "whether the alleged facts, if true, raise a plausible inference that the university discriminated [against the plaintiff] on the basis of sex." *Schwake v. Arizona Board of Regents*, 967 F.3d 940 (9th Cir. 2020).

(a) Applying this standard, the court held that the plaintiff stated a claim on based on largely conclusory allegations that were not specifically tied to gender bias.

(b) First, the court held that the plaintiff sufficiently alleged "background indicia of sex discrimination" based on allegations of a contemporaneous DOE investigation into the university and a pattern of gender-biased decisionmaking against male respondents based on an allegation that male students "are invariably found guilty regardless of the evidence or lack thereof." *Id.* at 14-16.

(i) The court accepted allegations that men are always found responsible for sexual assault without requiring an allegation that women are not, and characterized it is as "non-conculsory." *Id.* at 15. Specifically, the court stated that a specific "level of detail" for the allegation of a pattern of biased decision-making was not required because it could be "difficult for a plaintiff to know the full extent of alleged decisionmaking before discovery allows a plaintiff to unearth information controlled by a defendant." *Id.*

(c) Second, the court relied on procedural irregularities in the plaintiff's disciplinary proceeding that do not on their face appear to be linked to gender bias or the plaintiff's disciplinary proceeding. In particular, the court held that the plaintiff sufficiently alleged gender bias in his proceeding based on allegations that a professor (who was not a decision maker) publicly disclosed confidential information about the University's investigation, the

University modified the plaintiff's punishment in a way that insulated it from an appeal, the plaintiff was not permitted to file a harassment complaint against the complainant, and the University's investigation was one sided. *Id.* at 16-21.

(d) Under the "simpler" standard, the court held that these allegations combined with the background indicia of sex discrimination, were sufficient to state a claim because "sex discrimination is a plausible explanation for the University's handling of the sexual misconduct disciplinary case against [the plaintiff]." *Id.* at 20.

iii. Negligence, NIED, IIED, and defamation claims

4. Reporting obligations

a. Schools also have reporting requirements under various federal and state statutes, as well as under conditions of research funding.

b. Some reporting requirements include the following:

i. CANRA and its equivalent in other states.

ii. Clery Act

iii. Federal research funding agencies

iv. Physicians and other medical providers: medical board, physical therapy board, etc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF PENNSYLVANIA; STATE OF NEW JERSEY; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF ILLINOIS; COMMONWEALTH OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEW MEXICO; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; STATE OF WASHINGTON; STATE OF WISCONSIN; STATE OF NEVADA, *Plaintiffs*, v. ELISABETH D. DEVOS, in her official capacity as Secretary of the United States Department of Education; UNITED STATES DEPARTMENT OF EDUCATION; and UNITED STATES OF AMERICA, *Defendants*.	Civil Action No. 1:20-cv-01468-CJN

CONSENT MOTION OF LAW PROFESSORS FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Proposed *amici curiae* law professors who specialize in administrative and/or antidiscrimination law ("*Amici*"), through undersigned counsel, respectfully request leave of this Court to file the attached brief in support of Plaintiffs' Motion for Summary Judgment. District courts have "broad discretion" to permit participation "as an amicus curiae." *National Ass'n of Home Builders v. United States Army Corps of Eng'rs*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007). This Court routinely permits amicus briefs when the "information offered is 'timely and useful.'"

Ellsworth Assocs., Inc. v. United States, 917 F. Supp. 841, 846 (D.D.C. 1996). In support of this motion, they state as follows:

1. *Amici* are law professors who specialize in administrative and/or antidiscrimination law. They include the following:

Samuel Bagenstos is the Frank G. Millard Professor of Law at University of Michigan Law School.

Nicole Huberfeld is a Professor of Law at Boston University School of Law and a Professor of Health Law and Ethics & Human Rights at Boston University School of Public Health.

Katharine K. Baker is the University Distinguished Professor of Law at the IIT Chicago-Kent College of Law.

Deborah Brake is a Professor of Law and John E. Murray Faculty Scholar at the University of Pittsburgh School of Law.

Nancy Cantalupo is an Associate Professor of Law at the California Western School of Law.

Joanna L. Grossman is the inaugural Ellen K. Solender Endowed Chair in Women and the Law and a Professor of Law at the Southern Methodist University Dedman School of Law.

Erin Buzuvis is an Associate Dean and Professor of Law at Western New England University School of Law.

David S. Cohen is a Professor of Law at Drexel University Thomas R. Kline School of Law.

Ann McGinley is the William S. Boyd Professor of Law at the William S. Boyd School of Law at the University of Nevada, Las Vegas.

Ruben Garcia is a Professor of Law at the William S. Boyd School of Law at the University of Nevada, Las Vegas.

David Oppenheimer is a Clinical Professor of Law at the University of California, Berkeley School of Law.

Jodi Short is the Associate Dean for Research and the Honorable Roger J. Traynor Chair and Professor of Law at the University of California, Hastings College of the Law.

Jonathan Weinberg is the Associate Dean for Research & Faculty Development and a Professor of Law at the Wayne State University Law School.

Michael J. Wishnie is a William O. Douglas Clinical Professor of Law and Counselor to the Dean at Yale Law School.

Robert S. Chang is a Professor of Law and Executive Director of the Fred T. Korematsu Center for Law and Equality at the Seattle University School of Law.

Hannah Brenner Johnson is the Vice Dean for Academic and Student Affairs and an Associate Professor of Law at the California Western School of Law.

Michele Dauber is the Frederick I. Richman Professor of Law at Stanford Law School.

Daniel Deacon is a Lecturer at the University of Michigan Law School.

Sally Goldfarb is a Professor of Law at Rutgers Law School.

Julie Goldscheid is a Professor of Law at the City University of New York School of Law.

Victoria F. Nourse is the Ralph Whitworth Professor of Law at Georgetown University Law Center.

Vicki Schultz is the Ford Foundation Professor of Law and Sciences at Yale Law School.

Leigh Goodmark is the Marjorie Cook Professor of Law and Co-Director of the Clinical Law Program at the University of Maryland Francis King Carey School of Law.

Roseanna Sommers is an Assistant Professor of Law at the University of Michigan Law School.

Penny Venetis is a Clinical Professor of Law and Director of the International Human Rights Clinic at Rutgers Law School.

2. As experts in the enforcement of civil rights law, *Amici* file this brief to demonstrate that Defendants' new Title IX rule will undermine, not advance, the purposes of Title IX, and that the adoption of that rule is arbitrary, capricious, an abuse of discretion, and not in compliance with law.

3. The proposed brief would aid this Court's deliberation by offering "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Youming Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008). *See also* LCvR 7(o)(2). Here, *Amici* offer unique information and perspective as professors at law schools throughout the country. Their positions as law professors allow them to provide expertise, first-hand experience, and assistance beyond the help the parties are able to provide.

4. Pursuant to LCvR 7.1(o), *Amici*'s counsel have consulted with counsel for the parties. Counsel for Plaintiffs, Defendants, and Intervenor-Defendants consent to the filing of this brief.
5. No counsel for a party authored the brief in whole or in part, and no party, counsel for party, or person other than *Amici*, their members, or their counsel funded the preparation or submission of this amicus brief.

WHEREFORE, the proposed *Amici* respectfully request that this Court grant leave to file the attached *amicus curiae* brief.

Dated: January 8, 2021

Respectfully submitted,

/s/ Lauren E. Snyder
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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2021, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Lauren E. Snyder
Lauren E. Snyder

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF PENNSYLVANIA; STATE OF NEW JERSEY; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF ILLINOIS; COMMONWEALTH OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEW MEXICO; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; STATE OF WASHINGTON; STATE OF WISCONSIN; STATE OF NEVADA, *Plaintiffs*, v. ELISABETH D. DEVOS, in her official capacity as Secretary of the United States Department of Education; UNITED STATES DEPARTMENT OF EDUCATION; and UNITED STATES OF AMERICA, *Defendants*.	Civil Action No. 1:20-cv-01468-CJN

[PROPOSED] ORDER GRANTING MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Upon consideration of the Consent Motion of *amici curiae* law professors for Leave to File *Amicus Curiae* Brief in Support of the Plaintiff's Motion for Summary Judgment and the brief attached thereto, it is hereby:

ORDERED that the motion is **GRANTED** and the attached brief be filed.

Dated: _____, 2020

_____
Honorable Carl J. Nichols
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF PENNSYLVANIA; STATE OF NEW JERSEY; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF ILLINOIS; COMMONWEALTH OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEW MEXICO; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; STATE OF WASHINGTON; STATE OF WISCONSIN; STATE OF NEVADA, *Plaintiffs*, v. ELISABETH D. DEVOS, in her official capacity as Secretary of the United States Department of Education; UNITED STATES DEPARTMENT OF EDUCATION; and UNITED STATES OF AMERICA, *Defendants*.	Civil Action No. 1:20-cv-01468-CJN

BRIEF OF LAW PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTEREST OF AMICI

Amici are law professors[1] who specialize in administrative and/or antidiscrimination law. *Amici* believe that administrative agencies like the Department of Education's Office for Civil Rights have broad authority to implement statutory mandates like those in Title IX. As *Amici* argue below, however, Defendants exceeded that authority here by failing to comply with basic principles of administrative law. As experts in the enforcement of civil rights law, *Amici* file this brief to demonstrate that Defendants' new Title IX rule will undermine, not

[1] Samuel Bagenstos is the Frank G. Millard Professor of Law at University of Michigan Law School; Nicole Huberfeld is a Professor of Law at Boston University School of Law and a Professor of Health Law and Ethics & Human Rights at Boston University School of Public Health; Katharine K. Baker is the University Distinguished Professor of Law at Chicago-Kent College of Law at Illinois Institute of Technology; Deborah Brake is a Professor of Law and John E. Murray Faculty Scholar at the University of Pittsburgh School of Law; Nancy Cantalupo is an Associate Professor of Law at the California Western School of Law; Joanna L. Grossman is a Professor of Law and the inaugural Ellen K. Solender Endowed Chair in Women and the Law at the Southern Methodist University Dedman School of Law; Erin Buzuvis is a Professor of Law and Associate Dean at Western New England University School of Law; David S. Cohen is a Professor of Law at Drexel University Thomas R. Kline School of Law; Ann McGinley is the William S. Boyd Professor of Law at the William S. Boyd School of Law at the University of Nevada, Las Vegas; Ruben Garcia is a Professor of Law at the William S. Boyd School of Law at the University of Nevada, Las Vegas; David Oppenheimer is a Clinical Professor of Law at the University of California, Berkeley School of Law; Jodi Short is a Professor of Law, the Associate Dean for Research, and the Honorable Roger J. Traynor Chair at the University of California, Hastings College of the Law; Jonathan Weinberg is a Professor of Law and the Associate Dean for Research & Faculty Development at Wayne State University Law School; Michael J. Wishnie is the William O. Douglas Clinical Professor of Law at Yale Law School; Robert S. Chang is a Professor of Law and Executive Director of the Fred T. Korematsu Center for Law and Equality at the Seattle University School of Law; Hannah Brenner Johnson is an Associate Professor of Law and the Vice Dean for Academic and Student Affairs at the California Western School of Law; Michele Dauber is the Frederick I. Richman Professor of Law at Stanford Law School; Daniel Deacon is a Lecturer at the University of Michigan Law School; Sally Goldfarb is a Professor of Law at Rutgers Law School; Julie Goldscheid is a Professor of Law at the City University of New York School of Law; Victoria F. Nourse is the Ralph V. Whitworth Professor of Law at Georgetown University Law Center; Vicki Schultz is the Ford Foundation Professor of Law and Sciences at Yale Law School; Leigh Goodmark is the Marjorie Cook Professor of Law and Co-Director of the Clinical Law Program at the University of Maryland Francis King Carey School of Law; Roseanna Sommers is an Assistant Professor of Law at the University of Michigan Law School; Penny M. Venetis is a Clinical Professor of Law and Director of the International Human Rights Clinic at Rutgers Law School.

advance, the purposes of Title IX, and that the adoption of that rule is arbitrary, capricious, an abuse of discretion, and not in compliance with law.[2]

SUMMARY OF ARGUMENT

The Department of Education's (the "Department") new Title IX Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) (the "New Rule"), unlawfully reduces protections for students who are victims of sexual harassment, including sexual assault, and makes it harder for their schools to respond to their complaints. The New Rule is premised on a fallacy that false allegations of sexual harassment and assault are widespread. In fact, they are few and far between. Instances of sexual harassment and sexual assault in schools impose lasting damage on students, faculty, and the learning environment. To fulfill Title IX's mandate, schools can and must ensure a fair process for the accused without—as the New Rule does—imposing hurdles to reporting. The search for the truth in a Title IX investigation does not require a process like we have in our criminal (or even civil) courtrooms. The New Rule does not remedy sex-based harassment; it protects it.

The Department of Education's New Rule is unlawful because it is arbitrary, capricious, and an abuse of discretion in violation of the Administrative Procedure Act ("APA") and because it exceeds the Department's statutory authority to issue regulations that further Title IX's objectives. The New Rule has many serious flaws, and *Amici* law professors support Plaintiffs' challenge in full. But we focus on three issues: First, the New Rule arbitrarily creates a double standard by singling out complaints of sexual harassment for less favorable treatment than

[2] No counsel for a party authored the brief in whole or in part, and no party, counsel for party, or person other than *Amici*, their members, or their counsel funded the preparation or submission of this *amicus* brief.

complaints regarding other forms of harassment. Second, the New Rule's required grievance process will both deter victims from coming forward and insulate schools that fail to protect their students. Finally, the New Rule's imposition of the heightened standards imposed by *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) and *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999), which were limited to private Title IX suits seeking monetary damages from schools, is arbitrary and capricious because the Department failed to consider important aspects of the problem. The Department did not address the salient differences between enforcement in court by aggrieved individuals pursuing damages suits against schools and administrative enforcement by the Department itself. And it imposed heightened standards for schools to enforce against students—a context even further removed from the posture of *Gebser* and *Davis*.

ARGUMENT

Pursuant to the APA, which sets forth the standard governing judicial review of decisions made by federal administrative agencies, agency decisions must be set aside where they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *United States v. Bean*, 537 U.S. 71, 77–78 (2002); *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999). To determine whether an agency regulation is "arbitrary or capricious," the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989) (internal citation omitted). To survive judicial scrutiny, the agency must have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Where, as here, "an agency changes course . . . it must be cognizant that longstanding policies may have

engendered serious reliance interests that must be taken into account . . . [and] [i]t would be arbitrary and capricious to ignore such matters." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020) (internal citations omitted).

The Department of Education has authority to issue regulations to effectuate the substantive provisions of Title IX and provide an administrative enforcement scheme. *Davis*, 526 U.S. at 638–39 ("Congress authorized an administrative enforcement scheme for Title IX. Federal departments or agencies with the authority to provide financial assistance are entrusted to promulgate rules, regulations, and orders *to enforce the objectives of § 1681*, *see* § 1682 [.]") (emphasis added). But that authority is not limitless, and where those regulations or enforcement mechanisms "fail[] to consider an important aspect of the problem," are not the result of reasoned decision-making, or fail to further Title IX's nondiscrimination mandate, they are arbitrary and capricious. *State Farm*, 463 U.S. at 43 ("[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."); *Dep't of Homeland Sec.*, 140 S. Ct. at 1910, 1913 (holding that it is arbitrary and capricious for an agency to fail to "consider . . . important aspect[s] of the problem" before the agency and to supply the requisite "reasoned analysis") (citing *State Farm*, 463 U.S. at 57)).

I. The New Rule Unlawfully and Unreasonably Treats Sexual Harassment Differently Than Other Forms of Harassment.

Under the guise of enforcing Title IX, the New Rule arbitrarily and capriciously treats allegations of sexual harassment differently and less favorably than allegations of harassment based on race, national origin, and disability. The double standard goes to the central provisions

of the New Rule, including the provisions that redefine harassment and impose a less-stringent deliberate indifference standard for responding to complaints. But the Department did not adequately explain *why* sexual harassment should be treated differently. Perhaps that is because there is no reasonable explanation for such disparate treatment.

The examples of this double standard are numerous. For race and disability, the Department has concluded that harassing conduct that is so "severe, pervasive *or* persistent" as to create a hostile environment qualifies as harassment.[3] From 1997 until the promulgation of the New Rule, the Department treated sexual harassment the same way. Office for Civil Rights Sexual Harassment Guidance, 62 Fed. Reg. 12,034, 12,038 (Mar. 13, 1997) ("1997 Guidance"). The New Rule redefines "sexual harassment," however, which it now limits to "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." New Rule § 106.30(a)(2) (emphasis added). The difference between "or" and "and" is crucial. As commenters observed, the new definition does not cover misconduct that is "severe but not

[3] *See, e.g.*, Tennessee State University Resolution Letter from Andrea de Vries, Compliance Team Leader, Office for Civil Rights, U.S. Dep't of Educ., to Dr. Glenda Baskin Glover, President, Tennessee State University, at 3-4, OCR Case No. 04-15-2347 (Apr. 2, 2018), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04152347-a.pdf (emphasis added); Barbour County Schools Resolution Letter from Melissa M. Corbin, Team Leader, Office for Civil Rights, U.S. Dep't of Educ., to Jeffrey P. Woofter, Superintendent, Barbour County Schools, at 2, OCR Case No. 03-17-1170 (Oct. 10, 2018), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03171170-a.pdf; Resolution Agreement, Duke University, at 1-2, OCR Case No. 11-19-2214 (Dec. 10, 2019), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11192214-b.pdf (investigating hostile environment complaint premised on one anti-Semitic performance); Office for Civil Rights, U.S. Dep't of Educ., *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance* (Mar. 10, 1994), https://www2.ed.gov/about/offices/list/ocr/docs/race394.html ("1994 Investigative Guidance"); Norma V. Cantu, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., 2000 Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000), https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html.

pervasive," such as some single assaults, or "conduct that is pervasive but not independently severe," like persistent statements that subtly undermine the competence of students of a particular sex.[4] Under the New Rule, a one-off instance of harassing conduct on the basis of sex that is both severe and objectively offensive is not sexual harassment—and therefore a school would be required to dismiss a Title IX complaint, *id.* § 106.45(b)(3)—while that exact conduct, if motivated instead by race or disability, would qualify as harassment. This underexplained distinction between Title IX complaints and other discrimination complaints is unreasonable and does not further the aims of Title IX.[5]

The requirements about how institutions must respond to complaints are similarly premised on an invalid and inexplicable double standard. The New Rule relieves colleges and universities of the obligation to address sexual harassment unless they have "actual knowledge" of sexual harassment. *Id.* § 106.44(a). To meet that standard, a report of sexual harassment must be made to the school's designated Title IX Coordinator or some other limited number of school officials. *Id.* § 106.30 (defining "actual knowledge"). Conversely, schools must respond to all harassment on the basis of race, national origin, or disability about which they know or *should know*.[6] The New Rule also allows schools to ignore many Title IX reports of sexual assault that

[4] Comments of Jeannie Suk Gersen, Nancy Gertner & Janet Halley at 15, ED-2018-OCR-0064-11950 (filed Jan. 30, 2019) ("Comments of Gersen, Gertner & Halley"). *See generally* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1755-1774 (1998).

[5] Indeed, the explanation offered for this change, which does not serve as a distinction, is that this language is needed to protect free speech. New Rule at 30,141-42, 30,151. That justification further demonstrates the arbitrary nature of the change, because the Department fails to explain why such reasoning applies only to sexual harassment and not to harassment on the basis of race, national origin, or disability.

[6] *See, e.g.,* New Fairfield Board of Education Resolution Letter from Meena Morey Chandra, Acting Regional Director, Office for Civil Rights, U.S. Dep't of Educ., to Dr. Alicia M. Roy, Superintendent of Schools, New Fairfield Board of Education, at 3, OCR Case No. 01-16-1117 (Mar. 5, 2018), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01161117-

occur off school grounds, including in off-campus housing or during study abroad programs, regardless of the effect they have on campus and on survivors' educations. *Id.* § 106.44(a). This broad immunity from liability has never been applied to any other form of harassment.[7] The Department redefines "program or activity" just for sexual harassment and not for other forms of discrimination, including other forms of sex discrimination, despite Congress's own broadly applicable definition of "program or activity" in 20 U.S.C. § 1687, which defines the term to include "all of the operations of" schools. It makes particularly little sense to apply this definition to complaints of sexual harassment, which the Department admitted often occurs off campus. *See* Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,487 n.27 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106). If anything, the prevalence of off-campus sexual harassment and assault should drive the Department to be more concerned about responding to off-campus complaints, not less.

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a.pdf; Tallahassee Community College Resolution Letter from Ebony Calloway-Spencer, U.S. Dep't of Educ., Office for Civil Rights, to Dr. Jim Murdaugh, President, Tallahassee Community College, at 4, OCR Case No. 04-16-2248 (Dec. 12, 2017), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04162248-a.pdf; Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., 2014 Dear Colleague Letter: Responding to Bullying of Students with Disabilities (Oct. 21, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf; Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Harassment and Bullying (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html; 1994 Investigative Guidance.

[7] For example, Department of Justice guidance explains that Title VI may apply to some discriminatory conduct that takes place outside the United States, "depending on how much control the recipient exercises over the overseas operation and how integral the overseas operation is to the recipient's program in the U.S." Civil Rights Div., U.S. Dep't of Justice, *Title VI Legal Manual, Section V: Defining Title VI* 6 (Sept. 27, 2016), https://www.masslegalservices.org/system/files/library/title_vi_legal_manual_section_5pdf_0.pdf.

The New Rule also dramatically limits schools' obligations to respond to conduct that meets the heightened definition of sexual harassment, requiring them to act only in a way that is not "deliberately indifferent." New Rule § 106.44(a). This is a significant change from the Department's previous guidance,[8] and once again it is different from the standard applied to other forms of harassment. And the New Rule permits—and effectively requires, in many cases—schools to apply a heightened clear and convincing evidentiary standard in sexual harassment hearings, which it has never applied to allegations of other forms of harassment committed by students. *Id.* § 106.45(b)(1)(vii). For allegations of sexual harassment (and only sexual harassment) schools must apply the same standard for complaints brought against other students and complaints brought against faculty. *Id.* Because faculty contracts and collective bargaining agreements often require the use of the clear and convincing evidence standard for faculty disciplinary proceedings, the New Rule effectively imposes a heightened standard as a requirement for student complaints without saying so.[9] The Department did not explain why the considerations that drive such collective bargaining agreements should also govern students, who stand in a very different relationship with their schools than do faculty. Indeed, elsewhere the Department recognized the "unique nature and purpose" of educational environments and the important differences between students and employees in the workplace. *Id.* at 30,037. Nor did

[8] 1997 Guidance at 12,042 ("A school will be in violation of Title IX if the school 'has notice' of a sexually hostile environment and fails to take immediate and appropriate corrective action.").

[9] *See, e.g.*, Comments of State Attorney Generals of the Commonwealths of Pennsylvania and Kentucky, the States of New Jersey, California, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia at 46, ED-2018-OCR-0064-123878 (filed Jan. 30, 2019).

the Department sufficiently explain why those collective bargaining agreements should control school-student relationships in the Title IX context but not the Title VI or Section 504 context.[10]

These differences do not come from the text of the relevant statutes. Title VI, which prohibits discrimination on the basis of race and national origin in federally funded programs, and Title II and Section 504 of the Rehabilitation Act, which prohibit discrimination on the basis of disability in public programs, are worded almost identically to Title IX.[11] Indeed, the Supreme Court has recognized that "Title IX was modeled after Title VI of the Civil Rights Act of 1964, which prohibits race discrimination in programs receiving federal funds." *Gebser*, 524 U.S. at 275. Several comments identified this close relationship between Title VI and Title IX.[12]

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[10] The Department's Office for Civil Rights has required the use of the preponderance of the evidence standard for discrimination on the basis of race and disability. *See, e.g.*, Resolution Agreement, Wallingford Board of Education, OCR Case No. 01-13-1207 (Dec. 23, 2013), http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01131207-b.pdf; Resolution Agreement, BASIS Scottsdale, OCR Case No. 08-16-1676 (Mar. 20, 2017), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08161676-b.pdf; Resolution Agreement, Independent School District No. 1 of Woods City, Oklahoma, OCR Case No. 07-15-1154 (Sept. 28, 2017), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/07151154-b.pdf.

[11] 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."); 42 U.S.C. § 12132 ("Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

[12] *See, e.g.*, Comments of ACLU at 6, ED-2018-OCR-0064-17939 (filed Jan. 30, 2019) ("Comments of ACLU") ("These disparities lack justification, particularly as 'Title IX was patterned after Title VI.'") (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694 (1979)); Comments of Penny M. Venetis at 26, ED-2018-OCR-0064-18079 (filed Jan. 16, 2019) (explaining that Title IX and Title VI are *in pari materia* and should be interpreted consistently).

The Department provided no legitimate reason for departing from the interpretation of these related statutes.

The practical problems imposed by the New Rule's double standard are severe. The distinction also serves to reinforce sexist stereotypes that sexual harassment allegations are uniquely suspect. Many cases of harassment involve discrimination along more than one axis (e.g., students targeted for being both Black and female, or for being both female and disabled). And colleges and universities act not just as educators but also as employers and housing providers. Many students also are both employees of the school and residents of its facilities. As a result, discriminatory harassment of students will frequently violate multiple statutes at the same time: not just Title IX, Title VI, and Section 504, but also Title VII and the Fair Housing Act. All of these statutes continue to use the disjunctive definition of harassment that the Department previously applied to Title IX and thus require universities to respond to conduct that is severe *or* pervasive.[13] Currently, "[m]any institutions use a single, combined grievance procedure for persons alleging discrimination based on a protected class."[14] But the New Rule will require institutions to provide a different process particularly applicable to sexual harassment. That will create needless administrative complexity and confusion for universities—all of which will translate into additional burdens placed on those who allege discrimination.

[13] *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (holding that sexual harassment is actionable under Title VII when it is "sufficiently severe or pervasive to alter the conditions of the victim's employment") (internal citation omitted); 24 C.F.R. § 100.600(a)(2) (defining harassment to include "unwelcome conduct that is sufficiently severe or pervasive").

[14] Comments of Margaret B., ED-2018-OCR-0064-104561 (filed Apr. 2, 2019) ("Comments of Margaret B.").

These burdens are apparent in the New Rule itself. When a student files a complaint alleging harassment on the basis of both sex (in violation of Title IX) and race (in violation of Title VI), the New Rule offers the school a choice: It may apply the new Title IX grievance requirements to the entire complaint, thus overriding the more victim-friendly standards for race- and disability-based harassment. Or it may engage in separate, duplicative proceedings, thus bearing additional costs and forcing the student who alleges discrimination to go through the process twice. New Rule at 30,449. It did not have to be this way. The Department could have treated sexual harassment like other forms of harassment, instead of imposing unique, unjustified heightened procedural rules.

In fact, the Department agreed that "consistency with respect to administrative enforcement of Title IX and other civil rights laws (such as Title VI and Title VII) is desirable." *Id.* at 30,382. But the New Rule offers little more than conclusory statements in place of honest explanations for its departures. For instance, the Department said that the APA does not "require" it to devise identical rules to eliminate discrimination on the bases of sex, race, or disability, and that holding otherwise would "wreak havoc on agency behavior" by denying it the ability to make gradual changes to one area at a time or limit rules to a particular subject matter. *Id.* at 30,528–29. While the APA does not require regulations promulgated under Title IX to be identical to those issued under other discrimination statutes in all instances, it does require that the Department engage in reasoned decision-making and that the Department give an adequate explanation for singling out sexual harassment. That is particularly true when the Department is departing both from longstanding interpretations of Title IX and the interpretation of closely related antidiscrimination statutes.

These disparities are inconsistent with Title IX's purpose of protecting students from sex discrimination and the Department's stated "objective of creating uniformity and consistency."

Id. at 30,086–87. The agency has therefore "failed to consider an important aspect of the problem," failed to "articulate a satisfactory explanation," and reached a result that is substantively "implausible." *State Farm*, 463 U.S. at 43. And it has exceeded its statutory authority by issuing regulations that do not "effectuate the provisions of" Title IX's nondiscrimination rule. 20 U.S.C. § 1682.

II. The Grievance Process is to the Detriment of Sexual Assault Victims and Allows Schools to Ignore Valid Complaints.

The Department's grievance process also does not "effectuate" Title IX's mandate that "[n]o person" is subjected to sexual harassment in an education program or activity. 20 U.S.C. §§ 1681(a), 1682. On the contrary, it discourages victims from coming forward and allows schools to disregard valid complaints.[15] Despite recognizing that the New Rule might have a "chilling effect" on reporting and acknowledging "data showing that reporting rates are lower than prevalence rates with respect to sexual harassment, including sexual violence," the Department dismissed these concerns without justification. New Rule at 30,067. And here, where the Department "change[d] course" from prior guidance, it arbitrarily and capriciously ignored "that longstanding policies may have engendered serious reliance interests that must be taken into account." *Dep't of Homeland Sec.*, 140 S. Ct. at 1913 (quotation marks omitted).

[15] *See e.g.,* Comments of ACLU at 3 ("[T]he ACLU believes the Proposed Rule undermines Title IX by substantially reducing the responsibility of institutions to respond to claims of sexual harassment and assault."); Comments of Public Justice at 5, ED-2018-OCR-0064-18382 (filed Jan. 30, 2019) ("Comments of Public Justice") ("[T]he Department's proposed rules would eliminate, rather than effectuate, many of Title IX's protections, making it harder for students to report sexual harassment, allowing (and often requiring) schools to ignore students' reports of harassment, and unfairly tilting the grievance process in favor of respondents to the detriment of survivors."); Comments of Diane L. Rosenfeld, Director, Gender Violence Program, Harvard Law School, at 25-26, ED-2018-OCR-0064-12001 (filed Jan. 30, 2019) (quoting Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 Harv. L. Rev. F. 359 (2015)) (explaining the New Rule will chill reporting and drastically increase the incidences of "second rape" because schools are disincentivized to fulfill their Title IX duties).

Previous Department guidance established that a school could be held responsible for instances of sexual harassment by a teacher, irrespective of actual notice, and schools could be held responsible for student-on-student harassment if a "responsible employee" had constructive notice—i.e., the employee knew or should have known—of the harassment. 1997 Guidance at 12,042. Schools were affirmatively obligated to "take immediate and appropriate steps to investigate or otherwise determine what occurred and take steps reasonably calculated to end any harassment, eliminate a hostile environment if one ha[d] been created, and prevent harassment from occurring again." *Id.* The investigation had to be "prompt, thorough, and impartial," but "[t]he specific steps in an investigation w[ould] vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors." Office for Civil Rights, U.S. Dep't of Educ., *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 2001) at 15, https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf ("2001 Revised Guidance"); *see also* 1997 Guidance at 12,042.

In contrast, the New Rule requires a school have "actual notice," rather than constructive notice, of harassment to trigger its Title IX responsibilities, New Rule §§106.30, 106.44(a), and provides that a school's response to allegations of sexual harassment will violate Title IX only if it amounts to "deliberate indifference." *Id.* § 106.44(a). But requiring that an institution have "actual knowledge" and be "deliberately indifferent" to trigger its obligations under Title IX shields institutions from liability even if they remain intentionally ignorant, and makes campuses more dangerous for victims. The "actual notice" requirement disincentivizes institutions from learning about possible harassment because without "actual knowledge," they can avoid liability

for failure to respond.[16] And once a school has "actual knowledge" it must respond in a manner that is only not "deliberately indifferent"—i.e., a "response to sexual harassment [that] is clearly unreasonable in light of the known circumstances." *Id.* at 30,092. Both standards disincentivize schools from investigating complaints.

The Department claimed that requiring "actual knowledge . . . furthers the Department's policy goals of ensuring that elementary and secondary schools respond whenever a school employee knows of sexual harassment or allegations of sexual harassment, while respecting the autonomy of students at postsecondary institutions to decide whether or when to report sexual harassment" and that requiring "deliberate indifference . . . ensures that recipients respond to sexual harassment by offering supportive measures designed to restore or preserve a complainant's equal educational access without treating a respondent as responsible until after a fair grievance process." *Id.* at 30,034. But the Department did not explain how it is consistent with Title IX's mandate for these concerns to override the obvious effect of causing schools to do less to respond to sexual harassment.

Further, the Department *admitted* it designed the New Rule to reduce the number of sexual harassment allegations the schools investigate and remedy. *See id.* at 30,551, 30,565–68 (estimating that after the New Rule the average post-secondary school will receive 3.82 formal complaints per year (a 33-percent reduction in reporting) and a K-12 school will receive 1.62

[16] Comments of the City University of New York at 10, ED-2018-OCR-0064-11739 (filed Jan. 29, 2019) ("In order to avoid liability, a 'knew or should have known' standard encourages colleges to acquire knowledge of sexual harassment on their campuses from every institutional actor who 'should have known.' By contrast, an 'actual knowledge' standard discourages colleges from acquiring actual knowledge of sexual harassment on their campuses, in order to avoid liability."); Comments of Girls for Gender Equity, ED-2018-OCR-0064-14976 (filed Jan. 30, 2019); Comments of Human Rights Campaign, ED-2018-OCR-0064-11375 (filed Jan. 30, 2019); Comments of Washington State School Directors Association, ED-2018-OCR-0064-30979 (filed Jan. 30, 2019).

formal complaints per year (a 50-percent reduction in reporting)). There is overwhelming evidence that a reduction in investigations and remedies will result in more harassment.[17] Yet the Department dismissively concluded, contrary to the evidence, that it is "not apparent that a recipient's response to sexual harassment and assault under these final regulations would be likely to exacerbate the negative effects highlighted by the commenters." New Rule at 30,545, 30,568. The "actual knowledge" and "deliberate indifference" standards constitute an unreasonable departure from previous guidance and undermine Title IX's goal. (As we explain in Part III, those standards are not required by the Supreme Court's *Davis* and *Gebser* cases. The Department's misplaced reliance on those cases is an additional reason for invalidating the New Rule.)

The new cross-examination requirement for post-secondary institutions is yet another stark departure from prior guidance. The Department's 2011 Dear Colleague Letter "strongly discourage[d] schools from allowing the parties personally to question or cross-examine each other during the hearing," recognizing that "[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or

[17] "The more certain respondents were that the scenario male would be dismissed from school or arrested, the less likely they were to report that they would commit sexual assault under the same set of hypothetical conditions." Comments of Center for American Progress at 5 n.22, ED-2018-OCR-0064-31283 (filed Jan. 30, 2019) (quoting Ronet Bachman et al., *The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault*, 26 Law & Soc'y Rev. 343-57 (1992)*; see also* New Rule at 30,266 n.1095 (citing David Lisak & Paul Miller, *Repeat and Multiple Offending Among Undetected Rapists*, 17 Violence & Victims 1 (2002) (finding that "undetected rapists were repeat rapists" and undetected repeat rapists committed on average of "5.8 rapes each")); Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, The Sentencing Project, 4-5 (2010), https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf (explaining that potential offenders are more likely to be deterred from, and thus less likely to engage in criminal behaviors, when there is reasonable certainty of some kind of accountability).

perpetuating a hostile environment."[18] Under the New Rule, postsecondary schools must now "provide for a live hearing" during which "the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." New Rule § 106.45(b)(6)(i). This cross-examination technique resembles that of a criminal trial. The Department claimed the grievance process "ensure[s] due process protections for both complainants and respondents," *id.* at 30,049, but it favors respondents. For example, the cross-examination procedure excludes statements by parties and statements against interest, including those in writing or on video.[19] *Id.* at 30,345–46. The Department also failed to acknowledge the vast differences between schools and courtrooms or the slew of comments explaining how cross examination severely harms victims of sexual harassment and sexual assault.[20]

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[18] Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., 2011 Dear Colleague Letter, at 12 (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf ("2011 Dear Colleague Letter").

[19] This means that if a respondent has previously confessed to the harassment—even on video or in writing—she can effectively choose not to let the school consider that evidence. The Department's justification for this is that these evidentiary rulings might be too complicated for a non-attorney decision-maker, New Rule at 30,345, but deciding whether a statement was made by a party or is against interest is no more complicated than making relevance determinations in real-time, which the decision-maker is required to make. *Id.* at 30,349.

[20] *See, e.g.*, Comments of Judith L. Herman on behalf of 902 Mental Health Professionals at 3, ED-2018-OCR-0064-104088 (filed Jan. 30, 2019) (describing cross-examination by the accused student's "advisor of choice" as "being subjected to hostile attacks on their credibility and public shaming at a time, following a traumatic event, when they may feel most vulnerable" and is "almost guaranteed to aggravate their symptoms of post-traumatic stress"); Comments of Public Justice at 30 (describing live cross-examination as "uniquely harmful to survivors of sexual harassment because they are often asked detailed, personal, and humiliating questions rooted in gender stereotypes and rape myths" and explaining it "can also re-victimize a survivor because it forces them to relive the assault"); Comments of National Women's Law Center at 26, ED-2018-OCR-0064-30297 (filed Jan. 30, 2019) ("Being asked detailed, personal, and humiliating questions often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced would understandably discourage many students—parties and witnesses—from participating in a Title IX grievance process, chilling those who have experienced or witnessed harassment from coming forward.") (citation omitted).

Indeed, schools have different powers and goals than the criminal justice system and must therefore be treated differently. "Because violating criminal law often results in incarceration and is meant to stigmatize the convicted . . . [c]riminal defendants get certain procedural rights, including higher standards of proof, that are aimed at protecting against abuse of the state's greater powers in the proceeding." Katharine K. Baker, Deborah L. Brake, Nancy Chi Cantalupo et al., *Title IX & The Preponderance of the Evidence: A White Paper* 6 (2016), http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-10.3.16.pdf. Schools do not have those same coercive powers. Rather, school disciplinary processes are designed not merely to punish, but to foster positive learning environments. *See id.* at 7 ("The central goal of student disciplinary systems [i]s helping 'to create the best environment in which students can live and learn . . . [a]t the cornerstone [of which] is the obligation of students to treat all other members of the academic community with dignity and respect—including other students, faculty members, neighbors, and employees.'") (citing Edward N. Stoner II, *Reviewing Your Student Disciplinary Policy: A Project Worth the Investment* 7 (2000)). That goal is consistent with Title IX's goal of preventing sex discrimination in schools.

Additionally, no court has ever equated the consequences of a criminal conviction with those of a finding of misconduct in a school setting. Our law attempts to ensure the greatest possible protections for the greatest forms of punishment, like the potential loss of liberty. On the contrary, the greatest possible punishment in the school setting is expulsion. *See id.* at 6. The Supreme Court has cautioned that although a student must be afforded "an opportunity to present his side of the story" before he is suspended, "further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular

disciplinary tool but also destroy its effectiveness as part of the teaching process." *Goss v. Lopez*, 419 U.S. 565, 581, 583 (1975).

Further, the New Rule requires schools to conduct live, quasi-criminal trials with live cross-examination only in sexual misconduct investigations—and not in investigations of other types of student or staff misconduct. This will present a procedural conundrum for schools, which often use the same disciplinary procedure to address various types of misconduct.[21] Not only is the cross-examination requirement contrary to previous guidance and challenging for schools to administer, but the New Rule rejects less burdensome and less traumatizing truth-seeking methods that schools already have in place.[22] And courts have upheld such "inquisitorial" or "indirect" cross-examination procedures, precisely because "student disciplinary proceedings need not mirror common law trials." *See, e.g.*, *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 69-71 (1st Cir. 2019) (finding indirect cross examination allows schools to avoid "displays of acrimony or worse"); *Doe v. Colgate*, 760 F. App'x 22, 33 (2d Cir. 2019). Under the pretense of "due process," the Department improperly equates schools with courtrooms, while ignoring the overarching goals of discipline in the school setting.

The Department arbitrarily and capriciously ignores the reliance interests of schools in light of previous guidance. Instead, the New Rule requires schools to rapidly implement a rigid

[21] Comments of Margaret B.

[22] *See, e.g.*, Comments of Gersen, Gertner & Halley at 11 ("There is a suitable alternative that aims at the desired truth-seeking objective, yet achieves a better balance of the competing interests here. That alternative is used in the Harvard Law School Procedures for Student/Student Sexual Harassment Cases and is endorsed by the American Bar Association Criminal Justice Section and by the University of California Post SB 169 Working Group."); Comments of California Women's Law Center at 10, ED-2018-OCR-0064-10845 (filed Jan. 28, 2019) (noting that in response to the 2011 Dear Colleague Letter, "many universities developed policies still in effect that safely provide a means by which complainants and respondents may submit questions to be asked of the other party without requiring an in-person confrontation").

new process that undermines a very tenet of Title IX—to protect victims of sexual harassment and assault. *See Gebser*, 524 U.S. at 286 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)).

III. The New Rule's Reliance on *Gebser* and *Davis* Is Arbitrary and Capricious Because Those Cases Involved Private Title IX Suits Seeking Monetary Damages, and the Considerations Governing Administrative Enforcement by the Department Are Very Different.

The Department's reliance on *Gebser* and *Davis* is misplaced. In *Gebser* and *Davis*, the Supreme Court set heightened standards for liability in cases brought against schools for failure to address harassing conduct under Title IX's implied private right of action for money damages. *See Gebser*, 524 U.S. at 277; *Davis*, 526 U.S. at 632 (requiring a school's actual knowledge of, and deliberate indifference to, harassing conduct for purposes of private claims for money damages). The New Rule seeks to align the Department's own administrative enforcement and the rules dictating when schools can discipline students with the *Gebser* and *Davis* framework. But neither case purported to address the rules that should govern the Department's investigations. And because administrative enforcement of Title IX by the federal government implicates very different considerations than does a private lawsuit for damages, it was arbitrary and capricious for the Department to rely on those cases.

Crucial to the Court's decisions in *Gebser* and *Davis* was the fact that Congress had not expressly created a private right of action to enforce the statute. Rather, it was the Court itself, in *Cannon,* 441 U.S. at 717, that had created such a right. *See also Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 72-73, 75-76 (1992) (private right of action extends to sexual harassment). The statutory text expressly authorizes only one form of enforcement—carefully regulated administrative proceedings brought by the Department to terminate federal funds. 20 U.S.C. § 1682.

When it first crafted the heightened standard of liability in *Gebser*, 524 U.S. at 284, the Court pointed to the lack of an express private right of action as giving it "a measure of latitude" to craft the remedies that would apply when private parties sued under Title IX. In particular, the Court was concerned about imposing a standard that would lead to "unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs." *Id.* at 285.

As *Gebser* itself recognized, the statutory procedure for administrative enforcement by the federal government necessarily supplies the very notice that the Court feared would be absent in a retrospective damages suit brought by a private party. *See id.* at 288-89. Further, by only holding schools liable if they have "actual knowledge" of sexual harassment, the Department's administrative enforcement, rather than seeking primarily to compensate individual victims, aims to prevent violations before they occur.

Courts across the country have recognized that the Department's administrative enforcement of Title IX serves a different purpose, and thus follows different standards, than private damages litigation under the statute. "What funding recipients' responsibilities are under Title IX and what they can be held liable for in a private cause of action for damages . . . are not one and the same." *Doe v. Bibb Cty. Sch. Dist.*, 126 F. Supp. 3d 1366, 1377 (M.D. Ga. 2015), *aff'd*, 688 F. App'x 791 (11th Cir. 2017); *Karasek v. Regents of the Univ. of California*, No. 15-cv-03717-WHO, 2015 WL 8527338, at *13 (N.D. Cal. Dec. 11, 2015) (similar); *cf. Roe v. St. Louis Univ.*, 746 F.3d 874, 883 (8th Cir. 2014) ("[T]he Supreme Court has cautioned that 'alleged failure to comply with the [Title IX] regulations' does not establish actual notice and deliberate indifference and it has never held that 'the implied private right of action under Title IX allows recovery in damages for violation of [such] administrative requirements.'") (quoting *Gebser*, 524 U.S. at 291-92).

The Department itself has long taken the same position. Since *Gebser* and *Davis*, the Department has consistently stated that those cases did not affect the standards that apply in its administrative enforcement proceedings. *See* Richard W. Riley, U.S. Sec'y of Educ., U.S. Dep't of Educ., Dear Colleague Letter regarding *Gebser v. Lago Vista* (Aug. 31, 1998) (the "1998 Dear Colleague Letter"), https://www2.ed.gov/offices/OCR/archives/pdf/AppC.pdf; Richard W. Riley, U.S. Sec'y of Educ., U.S. Dep't of Educ., Dear Colleague Letter regarding *Gebser v. Lago Vista* (Jan. 28, 1999), https://www2.ed.gov/News/Letters/990128.html. In particular, the Department explained, *Gebser* did not alter the fundamental obligations of schools to take prompt action to address sexual harassment, because the Court had "expressly distinguished the limits on private recovery of money damages from the Department of Education's enforcement of Title IX." 1998 Dear Colleague Letter at 1.

Successive Department policy documents across multiple presidential administrations unfailingly distinguished the Department's administrative enforcement of Title IX from private claims for money damages against schools. *See e.g.*, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512, 5512 (Jan. 19, 2001) (the "2001 Policy") ("reaffirm[ing] the compliance standards that OCR applies in investigations and administrative enforcement of Title IX" and "re-ground[ing] these standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages"); Stephanie Monroe, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., 2006 Dear Colleague Letter (Jan. 25, 2006), https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html ("2006 Letter") (stating that the 2001 Policy "outlines standards applicable to OCR's enforcement of compliance in cases raising sexual harassment issues" and distinguishing these standards from those "applicable to private Title IX lawsuits for monetary damages").

The 2001 Revised Guidance, which remained in effect until superseded on August 14, 2020, by the New Rule, clarified that the Office for Civil Rights ("OCR") policies for the administrative enforcement of Title IX were unaffected by *Gebser* and *Davis* because both cases only addressed the liability standards for private Title IX sexual harassment lawsuits seeking monetary damages. *See* 2001 Revised Guidance at i-iv (stating that the liability standards used in *Gebser* and *Davis* "are limited to private actions for monetary damages" and that those cases "did not change a school's obligations to take reasonable steps under Title IX and the regulations to prevent and eliminate sexual harassment as a condition of its receipt of Federal funding," a position that was "uniformly agreed" upon by the institutions and individuals who submitted comments). In 2006, OCR issued a guidance document, Dear Colleague Letter: Sexual Harassment Issues,[23] that reiterated schools' "essential" obligation to prevent and remedy sexual harassment, reaffirmed the 2001 Revised Guidance as the operative statement of OCR's enforcement policies for sexual harassment, and expressly distinguished OCR's administrative enforcement standards from those applicable to private Title IX damages lawsuits.

Indeed, in the preamble to the New Rule, the Department conceded that neither *Gebser* nor *Davis* requires it to redefine "sexual harassment" in the more restrictive way it has. New Rule at 30,033. But the Department utterly could not explain why it was still simply plugging the standards that those cases applied to private damages suits into the very different context of administrative enforcement. It thus entirely failed to justify its "change[] [of] course" from longstanding policy. *Dep't of Homeland Sec.*, 140 S. Ct. at 1913.

On June 18, 2020, the Supreme Court held that the Department of Homeland Security violated the APA when it treated a prior judicial ruling invalidating the *provision of benefits* to

[23] *See* 2006 Letter.

certain unauthorized immigrants as necessarily invalidating the *forbearance from deportation* of those immigrants. *Id.* at 1911. The Department here committed the same error. It treated a judicial ruling addressing the scope of an implied private right of action as necessarily dictating the remedies in the very different context of administrative enforcement. And it did so without justifying why imposing that standard serves Title IX's mandate to eliminate sexual harassment. That failure renders the New Rule arbitrary and capricious and in excess of the Department's statutory authority. *See id.* at 1910, 1913 (arbitrary and capricious for an agency to fail to "consider . . . important aspect[s] of the problem" before the agency and to supply the requisite "reasoned analysis" (citing *State Farm*, 463 U.S. at 57)); 20 U.S.C. § 1682 (rules must "effectuate" Title IX).

CONCLUSION

The New Rule is arbitrary and capricious and undermines the goals of Title IX because it arbitrarily creates a double standard by singling out sexual harassment for less favorable treatment than other forms of harassment; outlines a required grievance process that will deter victims from coming forward and protect schools that fail to protect their students; and applies the heightened standards imposed by private Title IX lawsuits seeking monetary damages—*Gebser* and *Davis*—without considering important aspects of that application. As such, Plaintiffs' motion for summary judgment should be granted.

Dated: January 8, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lauren E. Snyder, hereby certify that on January 8, 2021, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

Respectfully submitted,

/s/ Lauren E. Snyder
Lauren E. Snyder

(/news/2021/01/22/live-updates-latest-news-coronavirus-and-higher-education) Biden Orders Guidance

#News (/news)

A Long and Complicated Road Ahead

colleges respond to sexual assault on campus is one of President Biden's
t it's likely to be an uphill battle.

By Greta Anderson // January 22, 2021

Joe Biden entered the White House this week with high and wide-ranging expectations from higher education leaders, advocates for survivors of sexual violence and students for how his new administration will require colleges to handle and reduce sexual assault on college campuses.

In addition to addressing the public health and economic consequences of the pandemic, supporting the ongoing movement for social justice and equity for Black Americans, and trying to unite a politically polarized

at Boston College and author *The Transformation of Title IX: Regulating Gender Equality in Education* (Brookings, 2018).

Melnick noted that Biden was a "major factor" in the Obama administration's emphasis on reducing campus sexual assault. As vice president during that eight-year period, Biden led the administration's It's On Us campaign (https://obamawhitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus) and visited colleges to promote awareness of the problem and advocate for prevention strategies, such as bystander intervention, or encouraging and training students, particularly young men, to intervene when they see a classmate in a dangerous situation. He wrote (https://joebiden.com/womens-agenda/) the 1990 Violence Against Women Act, which aimed to protect women from gender-based violence.

Aya Gruber, a law professor at the University of Colorado, Boulder, who writes about feminism and the criminal justice system, recalled when Biden said (https://www.cbsnews.com/news/joe-biden-speaks-out-against-campus-sexual-assault/), "If a man raised his hand to a woman, you had the job to kick the living crap out of him," during a White House event promoting men's involvement in the fight against campus sexual assault.

Protecting women and strongly punishing those who commit sexual violence is "part of Biden's brand," Gruber said. His past rhetoric and policy positions on campus sexual assault offer some idea of how Biden's Department of Education will address the issue. He has so far vowed to "immediately" put an end (https://joebiden.com/womens-agenda/) to the Title IX regulations

campus hearings for sexual assault investigations. The regulations also exclude sexual misconduct that occurs off campus (https://www.insidehighered.com/news/2020/05/12/new-title-ix-regulation-sets-location-based-boundaries-sexual-harassment-enforcement) from oversight under Title IX and apply a more limited definition of sexual harassment.

Several women's groups and organizations that support survivors' rights, such as the advocacy group Know Your IX, want the DeVos regulations gone (https://www.insidehighered.com/quicktakes/2020/12/11/gender-equity-groups-urge-biden-rescind-devos-title-ix-rules) . They say students who are sexually assaulted or harassed were better off under the 2011 Title IX guidance issued by the Obama administration (https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf) , when institutions were advised to investigate and adjudicate all reports of sexual misconduct, "regardless of where the conduct occurred." The guidance, commonly referred to as the 2011 Dear Colleague letter, said that a single incident of sexual harassment could prompt a Title IX investigation and that institutions must use a preponderance of the evidence standard when determining a student or staff member's guilt.

DeVos rescinded the 2011 guidance (https://www.insidehighered.com/news/2017/09/25/education-department-releases-interim-directions-title-ix-compliance) during her first months as education secretary in 2017. Biden has pledged to reinstate it. His plan to address violence against women (https://joebiden.com/vawa/) published online says his administration will "restore" the 2011 guidance that "outlined for schools how to fairly conduct Title IX proceedings."

Biden's campaign website (https://joebiden.com/womens-agenda/) , which details his agenda for women's issues, says the Education Department under DeVos has "rolled back the clock and given colleges a green light to ignore sexual violence and strip survivors of their civil rights under Title IX, guaranteeing that college campuses will be less safe for our nation's young people."

His administration will "stand on the side of survivors, who deserve to have their voices heard, their claims taken seriously and investigated, and their rights upheld," the comments on the website say.

Civil liberties groups and advocates for the rights of students accused of sexual misconduct are dismayed by Biden's stated intention to reinstate the 2011 guidance. They argue that the guidance led to colleges violating free speech and due process rights. Supporters of the DeVos regulations, such as the Foundation for Individual

those accused of it, he said.

Bartlett noted that a Campus Climate Survey on Sexual Assault and Misconduct by the Association of American Universities found a slight uptick in rates of sexual assault (https://www.insidehighered.com/news/2019/10/15/underreporting-remains-top-issue-universities) at top colleges between 2015 and 2019, and reporting of incidents remained low throughout this time period. Two surveys were conducted, one in 2015, which involved 27 colleges, and another in 2019, in which 33 colleges participated. The 2019 survey found the overall rate of sexual assault was 13 percent for all students and nearly 26 percent for women undergraduates at those colleges, according to an AAU report about the data (https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf) . There was a 3 percent increase in the rate of sexual assault among undergraduate women between 2015 and 2019 at the colleges that participated in the surveys, the AAU report said.

“Not only did they find no improvement, they found it got worse,” Bartlett said.

Melnick, the Boston College professor, said the AAU survey and other data available about the prevalence of campus sexual assault are not strong enough to conclude whether or not the 2011 guidance was effective. There isn’t any empirical evidence that suggests that Title IX guidance issued during the Obama administration made the issue worse, he said. But if the Biden administration intends to revert to the former guidance, it may soon have to provide data to support that decision, Melnick said.

“The current debate over evidence -- inconclusive as it is -- will loom larger in the future,” he said in an email.

In the years since the guidance, several federal appeals courts have also struck down (https://www.insidehighered.com/news/2019/07/01/appeals-court-finds-purdue-may-have-been-biased-against-man-accused-sexual-assault) parts of the Title IX processes that many colleges developed following the Obama administration’s guidelines, deeming them “unfair” (https://www.insidehighered.com/quicktakes/2020/06/02/federal-appeals-court-defines-fairness-title-ix-policies#:~:text=The%20three%2Djudge%20panel%20concluded,form%20of%20cross%2Dexamination%20and) and sometimes discriminatory against men (https://www.insidehighered.com/quicktakes/2020/07/30/ninth-circuit-adopts-%E2%80%98simpler%E2%80%99-method-accused-student-claims) .

The DeVos regulations rely heavily on these federal court opinions and went through a formal rule-making process that can't simply be revoked, as some advocacy groups for sexual assault survivors are urging Biden to do, Sapp said. Even the most contested item in the DeVos regulations -- the cross-examination requirement -- has been backed by several appeals court decisions and will be applicable to colleges in those judicial circuits even if the Biden administration stops enforcing the regulations, he said.

“The administration can set a regulatory floor, but they can’t build a roof over what the court’s jurisdiction is,” he said. “They can’t say colleges can’t provide this due process protection when a federal court says that you already have to have that.”

Sage Carson, manager of Know Your IX, endorses halting enforcement of the DeVos regulations, but she said the challenges student survivors face have changed significantly in the decade since the 2011 guidance was issued and returning to it isn’t going to effectively address those new challenges.

“Survivors on campus are facing horrendous obstacles to getting support from their school that are nothing like the Obama administration was dealing with,” Carson said. “My fear is that the Biden administration will come in and say, ‘We’ve dealt with this issue before, we know how to do this,’ and not take the time to understand the needs of students right now in this unique moment.”

Carson described obstacles such as a “huge uptick” in students accused of sexual assault filing retaliatory countercomplaints or defamation lawsuits against their accusers. These actions can mean survivors do not receive the support they need from their college or end up in debt from legal fees, she said.

Colleges and students have also been through bouts of “whiplash” as they've had to make policy adjustments based on the political positions of the president in office, Carson said. Some institutions have been consistently “awful” on protecting students from sexual misconduct, but other institutions attempted to comply (http://www.insidehighered.com/news/2020/08/14/colleges-implement-changes-meet-title-ix-deadline) with the Trump administration’s requirements and experienced “confusion, frustration and a lack of resources,” Carson said.

The lack of clarity and conflicting policies and rhetoric has frustrated students and discouraged some from filing sexual misconduct reports, she said.

“There will be schools that are strained by this back-and-forth,” she said. “To restore confidence in survivors

(https://www.insidehighered.com/quicktakes/2020/03/27/major-title-ix-violations-identified-penn-state) between the Education Department and individual colleges that outline how those colleges must improve their Title IX policies and procedures, McDonough said. The DeVos regulations are just one piece of the puzzle, and eliminating them doesn't change how colleges must deal with sexual misconduct moving forward, he said.

College officials would appreciate "more flexibility" from the Biden administration -- such as guidance that loosens some requirements of the DeVos regulations -- but they also spent months pouring time and energy into adjusting their policies to meet the new standards during the coronavirus pandemic, McDonough said.

"We're tired," he said. "Don't give us one more thing to do this academic year. Let us get our students back to as close as we can to normal."

The Biden administration should begin the work of creating new Title IX regulations that strike a balance for all sides, including those who experience sexual assault, those accused of it and the college officials that are legally responsible for carrying out the procedures, McDonough said. What college officials are hoping for is a "thoughtful" look at how to amend or replace the DeVos regulations with what all sides feel is the fairest possible process, he said.

"Otherwise we're going to boomerang for years," McDonough said. "How are we going to get ourselves, as a broad community, to a place where we feel like what we've got is pretty fair? That rhetorical question needs to guide a fair amount of the decision making in this next administration."

Sapp, who is also deputy Title IX coordinator at Austin College in Sherman, Tex., said Biden and the Education Department officials working under him should not focus on rhetoric painting the DeVos regulations as an "attack on survivors" and listen to more than just one line of thought on the issue. Sapp believes the DeVos regulations are a "good starting point" for Biden to build on, but that the politics surrounding them will deter Biden from publicly recognizing that.

"Part of what Biden has demonstrated is that he's open to diversity of ideas and thought," Sapp said. "That needs to be demonstrated in the ideas that he has on Title IX … If you're going to put forward a Title IX regulation that's going to stand the test of time, it's going to have to have input from across the board."

Gruber, the University of Colorado law professor, is not convinced there can be a compromise on Title IX.

that she and other survivors have not forgotten the story of Tara Reade (https://www.nytimes.com/2020/05/31/us/politics/tara-reade-joe-biden.html) , the woman who said she was sexually assaulted by Biden in 1993, and others who said he inappropriately touched them.

"That's something that our team is grappling with every day as we approach this administration," Carson said. "That's something we're going to remember moving forward. We should always be supporting equity and supporting survivors, not just when it's convenient."

Read more by *Greta Anderson*

Letters may be sent to letters@insidehighered.com (mailto:letters@insidehighered.com) .

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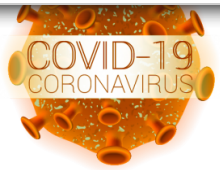

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#Quick Takes (/quick-takes)

Dept. of Ed Says Title IX Does Not Apply to LGBTQ Discrimination

By Greta Anderson // January 12, 2021

The United States Department of Education's Office of the General Counsel published a memorandum (https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=) on Friday that states that LGBTQ students are not expressly included in protections under Title IX, the law that prohibits sex discrimination at federally funded institutions.

Questions about how Title IX applies to LGBTQ students surfaced after the U.S. Supreme Court's landmark ruling in June (https://www.insidehighered.com/news/2020/06/16/landmark-supreme-court-ruling-could-redefine-title-ix), Bostock v. Clayton County, which cemented protections for LGBTQ workers under Title VII of the Civil Rights Act of 1964, the law that prohibits workplace discrimination based on race, sex, religion or national origin. The Supreme Court determined that "sex" under Title VII should be interpreted to include LGBTQ people, when they face discrimination based on their sexual orientation or gender identity.

discrimination) that it would investigate some Title IX complaints that allege discrimination based on homosexuality or transgender identity, but that some exceptions remain for Title IX enforcement. For example, the department said in previous letters that it is not discrimination against transgender students for a school to maintain separate sports teams based on biological sex.

Friday's memo further maintained that OCR should only consider certain forms of discrimination based on LGBTQ identity as discrimination under Title IX and said that "sex" should only be interpreted to mean "biological sex, male and female." Title IX allows for exceptions to the law based on biological sex, such as permitting schools to have separate bathrooms for male and female students, and therefore a claim that a transgender student was disallowed from using the bathroom not of their biological sex would not be discrimination, the memo said. The memo outwardly contradicts recent federal appeals court decisions (https://www.aclu.org/press-releases/fourth-circuit-court-appeals-again-rules-favor-gavin-grimm) on the matter.

The Human Rights Campaign, an LGBTQ rights advocacy organization, said in a press release (https://www.hrc.org/press-releases/department-of-education-publishes-memorandum-misconstruing-supreme-courts-bostock-decision) that the department, in the Trump administration's final days, is "misconstruing" the Supreme Court's Bostock decision. Alphonso David, president of the campaign, said in the release that the memo "is unconscionable and legally flawed."

"Over the last four years, Secretary DeVos has repeatedly attacked the LGBTQ community -- especially transgender students -- leaving an egregious record of recruiting anti-LGBTQ extremists," David said. "The Biden-Harris administration and Secretary Designate Miguel Cardona must urgently rescind this discriminatory guidance."

The department's interpretation of how Title IX applies to LGBTQ students is not expected to last long. President-elect Joe Biden, a Democrat, will be inaugurated in less than two weeks, and the department will likely be turned over to Cardona, Biden's nominee for education secretary (https://www.insidehighered.com/news/2021/01/04/biden-selects-miguel-cardona-education-secretary) .

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#Quick Takes (/quick-takes)

Gender Equity Groups Urge Biden to Rescind DeVos Title IX Rules

By Greta Anderson // December 11, 2020

More than 100 gender equity and civil rights advocacy organizations signed a letter (https://nwlc.org/wp-content/uploads/2020/12/Biden-Harris-Title-IX-sexual-harassment-sign-on-letter-12.9.20-vF.pdf) to the incoming Biden administration's transition team recommending that President-elect Joe Biden and Vice President-elect Kamala Harris stop enforcement of and move to rescind (https://www.insidehighered.com/quicktakes/2020/11/20/colleges-want-biden-undo-much-what-devos-did) new regulations that reshaped how colleges respond to reports of sexual misconduct on campus. The new rules were put in place (https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations) by the U.S. Department of Education in May and have since come under fire (https://www.insidehighered.com/news/2020/07/13/understanding-lawsuits-against-new-title-ix-regulations) from higher education associations, advocates for survivors of sexual assault and women's rights organizations.

The letter, signed by the National Women's Law Center, the American Federation of Teachers, Know Your IX and 100 other groups, offered several steps the new administration should take to "reverse the damage caused by

%E2%80%98failed%E2%80%99-will-seek-public-input-new) for how colleges respond to sexual misconduct.

"We are grateful for President-Elect Biden's long track record of and continued commitment to supporting student survivors and for Vice President-Elect Harris's work to end sexual harassment and advance gender equity," the letter said. "Under the Biden-Harris administration, we look forward to the Department returning to its role of protecting rather than eroding students' civil rights."

The organizations also suggested that the Biden administration create a White House task force for sexual harassment in schools, fill gender equity positions in both the White House and Department of Education, and conduct a "listening tour" with students and survivors of sexual assault to evaluate how the Trump administration's Title IX regulations have impacted them (https://www.insidehighered.com/news/2020/08/14/colleges-implement-changes-meet-title-ix-deadline), the letter said. The letter also called on Biden and Harris to double the amount of federal funding requested by the department's Office for Civil Rights, which handles Title IX complaints and investigations of colleges accused of mishandling sexual misconduct reports.

The Biden administration should additionally support key congressional legislation to combat sexual harassment in schools and improve the Department of Education's collection of data on sex discrimination on campuses, the letter said. The newly staffed department should also address the recent U.S. Supreme Court decision (https://www.insidehighered.com/news/2020/06/16/landmark-supreme-court-ruling-could-redefine-title-ix) that protects LGBTQ people from employment discrimination and issue new Title IX regulations that offer similar protections for LGBTQ students (https://www.insidehighered.com/quicktakes/2020/09/02/ed-dept-updates-response-lgbtq-student-discrimination) on campus, the letter said.

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Plenary II: Navigating the new Title IX hearing and achieving due process (CLE 1.0)

Navigating the new Title IX Hearing and Achieving Due Process

2021 Sexual Harassment in Education Conference

Berkeley Center on Comparative Equality & Anti-Discrimination Law

Presenter and Moderator Bios

- **Amy Oppenheimer, Managing Partner, Oppenheimer Investigations Group LLP**
- **Ruth Jones - University Counsel-Civil Rights, California State University**
- **Lauren Groth, Attorney, Hutchinson, Black & Cook**
- **Stephanie Penrod, Managing Attorney, Family Violence Law Center**

Overview of the Process

Ruth Jones

Title IX Regulations and a New Process for Resolving Sexual Harassment Complaints

Effective August 20, 2020, new Title IX Regulations required major procedural changes to how colleges and universities resolve sexual harassment complaints.

Among other requirements, the regulations require colleges and universities to use live hearings to resolve complaints.

In addition to the new regulations, colleges and universities must apply other procedural requirements from federal and state laws, case law and federal guidance to hearings.

Hearings and Title IX Regulations

- Broadens definition of sexual harassment to include dating violence, domestic violence and stalking
- Permits universities to use alternative procedures for sexual harassment complaints that do not meet the Title IX regulation definition of sexual harassment
- Applies to both student and employee complaints
- Requires a hearing to resolve complaints
- Cross-examination must be conducted by a party's advisor
- Party advisors must be permitted to ask all relevant questions including those challenging credibility
- Colleges and universities must provide an advisor if a party does not have one
- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility

The Violence Against Women Act (VAWA)

Officials who conduct hearings must be trained in a manner that “protects the safety of victims” and “promotes accountability.”

Requires the institution to permit the parties an Advisor of their Choice during the process (interviews, meetings, hearings).

The Violence Against Women Reauthorization Act of 2013
Regulations, 34 C.F.R. § 668.46

California State Law

CA Education Code – CAL. EDUC. CODE § 67386 (2016) (Affirmative Consent Law)

- Trauma-informed training program for campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence, and stalking cases
- The standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.

California State Law

CAL. EDUC. CODE § 66281.8 (2020)

- The complainant does not have the burden to prove, nor does the respondent have the burden to disprove, the underlying allegation or allegations of misconduct.
- Limitations on the use of sexual history and dating relationship evidence
- Cross-examination by a party or the party's advisor is prohibited
- At the hearing, a party can object to

Procedural Due Process : What Process is Due?

"[D]ue process is flexible,and calls for such procedural protections as the particular situation demands.“

Morrissey v. Brewer, 408 U.S. 471, 481 (1972)

California Due Process and Sexual Assault Cases

- *Doe v. University of Southern California*, 246 Cal.App.4th 221 (2016)
- *Doe v. Claremont McKenna College*, 25 Cal. App. 5th 1055(2018)
- *Doe v. Keegan Allee*, 30 Cal. App. 5th 1036 (2019)

Doe v. Allee, 30 Cal. App. 5th 1036 (2019)

When is a hearing required?

1. A student is accused of sexual misconduct;
2. faces serious disciplinary sanctions, and
3. the credibility of witnesses is central to the adjudication of the allegations against him.

What procedure is required?

1. Student must have the ability to ross-examine witnesses, directly or indirectly,
2. at a hearing at which the witnesses appeared in person or by other means
3. before a neutral adjudicator with the power to make findings of credibility and facts.

Challenges of Implementing a Sexual Harassment Hearing Process

- Harmonizing the requirements from federal laws and regulations, case law and state laws
- Deciding whether to use a single process for cases that do not require the Title IX regulation procedures
- Implementing cross-examination without the rules of evidence
- Clarifying the role of hearing advisors
- Admissibility rulings without rules of evidence
- Communicating new procedures to community
- Likelihood of having to revise policy and procedure to implement guidance or revised regulations by the new administration

Being an Advocate/Support Person

Stephanie Penrod

Polling

- **What is your role?**
  - Survivor
  - Advocate
  - Attorney
  - Other (?)
- **What is your familiarity with Title IX?**
  - I am very familiar with Title IX
  - I am slightly familiar
  - I know very little - just what I read in the news
  - I know nothing about Title IX
- **Clients with Title IX issues**
  - I have had several clients with T9 issues
  - I have had one or two clients with T9 issues
  - I have never had a client with T9 issues

Prevalence of IPV on College Campuses

- **The risk for intimate partner violence** (IPV), including "physical, sexual, or psychological harm by a current or former partner or spouse," **among women is greatest between the ages of 18 to 24 years**, a period when many women enter college. (CDC 2014)
- Women are far more likely than men to experience sexual and physical violence, or to be killed as result of IPV. (CDC, DVRC)
- **Among sampled American college students, 43 % of women (vs. 28 % of men) reported experiencing physical abuse, sexual abuse, or other forms of IPV** (e.g., controlling behavior, verbal abuse, excessive calling or texting, etc.), and **over half of the students reported having these experiences while in college**. (Knowledge Networks 2011)
- Women are more likely than men to experience physical limitations and overall performance and cognitive impairment as a result of IPV, which elevate their risk for college interruption or permanent dropout. (Straight Harper Arias 2003)

What does the hearing process look like?

- Every institution must now provide live hearings for Title IX grievance proceedings. California now requires that a hearing must be held with opportunity to cross-examine in Title IX cases (current challenges in court).
- Student may have **one advocate or support person** present; may be a lawyer but previously could not peak on behalf of or communicate verbally with student (changed by Final Rule)
  - Under Final Rule, the advisor is a direct participant in the proceedings - much more similar to court. The parties' advisors must be allowed to cross-examine witnesses and the other party, with certain restrictions.
- Accommodations:
  - Either party may request that the hearing be conducted with the parties in separate rooms, with the parties able to see and hear each other in real time
  - Any party or witness may be allowed to participate in the hearing remotely.
  - The institution must record all hearings, even if the hearing is in person.

Hearing Process Continued

- Both parties may appear at the hearing but may also choose not to participate, BUT the hearing will proceed in their absence
  - Under Final Rule, complainant cannot refuse to participate or will lose the case (because their statements will not be considered without subjecting to cross). Same problem with witnesses. Respondent can refuse to participate.

Additional Accommodations

- Evidence rules do not generally apply, most relevant evidence is admissible unless harassing or repetitive.
  - A trained hearing officer must oversee the hearing and exclude any question or evidence deemed to be irrelevant. Final Rule requires all evidence be admitted unless it is irrelevant, so harassing and repetitive questions will be allowed. **It also prohibits any statements from coming into evidence unless the person who made the statement is subjected to cross.**
  - Prior sexual history/practices typically excluded except to prove consent
- Hearing officer or body decides whether violation occurred based on a **preponderance of evidence** (more likely than not).
  - Based upon the findings of the hearing officer or body and any recommendation for sanctioning, the Dean of Students or their designee will determine the sanction to be imposed.
  - Both parties have the option of an administrative written appeal which must be based on newly discovered evidence not available at time of hearing; significant procedural error, or other good cause arguments.

Tips for Practitioners

- **Preserve evidence!** Screenshots of texts, social media, call logs, rideshare receipts; physical evidence such as torn clothing; GPS info.
- **Request extensions** as needed for “good cause”
  - NOTE: Extensions will also be granted to respondent
- **Look for inconsistencies** - is info missing? Factually inaccurate? Out of context? Any bias by investigator

The Hearing Process and Survivors

Lauren Groth

Survivor Concerns: Background

- The Dear Colleague Letter and pre-2020 Title IX hearing requirements
- Civil liability and Title IX.
  - Erroneous Outcome Claims. *See Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940 (9th Cir. 2020)
  - Procedural Due Process Under 1983. *See Austin v. Univ. of Or.*, 925 F.3d 1133 (9th Cir. 2019)
- Rectifying "inequities" in school Title IX proceedings
  - The #MeToo Movement and Ongoing Challenges for Survivors
  - The Rise of the Respondent Rights Movement

Survivor Concerns: Cross Examination

- ”Live, Direct and in Real Time”
- What’s Actually Required?
- Re-Traumatization
- The Problem with Advisors
- Impacts on Reporting

Survivor Concerns: Exclusion of Evidence

- Disregard of oral and written statements for those who do not participate fully.
- A standard that is far beyond the rules of evidence in court.
- Punishes survivor anxiety and fear.
- Impact on expert and third-party evidence.
- Potential manipulation by offenders.

Survivor Concerns: Presumptions and Burdens

- Presumption of No Sexual Harassment.
  - Improper Import of Criminal Standards
  - Perpetuates Negative Stereotypes of Victims
  - Conflicts with Equity and Credibility Standards

- Burden of Proof
  - Drastic Change in Evidentiary Requirement for Administrative Proceedings
  - Inconsistent with General Standard in Civil Rights Cases
  - Ignores Circumstances That Could Lead to Requirement of Clear and Convincing Standard

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Rape Exceptionalism Returns to California: Institutionalizing a Credibility Discount for College Students Reporting Sexual Misconduct

Kelly Alison Behre

RAPE EXCEPTIONALISM RETURNS TO CALIFORNIA: INSTITUTIONALIZING A CREDIBILITY DISCOUNT FOR COLLEGE STUDENTS REPORTING SEXUAL MISCONDUCT

KELLY ALISON BEHRE*

I. Introduction

Recent litigation filed by students disciplined for student conduct code violations involving sexual misconduct persuaded some federal and state courts to reconsider student rights in college disciplinary adjudications. Although most of the litigation was unsuccessful, the few, but significant, victories have been hailed as evidence that Title IX forced colleges to overcorrect their responses to campus sexual assault by abandoning procedural fairness for respondents.[1] This framing of the issue is misleading and contributes to problematic outcomes. Rather than apply settled law to address procedural errors in individual cases, a few courts created new, unprecedented procedural rights for college students accused of sexual misconduct.

Embedded within the discussion of why students facing college discipline for sexual misconduct need procedural protections not afforded to students facing other kinds of student misconduct is "rape exceptionalism"—the insidious myth that students reporting sexual assault are more likely to lie than students reporting other kinds of misconduct. By creating new procedural rights for student respondents in sexual misconduct cases to cross-examine complainants and witnesses in a live hearing setting in order to test credibility, courts are effectively ordering colleges to institutionalize processes that discount the credibility of students reporting sexual assault. They are forcing colleges to signal to their students that victims of sexual assault are less trustworthy and therefore must submit themselves to credibility testing in an adversarial setting that may not exist for students reporting other types of misconduct.

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* Professor Behre directs the Family Protection and Legal Assistance Clinic at the UC Davis School of Law.

1. *See* Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 102–03 (2017); *see also* Sarah L. Swan, *Procedural Discriminatory Dualism: Title IX and Campus Sexual Assault*, 73 OKLA. L. REV. 69 (2020).

This Article focuses on a 2019 California appellate opinion that required most public and private colleges in the state to rewrite their procedures for campus sexual misconduct adjudications.[2] It shifts the focus from the discussion about the individual rights of student respondents to the implications of this abrupt change in state law for California student victims of sexual assault. This Article further considers the potential impact of this case on a college's ability to respond to campus sexual assault.

II. Doe v. Allee[3]

A. Facts

The University of Southern California (USC) is a private college[4] that utilizes an investigatory model with a preponderance of the evidence standard for nonacademic campus discipline cases and a written appeal process with enumerated, qualifying grounds.[5] In 2014, a USC student reported that John Doe violated the USC Student Code of Conduct (SCC) when he sexually assaulted her.[6] The USC Title IX investigator twice interviewed both the complainant and the respondent (Doe) in person and asked the complainant additional questions by phone.[7] The investigator also interviewed witnesses proposed by both parties, reviewed text messages

2. This Article does not address the new Title IX regulations released by the Department of Education on May 6, 2020. It is important to note, however, that these new regulations mandate procedural protections for respondents in campus disciplinary cases involving gender-based violence that may lead to many of the same concerns identified in this Article. *See Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students*, U.S. DEP'T EDUC. (May 6, 2020), https://www.ed.gov/news/pressreleases/secretary-devos-takes-historic-actionstrengthen-title-ix-protections-all-students.

3. 242 Cal. Rptr. 3d 109 (Ct. App. 2019).

4. As used herein, the term "college" refers to both colleges and universities.

5. *SCampus Part B: Student Conduct Code*, USC: UNIV. OF S. CAL. (July 9, 2018), https://policy.usc.edu/scampus-part-b/ (listing the permissible grounds for appeals as new, relevant, and previously unavailable evidence; claims that the sanction was excessive or inappropriate; claims that the coordinator or panel failed to follow university rules or regulations).

6. *Doe*, 242 Cal. Rptr. 3d at 115–16, 118. Although Doe initially filed his lawsuit against USC under his own name, he proceeded under the pseudonym "John Doe" in his appeal. Therefore, I will refer to him as "Doe" in this Article as well. For a discussion about disciplined students' use of the Doe pseudonym to strengthen their claims, see Kelly Alison Behre, *Deconstructing the Disciplined Student Narrative and Its Impact on Campus Sexual Assault Policy*, 61 ARIZ. L. REV. 885, 903–04 (2019) [hereinafter Behre, *Deconstructing*].

7. *Doe*, 242 Cal. Rptr. 3d at 121–23.

submitted by the parties, and reviewed photographs of injuries submitted by the complainant.[8] The investigator found Doe responsible for violating six sections of the USC SCC, including sexual misconduct, and sanctioned him with expulsion from USC.[9] Doe submitted an internal written appeal to the USC Appeals Panel, which, in turn, recommended upholding five of the six violations.[10] The Vice Provost of Student Affairs approved the Appeals Panel's recommendation and affirmed the sanction of expulsion.[11]

In 2015, Doe filed a Writ of Administrative Mandate and an Ex Parte Application for Stay in the Superior Court of California, County of Los Angeles seeking to overturn his expulsion based on due process violations and investigator bias.[12] The trial court initially granted a stay of Doe's expulsion from USC and found that a justiciable controversy existed in spite of Doe's subsequent expulsion from USC in 2016 for separate

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8. *Id.* at 120–21.

9. *See Doe*, 242 Cal. Rptr. 3d at 123–24. The Title IX investigator found Doe responsible for violating the following sections of the USC SCC: section 11.53A (unwelcome sexual advances); section 11.53B (non-consensual sexual touching); section 11.53C (attempted non-consensual intercourse); section 11.53D (non-consensual intercourse); section 11.41 (use of illegal drugs); and section 11.36B ("causing reasonable apprehension of harm"). The investigator did not find Doe responsible for other alleged violations. *Id.* at 118 n.16, 124.

Specifically, USC found the complainant's report credible that Doe committed forcible sexual acts, including nonconsensual vaginal penetration with his penis. The complaint said that Doe grabbed her breast (resulting in some bruising) and ripped off her shorts. *Id.* at 116. When "[s]he tried to pull herself away by holding onto the headboard, . . . Doe pulled [her] hands down," and when she tried to push against his chest, she "could not push him away." *Id.* She explained that, because he was a football player, he was very strong. *Id.* The complainant described how Doe pulled her hands over her head and used one of his hands to hold them down. *Id.* She said that when she told him "'I can't' because I know I'm not allowed to for job purposes," he put "his hand 'aggressively' over her mouth, 'shush[ing]' her, and said, '[n]o one has to know.'" *Id.* She explained how frightened this made her not because she was worried about people knowing, but because she did not want to engage in this conduct. *Id.* She described how Doe then "flipped [her] over onto her stomach and continued to have sex with her from behind." *Id.* She reported that "[h]e pulled her head back by the hair, which 'really hurt[]' and caused her to say 'Ow.' He stuck several fingers in her mouth," which made her gag. *Id.* at 116–17. USC further found that Roe disclosed to several friends the next morning and that her friends described seeing bruising on the inside of Jane Roe's arms and legs that had not been there before the incident, which a friend documented with photographs and submitted to USC. *Id.* at 117–18.

10. *Id.* at 127.

11. *Id.* at 128.

12. *See id.* at 113, 128.

violations of the SCC related to several felonies.[13] Despite this preliminary approval, it ultimately denied Doe's writ.[14] Doe appealed the trial court's denial of his writ.

B. Holding

The California Court of Appeal, Second Appellate District, reversed the denial of the Writ of Administrative Mandate on the ground that USC's process for adjudicating sexual misconduct cases was fundamentally flawed.[15] The appellate court noted that colleges were historically only required to provide a student facing discipline with some kind of notice and some kind of hearing that does not necessarily include the same safeguards and formalities of a criminal trial.[16] However, the court further noted that "[i]n the case of competing narratives, 'cross-examination has always been considered a most effective way to ascertain truth'" and that as "'the greatest legal engine ever invented for the discovery of truth,'" it permits the fact finder to observe a witness's demeanor in assessing credibility.[17] After acknowledging that not every administrative process must afford a respondent an opportunity to confront and cross-examine witnesses, the court concluded that specific procedural requirements vary based on the situation and the interests involved.[18]

> In light of these concerns, we hold that when a student accused of sexual misconduct faces severe disciplinary sanctions and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university

13. After the trial court issued its stay reinstating Doe, USC again expelled Doe for violating independent SCC provisions related to a carjacking and robberies he committed with a knife near the USC campus. Doe was also criminally prosecuted for several felonies and sentenced to six years in state prison for the same underlying incidents. Nathan Fenno, *Former USC Tight End Bryce Dixon Sentenced to Six Years in State Prison*, L.A. TIMES (Apr. 21, 2016, 7:14 PM), https://www.latimes.com/sports/usc/la-sp-bryce-dixon-sentence-20160422-story.html.

14. *Id.*; *Doe*, 242 Cal. Rptr. 3d at 112. Of note, the record does not indicate that Dixon amended his pleadings to argue that he should have also been given the opportunity to cross-examine the victims and witnesses to his robberies or carjackings in a live hearing on campus, even though these complaints also led to his expulsion from USC.

15. *See Doe*, 242 Cal. Rptr. 3d at 138.

16. *Id.* at 130–33.

17. *Id.* at 133–34.

18. *Id.* at 135.

> provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (e.g., videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments.[19]

The *Allee* holding applies to all public and private colleges in California, impacting almost three million students.[20] In response, colleges across the state changed their procedures for investigating and adjudicating sexual misconduct complaints.[21] There are pending class action lawsuits attempting to retroactively apply *Allee* to closed cases, potentially extending its holding even further.[22]

III. How Did We Get Here?

A. Campus Misconduct and Due Process

Both private and public colleges enjoy wide discretion in how they investigate and adjudicate student code violations on their campuses. Public colleges, however, must provide students facing campus discipline with notice of the case against them and an opportunity to be heard.[23] There is a recent federal circuit split on whether or not public colleges must provide students accused of misconduct with a live hearing and an opportunity to cross-examine the complainant and adverse witnesses, but it is important to note that these new decisions all arose from litigation filed by students disciplined for sexual misconduct.[24]

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19. *Id.* at 136–37.

20. *See* Teresa Watanabe & Suhauna Hussain, *Ruling Affirming the Rights of Students Accused of Sexual Misconduct Roils California Colleges*, L.A. TIMES (Feb. 14, 2019, 5:05 PM), https://www.latimes.com/local/education/la-me-california-universities-title-ix-20190215-story.html; PUB. POLICY INST. OF CAL., CALIFORNIA'S HIGHER EDUCATION SYSTEM (Oct. 2019), https://www.ppic.org/wp-content/uploads/higher-education-in-california-californias-higher-education-system-october-2019.pdf.

21. Watanabe & Hussain, *supra* note 20.

22. *See, e.g.*, Doe v. Regents of the Univ. of Cal., No. RG19029617 (Cal. Super. Ct., Alameda Cty. Aug. 2, 2019).

23. *See* Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976); Goss v. Lopez, 419 U.S. 565, 579 (1975); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 151 (5th Cir. 1961).

24. *Compare* Doe v. Baum, 903 F.3d 575, 578 (6th Cir. 2018) ("[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."), *with* Haidak v. Univ. of Mass.-Amherst,

Private colleges are entitled to an even greater level of discretion because they are not subject to the same due process requirements of the Fifth and Fourteenth Amendments that govern public colleges.[25] Although private colleges cannot "arbitrarily and capriciously dismiss a student," they need only provide students accused of misconduct with procedural protections that meet a standard of "basic fairness" and comply with their own contractual obligations.[26] A few states provide additional minimum protections for students facing campus discipline, such as the right to retained counsel acting in an advisory or participatory role.[27] Similarly, some colleges provide expanded rights for student respondents and complainants, while others limit them, as is within their discretion under state and federal law.[28] In short, students facing discipline for campus

933 F.3d 56, 69 (1st Cir. 2019) (declining to adopt the *Baum* court's holding requiring state schools to provide respondents or their agents with a right to cross-examine complainants and other witnesses "because we have no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation.").

25. *See* Bleiler v. Coll. of Holy Cross, No. 11-11541-DJC, 2013 WL 4714340, at *4 (D. Mass. Aug. 26, 2013).

26. *Id*. at *5; Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 601 (D. Mass. 2016).

27. *See, e.g.*, North v. W. Va. Bd. of Regents, 233 S.E.2d 411, 417 (W. Va. 1977) (explaining that, in certain situations, student respondents have a right to representation by retained counsel at public university disciplinary hearings); *see also* N.C. GEN. STAT. ANN. § 116-40.11(a) (West 2013) (providing students responding to non-academic violations at public colleges with the right to have an attorney actively participate in all campus disciplinary procedures at their expense); ARK. CODE ANN. § 6-60-109(b)(1)(A)–(B) (West 2015) (granting the students disciplined with a suspension longer than ten days and the students who submitted complaints that resulted in that discipline the right to hire an attorney at their own expense to represent them in the appeals process).

28. *Compare* HARVARD LAW SCH., HARVARD LAW SCHOOL HANDBOOK OF ACADEMIC POLICIES 2019–2020, at XI(B) (2019), https://hls.harvard.edu/dept/academics/handbook/rules-relating-to-law-school-studies/xii-administrative-board/b-procedures-for-disciplinary-cases-except-for-cases-covered-under-the-law-schools-interim-sexual-harassment-policies-and-procedures-see-appendix-viii/ (providing that students facing discipline may examine all witnesses and appear with legal counsel, which the school will try to provide for students who desire but cannot afford), *with* HOWARD UNIV., HOWARD UNIVERSITY STUDENT HANDBOOK 2018–2019, at 90 (2018), https://www.howard.edu/students/hbook/H-Book.pdf (forbidding students' attorneys from attending, participating, or representing students in a student disciplinary hearing not involving sexual misconduct); *see also* STANFORD UNIV., THE STUDENT JUDICIAL CHARTER OF 1997 § II(A)(7) (2013), https://communitystandards.stanford.edu/policies-and-guidance/student-judicial-charter-1997#party (granting a responding student the right to be accompanied by a person of their choice to assist in responding to charges during judicial procedures).

misconduct do not currently enjoy a universal due process right to a live hearing, to cross-examine witnesses, or to bring retained counsel to any part of the disciplinary process.[29]

B. Sexual Misconduct on Campus

Colleges have always maintained the ability to prohibit different kinds of student behavior, on and off campus, through their student conduct codes, including criminal behavior (e.g., theft, assault, sexual assault, vandalism, illicit drug use, underage drinking), academic behavior (e.g., cheating, plagiarism), and honor-based or community-based behavior (e.g., lying to administrators, disrupting class, curfew violations, legal alcohol consumption, premarital sex, dress code violations, and any behavior reflecting poorly on the school).[30] Through student conduct codes, colleges have prohibited and adjudicated sexual misconduct for generations as they have other types of student misconduct,[31] even if their responses to reports of sexual misconduct violations were often inadequate.

Although sexual misconduct constitutes only a small percentage of student code violations potentially resulting in serious discipline, federal law creates some unique obligations for how colleges must respond to these types of cases. Title IX of the Educational Amendments of 1972 prohibits colleges from discriminating on the basis of sex in federally assisted education programs and activities.[32] The Campus Sexual Assault Bill of Rights of 1992 mandates that colleges provide victims of campus sexual assault with the same rights they provide to accused students during

29. *See, e.g.*, Jaksa v. Regents of the Univ. of Mich., 597 F. Supp. 1245, 1252–53 (E.D. Mich. 1984).

30. *E.g.*, *Church Educational System Honor Code*, BYU, https://policy.byu.edu/view/index.php?p=26 (last visited Aug. 17, 2020) (requiring enrolled BYU students to commit to "[l]ive a chaste and virtuous life, including abstaining from any sexual relations outside a marriage between a man and a woman," "[a]bstain from alcoholic beverages, tobacco, tea, coffee, vaping, and substance abuse," and "[o]bserve Brigham Young University's dress and grooming standards").

31. Examples of campus sexual assault investigations and adjudications are found in lawsuits filed by students disciplined for violations of student codes involving sexual misconduct. *See, e.g.*, Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 10–13 (D. Me. 2005); Donohue v. Baker, 976 F. Supp. 136, 140–41 (N.D.N.Y. 1997); Nzuve v. Castleton State Coll., 335 A.2d 321, 323 (Vt. 1975).

32. 20 U.S.C. § 1681 (2018).

disciplinary proceedings and that they provide victims with notification of proceeding outcomes.[33]

In 1997, the U.S. Department of Education, Office for Civil Rights (OCR) issued guidance on Title IX clarifying that schools could be liable for peer-to-peer sexual harassment for failing to take immediate and appropriate corrective action to remedy a hostile environment, which could be created by a single incident of sexual assault.[34] In 1999, the U.S. Supreme Court recognized a private cause of action under Title IX for peer-to-peer sexual harassment in specific circumstances.[35] In response, OCR issued revised guidance in 2001 explaining that it can promulgate and enforce regulations related to Title IX's mandate even in circumstances that would not give rise to a claim for monetary damage.[36]

OCR issued a "Dear Colleague Letter" in 2011 and a "Questions and Answers" letter in 2014 further clarifying colleges' obligations under Title IX, but rescinded both in 2017, rendering them no longer binding.[37] Despite this rescission, the Violence Against Women Reauthorization Act of 2013 ("VAWA 2013") codified some aspects of prior Title IX guidance though amendments to the Clery Act. The Clery Act requires colleges to provide a prompt, fair, and impartial disciplinary process for allegations of dating violence, domestic violence, sexual assault, and stalking.[38] Colleges must complete the process in a reasonably prompt timeframe, provide timely and equal access to information that will be used during informal and formal disciplinary meetings and hearings, and allow both the accuser and the accused to have an advisor of their choice present (including an attorney).[39]

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33. *Id.* § 1092(f)(8)(b)(iv)(II)–(III).

34. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (Mar. 13, 1997).

35. Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999).

36. U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES iii (2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

37. Letter from Candice Jackson, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf. To review 2011 and 2014 guidance, see Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

38. 34 C.F.R. § 668.46(k)(2)(i) (2020).

39. *Id.* § 668.46(k)(2)–(3).

Contrary to popular rhetoric, students responding to complaints of student code violations involving sexual misconduct (as well as dating violence, domestic violence, and stalking) do not have fewer due process rights than students responding to other types of student code violations.[40] They have more. They are the only students who have a federal right to timely process, to access the evidence gathered during the student misconduct investigation, and to have their attorney participate in an advisory role.[41]

C. Competing Narratives and Social Movements

Litigation does not exist in a vacuum. Narratives and counter-narratives play an essential role in policy debates and legal opinions. Competing narratives about campus sexual misconduct influence individual college responses, federal and state legislation, administrative guidance, and lawsuits about campus sexual misconduct. Research conducted over the past two decades consistently reveals campus sexual assault rates of approximately 20% for female students and approximately 5% for male students.[42] In a precursor to the #MeToo movement, student survivors of campus sexual assault created a strong narrative, replacing depersonalized statistics with individual stories detailing how campus sexual assault impacted their health and access to education.[43] Many shed their anonymity to share their experiences through the media and describe how inadequate

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40. *See generally* Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822 (2017).

41. *See id.* at 831–32.

42. *See* Tara N. Richards, *No Evidence of "Weaponized Title IX" Here: An Empirical Assessment of Sexual Misconduct Reporting, Case Processing, and Outcomes*, 43 L. & HUM. BEHAV. 180, 180 (2019) (reviewing decades of victimization surveys and noting that "[i]n light of these prevalence estimates, research must move beyond asking questions about whether gender-based violence is happening on college campuses and examine what happens when an incident occurs"); NAT'L SEXUAL VIOLENCE RES. CTR., STATISTICS ABOUT SEXUAL VIOLENCE 2 (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf ("One in 5 women and one in 16 men are sexually assaulted while in college.").

Although definitions of rape, sexual assault, and sexual misconduct vary between studies, research conducted by the federal government, professional organizations, the media, and individual campuses show similar rates. *See* Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 DRAKE L. REV. 293, 316–18 n.87, 88 (2017) [hereinafter Behre, *Ensuring Choice*].

43. Behre, *Deconstructing*, *supra* note 6, at 888.

college responses exacerbated trauma.[44] They leveraged social media to coordinate protests across different campuses and coordinate national campaigns.[45] Student survivors lobbied the Department of Education for better enforcement of their civil rights and filed successful lawsuits and administrative complaints based on Title IX and the Clery Act.[46]

The disciplined-student narrative (or counter-narrative) emerged as part of a backlash movement. It argued that colleges fearful of negative publicity and the wrath of the federal government overcorrected for earlier failures by adopting a presumption of guilt for all male students reported for sexual misconduct violations.[47] It changed the focus and empathy from student survivors of sexual misconduct to those accused and disciplined for sexual misconduct by labeling them the real victims and suggesting that there is an epidemic of male students wrongly disciplined for sexual misconduct.[48]

Those sharing the disciplined-student narrative argued that colleges should not investigate or adjudicate sexual misconduct but should instead report and defer to the police.[49] They used criminal language to conflate the student disciplinary process with the criminal law system and suggest that male students responding to reports of student code violations involving sexual misconduct need protection in the form of more robust due process rights.[50] They adopted the same legal tools used by student survivors by lobbying the Department of Education for new guidance and filing federal lawsuits.[51] *Allee* was the culmination of dozens of California state lawsuits filed by a single attorney advocating for disciplined students throughout the state.[52]

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44. *Id.* at 889.

45. *Id.* at 889–90.

46. *See id.* at 891–92.

47. *See id.* at 914.

48. *See id.* at 902–06.

49. *See id.* at 909–10, 918 (explaining that those who share the disciplined student narrative frame the debate about sexual assault through the lens of criminal law rather than civil rights in education).

50. *Id.* at 918; *see also* Brodsky, *supra* note 40, at 823.

51. Behre, *Deconstructing*, *supra* note 6, at 927.

52. *Cf.* Watanabe & Hussain, *supra* note 20 (noting that the disciplined-student's attorney had "pioneered much of the litigation on behalf of accused students").

IV. Why Does Allee *Matter?*

A. A Conspicuously Specific Holding

Allee explicitly created a new standard for due process rights in only some types of campus discipline proceedings. Its holding is both overbroad and underinclusive. USC uses the same single investigator model and written appeal process for all nonacademic student discipline, including: unauthorized entry; theft; "causing physical harm to any person in the [college] community"; "causing reasonable apprehension of harm to any person in the [college] community"; "destroying, damaging, or defacing the property of others"; "engaging in disruptive or disorderly conduct"; "engaging in or encouraging lewd, indecent, or obscene behavior"; unauthorized use or possession of firearms, knives, or other weapons; and "engaging in harassing behavior."[53] USC provides no right to confront accusers or witnesses through cross-examination in any of their student misconduct cases.[54] Yet, *Allee*'s holding does not apply explicitly to any of USC's student code of conduct cases outside of those involving sexual misconduct violations.[55]

Student code violations carrying potential sanctions of suspension and expulsion are not unique to violations involving sexual misconduct. If the *Allee* court was concerned that college disciplinary adjudications carrying potential sanctions of suspension or expulsion are sufficiently serious to warrant increased due process protections, it could have created a balancing test to hold that all students facing "serious discipline" are entitled to more robust protections, such as the right to a live hearing or cross-examination. But, it did not choose to do so. The court instead limited the holding solely to adjudications that included complaints of sexual misconduct violations.

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53. *SCampus Part B: Student Conduct Code*, *supra* note 5.

54. *See id.* It is also important to note that USC uses a preponderance of the evidence standard for all campus disciplinary cases. *Id.*

55. *See* Doe v. Allee, 242 Cal. Rptr. 3d 109, 138 (Ct. App. 2019) (limiting the announced procedural requirements to cases in which a student respondent is "accused of sexual misconduct for which he face[s] severe disciplinary sanctions"). The decisions in the U.S. Sixth Circuit Court of Appeals differ from *Allee* both in their limited applicability to public universities and in their factual analysis noting that the universities in question bear minimal burden and little cost because they already provide students facing non-sexual misconduct student code violations with an opportunity to cross-examine complainants during a live hearing (which is not the case at USC or many other California colleges). *See* Doe v. Baum, 903 F.3d 575, 582 (6th Cir. 2018); Doe v. Univ. of Cincinnati, 872 F.3d 393, 406–07 (6th Cir. 2017).

Similarly, credibility assessments are not unique to student disciplinary cases involving sexual misconduct.[56] If the *Allee* court was concerned that students responding to complaints primarily based on the credibility of a reporting witness need additional due process protections, it could have created a definition of fundamental fairness that required colleges to provide all students facing discipline based on a reporting witness's credibility with the right to confront the complainant through cross-examination during a live hearing. But it did not do so. Instead, *Allee* carved out a special rule for only cases including complaints of sexual misconduct.

In spite of the high rates of campus sexual assault, college adjudications of student code violations involving sexual misconduct remain a small percentage of all college adjudications.[57] Yet, the *Allee* court limited its holding to this small subset of campus misconduct cases without explanation. As such, the *Allee* holding is too narrow to achieve its stated goals of protecting students facing severe sanctions or providing additional confrontation rights to students responding to reports based on a single complainant.[58]

Allee is also inexplicably overbroad in its likely application by colleges. Rather than only including cases of campus sexual misconduct in which the sole evidence is the complainant's statement, *Allee* holds that the new procedural protections apply in all sexual misconduct cases based on the credibility of any witness.[59] This would include even the rare campus sexual assault cases with witnesses, such as the Brock Turner case at Stanford University, where two students witnessed and reported Turner for

56. There are many types of campus misconduct that might rely on the credibility of an individual complainant or witness. For example, a student might report another student for stealing a laptop or physically assaulting him or threatening her or hazing him or harassing her or breaking into his dorm room or plagiarizing her work or using illegal drugs.

57. For example, of the 2565 student misconduct cases the University of California, Berkeley, opened between January 1, 2016 and June 30, 2019, only sixty-six cases (2.6%) involved reports of sexual violence and sexual harassment (SVSH), and only twenty-one of those—less than one-third of SVSH cases opened—resulted in a suspension or dismissal. UC BERKELEY CTR. FOR STUDENT CONDUCT, SEXUAL VIOLENCE AND SEXUAL HARASSMENT CASES UNDER 1/1/16 UC POLICY ON SEXUAL VIOLENCE AND SEXUAL HARASSMENT JANUARY 1, 2016–JUNE 30, 2019, at 1 (2019), https://sexualassault.berkeley.edu/wp-content/uploads/2019/08/Finalized-Center-for-Student-Conduct-SVSH-Data-1_1_19-6_30_19.pdf.

58. *See* Doe v. Allee, 242 Cal. Rptr. 3d 109, 136–37 (Ct. App. 2019).

59. *Id.*

sexually assaulting an unconscious woman.[60] The *Allee* holding therefore applies to virtually all disciplinary cases including a report of sexual misconduct, a reality that some colleges responding to *Allee* note in their new procedures.[61]

Allee also applies to campus disciplinary cases involving other types of non-sexual misconduct violations of a student conduct code that co-occur with sexual misconduct, such as physical assault, threats, trespass, and harassment.[62] Furthermore, in response to amendments to the Clery Act in 2013 incorporating more forms of gender-based violence, many colleges use the same process to investigate and adjudicate all reports of sexual assault, dating violence, domestic violence, and stalking.[63] Consequently, at least some California colleges expanded the new procedural protections detailed in *Allee* to respondents in dating violence and stalking cases, even though they are judicially beyond the scope of *Allee*.

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60. *See* Lindsey Bever, *The Swedish Stanford Students Who Rescued an Unconscious Sexual Assault Victim Speak Out*, WASH. POST (June 8, 2016, 6:54 AM CDT), https://www.washingtonpost.com/news/morning-mix/wp/2016/06/07/the-swedish-stanford-students-who-rescued-an-unconscious-sexual-assault-victim-speak-out/.

61. *See, e.g.*, *Systemwide Policy Prohibiting Discrimination, Harassment & Retaliation, Sexual Misconduct, Dating & Domestic Violence, & Stalking Against Students & Procedure for Addressing*, CSU: CAL. ST. U. (rev. Mar. 29, 2019) (footnote 31), https://calstate.policystat.com/policy/6742744/latest/#autoid-58zq4 [hereinafter *CSU Systemwide Policy*] ("In most Sexual Misconduct cases, credibility will be central to the finding. Therefore, Parties should presume that this Addendum applies to all matters alleging Sexual Misconduct.").

The CSU Executive Order applies to the 481,210 students attending colleges within the California State University system. *Enrollment*, CSU: CAL. ST. U., https://www2.calstate.edu/csu-system/about-the-csu/facts-about-the-csu/enrollment (last visited May 24, 2020).

62. *See, e.g.*, *CSU Systemwide Policy*, *supra* note 61 (Addendum to CSU Executive Orders) ("This Addendum **supersedes** the existing investigation and resolution process . . . for cases (i) alleging Sexual Misconduct by a Student that, (ii) if substantiated, could result in a severe sanction (suspension or expulsion), ***and*** (iii) where credibility of any Party or witness is central to the finding. Allegations of other misconduct set forth in the same Complaint that arise out of the same facts and/or incidents will also be investigated and resolved (including sanctions) in accordance with this Addendum.").

63. 34 C.F.R. § 668.46 (2014); *see, e.g.*, UNIV. OF CAL., POLICY SVSH, SEXUAL VIOLENCE AND SEXUAL HARASSMENT POLICY 2, 3–4 (July 31, 2019), https://policy.ucop.edu/doc/4000385/SVSH (including relationship violence and stalking in categories of prohibited conduct governed by the sexual violence policy and procedures).

B. Requiring a Credibility Discount for Student Victims of Sexual Assault

Under federal law, respondents in sexual misconduct cases already had rights that students responding to other types of student conduct code violations do not enjoy. *Allee* provided additional procedural rights for this particular group of California students—and only this particular group of California students—in campus misconduct adjudications. Without providing a meaningful discussion, *Allee* simply asserted that cross-examination in an adversarial system is the best tool to ascertain the truth, conflating procedural justice for respondents with the most accurate outcome in student disciplinary cases involving sexual misconduct.[64] In deciding that students responding to sexual misconduct violations have the right to confront both the students who reported them and witnesses through cross-examination in a live hearing, the court focused on the issue of credibility.

Allee began as a Title IX campus case at a private college. Through the context of Title IX's prohibition of sex discrimination in the form of sexual harassment and sexual violence in education, *Allee's* emphasis on complainant credibility should be interpreted as a concern about the *lack of credibility* of women and transgender or non-conforming students who disproportionately experience and report sexual misconduct.[65] "Credibility" is coded language for an increased skepticism of students who report sexual misconduct that serves as justification for the court to mandate a respondent's opportunity to confront them by testing their credibility in front of a neutral factfinder who can then observe their demeanor.[66]

64. The First Circuit Court of Appeals noted in its decision not to create a right of cross-examination in an adversarial hearing setting to respondents in sexual misconduct that "[w]e are aware of no data proving which form of inquiry produces the more accurate result in the school disciplinary setting." Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 68 (1st Cir. 2019). *Allee* does not provide this data either but rather provides supporting quotes from previous cases. *See* Doe v. Allee, 242 Cal. Rptr. 3d 109, 134–35 (Ct. App. 2019).

65. *See* DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT ix (2020), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf.

66. Contrary to the *Allee* court's assertion that hearing officers need to be able to observe a witness's demeanor during cross-examination in order to assess credibility, research actually shows that people generally do not have the ability to assess credibility by observing demeanor. Maria Hartwig & Charles F. Bond, *Why Do Lie-Catchers Fail? A Lens Model Meta-Analysis of Human Lie Judgments*, 137 PSYCHOL. BULL. 643, 644 (2011). This is particularly true in sexual assault cases in which the general public often has

Embedded within the *Allee* decision is a historic sexist credibility discounting of students reporting sexual misconduct based on the insidious and pervasive myth that women lie about sexual assault.[67]

Institutional skepticism and credibility discounting of women reporting sexual assault is not a new phenomenon. To the contrary, credibility discounting of women reporting sexual assaults is built into every stage of the criminal legal system.[68] One manifestation of this discounting is found in historic statutes requiring independent witnesses and evidence of force, however, biased police investigations, decisions not to test rape kits, prosecutorial discretion not to charge in rape cases to jury, and judicial biases against rape victims all persist to this day.[69]

Student victims of sexual assault have experienced credibility discounting from their colleges as well—one of the many reasons students fought to enforce their civil rights on their campuses through Title IX.[70] *Allee* transforms colleges' common practice of implicit credibility discounting of student victims into a mandatory, explicit credibility discounting. In requiring California colleges to create extraordinary procedural protections for respondents in sexual misconduct cases, *Allee* essentially requires California colleges to advertise to their students that they find victims of sexual assault less credible than other students through the adoption of procedures that subject victims of sexual misconduct to additional credibility testing.

C. Discriminating Against Student Victims of Sexual Assault

Allee orders colleges to subject victims of sexual assault to longer and more traumatic processes than they generally impose on students reporting

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misinformation about what "normal" post-rape responses and effects look like. *See* KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, END VIOLENCE AGAINST WOMEN INTERNATIONAL, VICTIM IMPACT: HOW VICTIMS ARE AFFECTED BY SEXUAL ASSAULT AND HOW LAW ENFORCEMENT CAN RESPOND 41–42, 44–45 (2019), https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=656.

67. Not all victims of campus sexual assault are women. Indeed, male students are actually more likely to experience sexual assault than be accused of sexual assault, and transgender students are at higher risk of sexual assault than cis-gender students. Nonetheless, the trope of lying women who falsely report sexual assaults underpins the credibility discussions. *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 8–9 (2017).

68. *Id.* at 3.

69. *See id*.

70. *See* Behre, *Deconstructing*, *supra* note 6, at 887–88.

other types of student misconduct. Ironically, these are the very students at a heightened risk of experiencing secondary victimization (also referred to as "second rape") from investigation and adjudication processes.[71] Negative post-assault interaction with legal and community systems exacerbates trauma and leads to poorer health outcomes for sexual assault victims, particularly when it includes exposure to individuals engaging in "victim-blaming attitudes, behaviors, and practices."[72] Closed systems, such as colleges, can cause particular harm to victims of sexual assault.[73] Victims who experience institutional betrayal when colleges fail to respond effectively to their abuse suffer increased posttraumatic symptomology when compared to other victims of sexual assault.[74] How a college responds to a student's report of sexual assault impacts not only that student's educational trajectory, but also that student's overall recovery from the sexual assault.[75]

By requiring colleges to hold a live hearing with cross-examination in addition to the investigation already required by federal law, *Allee* obligates colleges to increase the duration of the adjudication process as well as the number of times a student-victim of sexual assault must describe (and relive) the assault, both of which will increase a student's trauma and delay recovery.[76] Moreover, *Allee* requires colleges to subject student victims of sexual assault to cross-examination questions designed to attack their credibility—a process that inevitably (and often intentionally) increases victim trauma.[77] *Allee* only briefly acknowledges the impact of cross-examination during live hearings on victims of sexual assault by stating that

71. Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 159–60 (2003).

72. Rebecca Campbell et al., *Preventing the "Second Rape": Rape Survivors' Experiences With Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE 1239, 1240–42 (2001).

73. *See* Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 122 (2013); *see also* Hannah Brenner Johnson, *Standing In Between Sexual Violence Victims and Access to Justice: The Limits of Title IX*, 73 OKLA. L. REV. 15 (2020).

74. *Id.*

75. Behre, *Ensuring* Choice, *supra* note 42, at 325–26; *see* Diane L. Rosenfeld, *Schools Must Prevent the "Second Rape"*, HARV. CRIMSON (Apr. 4, 2014), http://www.thecrimson.com/article/2014/4/4/Harvard-sexualassault/.

76. *See* Smith & Freyd, *supra* note 73, at 122–23 ("[S]exually assaulted women who also experienced institutional betrayal experienced higher levels of several posttraumatic symptoms.").

77. *See* Doe v. Allee, 242 Cal. Rptr. 3d 109, 134–37 (Ct. App. 2019).

schools may allow indirect questioning through intermediaries and use videoconferencing.[78] But this concession does not undo the additional trauma caused by cross-examination.

The increased burden for student victims of sexual assault is especially troubling in the context of high rates of campus sexual assault and low reporting rates to both law enforcement and colleges.[79] Two of the many reasons for the low reporting rates are the concerns student victims have about the emotional impact of the process on their mental health and fear of retaliation.[80] Increasing the emotional toll of the college adjudicatory process may further decrease reporting rates, making it even more challenging for colleges to respond to sex discrimination in the form of sexual violence on their campuses.[81] Through the additional burdens *Allee*

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78. *See id.* at 137.

79. Less than 5% of sexual assault and rape victims attending college choose to report the assault to law enforcement. U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT—MAJORITY STAFF, SEXUAL VIOLENCE ON CAMPUS 1 (2014), http://dcrcc.org/wp-content/uploads/2014/10/Sen.-McCaskills-Sexual-Violence-on-Campus-Survey-Report1.pdf. For general reporting rates to law enforcement, see DEAN G. KILPATRICK ET AL., MED. UNIV. OF S.C., NAT'L CRIME VICTIMS RESEARCH & TREATMENT CTR. DRUG FACILITATED, INCAPACITATED AND FORCIBLE RAPE: A NATIONAL STUDY 2 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf (finding that "16% of all rapes [are] reported to law enforcement").

Approximately "2.7% of sexual battery incidents and 7.0% of rape incidents were reported by the victim to any school official." CHRISTOPHER KREBS ET AL., BUREAU OF JUSTICE STATISTICS RESEARCH & DEV. SERIES, CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT 107 (2016), https://www.bjs.gov/content/pub/pdf/ccsvsftr.pdf; *see also* Amy Becker, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014*, AM. ASS'N U. WOMEN (Nov. 23, 2015), http://www.aauw.org/article/clery-act-data-analysis/.

80. Student victims have many different reasons for not reporting sexual assaults to their colleges. Some are embarrassed or ashamed, and they believe participation in a campus investigation and adjudication will be too emotionally difficult. Student victims also chose not to report because of their belief that their school will not take the report seriously or conduct a fair investigation, concern that their school will not protect their safety, the belief that their college community will not support them, fear of retaliation by the assailant or his friends, and skepticism that their college will not hold the assailant accountable. CHRISTOPHER P. KREBS ET AL., U.S. DEP'T OF JUSTICE, CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT xvii, 2–9 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.

81. Under Title IX, colleges are only liable for responding to sexual harassment in the form of sexual violence when they knew or should have known about the harassment. Consequently, lower reporting rates make it more difficult for students to hold their schools accountable. *See* Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge,*

creates for victims of sexual assault, colleges will send a strong message that they do not value student safety (particularly students at a higher risk of sexual violence—i.e., women and LGBTQ students) as much as they value students accused of sexual misconduct (predominantly men).

D. A Catch-22 for Colleges

California colleges now face conflicting requirements under federal and state law. *Allee* does not erase federal obligations under Title IX and the Clery Act. Colleges still have a legal obligation to prohibit sex discrimination in the form of sexual violence by conducting an independent investigation and responding effectively to prevent recurrence.[82] In situations in which a college has knowledge of sexual violence, it must respond. Yet, under *Allee*, even after a college conducts an investigation finding that a student committed sexual misconduct, the college can only suspend or expel the student after providing the student with an opportunity to cross-examine his or her victim. If a student victim of sexual misconduct decides not to subject herself or himself to re-traumatization through cross-examination in a live hearing after the investigation concludes, the college will face a choice: violate Title IX by failing to respond to sexual misconduct it substantiated through an independent investigation or violate California case law by failing to provide the respondent with an opportunity to conduct live cross-examination. Student victims are rarely parties to disciplined-student litigation, as was the case in *Allee*. It is therefore the responsibility of colleges to effectively defend themselves against this litigation and appeal court decisions that place them in a catch-22 .

V. Conclusion

Although hailed by many as a progressive recognition of the due process rights of students in college misconduct proceedings, *Allee* fundamentally undermines the rights of student victims of sexual assault by forcing colleges to institutionalize a credibility discount against them. By creating new, extraordinary rights for students responding to student code violations involving sexual misconduct and not extending those rights to students responding to other student code violations resulting in similar sanctions, *Allee* singled out victims of sexual assault as less credible than other

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Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence, 43 LOY. U. CHI. L.J. 205, 252–53 (2011).

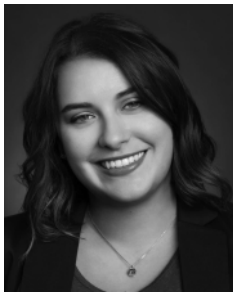
82. *See supra* Section III.B.

students. The additional rights—to conduct cross-examination of the complainant and witnesses in an adversarial, live hearing—do not exist in a vacuum. They will cause additional trauma to victims of sexual assault and lengthen the duration of the investigation and adjudication of sexual misconduct cases. Additionally, these new barriers solely impact the students who choose to report, further decreasing the already abysmal reporting rates for campus sexual assault. *Allee* may also create a conflict for colleges between their federal obligations under Title IX and Clery and state law. The lasting effects of *Allee* on student sexual assault victims remain to be seen, but it seems likely that this opinion will reduce California colleges' ability to effectively respond to and prevent sexual assault on their campuses.

MCLE Self-Study:

The Meaning of "Due Process" in Harassment Investigations

By Amy Oppenheimer and Alezah Trigueros



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I. Introduction

The #MeToo movement shone a light on the pervasiveness of sexual harassment, bringing into the public consciousness the breadth and scale of harassment faced by women in the workplace, in educational institutions, and in their private lives. The movement has also placed increased pressure on employers and educational institutions to address harassment occurring in those settings and to take action against individuals found to have engaged in prohibited conduct. This in turn has led to concerns regarding the rights of those accused of engaging in sexual harassment and questions of whether the investigations and adjudications of harassment complaints in employment and educational settings afford due process to the accused.

There are two different standards of due process in the context of the investigation and adjudication of harassment complaints in the workplace. In the private sector, where employees are generally at will, the accused does not have formalized due process protections. However, case law, discussed below, sets forth some basic due process rights under these circumstances. In the public sector, there are greater due process protections because public employees have a property interest in their jobs and the government is constrained in its ability to deprive an individual of a property interest. A third, more stringent standard of due process is evolving in educational institutions that receive federal funding. Recent cases have also imposed more stringent procedures in sexual assault cases that have not been applied in an employment setting but are nevertheless instructive of how these issues are viewed.

It is noteworthy that harassment differs from other types of misconduct due to the significant impact on the individual being targeted. Other terminable conduct, such as poor attendance or poor performance, does not impact other employees in the manner that harassment does. And, importantly, employers have legal duties to protect other employees from harassment. Because of this, when it comes to harassment cases, a heightened level of due process may conflict with an employer's affirmative duty to prevent and respond to workplace harassment. If heightened due process rights lead the target of harassment to feel unprotected, it could result in fewer targets of harassment bringing forward complaints, and result in these employees either suffering the harassment or leaving the employment.

This article examines the processes that afford fundamental fairness to employees who are accused of harassment and argues that an evidentiary hearing is not necessary to provide fundamental fairness to the accused. Rather, a thoroughly conducted workplace investigation provides a process that is fair to both the targets of harassment and the accused.

II. Procedural Due Process

Due process represents the broad concept that our laws and how they are enforced must be fundamentally fair. The right to due process is referenced twice in the U.S. Constitution in the context of government actions. The Fifth Amendment states that no person "shall be deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment states that no State shall "deprive any person of life, liberty, or property, without due process of law."[1]

There are two types of due process: procedural due process and substantive due process. Procedural due process, the focus of this article, refers to the fair procedures that the government must adhere to before it can deprive a person of life, liberty, or property. Substantive due process, on the other hand, protects against the deprivation of a fundamental right.

III. Due Process Rights of Public Employees

In the workplace, it has long been established that public employees have a property interest in their jobs and, therefore, for a government actor to deprive an employee of that property

[A]n evidentiary hearing is not necessary to provide fundamental fairness to the accused. Rather, a thoroughly conducted workplace investigation provides a process that is fair to both the targets of harassment and the accused.

interest (for example by terminating the employee or suspending the employee without pay), due process must be afforded. For example, in *Arnett v. Kennedy*[2], the Court held that due process protected the right of a non-probationary federal civil service employee to continue his position absent just cause for dismissal. This also holds in public education. In *Goss v. Lopez*[3], the Court found that "[h]aving chosen to extend the right to an education," the State could not "withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."

Having established that the government cannot deprive individuals of their protected interests without affording a fundamentally fair process, the question is what that due process entails. The Constitution does not outline a mechanism for due process. Rather, legislation and judicial precedents have, over time, fleshed out what specific protections are required to ensure procedural fairness, and these specifics have varied depending on the type of action being taken. That is, a criminal case is subject to more stringent due process requirements than a civil case, which is subject to more stringent requirements than an administrative case, and so forth.

In his 1975 article, *Some Kind of Hearing*, U.S. Circuit Judge Henry J. Friendly questioned how closely due process hearings concerning executive and administrative actions must conform to the judicial model applied in criminal and civil contexts. Friendly explained that while early Supreme Court decisions set forth that "some kind of hearing is required at some time before a person is finally deprived of his property interests" given the "number and types of hearings required in all areas in which the government and the individual interact, common sense dictates that we must do with less than full trial-type hearings," when mere executive or administrative actions are involved.[4]

That same year, in *Skelly v. State Personnel Board*[5], the California Supreme Court established a due process framework for disciplinary action taken against public sector employees. In *Skelly*, an employee was given written notice of termination, which set forth the basis for the termination, and was permitted to submit a written response and request a hearing.[6] The employee asserted that terminating him *prior to* an evidentiary hearing, and without any prior procedural safeguards, was a violation of his due process rights.[7]

The *Skelly* court concluded: "It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However . . . due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline."[8] The *Skelly* case thus established a basic procedural framework for due process protections in the context of employee discipline in the public sector.

While *Skelly* rights help protect employees from being unfairly terminated, they can also serve to make it difficult to terminate employees, even those who have harassed others at work. In the employment setting, additional sources of due process requirements can include individual employment contracts, collective bargaining agreements, employee handbooks, codes of conduct, personnel policies and grievance procedures, and regulations and guidance issued by government agencies.

IV. Due Process Rights of Private Employees Accused of Harassment

Although private employees do not have a property interest in their jobs, principles of fundamental fairness still apply to actions taken against private employees. In the context of an employee terminated for sexual harassment, California courts have set forth that a fair investigation of the accusations of sexual harassment provides a qualified immunity to the employer for liability for wrongful termination.

In *Cotran v. Rollins Hudig Hall International, Inc.*[9], the California Supreme Court considered a case involving a male supervisor who was an at-will employee and was accused

In the context of an employee terminated for sexual harassment, California courts have set forth that a fair investigation of the accusations of sexual harassment provides a qualified immunity to the employer for liability for wrongful termination.

of sexual harassment by two female employees. The male employee was terminated following a two-week investigation that ultimately substantiated the allegations based on the credibility of the two complainants. The court found that an employee is terminated for "just cause" when "the factual basis on which the employer concluded a dischargeable act had been committed [was] reached honestly, after an appropriate investigation and for reasons that [were] not arbitrary or pretextual."[10] Expanding upon the *Cotran* decision, *Silva v. Lucky Stores, Inc.* further established that "investigative fairness contemplates listening to both sides and providing employees a fair opportunity to present their position and to correct or contradict relevant statements prejudicial to their case, without the procedural formalities of a trial."[11] The *Silva* court found that the employer in that case had "listened to both sides, advised Silva of the charges and provided him with ample opportunity to present his position and to correct or contradict relevant statements prejudicial to his case," and had therefore met *Cotran*'s "fairness requirements."[12]

V. Governmental Guidance on Due Process in the Investigation of Sexual Harassment

Governmental agencies enforcing laws against sexual harassment have also discussed what a fair investigation consists of. While the focus of this guidance is how to protect employees who are harassed, it also discusses the rights of the accused. In 1999, the U.S. Equal Employment Opportunity Commission (EEOC) issued its first *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*.[13] This guidance included information concerning the duty of employers to conduct timely, fair, and thorough investigations of sexual harassment allegations. While the guidance did not specifically reference due process, the guidance expressly states that the employer must "ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts," that the accused should have an opportunity to tell his or her side of the story, and that any "disciplinary measures should be proportional to the seriousness of the offense."[14]

In 2017, the California Department of Fair Employment and Housing (DFEH) issued a *Workplace Harassment Guide for California Employers*.[15] The DFEH guide specifically uses the term "due process" in relation to providing a fair investigation, and expands on the investigative principles set forth by the EEOC. The DFEH guide states that the investigator should give the accused party "a chance to tell his/her side of the story, preferably in person," and further states that the accused party "is entitled to know the allegations being made against him/her."[16] The guide notes that due process does not necessarily require that the accused party be informed of the allegations against them prior to their investigative interview or that the allegations be provided in writing, but rather due process entails "making the allegations clear and getting a clear response" and reaching a "reasonable and fair conclusion based on the information . . . collected, reviewed and analyzed during the investigation."[17]

This guidance sets the framework for the procedural fairness an employee accused of engaging in harassment is entitled to in the context of a workplace investigation. Whether the employee would then be entitled to any further procedural protections, such as a hearing, should the investigative findings lead to termination or lesser discipline, depends on whether the employer is a public or private employer, and/or whether some other source of due process applies, as discussed above. In the private employment setting, the timely, fair, and thorough investigation itself is the extent of the due process to which the employee is entitled.

VI. Due Process in Educational Institutions

Although historically Title IX cases, which address discrimination and harassment in educational settings, have followed generally the same model of investigating and adjudicating allegations of misconduct as in the employment setting,[18] recent California cases have demonstrated a shift in approach that

favors enhanced protections for those accused of sexual misconduct. Pre-2017 decisions, such as the 2016 *Doe v. Regents of University of California* case, emphasized that a "fair hearing," in the context of a university student conduct review panel, "need not include all the safeguards and formalities of a criminal trial."[19] The court went on: "A university's primary purpose is to educate students: '[a] school is an academic institution, not a courtroom or administrative hearing room.' A formalized hearing process would divert both resources and attention from a university's main calling, that is education. Although a university must treat students fairly, it is not required to convert its classrooms into courtrooms."[20]

Thus, in *Doe v. Regents*, the court found that the due process rights of a male student—found by the university's student conduct review panel to have sexually assaulted a female student—were not violated when the accused's attorney was prevented from actively participating in the hearing, when the accused was prevented from cross-examining the female student (though he was permitted to submit written questions to the female student, who did testify before the panel), or when the panel relied on the findings contained in the Title IX investigator's report without directly questioning the investigator or providing to the investigator's interview notes to the accused.[21]

However, post-2017 cases, such as 2019's *Doe v. Allee*,[22] have seemingly tempered universities' freedom to deviate from the type of "safeguards and formalities" referenced in the 2016 *Doe v. Regents* case. In *Doe v. Allee*, the California Court of Appeal cited the 2017 decision in *Doe v. University of Cincinnati*,[23] which found that the due process rights of a male student were violated because the female student did not testify in person before the review panel and the panel relied on the Title IX investigator's report in reaching its finding; as well as the 2018 *Doe v. Claremont McKenna College*[24] case, which likewise found that the due process rights of a male student were violated because the university permitted the female student and witnesses to submit written statements to the review panel, rather than appear personally before the panel and be cross-examined. The court then found that when a student "faces serious discipline for alleged sexual misconduct, and the credibility of witnesses is central to the adjudication of the charge, fundamental fairness requires that the university must at least permit cross-examination of adverse witnesses at a hearing in which the witnesses appear in person or by some other means (such as means provided by technology like videoconferencing) before one or more neutral adjudicator(s) with the power independently to judge credibility and find facts."[25]

Thus, the trend, at least in educational settings, is for more formalized trial-like proceedings that go beyond the safeguards provided for public employees under *Skelly*.

VII. What Does This Mean for Employers Enforcing Laws and Policies Regarding Harassment?

The above authorities are illustrative of the gap between the due process afforded an employee of a private employer who is terminated for violation of a sexual harassment policy (that is, a fair and thorough investigation as articulated by *Cotran* and *Silva*), as opposed to a public employee (who has additional rights under *Skelly*), as opposed to a student at an educational institution (who has enhanced due process rights under *Allee*). But should there be different levels of due process for what is essentially the same type of conduct? What level of due process is appropriate in employment settings? And how might these different levels of due process impact the prevention of harassment?

Employees who are accused of harassment will no doubt argue for heightened due process procedures. However, those who are targets point to the fact that being subjected to cross-examination may have a chilling effect on bringing claims forward. Sexual harassment is already under-reported. More formalized processes protecting the rights of the accused may have the (presumably unwanted) effect of discouraging claims and making it harder to terminate wrongdoers. Public employers often already have the difficult decision of whether they should protect the complainant and witnesses by failing to disclose information that would expose employees to embarrassment or ridicule when it could mean risking having sufficient evidence for a termination to survive a *Skelly* hearing.

Employers are increasingly in a no-win position, trying to provide heightened due process for the accused (or being criticized if they do not) while effectively addressing sexual harassment and also being subject to criticism if they do not swiftly terminate the individual accused. In the meantime, the sort of mini-trials that courts have determined are impractical and detrimental to educational institutions' primary purpose—to educate students—could equally be said to divert resources and attention from the employers' primary purpose—whether the organization is a public entity, serving the public good, a non-profit with a charitable purpose, or a private entity. The unintended victims of increasing due process rights could be the rest of the employees in the workplace, who often cannot help but be impacted by what is going on.

Treating employees fairly—not terminating without a reasonable basis to do so and not making findings about harassment without a

fair and thorough process—should be an essential element of any workplace culture. But that doesn't necessarily require enhanced due process rights for the accused such as those that have come to prevail in the educational setting. In private workplaces (and arguably in public workplaces as well), the *Cotran* and *Silva* standards have worked successfully for many years. A thorough and fair investigation in conformity with those standards strikes the proper balance. Both employers and employees should think twice before advocating for something different.

ENDNOTES

1. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Garfinkle v. Superior Court*, 21 Cal. 3d 268, 281-82 (1978); *Coleman v. Department of Personnel Admin.*, 52 Cal. 3d 1102, 1112 (1991).
2. 416 U.S. 134 (1974).
3. 418 U.S. 565, 573-74 (1975).
4. Henry J. Friendly, *Some Kind of Hearing*, 123 U. Penn. L. Rev. 1267, 1268 (1975).
5. 15 Cal. 3d 194 (1975).
6. *Id.* at 197-98.
7. *Id.* at 205.
8. *Id.* at 215.
9. 17 Cal. 4th 93 (1998).
10. *Id.* at 107.
11. 65 Cal. App. 4th 256, 264 (1998) (*citing Cotran*, *supra* n.9 at 108).
12. *Id.* at 273.
13. Available at: https://www.eeoc.gov/policy/docs/harassment.html (last visited Oct. 16, 2019).
14. *Id.*
15. Available at: https://dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-Harassment-Guide.pdf (last visited Oct. 16, 2019).
16. *Id.*
17. *Id.*
18. Although these cases do not currently apply in employment settings, this trend could be applied in the employment arena and thus is instructive to a discussion of due process in the context of the investigation and adjudication of sexual harassment complaints.
19. 5 Cal. App. 5th 1055, 1078 (2016).
20. *Id.* (*quoting Murakowski v. University of Delaware*, 575 F. Supp. 2d 571, 585-86 (D. Del. 2008)).
21. *Id.* at 1082-98.
22. 30 Cal. App. 5th 1036 (2019).
23. 872 F.3d 393, 400 (6th Cir. 2017).
24. 25 Cal. App. 5th 1055 (2018).
25. *Id.*

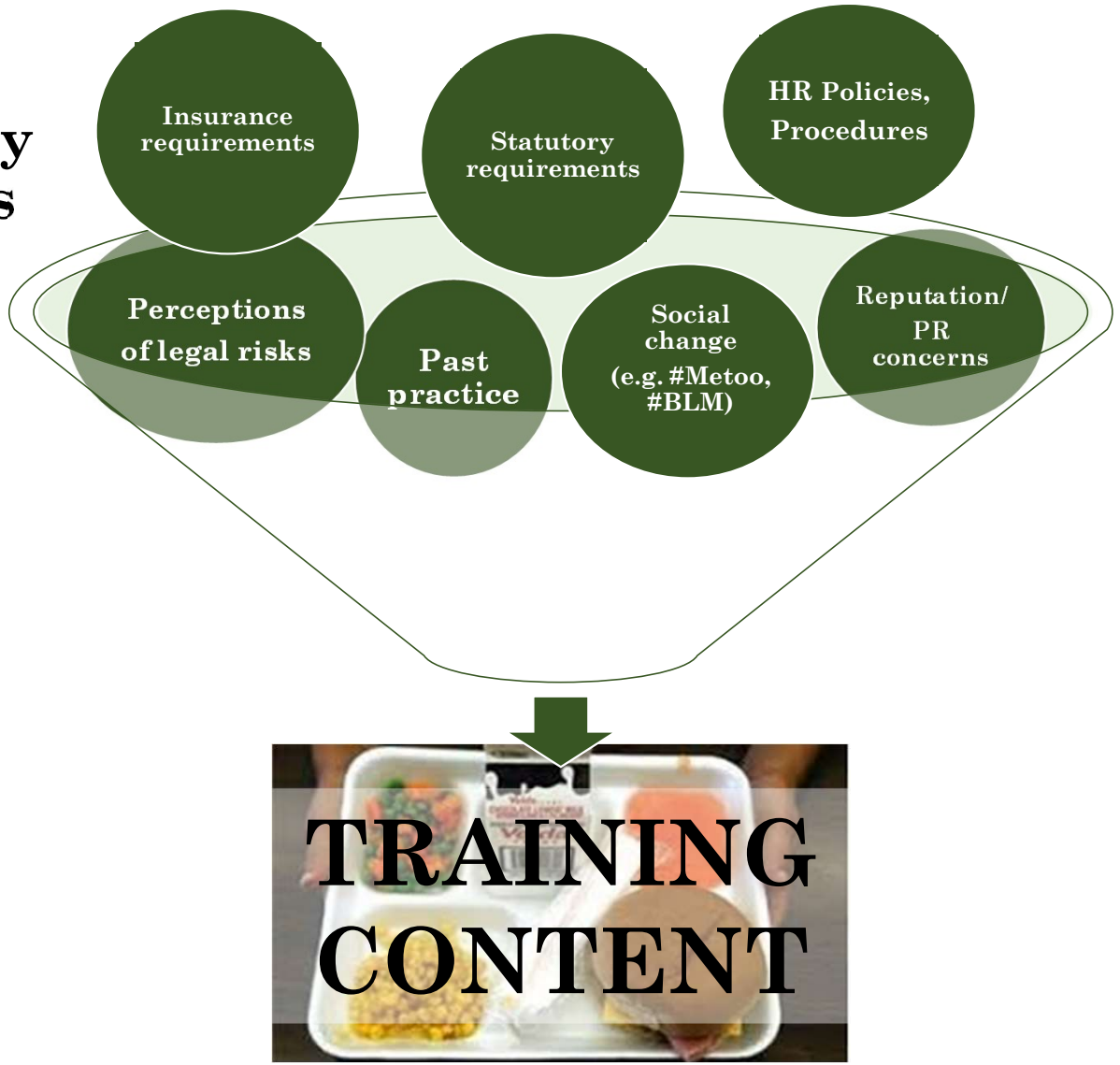
Plenary III: Prevention Education Programs: Is Behavior Actually Changing (CLE 1.25)

Harassment education programs: An empirically informed approach

Jamillah Bowman Williams, J.D., PhD., Georgetown University School of Law

Elizabeth Tippett, JD, University of Oregon School of Law

Training content influenced by many factors

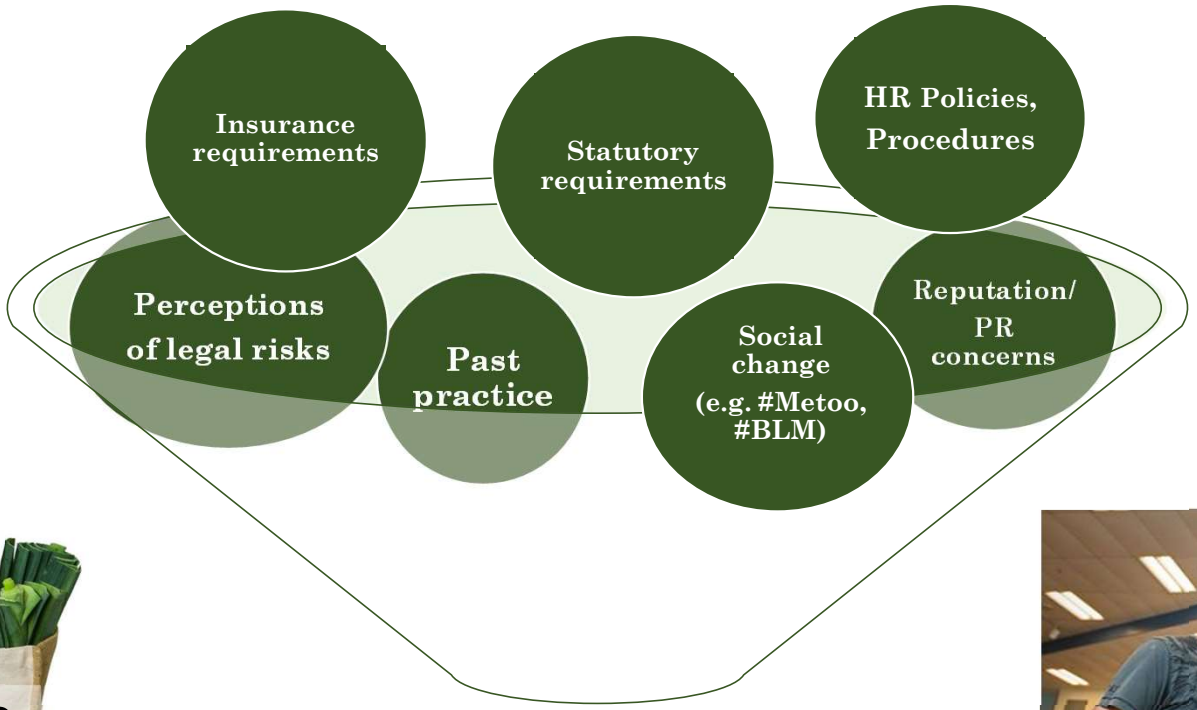


Legal requirements can be onerous. *See e.g.* Cal. Govt Code 12950.1

(a) (1) By January 1, 2021, an employer having five or more employees shall provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees and at least one hour of classroom or other effective interactive training and education regarding sexual harassment to all nonsupervisory employees in California. Thereafter, each employer covered by this section shall provide sexual harassment training and education to each employee in California once every two years. New nonsupervisory employees shall be provided training within six months of hire. New supervisory employees shall be provided training within six months of the assumption of a supervisory position. An employer may provide this training in conjunction with other training provided to the employees. The training may be completed by employees individually or as part of a group presentation, and may be completed in shorter segments, as long as the applicable hourly total requirement is met. An employer who has provided this training and education to an employee in 2019 is not required to provide refresher training and education again until two years thereafter. **The training and education required by this section shall include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.** The department shall provide a method for employees who have completed the training to save electronically and print a certificate of completion.

The hangover of past practice.

What's missing?



How to measure efficacy?

- Knowledge
- Reporting
- Behavior
- Attitudes
- Behavioral intentions

Knowledge

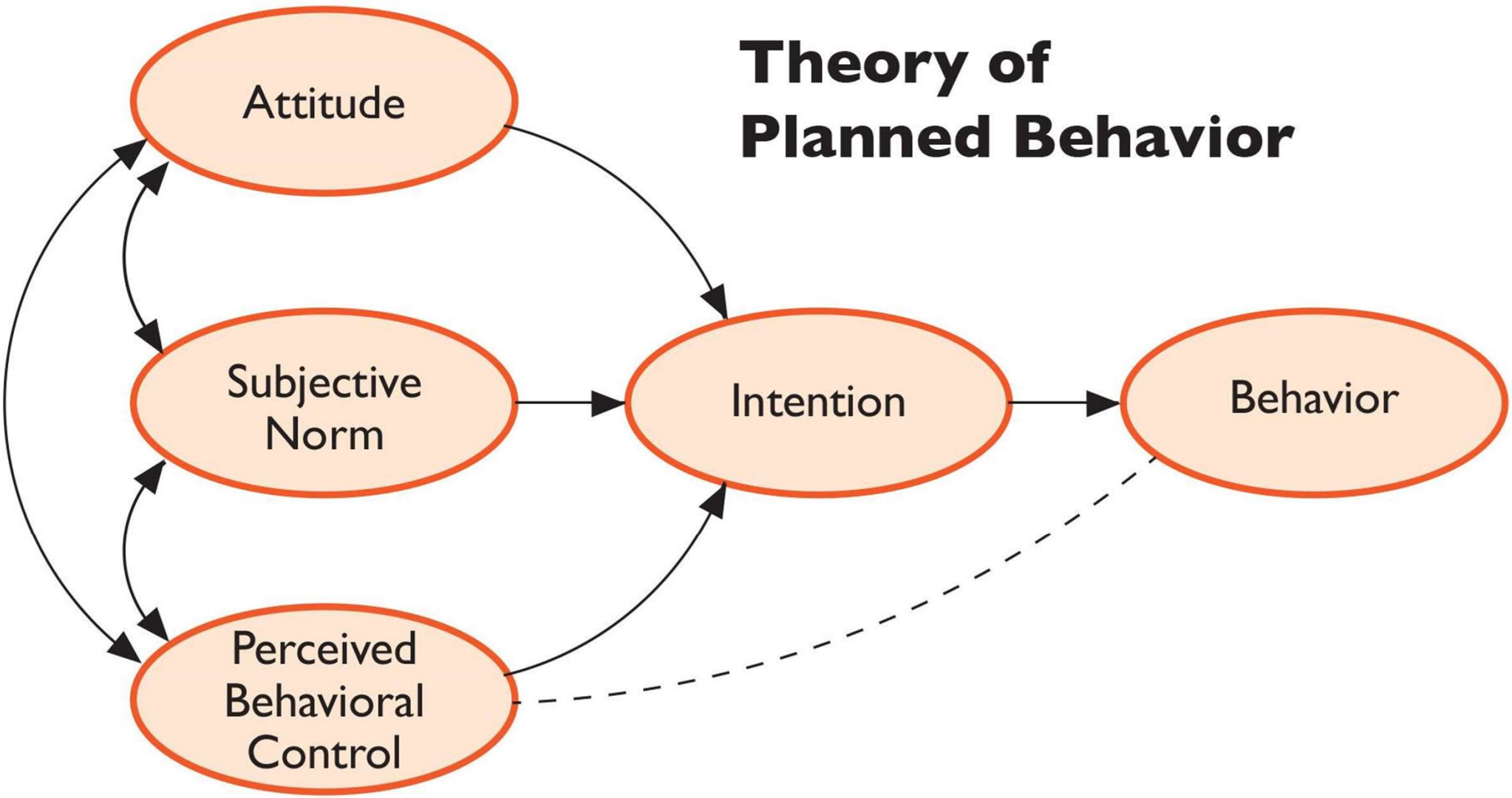
- Quiz on legal rules or company policy.
- The perils of conflating attitudes and knowledge. (e.g. definition of harassment).
- Is knowledge acquisition your goal?

Reporting

Increased reporting can be a sign of progress.

Behavior

Hard to measure in the short term.
In the long term, hard to make causal inferences.


Theory of
Planned Behavior
Attitude
Subjective
Norm
Perceived
Behavioral
Control
Intention
Behavior

TRANSTHEORETICAL MODEL

✦ Precontemplation

Not Ready

Not aware, uninformed, no intention to change

✦ Contemplation

Getting Ready

Aware problem exists, are thinking about changing

✦ Preparation

Ready

Intention to take action to change

✦ Action

6 Months

Make modifications in their behavior

✦ Maintenance

6 Months - 5 years

Have made modifications, prevent relapse

✦ Termination

Lifetime

100% Self-Efficacy, no temptation to relapse

Measures that have worked well in campus sexual assault trainings

Banyard (2005, 2010) based on Transtheoretical Model

"I don't think sexual assault is a big problem on campus."
"I don't think there is much I can do about sexual assault on campus."
"There isn't much need for me to think about sexual assault on campus, that's the job of the crisis center."
"Sometimes I think I should learn more about sexual assault but I haven't done so yet."
"I think I can do something about sexual assault and am planning to find out what I can do about the problem."
"I am planning to learn more about the problem of sexual assault on campus."

Bystander training has worked well on campus

Banyard (2005) Attitudes Toward Bystander Interventions
If I intervene regularly, I can prevent someone from being hurt.
It is important for all community members to pay a role in keeping everyone safe.
Friends will look up to me and admire me if I intervene.
I will feel like a leader in my community if I intervene.
I like thinking of myself as someone who helps others when I can.
Intervening would make my friends angry with me.
Intervening might cost me friendships.
I could get physically hurt by intervening.
I could make the wrong decision and intervene when nothing was wrong and feel embarrassed.
People might think I'm too sensitive and overreacting to the situation.
I could get in trouble by making the wrong decision about how to intervene.
I can help prevent violence against women in my community.
A group of guys would listen to me if I confronted them about their sexist behavior.

Bystander training gaining traction in workplace

Adapting measures to the workplace context

The Collective Accountability in the Workplace Scale

- Behavioral intentions as to bystander behaviors (e.g. ask employee who is being harassed if they need help, advocate on behalf of someone affected by harassing behavior)
- Attitudes towards bystander actions (e.g. people who are important to me think harassment should be reported, if I can intervene I might prevent people from being hurt)
- Higher scoring attitudes on TTM (e.g. I think I can do something about workplace discrimination, I am reflecting on past behavior that might have contributed to harassment).
- Low scoring attitudes on TTM (e.g. I don't think discrimination is a big problem, I don't think there's much I can do about workplace harassment)

Collective Accountability in the Workplace Scale

Bystander Behavioral Intentions	Positive Intervention Attitudes	Reflection and Planning	Negative Intervention Attitudes
Ask an employee who is being harassed if they need help.	People who are important to me think harassment should be reported	Sometimes I think I should learn more about workplace discrimination but I haven't done so yet.	If I intervene, it might make the situation worse.
Offer an employee who is being harassed a way to exit the situation.	I have full control over my ability to report harassment.	I think I can do something about workplace discrimination and am planning to find out what I can do about the problem.	If I intervene, it might cost my relationship with the person engaging in the harassing behavior.
Offer alternative approaches if you think a decision or decision making process is biased.	I know how to report harassment.	I am reflecting on past behavior that might have contributed to workplace discrimination.	If I intervene, the victim might be embarrassed.
Steer a conversation in a different direction if it strikes you as harassing or discriminatory.	Others in the organization will support my decision to report harassment.	I plan to change past behaviors that might have contributed to workplace discrimination.	If I intervene, it might be awkward for a long time.
Point out a decision or decision making process that might be biased.	Reporting harassment would have a positive impact on the work environment.	Sometimes I think I should learn more about workplace harassment, but I haven't done so yet.	I don't think discrimination is a big problem in the workplace.
Challenge a coworker who made an offensive joke.	If I intervene, I can prevent someone from being hurt.	I think I can do something about workplace harassment and am planning to find out what I can do about the problem.	I don't think there is much I can do about workplace discrimination.
Express concern about a decision that seemed motivated by gender, race, religion, or national origin.	If I intervene, it might prevent the harasser from engaging in worse behavior that might get them fired.	I am reflecting on past behavior that might have contributed to workplace harassment.	I don't think harassment is a big problem in the workplace.
Advocate on behalf of someone affected by harassing behavior.	If I intervene, it provides a path for everyone to extract themselves from the situation without getting more embarrassed.	I plan to change past behaviors that might have contributed to workplace harassment.	I don't think there is much I can do about workplace harassment.
Point out problematic language in an email, text or chat.	If I intervene, I am showing the victim that I care about them.		
Refuse to participate in an offensive discussion.	If I intervene, it might be awkward in the short term but better in the long run.		

Research design options

- Experiment with training content
- Randomize workers into pre vs. post survey
- Repeat measures, and test other interventions (e.g. email, posters, short videos)
- Focus groups
- Reporting rates, lawsuits
- Follow up 6 months later

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tippett@uoregon.edu

BCCE SH Conference: Plenary III

LIst of additional reference materials

Examples of state laws and other mandates covering employee training requirements:

New York

- New York State Human Rights Law - https://dhr.ny.gov/law
- Sexual Harassment legal and policy information - https://www.ny.gov/combating-sexual-harassment-workplace/employers

California

- California Fair Employment and Housing Act - https://www.dfeh.ca.gov/legalrecords/#law
- CA SB-1343 Employers: sexual harassment training: requirements - https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1343
- California State Auditor Report 2013-124 (Fact Sheet) - Sexual Harassment and Violence: California Universities Must Better Protect Students by Doing More to Prevent, Respond to, and Resolve Incidents - https://www.auditor.ca.gov/pdfs/factsheets/2013-124.pdf

Examples of mandatory education requirements at public universities:

- **University of California** - https://sexualviolence.universityofcalifornia.edu/education-training/
- **University of Michigan** - https://sexualmisconduct.umich.edu/training/
- **University of Oregon**
  - Employee training- https://investigations.uoregon.edu/employee-training
  - Student training - https://dos.uoregon.edu/studenttrainings
- **University of Illinois** - https://www.ethics.uillinois.edu/training/sexual_misconduct_training/
- **University of Virginia** - https://eocr.virginia.edu/appendixE

BCCE SH Conference: Plenary III

LIst of additional reference materials

Class action settlement - USC

A Settlement reached with the **University of Southern California** and its Board of Trustees and with Dr. George M. Tyndall, M.D. in a class action lawsuit. The Settlement provides a $215 million Settlement Fund for Class Members. USC Health Center has created a litigation settlement website.

- Link to important settlement, claim and court documents - https://www.usctyndallsettlement.com/documents
- A summary of all institutional changes required by the terms of the settlement, including required training, as well as addition training initiated by USC as a result of allegations: https://www.usctyndallsettlement.com/changes-at-usc

PLENARY IV: Global Toolkits for Addressing Sexual Harassment/Violence at Schools, Colleges and Universities (CLE 1.25)

Keynote Conversation between Noreen Farrell (Equal Rights Advocates), Shiwali Patel (National Women's Law Center), and Pamela Price (Law Offices of Pamela Y. Price).

COLLEGE
06/10/2014 01:15 pm ET **Updated** Jun 10, 2014

How A Title IX Harassment Case At Yale In 1980 Set The Stage For Today's Sexual Assault Activism

heads
By Tyler Kingkade

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Catharine MacKinnon was a law student at Yale University in the mid-1970s when she had a radical idea: Sexual harassment on campus was discrimination, and it interfered with a woman's ability to attend college. MacKinnon would put that theory to the test in a court case that her side would eventually lose, but that would have far-reaching effects.

In recent months the issue of sexual assault and harassment at college has attracted the scrutiny of the White House and Congress. But some four decades ago, the gender equity law on which many federal inquiries into college sexual assault are based, Title IX, pertained primarily to sports. So in 1977, when MacKinnon advised a group of Yale students alleging harassment on campus to file their lawsuit, *Alexander v. Yale*, the legal argument was an untested theory.

"What has mainly improved since then — to which the recent initiatives to investigate complaints seriously by the government and impose sanctions is a response — is the willingness of survivors to stand and fight for themselves," MacKinnon told The Huffington Post.

As a Yale law student in 1977, MacKinnon wrote the framework for what would become the argument that sexual harassment is a form of discrimination based on sex. Prior to the publication of her argument, she provided a copy to Nadine Taub of the Women's Rights Litigation Clinic at Rutgers School of Law, who represented the female students in *Alexander v. Yale*.

Download

Students claimed at the time that male professors had propositioned female students for sex in return for better grades, according to *Alexander* plaintiff Ann Olivarius. But the victims had no recourse through the university. In fact, Olivarius would be threatened with arrest for libeling one of the professors by reporting his advances to Yale administrators.

The women in *Alexander* didn't seek compensation. They insisted Yale needed to have a grievance procedure for sexual harassment claims.

The court ruled the students did not have standing to bring the suit because they had graduated, and one student's claim of a "quid pro quo" case was denied because she never actually received better grades. However, in 1978, Yale established a harassment grievance board, and hundreds of other colleges would follow the Ivy League school's lead in instituting their own reporting procedures.

So the federal appeals court's dismissal of the case in 1980 was not really a loss, as Yale had by then established a mechanism for students to report sexual harassment. The American Civil Liberties Union later declared *Alexander* a "pivotal moment in Title IX history."

But it wasn't the last Title IX controversy Yale would face.

In 2003, Kathryn Kelly sued Yale University, alleging violations of Title IX in denial of accommodations for failing to provide her with academic assistance after she reported a sexual assault, and for remarks by a dean in an open forum that her assault was "not legal rape." Kelly sued for defamation, breach of contract and intentional infliction of emotional distress.

U.S. District Court Judge Janet C. Hall stated in her ruling, "There is no question that a rape ... constitutes severe and objectively offensive sexual harassment."

"The court agrees that a reasonable jury could conclude that further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university," Hall wrote.

Less than a decade after that case, in 2011, a group of 16 students and recent alumni filed a Title IX complaint with the U.S. Department of Education's Office for Civil Rights alleging a sexually hostile environment. Some

of those complainants would go on to assist other students in filing Title IX complaints against other universities, and some helped to found Know Your IX, a sexual assault survivor advocacy group.

MacKinnon later taught at Yale, among other universities, so the *Alexander* case was well-known to the 2011 complainants, said Alexandra Brodsky, who was among them.

"We knew that we were able to take this action because of students who had been on the same campus decades earlier," Brodsky said.

Around the same time as Brodsky's complaint, a "Dear Colleague" letter from the Education Department made clear colleges' need to address sexual assault on campus.

Experts on sexual violence in higher education seldom single out any particular university as being the worst offender, even those that have faced repeated complaints and lawsuits. Instead, experts tend to cite such frequent failures as evidence that academia as a whole hasn't made the necessary improvements on sexual assault.

"The OCR complaint of 2011 is a stunning example, over 30 years after *Alexander v. Yale*," MacKinnon said. "Schools with repeat complaints are not necessarily worse than others, although they, if anyone, should know better. Their students are just more ready to confront what is happening in their environment. Every school has a branding response, 'Let's disappear this.' They see the victims as the cause of their problem, which they conceive as looking bad. If they realized that the students are the school and took their side, they could solve this problem instead of trying to make sure nobody sees they have it."

What MacKinnon sees as new in today's cases is the "willingness of survivors to stand and fight for themselves," referring to them as an "inspiration."

MacKinnon also sides with current activists who have called for more teeth in Title IX enforcement. MacKinnon suggested the possibility of financial penalties exceeding a quarter million dollars, for example, to give institutions a meaningful incentive to avoid violating Title IX. "Relying on [universities'] good intentions is living in a fantasy world," she said.

Federal lawmakers seem to agree, with people like Sens. Claire McCaskill (D-Mo.) and Kirsten Gillibrand (D-N.Y.) hinting that they want a more realistic punishment for colleges that violate Title IX, or at least stronger incentives to follow the law. Right now, the worst an institution can expect of federal penalties for Title IX violations is bad public relations and a resolution agreement requiring new policies on sexual violence.

"Unless we see that shift in enforcement," Brodsky said, "we're going to be telling the same story 40 years from now."

Tyler Kingkade
Senior Editor/Reporter, The Huffington Post
Suggest a correction

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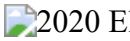

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Education & Title IX

All students should get the help they need to succeed in school and prepare for college and careers. But right now, too many girls confront challenges that undermine their success in school.

Affirmative Action in Education

Affirmative action programs have played a critical role in opening up educational opportunities for women — but now, equal access to education is under attack.

Athletics

A federal law, Title IX, makes it illegal for schools to discriminate against students because of their sex — which means that girls have the same right to play as boys.

Let Her Learn

Too many girls are being pushed out of school as a result of unfair discipline practices, or because they aren't getting the support they need to deal with trauma, harassment, and other negative experiences.

Pregnant & Parenting Students

For young parents, parenthood isn't the end of the road. It's essential that pregnant and parenting students not only have equal access to education, but also receive support to help them succeed in school.

School Discipline & Pushout Prevention

For students who are at risk of dropping out or who are pushed out of school — many of whom are girls of color — equal educational opportunities remain out of reach.

Science, Technology & Career Education

Traditionally male-dominated careers, like construction and engineering, tend to offer better pay than traditionally female fields. Women deserve equal access to career and technical education programs in fields leading to high-wage, high-skill, and high-demand jobs.

Sexual Harassment in Schools

Both sexual harassment and sexual violence are prohibited in schools under federal law — yet many students still experience harassment and assault, which can have a devastating impact on their lives.

Single-Sex Education

Federal law requires all students to be treated equally in school, regardless of gender. That means schools can't separate classes based on gender stereotypes that harm both boys and girls.

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Senior Vice President for Program

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Sexual Assault & Sexual Harassment

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How to use this guide

Click here for our K-5 guide

If you would like free legal help or advice, please fill out this form to request an appointment with a trained legal counselor (ENOUGH advocates). All services provided are completely **free and confidential**.

> For information about how Coronavirus (COVID-19) may affect your Title IX case, click here.

Content warning: This guide contains information and examples of sexual assault and sexual harassment that may be triggering or overwhelming for you, especially if you are a survivor of sexual violence. Please be aware of your emotional and mental needs while reading. You may want to take breaks, skip over or skim some sections, or ask a trusted loved one to read it for you and take notes.

How to use this guide: The purpose of this Know Your Rights Guide is to help you understand your rights and options if you have experienced sexual assault or sexual harassment at a school or university. This guide is not official legal advice. Laws frequently change and can be interpreted in different ways, so we cannot guarantee that all of the information in this Guide is accurate as it applies to your specific situation.

Definitions & Examples

There are different forms of sexual assault and sexual harassment. You can be assaulted or harassed by a fellow student, a teacher, professor, coach, staff or faculty member, or (if you work at the school) by a coworker.

Sexual Assault is a physical invasion of your body. It can sometimes result in bodily harm or injury, as well as psychological and emotional trauma. The definition of sexual assault includes rape, as well as other acts that invade or hurt your body. Other examples of sexual assault include inappropriate touching, groping, attempted rape, forcing you to perform a sexual act, or penetrating any part of your body with a part of their body, or with an object. If what happened included unwelcome touching of your body, the situation may have involved sexual assault.

Sexual Harassment ranges from unwanted touching, gesturing, and inappropriate jokes, to someone promising you a good grade or a promotion in exchange for sexual favors or sexual favors in order to give you something you deserve or want in a school or work setting. Sexual harassment does not always have to be "sexual." It can also look or feel like teasing, intimidating or offensive comments based on stereotypes (e.g., about how certain people "are" or should act), or bullying someone based on their sex, gender identity (man, woman, trans, intersex, nonbinary, two-spirit) or sexual orientation (queer, bisexual, lesbian, gay, asexual, pansexual, etc.). There is no requirement that the sexually harassing person or persons derive any sexual pleasure from their acts or that they are sexually attracted to their victims.

In short, sexual harassment is harassment that is sexual, sex-based, or gender-based in the nature of the harassment itself, regardless of the orientation, gender-identity, sexual interests or pleasure of the harasser.

Examples of sexual harassment include but are not limited to:

- unwanted repeated requests for sexual favors or dates from a peer
- requests for sexual favors or dates from a teacher to a student in a k-12 setting
- inappropriate or lewd comments said or repeated to you or around you
- inappropriate or lewd comments about someone's body or appearance
- saying bad things about someone (or about a group of people) based on gender identity or sexuality
- gender-based or sexuality-based slurs (swear words)
- jokes about sex, or making fun of people generally based on their gender identity or sexuality (i.e. "all women…" or "bisexual people are…")
    - Note: It can still count as sexual harassment even if the behavior or comment is not aimed at you specifically. For example, if you are a trans student who hears a group of other students making offensive jokes or insults about trans people in general, that could still be considered harassment even if they were not directing those comments to you as an individual.
- unwanted emails, texts, messages, videos, or photos of a sexual nature
- gossip about someone's personal relationships or sex life
- unwanted touching of any body part, clothing, face, or hair
- staring, leering, or making gestures of a sexual nature
- blocking someone's way or their movement, especially in a physically threatening or intimidating way
- inappropriate touching, massaging, kissing, or hugging
- flashing or mooning
- vulgar pictures or pornography, even if those pictures are not of or about you, if they are shown to you against your will repeatedly or in the context of other harassment.

- Note: pornographic pictures of anybody under the age of 18 is illegal child pornography, even if the person who took or shared the pictures is also under the age of 18. If you are reporting vulgar pictures or pornography, the age of the subject of the pictures or videos can be an important fact to tell the responsible school party you are reporting to.

Important things to remember

1. For something to be considered sexual assault or harassment, it matters what the person **who was assaulted or harassed** thinks; It does **not** matter if the person who did the assaulting or harassing thinks it was OK, harmless, not sexual, or "welcomed" (they thought you liked it, wanted it, or didn't have a problem with it). It still counts as still sexual assault or harassment if the behavior made you feel unsafe or uncomfortable, was unwanted, or violated your body.
2. It still counts as sexual harassment **even if you did not immediately say "stop," or "no,"** or something else to let the person know that what they were doing or saying was unwanted or inappropriate. For example, you might laugh at a joke, or accept a hug, because you're caught off guard in the moment, or because you're worried the person will react badly if you don't go along. Or, in the case of sexual assault, you may have been too drunk or inebriated to consent. This is not your fault. Nobody deserves to be harmed by another person when incapacitated, no matter what.
3. You can still experience sexual assault event if you previously consented to sexual activity with that person, and if you used to date them or sleep with them. **Saying "yes" once or even multiple times does not mean that you said "yes" to other sexual acts.** Consent must be given (and asked for) time.
4. Most importantly: **It is never the victim's or survivor's fault**. Do not let anyone blame or shame you.

"I was glad to finally have a partner in fighting for what I knew was right. Neither of us wanted to see this happen to anyone else."

Read Júlia & Amelia's Story

What are the laws?

Sexual harassment and sexual assault are considered versions of unlawful gender discrimination at school. Both are illegal across the country.

1. Sexual assault and sexual harassment are illegal at U.S. schools that receive federal funding (Title IX)

Title IX ("Title 9") of the Education Amendments Act of 1972 makes discrimination based on gender illegal at schools, colleges, and school programs (including school-affiliated sports teams, programs, and clubs) and in any education program that receives federal funds (i.e., prison diploma programs, construction trade training programs). Sexual assault and sexual harassment are forms of gender discrimination under this law.

If you are sexually assaulted or sexually harassed at school – or if the harassment or assault has a negative impact on your equal access to school (for example, if you have a class with the person who assaulted you at a party off campus, or if the fear and anxiety of running into that person even if you don't have a class with them is interfering with your equal ability to move around your campus as a student would) – you can report the incident (called "making a Title IX complaint") to your school and request that they take immediate, reasonable, action to help you feel safer while they investigate your Title IX complaint.

- **The Title IX process will take place at your school only. It is not connected to the criminal justice system, so it will not involve off-campus police, jail, or a trial court.** While you can file a criminal complaint and a Title IX complaint at the same time if you want to, these are separate processes investigated by different authorities. Title IX is a type of student misconduct complaint. A school must

begin, continue, or complete their internal Title IX investigation regardless of whether a separate police investigation is undertaken or ongoing.

- Legally, your school **must** share (or make available) its policies on sexual harassment and sexual assault with **every** student, teacher, and staff member. (Those policies may be under a "gender discrimination" section in the student handbook, HR manual, or school board policies.) Your school must also provide students with information about how to report sexual violence or harassment, known as a "grievance procedure." This policy should tell you what happens after you report, including how the investigation will go, and what "interim measures" are available from the school to help you feel safe during the investigation.
- Note about Title IX at **private schools**: If the school receives federal funding, they must comply with Title IX. This includes most but not all private and religious schools. If you're not sure whether your school receives any federal funding our how to find out, contact an ERA team member through our ENOUGH program.

2. If you report sexual assault or harassment, your school cannot ignore you or blame you. The law requires all federally funded schools and colleges to respond to reports of sexual assault or sexual harassment in a reasonably quick and appropriate way. This means once you tell your school about sexual harassment or sexual assault, they should start an investigation without much of a delay (it may take a few days, but should not take longer, unless you report over a school closure or holiday period, in which case it should not take longer than a couple weeks after school resumes). If the results of the investigation show that the sexual assault or sexual harassment more likely than not occurred, your school must then take to stop the harassment or assault if it is ongoing, or to prevent it from happening again.

Sometimes schools don't follow the law. Schools can break the law by mistreating or ignoring those who report sexual assault or sexual harassment. For example:

- The investigation could be delayed, or could drag on for too long
- The school could ignore or dismiss you
- They could try to get you to drop the complaint
- They could lash out against you for reporting, or make you feel as if it was your fault
- They could tell you they're not required to investigate your complaint when in fact they might be, based on what you have learned about your rights here.

If any of these things happened to you, if your school investigated and did nothing to help make you feel safer, or if your school made things even worse for you when you reported to them what happened to you (this is a type of bad response known as "institutional betrayal") **you could take legal action**. If you'd like to speak to a legal advocate for free about your options for taking action, fill out this form.

Schools must also do something to address the negative results of the sexual assault or sexual harassment, which could mean providing counseling for you, or giving you academic support, such as allowing you to re-take a test or a class if your grades suffered as a result of the assault or harassment.

3. Retaliation is illegal.

It's illegal for anyone to retaliate against (punish or intimidate) you for reporting or speaking out against sexual harassment or sexual assault that happened to you or someone else, or for participating in an investigation. Examples of retaliation for reporting include:

- if your school tries to limit where you, the victim of harassment or assault, can go. (For example, a Mutual No-Contact Order that says you must leave a place if you see your assailant there.)
- if you, the victim of harassment or assault, are asked to switch classes or move dorms
- if you're not allowed to go to certain places at certain times
- if a school official or investigator makes you feel ashamed, or makes you feel like if was your fault that you were harassed or assaulted

- if someone threatens you, tries to make you drop the complaint/investigation, intimidates you, or coerces you (promises you something in exchange for dropping the complaint/investigation)
- if you work at the school or school program, and you're fired or demoted; you receive a pay cut or a reduction of hours or benefits; you're assigned a different shift, location, or position; you receive new or different duties; or you're asked to take time off.

If you were retaliated against and would like to apply to speak with a legal advocate for free about your options, fill out this form.

What are my rights?

You have the right to:

1. Feel safe at school after sexual assault or sexual harassment. Your school is required by law to provide a safe learning environment that is not "hostile" to you, which includes creating an environment that's free from violence, harassment, and intimidation.

- **If you reported sexual assault or harassment and your school did not take it seriously**, or has not done anything to make you feel safer, or made things worse for you at school, you could consider contacting one of our ENOUGH legal advocates.

2. Be told about your school's policies on sexual assault and harassment — including how to report — in a way that you understand. The policy should tell you who to report to, and give you information about what could happen and what to expect of the school process after you report.

3. Talk to anyone you want about sexual assault or sexual harassment that happened to you. You also have the right to speak out against sexual assault or sexual harassment at your school, or to speak out against a school policy or practice that is harmful to survivors of sexual assault or harassment.

4. Report the sexual assault or harassment to a school official, including a professor, teacher, coach or faculty member. But be aware that if you tell a teacher, professor, coach, or school official about sexual assault or harassment, they are **required**, under other laws, to report it to a higher-up person at your school. If you do choose to report, we recommend reporting in writing (email or letter) and making copies for yourself. (For more on how to report sexual assault or harassment in writing, see the What Can I Do? section below.)

5. Report it without telling the assailant or harasser in advance. You do NOT have to tell the person who sexually assaulted or harassed you that you are going to report it to your school or that you are going to file a Title IX complaint. You do not even have to tell them after you report them or file the complaint, but they will find out if the school opens an investigation, so be prepared. The school has a legal obligation to let them know that a complaint was made against them and to collect their statement and/or answers to any questions the school may have in its investigation.

6. Warn the assailant that you are considering filing a Title IX complaint. It is OK to "threaten" reporting and then decide not to report if you are satisfied that the assailant's harassing has stopped or if you change your mind about reporting. You are not obliged to report just because you told your peers that you might report. But again remember, many school employees are "mandated reporters," so they will be required to report once aware of what happened.

7. Have your Title IX complaint taken seriously and investigated by your school. Once your school is aware of the sexual assault or sexual harassment, the law requires them to (1) take quick action to stop the harassment or assault if it is ongoing, and (2) provide protection for you if necessary. Protection could include issuing a "no-contact order"— which is like the school-version of an unofficial temporary restraining order— against the person who sexually assaulted or harassed you.

- Note: A no-contact-order issued by a school is not a legal document, and it is not enforceable by a court of law or by police who are not campus police.But it is an official school document and is enforceable by the school and/or campus police under the school's misconduct policies.

- **Be aware**: Investigations usually include the investigator interviewing the person who sexually assaulted or harassed you, and they will know that you are the one who reported them. If you think knowing this will make the person dangerous, be sure to tell your school and also make clear that you expect the school to take immediate actions to help you feel safe. The investigation will also include interviewing you in detail about the incident(s), and could involve interviews with potential witnesses. Usually, but not always, a school asks for a list of potential witness from both the student who complained (the "complainant") and the student accused of the harassment or assault (the "respondent"). The school may also interview individuals not on either student's witness list whom the school believes might be important to talk to.

8. If your school does any of the following after you report, you have the right to seek legal action against the school:

- if they ignore you
- if they don't investigate
- if they don't offer you protection when you need it
- if they treat you badly after you report, for example making you feel like it was your fault, like you are lying, or that you are overreacting
- if the school has created a dangerous situation for you or other students by inviting or keeping a serial assailant on campus

If your school did any of these things to you, we may be able to help. Learn more about our Learn more about our ENOUGH program, which provides free, confidential legal advice.

9. Participate in a Title IX investigation or be a witness for someone else. Whether it's an investigation into something that happened to you, or to someone else, you have a right to participate without barriers or retaliation — even if the claims end up being dismissed, or the investigation determines that sexual assault or harassment didn't occur.

10. To make a police report or seek other civil remedies. You have the right to report conduct that is a crime (such as harassment or assault) to law enforcement if you want to. You are not required to do so in order to file a Title IX complaint. You can use the civil (non criminal) court system to obtain a restraining order or sue your assailant for money. Your school cannot attempt to stop you from asserting any of these legal rights, or to force you to do so.

11. To do absolutely nothing. It is a perfectly acceptable choice to do nothing about the assault or harassment you experienced. It is 100% your decision whether or not to come forward about your experiences. If you decide you are ready to talk, we are ready to listen. Contact an ENOUGH advocate today.

What can I do?

If you or someone you know was sexually assaulted or sexually harassed, here are some things you could do. Remember: It is normal to be afraid or worried about reporting sexual assault or sexual harassment. Do what is right for you. These are just examples of some options you have.

1. Talk to an ENOUGH legal advocate. We provide free, confidential legal advice and help. Fill out our online form to be request a phone appointment with an ENOUGH advocate, attorneys who are here for you and can give you free legal information, tell you what your rights and options are, and potentially provide legal representation.

2. Look at your school's policies on sexual misconduct and the Title IX complaint process. Most schools have a Student Handbook or Code of Conduct. You may have received it when you started at the school, and it may be available on your school's website. Look through these policies to figure out what options you have. The policy should include information about how to report the misconduct (sexual assault or harassment). If it looks like your school does not have policies at all, or if you think their policies do not meet the requirement of Title IX, please contact us. Not having policies, or having legally inadequate policies, is a violation of Title IX. If you are looking into the policies of a K-12 school, our checklist might help you evaluate your schools policies and the accessibility of those policies.

3. Write everything down. If you are thinking of filing a Title IX complaint, you should write down what happened as soon as you can so you don't forget any details. This step may be very difficult, but it is recommended so you can protect yourself during an investigation and in the months that follow the harassment or assault.

Note: It is very normal for a person who has experienced such harm, especially sexual violence, to have trouble remembering things in order, to sometimes remember only some parts of what happened, etc. This is a protective response the brain has to to help protect a person who has experienced trauma. If you write things down, as much and as soon as you can, this will help you have the information you need as you move forward, even if your mental and emotional needs make remembering the exact chronology of events difficult as time goes .

- **Save any emails, texts, letters, or messages** from the person who assaulted or harassed you, or any messages or emails you sent to someone else about the incident.
- **Write down what happened to you**, including dates and times, where it occurred, what exactly was done and said, and the names of any potential witnesses from during, before, or after the incident. Include as much detail as possible. If you're comfortable doing so, ask any witnesses to write down what they saw or heard.
- **Keep notes of any meetings you have with school officials**. Record the time, date, and places of the meetings, who was there, and what was said.
- **Keep copies of all documents, emails, or letters regarding your report, the investigation, the Title IX complaint**, and any other related files, including copies of your responses.

If you think your school retaliated against (punished or intimidated) you for reporting, keep detailed notes of every action that happened, including who, when, where, and any witnesses to the retaliatory actions or threats.

4. Report the sexual assault or harassment to a school official. Try to find contact information for your school's Title IX Coordinator. If you can't find it, ask a trusted teacher, your RA, academic adviser, or guidance counselor. But remember: If you tell a teacher, professor, advisor, or counselor about sexual assault or sexual harassment occurring, **they're required by law to report it** to a school official.

- **If you do want to officially report and have the school investigate, we recommend submitting your report in writing**, whether it's an email or letter that you give to the Title IX coordinator in-person. Be sure to keep copies for yourself. This report should include detail of what happened, including the date and time, place, and who was involved.
- **If you report orally** (not in writing) in-person or on the phone, we recommend sending a follow-up email or letter confirming what happened during the conversation. For example:
    - Dear [name of Title IX coordinator or school official], I'm writing to confirm that we met/talked on the phone today, [date], to discuss the fact that I was sexually assaulted/ sexually harassed by [name] on [date]. You told me that you would [what they said they would do] by [date]. Thank you for taking the time to meet with me about this issue. Please let me know if you have any further questions for me and what you expect the timeline of your investigation to be. [Your name]"

5. If you reported sexual assault or harassment to your school and you were ignored or mistreated, you could seek legal action. If your school ignored you, tried to get you to "drop it," did not tell you about your

right to file a Title IX complaint, made you feel bad for reporting, did not investigate, took too long to investigate, or tried to blame you for the assault or harassment, they broke the law.

Download "Power of IX Checklist: K-12" PDF

- ____

What could happen?

The process at every school is different, and can even be different at campuses within the same university system, but most follow the same basic procedure:

1. Initial interview: Once you report the sexual assault or sexual harassment (known as "making a Title IX complaint") the Title IX Coordinator, administrator, or school employee who is assigned and to handle Title IX investigations, should reach out to conduct an **initial interview** with you (as the victim of sexual assault or harassment, or as the person reporting something you witnessed or are worried about) to gain more information. This interview will form the basis of the complaint, so it is important to be as clear as you can, to include any detail you can remember, and to let the investigator know when you are unsure about something. It's OK if you don't know everything.

- At this point, a school official or the Title IX Coordinator should provide you with information about the investigation process, your rights, your options to request interim measures to help you feel safe and supported at school, and your right to have an advisor of your choice assist you. Other services that may be available to you that the school should tell you about include counseling and academic services. All of this information should be given to you at the initial meeting.

2. Investigator interviews: After the initial interview, an investigator may be assigned to your case. The other party (the person who harmed or harassed you or someone else) will be notified and interviewed. The investigator will then interview any witnesses and receive any evidence provided. If you have any questions about how the investigator will contact the person you are complaining about, it is OK to ask the investigator to explain it to you and tell the investigator about any concerns you might have.

3. Follow-up questions: The investigator might follow up with you if more questions come up during their investigation.

4. Evidence review (COLLEGE ONLY): Once the investigator completes the process of interviewing everyone involved, they will most likely send summaries of the witness statements and any evidence to both parties for the evidence review. This is your opportunity to correct anything misstated, to rebut (oppose) any false statements by the other party or their witnesses, or to comment on the relevance of evidence or why the investigator should not consider certain evidence.

5. Issuing a determination: Once the evidence review period is complete, the investigator (or a different school official) will make a determination as to whether or not the violation took place. This is based on a "preponderance of the evidence," meaning that it is more likely true than not true that it occurred. If, by this standard, the school finds that the sexual assault or harassment occurred, it may recommend a sanction (a consequence for the person responsible).

6. Possible hearing (COLLEGE ONLY): Depending on what state you are in, whether your allegations include sexual violence, and whether the other party is a student or an employee, there may be a hearing after the determination is made. You may or may not have a right to appear at this hearing, and the other party may or may not have the opportunity to ask you questions about your allegations.

7. **Option to appeal:**

- **College**: Once a decision has been made about what happened and what disciplinary action should be taken, both parties typically have the right to appeal the decision to the Chancellor or some other officer at the school. Appeals are typically made because the disciplinary action taken by the school was not appropriate (either too big or too small), the evidence does not support the finding that was made, there was some procedural error in the investigation or hearing, and/or there is new evidence that should be considered which could change the outcome. The case might be sent back to the investigator to fix any errors that occurred, the decision could be overturned and replaced with a new decision, or the decision could be affirmed and kept in place.
- **K-12**: The structure of the appeal process differs by state. If you don't like the outcome of the investigation, you should see if your school district has an appeal process, or you could appeal to a state entity, such as your state's Department of Education.

Have questions or need legal help? Apply to speak with an ENOUGH advocate for free legal help, information, or advice. Fill out this form to get started.

Tools & resources

- ENOUGH — Apply to receive free legal help, information, or advice through our ENOUGH program. Fill out the form to get started. This service is completely **free and confidential**.
- Stop Sexual Assault in Schools — website with more information and resources
- Power of IX Checklist — Is your school doing enough to help end sexual harassment and assault, and following Title IX?
- Ending Harassment Now — Our groundbreaking investigative report about widespread sexual violence and sexual assault in education – and schools failing to comply with Title IX requirements for all survivors' equity.

Continue to EqualRights.org

The First 100 Days

We're calling on the Biden-Harris Administration to take 20 executive actions to support essential workers, women of color, and families in their first 100 days in the White House. Read our recommendations & sign our petition.

Let's go

- Join Our Team
- Get in Touch

- twitter
- facebook
- instagram
- youtube

Legal Advice & Resources / Consejos y Recursos legales

- English
- Español

Know Your Rights

Learn what your rights are so you can navigate your situation and make the best decision for you.

Your Rights at Work

- Gender Discrimination
- Sexual Harassment
- Pay Discrimination

Your Rights at School

- Gender Discrimination
- Sexual Assault & Harassment

Contact Us

We may be able to provide free legal help for the following issues at work or school: gender and LGBTQI+ discrimination, sexual harassment, sexual assault, and pregnancy or parenting discrimination.

Apply for Legal Help

- Workplace/Employment
- Education/School

Learn More

We have trained legal advocates and lawyers on staff to guide you through your legal issue.

- See what it's like to work with ERA.

We're helping women, families, workers & students navigate COVID-19

- Learn more.

Conozca Sus Derechos

Aprende sus derechos para que puedas navegar su situación y tomar la mejor decisión para ti.

Sus Derechos en el Trabajo

- California Pago Justo
- Acoso Sexual
- Trabajo Estando Embarazada

Contáctenos

Posible que podamos proveer ayuda legal por gratis por los siguientes problemas en el trabajo o la escuela: discriminación basado en el género o por LGBTQI+, acoso sexual, asalto sexual, y discriminación basado en el embarazo o por ser padre/madre.

Contáctenos

- Empleo
- Educacion

Nuestro servicio de asesoramiento por teléfono está cerrado por ahora

En este momento, no estamos recibiendo solicitudes dejadas por un recado de teléfono. Sin embargo, usted puede someter una solicitud para una consulta por la manera de hacer clic en el links "Empleo" o "Educacion."

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NATIONAL WOMEN'S LAW CENTER
Justice for Her. Justice for All.

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SUITE 800
WASHINGTON, DC 20036
202-588-5180
NWLC.ORG

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.D*%?!/,)-.;-0)&!A*%,%&-..5!#$.!J0&%?!@*?.!01!%?1)!%1!;)&+*10&A!%1!0-!01!?.&A-$('!B$0?.!-$.!
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A*0:%&;.!0&!2?)A!/)1-1!%&:!?0-0A%-0)&!:);*3.&-1=!-$.1./)1-!$);!/,)&)*&;.3.&-1!$%>.!)&?(!
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;$%&A0&A!%&:!.>)?>0&A!A*0:%&;.=!0&!1)3.!;%1.1![*1-!:%(1!2.+),.!-$.!J0&%?!@*?.!-)')'!.++.;-=!%&:!
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+);*1!)&!3(!)B&!$.%?0&A=!%&:!/*-!3(!.:*;%-0)&!)&!$)?:!U!1)!-$%-!-$.!3%&!B$)!,%/.:!3.!;)*?:!;)3+),-%2?(!
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\!E&)&(3)*1=!?.'0##,/+$'H,77,$1(3#=!hE<9!YEI<h!_9^6!aJ.25!"=!OP"Pb=!
$--/gcc(%?.:%0?(&.B15;)3c2?)AcOP"OcPOcP"c%&)&(3)*1U)&U%11%*?-U&%,,%-0>.1c5!
T!E&A0.!9/0+%&)=!0.'0%%"/.$'"A'I35/,+'0##,/+$',$'0>D37#$'*"++3B3=!EX79@6#!6#4Y9_#!aZ;-5!"M=!OP"Ob=!
$--/gcc%3$.,1-1-*:.&-5%3$.,1-5.:*cmDn%,-0;?.cOP"Oc"Pc"Mc%;;)*&-U1.C*%?U%11%*?-U%3$.,1-U;)??.A.5!
L!E&&0.U@)1.!6-,%11.,=!J.1(37#1$-'"A'H"7$D'*,7"+1.,'7,63'(1%$1>'>,-'@3'3563++32'A"7'#63,&1.B',@"/$'D37'%,#3=!
#7I_ie@ZF@966!aJ.25!O\=!OP"\b=!$--/1gcc-$0&'/,)A,.115),Ac*&0>.,10-(U)+U&),-$U;%,)?0&%U,%/.U>0;-03U3%(U2.U.C/.??.:U
+),U1/.%'0&AU%2)*-U$.,U;%1.UO:S.S2P.2OT.5!
S!I33'B3.37,++-'Y%&%!G)?A.,=!:3.237'K1"+3.%3'*"#$#L'I%D""+#W'=1.,.%1,+'?@+1B,$1".#'J.237'N1$+3'?0P=!"0L!hE<9!<5N5!O"PS!
aOP"Sb!a:.1;,02 0&A!-$.!+0&%&;0%?!0 3/%;-!)+!A.&:.,!>0)?.&;.!)&!1-*:.&-!1*,>0>),1b5!
M!)+!70A$.,!9:*;%-0)&!aE*A5!
"O=!OP"\b=!$--/gccBBB5;$,)&0;?.5;)3c%,-0;?.cH*0.-U_)U<)&A.,U@%/.c"T"PTR5!
]!E?(11%!e.-.,1)&!o!Z?0>0%!Z,-0K=!O'!3$$37'!,+,.%3L'G7"(121.B'I/7(1("7#'"A'I35/,+'K1"+3.%3'C1$D'Q4AA3%$1(3'G7"$3%$1".Q'
0B,1.#$'I35'R1#%71>1.,$1".'ND7"/BD'N1$+3'0P'*">6+,1.$#=!"0L!h%?.!<5N5!O"\O=!O"\]U\R!aOP"Sb'!@)20&!^0?1)&=!STUV'
0.A+/3.%3'W1#$L'4.A"7%37=!8$,)&0;?.!)+!70A$.,!9:*;%-0)&!aY.;5!"L=!OP"Tb=!,(,1+,@+3',$'
!

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$--/gccBBB5;$,)&0;?.5;)3c%,-0;?.c.&+),;.,U;%-$.,0&.U.U?$%3)&c"LP]\M!a:.1;,020&A!E1101-%&-!6.;,.-%,(!+),!80>0?!

!

R! 3$',+)!-)!9:*;%-0)&!6.;,.-%,(!N)$&!i0&A!aN*?(!"\=!OP"Sb=!,(,1+,@+3',$'
$--/1gcc&B?;5),Ac,.1)*,;.1c10A&U)&U?.--.,U1*//),-0&AU-0-?.U0CUA*0:%&;.U #$.1.!A*0:%&;.!:);*3.&-1!
%&:!0&;,.%1.:!.&+),;.3.&-!)+!#0-?.!IW!2(!-$.!Z++0;.!+),!80>0?!@0A$-1!$%>.!1/*,,.:!1;$))?1!-)!%::,.11!;*?-*,.1!-$%-!+),!
-))!?)&A!$%>.!;)&-,02*-.:!-)!$)1-0?.!.&>0,)&3.&-1!B$0;$!:./,0>.!3%&(!1-*:.&-1!)+!.D*%?!.:*;%-0)&%?!

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"P! *7"##1.B'$D3'W1.3L'I35/,+'<,7,##>3.$',$'I%D""+'O!aOP""b!d$.,.0&%+-.,!
*7"##1.B'$D3'W1.3p=!$--/1gccBBB5%%*B5),Ac+0?.1cOP"\cPOc8,)110&AU-$.U<0&.U6.C*%?U7%,%113.&-U%-U6;$))?5/:+5!
"" ! W3$'<37'W3,7.L'I$"661.B'I%D""+'G/#D"/$'A"7L':17+#'FD"'<,(3'I/AA3732'<,7,##>3.$',.2'
I35/,+'K1"+3.%3!"!aE/,5!OP"Mb!d$.,.0&%+-.,!W3$'<37'W3,7.L'I35/,+'<,7,##>3.$',.2'K1"+3.%3p=!,(,1+,@+3',$'
$--/1gcc&B?;5),Ac,.1)*,;.1c1-)//0&AU1;$))?U/*1$)*-U+),UA0,?1UB$)U$%>.U1*++.,.:U$%,%113.&-U%&:U1.C*%?U
>0)?.&;.c5!
"O! 936"7$'".'$D3'00J'*,>6/#'*+1>,$3'I/7(3-'".'I35/,+'O##,/+$',.2'X1#%".2/%$=!%-!0C!aZ;-5!"L=!
OP"Rb=!$--/1gccBBB5%%*5.:*c'.(U011*.1c;%3/*1U;?03%-.U%&:U1%+.-(c%%*U;%3/*1U;?03%-.U1*,>.(UOP"R5!!!
"\! W3$'<37'W3,7.L'I$"661.B'I%D""+'G/#D"/$'A"7':17+#'FD"'073'G73B.,.$'"7'G,73.$1.B!%-!"O!
aOP"Mb!d$.,.0&%+-.,!W3$'<37'W3,7.L'G73B.,.$'"7'G,73.$1.B'I$/23.$#p=!,(,1+,@+3',$'$--/1gcc&B?;U
;0BTR-0CABL?2%251-%;'/%-$:&15;)3cB/U;)&-.&-c*/?)%:1cOP"McPTcJ0&%?k&B?;kF%-.1ke,.Ae%,.&-0&A5/:+5!
"T! W3$'<37'W3,7.L'I$"661.B'I%D""+'G/#D"/$'A"7':17+#'FD"'<,(3'4563713.%32'I35/,+'
<,7,##>3.$!%-!\!aOP"]b!d$.,.0&%+-.,!W3$'<37'W3,7.L'I35/,+'<,7,##>3.$p=!,(,1+,@+3',$!$--/1gcc&B?;U
;0BTR-0CABL?2%251-%;'/%-$:&15;)3cB/U;)&-.&-c*/?)%:1cOP"]c"PcOP"]U"PUP"U67U-))?'0-UJI_E<5/:+5!
"L!F<69_=!ND3'STUY'H,$1".,+'I%D""+'*+1>,$3'I/7(3-L'ND3'456313.%3#'"A'W3#@1,.E':,-E'!1#35/,+E'N7,.#B3.237E',.2'
Queer Youth in Our Nation's Schools!OS!aOP"]b!d$.,.0&%+-.,!OP"M!_%-0)&%?!6;$))?!8?03%-.!6*,>.(p=!,(,1+,@+3',$!
$--/1gccBBB5A?1.&5),Ac10-.1c:.+%*?-c+0?.1cOP"RU"PcF<69_UOP"MU_%-0)&%?U6;$))?U8?03%-.U6*,>.(U_686UJ*??U
@./),-5/:+5!
"S!00J'*,>6/#'*+1>,$3'I/7(3-=!#/67,'&)-.!"O=!%-!"\U"T5!
"M! W3$'<37'W3,7.L'I$"661.B'I%D""+'G/#D"/$'A"7L':17+#'F1$D'R1#,@1+1$13#!M!aOP"Mb!d$.,.0&%+-.,!
W3$'<37'W3,7.L':17+#'C1$D'R1#,@1+1$13#p=!,(,1+,@+3',$'$--/1gcc&B?;5),Ac,.1)*,;.1c1-)//0&AU1;$))?U/*1$)*-U+),UA0,?1U
B0-$U:01%20?0-0.15!
"]!4)B)=!E*:,.(!8$*=!*I Dropped Out of College Because I Couldn't Bear to See My Rapist o.'*,>6/#=!QI89!a6./-5!OS=!
OP"Mb=!$--/1gcc2,)%:?(5>0;.5;)3c.&k*1c%,-0;?.cD>[K/:c0U:,)//.:U)*-U)+U;)??.A.U2.;%*1.U0U;)*?:&-U2.%,U-)U1..U3(U
,%/01-U)&U;%3/*15!
"R!4)B)=!E?.C%&:,%!G,):1'(=!<"C'>/%D'2"3#'#35/,+',##,/+$'%"#$'%"+3B3'#$/23.$#'3(37-'-3,7Z=!^E675!eZ6#!a_)>5!"]=!
OP"Tb=!$--/1gccBBB5B%1$0&A-)&/)1-5;)3c/)1-.>.,(-$0&AcB/cOP"Tc""c"]c$)BU3*;$U:).1U1.C*%?U%11%*?-U;)1-U
1-*:.&-1U.>.,(U(.%,5!
OP!8.;0?0%!X.&A)!o!G.>.,?(!X5!G?%;'=!K1"+3.%3'K1%$1>1[,$1".'".',"*"+3B3'*,>6/#L'0>6,%$'".':G0',.2'I%D""+'
R7"6"/$=!"]aOb!N585!6#4Y9_#!@9#9_#IZ_g!@965=!#79Z@h!o!e@E85!O\T=!OTT!aOP"Lb=!,(,1+,@+3',$'
$--/1gcc:)05),Ac"P5""MMc"LO"POL""LL]TMLP5!
O"!_0;'!E&:.,1)&!%&:!6;)--!8?.3.&-=!*"+3B3'I35/,+'0##,/+$L'U'1.'\'*"+3B3'F">3.'I,-'ND3-'F373'K1"+,$32=!^E675!
eZ6#!aN*&.!"O=!OP"Lb!d$.,.0&%+-.,'^%1$0&A-)&!e)1-!e)??p=!
$--/1gccBBB5B%1$0&A-)&/)1-5;)3c1+c?);%?cOP"LcPSc"Oc"U0&ULUB)3.&U1%(U-$.(UB.,.U>0)?%-.:c5!!
OO!W3$'<37'W3,7.L'I35/,+'<,7,##>3.$=!#/67,'&)-.!"T%-!O5!
O\!00J'*,>6/#'*+1>,$3'I/7(3-=!#/67,'&)-.!"O!%-!\S5!
OT!02)!
OL!@EI__=!*,>6/#'I35/,+'K1"+3.%3L'I$,$1#$1%#=!$--/1gccBBB5,%0&&5),Ac1-%-01-0;1c;%3/*1U1.C*%?U>0)?.&;.5!
OS!OP"M!_%-0)&%?!6;$))?!8?03%-.!6*,>.(=!#/67,!&)-.!"L=!%-!OM5!
OM!I33'N.&&0+.,!X.:0&%=!N""'I%,732'$"'936"7$'I35/,+'0@/#3)'ND3'=3,7L'R36"7$,$1".=!_5h5!#IX96!aE/,0?!\P=!OP"Mb=!
$--/1gccBBB5&(-03.15;)3cOP"McPTc\Pc*1c03 30A,%&-1U:./),-%-0)&U1.C*%?U%2*1.5$-3?m3;*2Kn\5'
O]!_%-0)&%?!8.&-.,!+),!#,%&1A.&:.,!9D*%?0-(='ND3'936"7$'"A'$D3'STU\'J)I)'N7,.#B3.237'I/7(3-L'453%/$1(3'I/>>,7-!
"O!aY.;5!OP"Sb!d$.,.0&%+-.,!STU\'J)I)'N7,.#B3.237'I/7(3-p=!
$--/1gcc-,%&1.D*%?0-(5),Ac10-.1c:.+%*?-c+0?.1c:);1c*1-1c46#6U9C.;*-0>.U6*33%,(UY.;"M5/:+5!
!

"R!

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OR!I33'3)B)=!G.-$)&0.!G*-?.,=!I/7(1("7#'"A'#35/,+',##,/+$'%".A7".$'(1%$1>'@+,>1.B'".'NC1$$37=!^E675!eZ6#!aX%,5!"\=!
OP"Tb=!$--/1gccBBB5B%1$0&A-)&/)1-5;)3c2?)A1c1$.U-$.U/.)/?.cB/cOP"TcP\c"\c1*,>0>),1U)+U1.C*%?U%11%*?-U
;)&+,)&-U>0;-03U2?%30&AU)&U-B0--.,5!
\P!Y%>0:!<01%'!.-!%?5=!=,+#3'0+3B,$1".#'"A'I35/,+'0##,/+$L'0.'0.,+-#1#'"A'N3.']3,7#'"A'936"7$32'*,#3#=!"Sa"Ob!QIZ<9_89!
EFEI_6#!^ZX9_!"\"] "\\T!aOP"Pb=!,(,1+,@+3',$!$--/1gcc:)05),Ac"P5""MMc"PMM]P"O"P\]MMTM5!
\"!4)B)=!#(?.,!i0&A'%:.=!X,+3#'073'X"73'W1&3+-'N"'I/AA37'I35/,+'0##,/+$'ND,.'N"'!3'=,+#3+-'0%%/#32'?A'0$=!74JJI_F#Z_!
eZ6#!aY.;5!]=!OP"Tb!d?%1-!*/:%-.:!Z;-5!"S=!OP"Lp=!$--/1gccBBB5$*++0&A-)&/)1-5;)3cOP"Tc"OcP]c+%?1.U,%/.U
%;;*1%-0)&1k&kSORP\]P5$-3?5!
\O!I33=!3)B)=!G,0%&!9&-0&=!X1,>1':,723.#'^$D_B7,237'#,-#'#D3'C,#'7,632'@-''@"-#'1.'#%D""+'@,$D7"">=!^6Q_U#Q!
aJ.25!]=!OP"]b=!$--/1gccB1>&5;)3c&.B1c?);%?c30%30UA%,:.&1UR-$UA,%:.,U1%(1U1$.UB%1U,%/.:U2(U\U2)(1U0&U1;$))?U
2%-$,))3'!_),%!8%/?%&UG,0;'.,=!*"My School Punished Me"*=!6<E#9!a6./-5!"R=!OP"Sb=!$--/1gcc1?%-.5;)3c$*3%&U
0&-.,.1-cOP"ScPRc-0-?.U0CU1.C*%?U%11%*?-U%??.A%-0)&1U0&U'U"OU1;$))?15$-3?'!E>0>%!6-%$?=!MND1#'0#',.'46123>1%ML'<"C'
H]*'G/@+1%'I%D""+#'G/.1#D':17+#'A"7'!31.B'9,632=!QI89!aN*&.!]=!OP"Sb=!
$--/1gcc2,)%:?(5>0;.5;)3c.&k*1c%,-0;?.cLR3K\Cc-$01U01U%&U./0:.30;U$)BU&(;U/*2?0;U1;$))?1U/*&01$UA0,?1U+),U2.0&AU
,%/.:5!
\\!6%,%$!G,)B&=!!]J'0#'J.237'=173E'0B,1.E'A"7'G/.1#D1.B'I35_0##,/+$'K1%$1>#=!87@Z_I8<9!ZJ!7IF79@!9Y485!aE*A5!S=!
OP"]b=!$--/1gccBBB5;$,)&0;?.5;)3c%,-0;?.cGh4UI1U4&:.,UJ0,.UEA%0&U+),cOTT"ST5!
\T! %B!8-,5=!J.+"%&1.B'?66"7$/.1$-'A"7'0A71%,.'
0>371%,.':17+#L'0'*,++'$"'0%$1".'A"7'42/%,$1".,+'4a/1$-!OL!aOP"Tb!d$.,.0&%+-.,!J.+"%&1.B'?66"7$/.1$-p=!
$--/1gcc&B?;5),AcB/U;)&-.&-c*/?)%:1cOP"LcP]c*&?);'0&Ak)//),-*&0-(k+),k%+,0;%&k%3.,0;%&kA0,?1k,./),-5/:+5!
\L!I33E'3)B)='#(?.,!i0&A'%:.='FD3.'*"++3B3#'ND73,$3.'N"'G/.1#D'I$/23.$#'FD"'936"7$'I35/,+'K1"+3.%3=!74JJI_F#Z_!
eZ6#!a6./-5!R=!OP"Lb=!$--/1gccBBB5$*++0&A-)&/)1-5;)3c.&-,(c1.C*%?U%11%*?-U>0;-031U
/*&01$3.&-k*1kLL%:%\\:.T2P;%+MO"2\2S";5!
\S!J),!.C%3/?.=!_^<8!,.;.&-?(!?0-0A%-.:!)&!2.$%?+!)+!-$,..!1-*:.&-!1*,>0>),1!B$)!B.,.!/*&01$.:!),!)-$.,B01.!

X1,>1'I%D""+'!",72'G/#D32'I/7(1("7'"A'X/+$16+3'I35/,+'0##,/+$#'?/$'"A'I%D""+E'I,-#'HFW*!aN%&5!
"L=!OP"Rb=!$--/1gcc&B?;5),Ac/,.11U,.?.%1.1c30%30U1;$))?U2)%,:U/*1$.:U1*,>0>),U)+U3*?-0/?.U1.C*%?U%11%*?-1U)*-U
)+U1;$))?U1%(1U G3.712B3'I%D""+'R1#$71%$'*".#1#$3.$+-'G/#D3#'I/7(1("7#'"A'I35/,+'
<,7,##>3.$'?/$'"A'I%D""+E'I,-#'HFW*!aE*A5!R=!OP"Mb=!$--/1gcc&B?;5),Ac/,.11U,.?.%1.1c/.&&,0:A.U1;$))?U:01-,0;-U
;)&101-.&-?(U/*1$.1U1*,>0>),1U)+U1.C*%?U$%,%113.&-U)*-U)+U1;$))?U1%(1U HFW*'=1+3#'
W,C#/1$',B,1.#$'G0'I%D""+'R1#$71%$'A"7'=,1+1.B'$"'02273##'I35/,+'0##,/+$"'A'<1BD'I%D""+'I$/23.$!aX%(!\"=!OP"Mb=!
$--/1gcc&B?;5),Ac/,.11U,.?.%1.1c&B?;U+0?.1U?%B1*0-U%A%0&1-U/%U1;$))?U:01-,0;-U+),U+%0?0&AU-)U%::,.11U1.C*%?U%11%*?-U
)+U$0A$U1;$))?U1-*:.&-5!
\M! W3$'<37'W3,7.L'0'N""+&1$'N"'I$"6'I%D""+'G/#D"/$'A"7':17+#'"A'*"+"7!"!aOP"Sb!d$.,.0&%+-.,!
W3$'<37'W3,7.L':17+#'"A'*"+"7p=!,(,1+,@+3',$!$--/1gcc&B?;5),Ac,.1)*,;.1c?.-U$.,U?.%,&U%U-))?'0-U)U1-)/U1;$))?U/*1$U
)*-U+),UA0,?1U)+U;)?),5!
\]!4)B)=!_%&;(!8$0!8%&-%?*/)=!0.2'4(3.'X"73'"A'J#'073'!7,(3L'0.$37#3%$1"".,+1$-';'I35/,+'<,7,##>3.$"'A'F">3.'
I$/23.$#'"A'*"+"7=!TO!7E@QE@Y!N5<5!O!F9_Y9@!"S=!OTUOR!a+),-$;)30&Ab=!,(,1+,@+3',$'
$--/1gcc11,&5;)3c%21-,%;-n\"S]RPR5!
\R!F.),A.-)B&!<%B!8.&-.,!)&!e)>.,-(!%&:!I&.D*%?0-(=!*Girlhood Interrupted: The Erasure of Black Girls' Childhood*=!"!
aOP"]b!d$.,.0&%+-.,!:17+D""2'0.$377/6$32p=!$--/1gccBBB5?%B5A.),A.-)B&5.:*c/)>.,-(U0&.D*%?0-(U;.&-.,cB/U
;)&-.&-c*/?)%:1c10-.1c"TcOP"McP]cA0,?$)):U0&-.,,*/-.:5/:+5!
TP!8%&-%?*/)=!#/67,'&)-.!\]=!%-!OTUOL5!
T"!:17+D""2'0.$377/6$32E'#/67,'&)-.!\R=!%-!OUS5!
TO! U"T!80>0?!@0A$-1!Y%-%!8)??.;-0)&!a8@Y8b!1$)B1!-$%-!G?%;'!A0,?1!%,.!+0>.!-03.1!
3),.!?0'.?(!-$%&!B$0-.!A0,?1!-)!2.!1*1/.&:.:!0&!.?.3.&-%,(!%&:!1.;)&:%,(!1;$))?=!%&:!-$%-!B$0?.!G?%;'!A0,?1!
,./,.1.&-.:!OP!/.,;.&-)+!%??!/.,1;$))?!.&,)??.:!1-*:.&-1=!-$.(!B.,.!LT!/.,;.&-)+!/.,1;$))?1-*:.&-1!B$)!B.,.!
1*1/.&:.:5! 0'=17#$'W""&L'b3-'R,$,'<1BD+1BD$#'".'4a/1$-',.2'
Opportunity Gaps in Our Nation's Public Schools=!%-!\!aN*&.!M=!OP"S'!?%1-!*/:%-.:!Z;-5!O]=!OP"Sb='
$--/1gccBBBO5.:5A)>c%2)*-c)++0;.1c%01-c);,c:);1cOP"\U"TU+0,1-U?))'5/:+5!
!

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T\!I33E'3)B)='F0??0%&!@5!8$%:B0;'=!93"713.$1.B'$D3'9/+3#'"A'4(123.%3='\R!8E@YZqZ!<5!@9Q5!O""L=!O""]!aOP"]b=!
$--/gcc;%,:)K)?%B,.>0.B5;)3c$.-.,)1.C013U,*?.1U.>0:.&;.'!<%*,%!Y),B%,-=!ND3'<1223.'cX3N""'46123>1%L'I35/,+'
0##,/+$'0B,1.#$'!1#35/,+'F">3.=!X9YI4x!aY.;5!\=!OP"Mb=!$--/1gcc3.:0*35;)3cr?%*,%3:),B%,-c-$.U$0::.&U
3.-))U./0:.30;U1.C*%?U%11%*?-U%A%0&1-U201.C*%?UB)3.&URL+.MS;\\\P%5!
TTI#$.!E,;=!G3"6+3'C1$D'0.$3+3%$/,+'R1#,@1+1$13#',.2'I35/,+'K1"+3.%3!O!aX%,5!OP""b=!,(,1+,@+3',$!
$--/1gccBBB5-$.%,;5),Ac:);*3.&-5:);m0:n\SLM5!
TLI4)B)E! 45,>1.1.B'*71>1.,+'d/#$1%3'93#6".#3#'$"',.2'<3+6_I33&1.B'G,$$37.#'"A'I35/,+'K1"+3.%3'
I/7(1("7#'C1$D'R1#,@1+1$13#!""=!"TU"L!aOP"Sb=!,(,1+,@+3',$!$--/1gccBBB5&0[5A)>c-)/0;1c;,03.c,%/.U1.C*%?U
>0)?.&;.ce%A.1c;$%??.&A.1U+%;0&AU1.C*%?U%11%*?-U1*,>0>),1UB0-$U:01%20?0-0.15%1/C5!
TS! -0)&!9&+),;.3.&-!%&:!
e)?0;(!6.,>0;.1!aE*A5!\"=!"R]"b!a 6.C*%?!$%,%113.&-!;)&1101-1!)+!>.,2%?!),!/$(10;%?!;)&:*;-!)+!%!1.C*%?!&%-*,.=!
03/)1.:!)&!-$.!2%101!)+!1.C!5!5!5!-$%-!:.&0.1=!?030-1=!/,)>0:.1!:0++.,.&-=!),!;)&:0-0)&1!-$.!/,)>0100)&!)+!%0:1=!2.&.+0-1=!
1. Z++0;.!+),!80>0?!@0A$-1=!*Sexual Harassment: It's Not*
O%,23>1%'G,>6D+3$!LUS!a"R]]b=!,(,1+,@+3',$!$--/1gcc+0?.15.,0;5.:5A)>c+*??-.C-c9Y\\POSL5/:+!a,.D*0,0&A!.:*;%-0)&!
0&1-0-*-0)&1=!B$.,.!1.C*%?!$%,%113.&-!01!+)*&:=!-)!-%'.!0330.:0%-.!%;-0)&!-)1-)/!%&:!/,.>.&-!+*,-$.,!$%,%113.&-=!
%1!B.??!%1!0&0-0%-.!%//,)/,0%-.!,.3.:0%?!3.%1*,.1 b5!
TMI=7,.&+1.')':C1..3$$'*$-)'G/@)'I%D)=!LP\!4565!SP=!MLUMS!a"RROb5!
T]! !
TRI133'R,(1#'()'X".7"3'*$-'!2)'"A'42/%)=!LOS!4565!SOR!a"RRRb'!:3@#37'()'W,B"'K1#$,'0.236)'I%D)'R1#$)=!LOT!4565!OMT!
a"RR]b5!
LPI:3@#37=!LOT!4565!%-!ORO5!
L"I133! E'93(1#32'I35/,+'<,7,##>3.$':/12,.%3L'<,7,##>3.$'"A'I$/23.$#'@-'
I%D""+'4>6+"-33#E'?$D37'I$/23.$#E'"7'ND172'G,7$13#!aOPP"b!d$.,.0&%+-.,!OPP"!F*0:%&;.p=!
$--/1gccBBBO5.:5A)>c%2)*-c)++0;.1c?01-c);,c:);1c1$A*0:.5/:+5!
LOI!#$.1.!1-%&:%,:1!$%>.!2..&!,.%++0,3.:!-03.!%&:!-03.!%A%0&=!0&!OPPS!2(!-$.!G*1$!E:30&01-,%-0)&=!0&!OP"P=!OP""=!
%&:!OP"T!0&!A*0:%&;.!:);*3.&-1!011*.:!2(!-$.!Z2%3%!E:30&01-,%-0)&=!%&:!.>.&!0&!-$.!OP"M!A*0:%&;.!:);*3.&-!
011*.:!2(!-$.!;*,,.&-!E:30&01-,%-0 R3,7'*"++3,B/3'W3$$37L'I35/,+'
<,7,##>3.$!aN%&5!OL=!OPPSb!d$.,.0&%+-.,!OPPS!F*0:%&;.p=!
$--/1gccBBBO5.:5A)>c%2)*-c)++0;.1c?01-c);,c?.--.,1c1.C$%,UOPPS5$-3?
R3,7'*"++3,B/3'W3$$37L'<,7,##>3.$',.2'!/+-1.B!aZ;-5!OS=!OP"Pb!d$.,.0&%+-.,!OP"P!
F*0:%&;.p=$--/1gccBBBO5.:5A)>c/,0&-c%2)*-c)++0;.1c?01-c);,c?.--.,1c;)??.%A*.UOP"P"P5/:+
Z++0;.!+),!80>0?!@0A$-1=!R3,7'*"++3,B/3'W3$$37L'I35/,+'K1"+3.%3!%-!T=!S=!R=!o"S!aE/,5!T=!OP""b!d$.,.0&%+-.,!OP""!
F*0:%&;.p=!$--/1gccBBO5.:5A)>c%2)*-c)++0;.1c?01-c);,c?.--.,1c;)??.%A*.UOP""PT5/:+
80>0?!@0A$-1=!e/3#$1".#',.2'0.#C37#'".'*,>6/#'I35/,+'X1#%".2/%$!a6./-5!OP"Mb!d$.,.0&%+-.,!OP"M!F*0:%&;.p=!
$--/1gccBBBO5.:5A)>c%2)*-c)++0;.1c?01-c);,c:);1cD%UOP"TPTU-0-?.U
e/3#$1".#',.2'0.#C37#'".'*,>6/#'I35/,+'X1#%".2/%$!a6./-5!OP"Mb!d$.,.0&%+-.,!OP"M!F*0:%&;.p=!
$--/1gccBBBO5.:5A)>c%2)*-c)++0;.1c?01-c);,c:);1cD%U-0-?.U0CUOP"MPR5/:+5!
L\!OPP"!F*0:%&;.=!#/67,!&)-.!L"=!%-!O5!
LTI02)!
LLI02)'
LSIOP""!F*0:%&;.=!#/67,!&)-.!LO'!OP"T!F*0:%&;.=!#/67,!&)-.!LO5!
LMI +),!80>0?!@0A$-1=!R3,7'*"++3,B/3'W3$$37!aN%&5!OL=!OPPSb=!
$--/1gccBBBO5.:5A)>c%2)*-c)++0;.1c?01-c);,c?.--.,1c1.C$%,UOPPS5$-3?5!
L]! I3%73$,7-'R3K"#'G736,732'93>,7&#'".'N1$+3'0P'4.A"7%3>3.$!a6./-5!M=!OP"Mb!d$.,.0&%+-.,!R3K"#'
G736,732'93>,7&#p=!,(,1+,@+3',$'$--/1gccBBB5.:5A)>c&.B1c1/..;$.1c1.;,.-%,(U:.>)1U/,./%,.:U,.3%,'1U-0-?.U0CU
.&+),;.3.&-5!
LRI9,0;%!<5!F,..&!o!6$.,(?!F%(!6-)?2.,A=!*Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*=!_5h5!
#IX96!aN*?(!"O=!OP"Mb=!$--/1gccBBB5&(-03.15;)3cOP"McPMc"Oc*1c/)?0-0;1c;%3/*1U,%/.U2.-1(U:.>)1U-0-?.U0>U
.:*;%-0)&U-,*3/U;%&:0;.U[%;'1)&5$-3?5!
SPI^$.&!^$0-.!7)*1.!)++0;0%?1!@)2!e),-.,!%&:!Y%>0:!6),.&1.&!,.10A&.:!%30:1-!,./),-1!-$%-!-$.(!$%:!;)330--.:!
A.&:.,U2%1.:!>0)?.&;.=!-$./,.10:.&-!-B..-.:g! >.1!%,.!2.0&A!1$%--.,.:!%&:!:.1-,)(.:!2(!%!3.,.!
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0"!

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?0+.!%&:!;%,..,!%,.!A)&.5!I1!-$.,.!&)!1*;$!-$0&A!
Y)&%?:!#,*3/!a r ,.%?Y)&%?:#,*3/b=!#^ı##9@!aJ.25!"P=!OP"]=!Mg\\!EXb=!
$--/1gcc-B0--.,5;)3c,.%?Y)&%?:#,*3/c1-%-*1cRSO\T]]\"M]RMRM\]"5!I33',+#"!N%;.(!J),-0&=!*Trump's History of*
R3A3.21.B'X3.'0%%/#32'"A'</7$1.B'F">3.=!_5h5!#IX96!aJ.25!""=!OP"]b=!
$--/1gccBBB5&(-03.15;)3cOP"]cPOc""c*1c-,*3/U1.C*%?U301;)&:*;-5$-3?!a%2)*-!$%,%113.&-!;?%031!%A%0&1-!

_.B1=!@)A.,!E0?.1=!

Trump asks why Christine Blasey Ford didn't report
D37',+3B,$1".#'#"".37)'I/7(1("7#',.#C37'C1$D'cFD-0R12.$936"7$=!^E675!eZ6#!a6./-5!O"=!OP"]b=!
$--/1gccBBB5B%1$0&A-)&/)1-5;)3c&.B1c1)?)01$cB/cOP"]cPRcO"c-,*3/U%1'1UB$(U;$,01-0&.U2?%1.(U+),:U:0:&-U
,./),-U$.,U%??.A%-0)&U1))&.,U1*,>0>),1U%&1B.,UB0-UB(0:0:&-,./),-cm*-3k-.,3n5\;%P:PP"M;\S!a%2)*-!1.C*%?!
%1

X%??)(=!.-!%?5=!N7/>6'X"%&#'*Christine Blasey Ford's Testimony, Tells People to 'Think of Your Son'*=!8__!aZ;-5!\=!
OP"]b=!$--/1gccBBB5;&&5;)3cOP"]c"PcPOc/)?0-0;1c-,*3/U3);'1U;$,01-0&.U2?%1.(U+),:U'%>%&%*A$U1*/,.3.U
.!-$.!6.&%-.!N*:0;0%,(!8)3 3 0--..b'!!
S"!!7s?t&.!G%,-$s?.3(=!*How Men's Rights Groups Helped Rewrite Regulations on Campus Rape*=!#79!_E#IZ_!aE*A5!
"T=!OPOPb=!$--/1gccBBB5-$.&%-0)&5;)3c%,-0;?.c/)?0-0;1c2.-1(U:.>)1U-0-?.U0CU3.&1U,0A$-1c5!
SO!_)&:01;,0 3 0&%-0)&!)&!-$.!G%101!)+!6.C!0&!9:*;%-0)&!e,)A,%31!),!E;-0>0-0.1!@.;.0>0&A!J.:.,%?!J0&%&;0%?!E1101-%&;.=!
]\!J.:5!@.A5!S"=TSO!a_)>5!OR=!OP"]b5!!!
S\'#$.!-.C-!)+!-$.!J0&%?!@*?.=!B$0;$!-))'!.++.;-!)&!E*A*1-!"T=!OPOP=!01!10?.&-!%1!-)!B$.-$.,!-$.!J0&%?!@*?.!%//?0.1!
,.-,)%;-0>.?(5!^$0?.!-$.!,*?.!/,.%32?.!/,)>0:.:!1)3.!;%,0-(!2(!1-%-0&A!-$%-!1;$))?1!;%&&)-!,.)/.&!673(1"/#+-'
%">6+3$32!0&>.1-0A%-0)&1!-)!,.U%:[*:0;%-.!-$.3!*&:.,!-$.!J0&%?!@*?.=!0-!-))!+%0?.:!-)!%::,.11!$)B!1;$))?1!1$)*?:!
$%&:?.!0&>.1-0A%-0)&1'-$%-!B.,.!#$1+'63.21.B'%1!)+!E*A*1-!"T=!OPOP!%&:!$)B!1;$))?1!1$)*?:!$%&:?.!&.B!
0&>.1-0A%-0)&1!)+!1.C*%?!$%,%113.&-!-$%-!"%%/7732!2.+),.!E*A*1-!"T=!OPOP!2*-!B.,.!736"7$32!%+-.,!E*A*1-!"T=!OPOP5!
]L!J.:5!@.A5!%-!\P=PS"5!Z&!E*A*1-!L=!OPOP=!&0&.!:%(1!2.+),.!-$.!J0&%?!@*?.!B.&-!0&-)!.++.;-=!-$.!Y./%,-3.&-!
/*2?01$.:!%!2?)A!/)1-!%&&)*&;0&A!-$%-!-$.!J0&%?!@*?.!%//?0.1!)&?(!-)!%??.A.:!1.C*%?!$%,%113.&-!-$%-!)
);*,,.:!:*,0&A!-$.!%//?0;%2?.!-03.!/.,0):15!
ST! *Questions and Answers Regarding the Department's Final Title IX Rul*3!
a6./-5!T=!OPOPb=!$--/1gccBBBO5.:5A)>c%2)*-c)++0;.1c?01-c);,c:);1cD%U-0-?.0CUOPOPPRPT5/:+5!
SL!J.30&01-!X%[),0-(!J)*&:%-0)&=!=,#$'A,%$#'_'I35/,+'(1"+3.%3'".'%,>6/#!aOP"]b=!$--/gcc+.30&01-;%3/*15),AcB/U
;)&-.&-c*/?)%:1cOP"]c""cJ%1-UJ%;-15/:+!a#$.!;)1-!-)!1*,>0>),1!01!2.()&:!+0&%&;0%?5!6*,>0>),1!%,.!-$,..!-03.1!3),.!
?0'.?(!-)!1*++.,!+,)3!:../,.110)&=!1!0C!-03.1!3),.!?0'.?(!-)!$%>.!/)1-U-,%*3%-0;!1-,.11!:01),:.,=!"\!-03.1!3),.!?0'.?(!
-)!%2*1.!%?;)$)?=!OS!-03.1!3),.!?0'.?(!-)!%2*1.!:,*A1=!%&:!+)*,!-03.1!3),.!?0'.?(!-)!;)&-.3/?%-.!1*0;0:.b5!
SS!^$0-.!7)*1.!8)*&;0?!)&!^)3.&!%&:!F0,?1=!9,63',.2'I35/,+'0##,/+$L'0'93.3C32'*,++'$"'0%$1".!"L!aN%&5!OP"Tb=!
$--/1gccBBB5'&)B()*,0C5),AcB/U;)&-.&-c*/?)%:1cOP"McP"c1.C*%?k%11%*?-k,./),-k"UO"U"T5/:+5!
SM! R73,>#'R3A37732L'0'I/7(3-'".'$D3'0>6,%$'"A'0.$1>,$3'G,7$.37'K1"+3.%3'".'
Survivors' Education, Careers, and Economic Security!]!aOP"]b=!$--/1gcc0B/,5),AcB/U
;)&-.&-c*/?)%:1cOP"]c"Pc8TMTkI^e@U@./),-UY,.%31UY.+.,,.:5/:+5!
S]!8),%!e.-.,1)&!.-!%?5=!W1A3$1>3'4%".">1%'!/723.'"A'9,63'0>".B'J)I)'02/+$#=!LOaSb!EX5!N5!e@9Q5!X9Y5!SR"=!SR]=!
aOP"Mb=!,(,1+,@+3',$'$--/1gcc1-%;'15;::5A)>c>0.Bc;:;cTL]PTc;:;kTL]PTkY6"5/:+5!
SR!OPP"!F*0:%&;.=!#/67,!&)-.!L"=!%-!"LU"S5!
MP!\T!85J5@5!j!"PS5TTa%b'!#33',+#"!j!"PS5TTa2baOb5!
!

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M"!OPP"!F*0:%&;.=!#/67,!&)-.!L"=!%-!"L "S5!

MO!e,)/)1.:!@*?.!%-!S"=TS]=!S"=TSR!a;0-0&A!:3@#37='LOT!4565!%-!OROb'!#33',+#"'R,(1#=!LOS!4565!%-!S\R!a:01-0&A*01$0&A!

!

M\!OPP"!F*0:%&;.=!#/67,!&)-.!L"=!%-!"P=!"O=!"\5!

MT!02)!%-!"\5!

ML! #33',+#"'j!"PS5TTa%b5!

MS!

U

;)&-.&-c*/?)%:1cOP"RcP"c8)33.&-1U)+UZ$0)U6-%-.U6*,>0>),1U)&U#0-?.UIWU_e@X5/:+'!<.--.,!+,)3!]O!6-*:.&-!6*,>0>),1!)+!<%,,(!_%11%,!%-!X0;$0A%&!6-%-.!4&0>.,10-(=!F.),A.!#(&:%??!%-!4&0>.,10-(!)+!6)*-$.,&!8%?0+),&0%=!%&:!

U

;)&-.&-c*/?)%:1cOP"]c""c_)>.32.,U"U6*,>0>),U<.--.,U-)U9Y5/:+5!!

MM!OP"M!F*0:%&;.=!#/67,!&)-.!LO=!%-!"!&5\'!OP"T!F*0:%&;.=!#/67,!&)-.!LO=!%-!OR'!OP""!F*0:%&;.=!#/67,!&)-.!LO=!%-!T'!OPP"!F*0:%&;.=!#/67,!&)-.!L"=!%-!L5!

M]!

3..-!-$.!#0-?.!IW!:.+0&0-0)&!)+!1.C*%?!$%,%113.&-=!:).1!&)-!/,.;?*:.!%!,.;0/0.&-!+,)3!%::,.110&A!-$.!%??.A.:!

U;%??.:!;?%,0+0;%-0)&!;,.%-.1!.>.&!

3),.!;)&+*10)&5!!I33']L!J.:5!@.A5!%-!\P=P\MU\]5!!e.,30--0&A!-$.!*1.!)+!)-$.,!A,0.>%&;.!/,);.:*,.1!*&:.;):.!)+!;)&:*;-!;,.%-.1!*&;.,-%0&-(!+),!;)3/?%0&%&-1!%&:!,.1/)&:.&-1!%?0'.=!%1!B.??!%1!/)-.&-0%?!?0%20?0-(!+),!1;$))?1!0+!-$.0,!;?%110+0;%-0)&!)+!;)&:*;-!%1!)*-10:.!)+!-$.!:.+0&0-0)&!)+!1.C*%?!$%,%113.&-!01!;$%??.&A.:5!!!

MR!\T!85J5@5!jj!"PS5TTa%b=!"PS5TLa2ba\ba0b5!!

]P! 9,63',.2'I35/,+'0##,/+$'K1%$1>1[,$1".'0>".B'*"+3B3_0B3'

=3>,+3#=!"RRLUOP"\!%-!S!aY.;5!OP"Tb=!$--/1gcc/.,3%5;;c]Qq<U7SJL5!!!

]"!@);$.??.!6$%,/.=!<"C'X/%D'R"3#'W1(1.B'?AA_*,>6/#'*"#$Z'FD"'b."C#Z=!_5h5!#03.1!aE*A5!L=!OP"Sb=!$--/1gccBBB5&(-03.15;)3cOP"ScP]cPMc.:*;%-0)&c.:?0+.c$)BU3*;$U:).1U?0>0&AU)++U;%3/*1U;)1-UB$)U'&)B15$-3?!a]M!/.,;.&-b5!

]O!4&0-.:!9:*;%-),1=!*Facts From United Educators' Report*_'*".A7".$1.B'*,>6/#'I35/,+'0##,/+$L'0.'45,>1.,$1".'"A'<!BD37'42/%,$1".'*+,1>#'aOP"Lb=!$--/1gccBBB5*.5),Ac1.C*%?k%11%*?-k;?%031k1-*:(5!

]\!8,)110&A!-$.!<0&.=!#/67,'&)-.!"P=!%-!]5!

]T!OPP"!F*0:%&;.=!#/67,!&)-.!L"=!%-!O5!

]L! #33',+#"!j!"PS5TLa2ba\ba0b5!_)-.g!#$.!&.B!,*?.!:).1!."$!

;,.%-.!&.B!#0-?.!IW!/,)-.;-0)&1!%A%0&1-!:)3.1-0;!>0)?.&;.=!%-0&A!>0)?.&;.=!%&:!1-%?'0&A5!#0-?.!IW!/,)$020-1!%??!+),31!)+!#35/,+!$%,%113.&-=!B$0;$!0&;?*:.1'&)&U1.C*%?';)&:*;-!%11);0%-.:!B0-$!:)3.1-0;!>0)?.&;.=!:%-0&A!>0)?.&;.=!%&:!1-%?'0&A5!

]S! !

]M!j!"PS5TLa2ba\ba00b5!

]]!\T!85J5@5!j!"PS5TLa2ba"ba0>b5!

]R!j!"PS5]a;b5!!

RP!j!"PS5TLa2ba"ba00b5!

R"!\T!85J5@5!j!"PS5TLa2baSba0b5!

RO!]L!J.:5!@.A5!%-!\P=PL\5!

R\!!@$0%&&)&!J)A?0%-0!o!i%(!G*11.(=!ND3'4AA3%$#'"A'*7"##*Examination on Children's Coached Reports*=!O"!e1(;$)?)A(=!e*25!e)?0;(=!o!<5!"P!aOP"Lb!a;,)11U.C%30&%-0)&!)?.:!;$0?:,.&!-)!,.;%&-!-$.0,!0&0-0%?!-,*.!%??.A%-0)&1!)+!B0-&.110&A!-,%&1A,.110>.!2.$%>0),!%&:!10A&0+0;%&-?(!,.:*;.'6%1'0%!@0A$%,-1!.-!%?5=!*Young Children's Responses to Cross*_45,>1.,$1".'I$-+3'e/3#$1".1.BL'ND3'4AA3%$#'"A'R3+,-',.2'I/@#3a/3.$'e/3#$1".1.B=!O"a\b!e1(;$)?)A(=!8,03.!o!<5!OMT!aOP"Lb!a;,)11U.C%30&%-0)&!,.ND3'4AA3%$'*of Age and Reminders on Witnesses' Responses to Cross*_45,>1.,$1"._I$-+3'e/3#$1".1.B='\!N5!)+!E//?0.:!@.1.%,;$!0&!X.3),(!%&:!8)A&0-0)&'U.C%30&%-0)&U1-(?.!

!

O\!

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!

D* . 1-0) &0&Ab‘!@$0%&&) &!J) A?0%-0! o! i %(!G*11 . (=!ND3’4AA3%$#’"A’*7"## *Examination on Children’s Reports of Neutral* , . 2’N7, . #B73##1(3’4(3 . $#E!"R!< . A%?! o!8,0 3 5!e1(;$)?) A(!ORS!aOP"Tb!a;,) 11U . C% 3 0&%-0) &!? . : !;$0? : , . &!-) ! / ,) >0 : . ! 10A&0+0;%&-?(!? . 11!%;;*,%-.!,./),-1!+),!&.*-,%?!.>.&-1!%&:!%;-*%??(!,.:*;.:!-$.!&*32.,!)+!)?:.,!;$0?:,.&!B$)! / ,) >0 : . :!-,*-$+*?! : 01;?) 1*, . 1!+),!-,%&1A, . 110>.!.>.&-1b‘!N) (;.!e?) -&0’) ++! o!@0;$%, :! ^)) ?+1) &=!*‘Kicking and Screaming’: The Slow Road to Best Evidence*=!0&!*D1+273 . ’, . 2’*7"## _45, >1. , $1" . L’N1>3’$"’*D, . B3’$D3’9/+3#Z!O"=!%-! 1 . !%!;$0? : !-) !A0>. ! !

RT! j !"PS5TLa2baSba0b5!!!
RL!] L!J . : 5!@ . A5!%-! \ P=\TS=! \ P=\TM=! \ P=\TR5!
RS!02)!%-! \ P=\TR5!
RM!02)!%-! \ P=\LS5!
R] !<. --. ,!+,) 3 !RPO! X . &-%?!
U
UOP"] UZ8@UPPSTU"PTP]] 5!
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100 SCHOOL DISTRICTS:

A CALL TO ACTION

for School Districts Across the Country to Address Sexual Harassment Through Inclusive Policies and Practices.

NATIONAL WOMEN'S LAW CENTER
Justice for Her. Justice for All.

GIRLS FOR GENDER EQUITY

DECEMBER 2020

BACKGROUND

TOO MANY STUDENTS SUFFER SEXUAL HARASSMENT.

Schools are often the first places where people experience sexual harassment. Sexual harassment includes a wide variety of conduct—e.g., sexual slurs, sexual "jokes," "catcalling," sexual rumors, sending or requesting sexual images or videos, forced kissing, groping, rape or other forms of sexual violence. In PK-12 schools, sexual harassment of students can occur during class, in the hallways, during school trips, in private homes, or online.

In any given school year, 56 percent of girls in grades 7-12, 40 percent of boys in grades 7-12,[1] and 57 percent of LGBTQ youth ages 13-21 are sexually harassed.[2] Among girls ages 14 to 18, one in five have been kissed or touched without their consent,[3] including more than one in three LGBTQ girls[4] and more than half of all pregnant or parenting girls[5] and girls with disabilities.[6] Further, one in 16 girls ages 14-18 have been raped, including one in 10 Black and Native girls and one in seven LGBTQ girls.[7]

Unfortunately, most students who experience sexual harassment never report it.[8] For example, fewer than one in four students in grades 7-12 who are sexually harassed report the incident to a teacher, guidance counselor, or other school employee.[9] A minuscule two percent of girls ages 14-18 who are kissed or touched without their consent report it to their schools.[10] Many students choose not to report because of shame or self-blame, fear that no one will help them, fear of retaliation, fear of being disciplined by their school, or fear of police or immigration officials. Other students do not report sexual harassment because they simply do not know that their schools can help them.

When students do summon the courage to report sexual harassment, they are often ignored, disbelieved, or even punished by their schools, based on administrators' conclusions that they engaged in "consensual" sexual activity or premarital sex or that they made a false accusation. Other students who experience sexual harassment are punished for physically defending themselves against their harassers, for acting out in age-appropriate ways after the harassment due to trauma, for missing school in order to avoid their harasser, or for merely talking about their harassment with other students. Schools are more likely to disbelieve and punish girls of color (especially Black girls), LGBTQIA students, pregnant and parenting students, and students with disabilities due to stereotypes that label these students as more "promiscuous," more "aggressive," less credible, and/or less deserving of protection.

When students do summon the courage to report sexual harassment, they are often ignored, disbelieved, or even punished by their schools.

SCHOOLS CAN BE SITES OF TRANSFORMATIVE CHANGE.

The 100 School Districts project is based on the principle that schools have a critical role to play in responding to and preventing sexual harassment and can be sites of transformative change.

This call to action is rooted in Tarana Burke's "me too" movement, which was created in 2006 in Selma, Alabama, for Black women and girls to build community around their shared experiences of surviving sexual violence. In October 2018, a year after the #MeToo hashtag went viral online, Girls for Gender Equity, the National Women's Law Center, and other key partners were joined by nearly 300 organizations working to end gender-based violence to publish a full-page letter in the New York Times, "To Those Who Seek A Better World in the #MeToo Era."[11]

In this letter, we called for policy reform, funding, and community organizing to address and prevent sexual harassment in schools, at work, in homes, and in our communities, with care to avoid policy responses that further criminalize people of color and other marginalized communities.

As a part of this call, we urged 100 school districts across the country to demonstrate their leadership by:

- Providing comprehensive sexual health education for all students;
- Creating protections for all students, including LGBTQIA students, above and beyond the requirements of Title IX; and
- Offering survivor-centered and trauma-informed restorative approaches to sexual harm rather than defaulting to punitive discipline.

We now offer this document as a resource for school districts to heed this call.

PROMISING PRACTICES FOR SCHOOLS TO ADDRESS SEXUAL HARASSMENT

PREVENTING SEXUAL HARASSMENT

1. PROVIDE SEXUAL HEALTH EDUCATION FOR ALL STUDENTS.

Sexual health education is one of the most e□ective tools in preventing sexual harassment: research has shown that providing sexual health education for K-12 students decreases the likelihood that a student will be a victim and/or perpetrator of sexual harassment, sexual violence, or dating violence.[12] K-12 students in every grade level should receive sexual health education that is comprehensive, evidence-based, medically accurate, age and developmentally appropriate, culturally and linguistically responsive, trauma-informed, and a□irming of LGBTQIA individuals. Sexual health education should address a wide range of topics, including consent, healthy relationships, dating violence, child sexual abuse, and reproductive rights, health, and justice.

2. TRAIN ALL STAFF ON SEXUAL HARASSMENT.

School districts should provide ongoing training to all sta□ on sexual harassment, including teachers, teacher aides, bus drivers, cafeteria workers, custodial sta□, administrative and clerical sta□, school medical sta□, security guards, school police, school board members, and contractors. Sta□ training should include how to recognize sexual harassment (including indicators of grooming and child sexual abuse), how to respond in the moment when it is reported or witnessed, how to notify the district's Title IX coordinator of sexual harassment, where to find the school's grievance procedure(s) for sexual harassment, the di□erence between sta□'s Title IX obligations and state law mandatory reporting obligations, and how to provide e□ective academic, mental health, and safety accommodations for students who report sexual harassment. Sta□ should also be trained on the prevalence, dynamics, and underreporting of sexual harassment; the impact of trauma on sexual harassment victims and how to respond to sexual harassment in a trauma-informed way; and how to recognize and avoid relying on rape myths and other stereotypes that label girls of color, pregnant or parenting students, LGBTQIA students, and students with disabilities as

more "promiscuous," more "aggressive," less credible, and/or less deserving of protection. Trainings for sta should be conducted in person rather than online (when possible to do so safely); should be culturally responsive and consider the impact of race, ethnicity, religion, class, sexual orientation, gender identity, and disability on sexual harassment; and should include best practices, open discussions, and specific examples in the school setting.

School districts should also provide additional and ongoing training to all Title IX personnel (i.e., Title IX coordinators, investigators, decision-makers, and informal facilitators) on how to conduct a trauma-informed investigation, a lethality assessment, or an informal process, and how to comply with the school's grievance procedure(s) for sexual harassment. Because Title IX personnel should not have any actual or perceived conflicts of interest or bias, they should be a di erent person from the school district's superintendent, general counsel, athletics director, or human resources director.

3. REMOVE POLICE FROM SCHOOLS.

Police do not make schools safer. Moreover, there is a long history of antagonism by police and immigration o icials toward students and communities of color. In school districts across the country, students of color, especially Black and Indigenous students, are disproportionately arrested in schools.[13] In other instances, girls experience sexual violence and other forms of sexual harassment at the hands of school police and police within their communities,[14] with no effective mechanism for accountability. Police power within schools prevents students from being able to make mistakes, challenge authority, or engage in developmentally appropriate risk-taking without risking lifelong criminalization or deportation.

Safety is created through building trust between adults and students, meeting the mental health and emotional needs of students and their families, and creating schools that are inclusive, a irming, and healing. Safety requires teaching students about consent, bodily autonomy, and healthy relationships. Investments in creating positive school climates and trust-building between students, their peers, and adults are often considered to be una ordable, when in fact those financial resources could be available if school districts were to remove police from schools and reinvest money that had been previously allocated for policing, toward healing, restorative, and preventative tools. For example, many school districts do not have full-time sta to provide trainings to sta or adults about how to support sexual abuse survivors, or how to create school environments where sexual violence is not the norm. The resources needed for hiring these sta could be made available if funding for policing was reinvested.

4. INVEST IN SOCIAL WORKERS AND NON-LAW ENFORCEMENT ADULT HELPERS IN SCHOOLS.

School-based social workers and trained adult helpers can be crucial lifelines in building positive school climate and providing support for survivors of sexual assault and other forms of sexual harassment. These adults can focus their time and skills specifically on the social and emotional wellness of students. The roles of social workers and adult helpers within schools must be restructured to focus on well-being and positive school climate and invested in meaningfully.

Preventing school-based sexual harassment and assault requires that students have access to social and emotional wellness, information about healthy relationships, and the building blocks for consent culture. Across the United States, many school districts have never invested meaningfully in hiring adults to support the social, emotional, and academic needs of students. For example, in New York City, the largest district in the country, a student body of over 1 million students is served by only 1,456 school social workers and 2,892 counselors. School districts should ensure that there are many qualified adults in schools—including teachers, counselors, and social workers—who are able to address

students' emotional needs, respond to the social and emotional dynamics students navigate, and to help ensure young people understand healthy relationships and consent.

While the "counselors not cops" framing appropriately highlights the need to divest from funding school police who criminalize young people, and to invest in supportive adults within schools, it is important to note that this frame has often ignored the ways in which counselors in some cases push students into the same criminalizing systems as police.

Creating a positive school climate and cultures of consent necessitates the decriminalization of schools. This includes ensuring that non-police school sta—including counselors, social workers, teachers, and principals—do not serve as police proxies. For example, school-based social workers make frequent referrals to police and child welfare agencies, which can be particularly harmful for youth and families of color and a deterrent for students seeking support navigating sexual harassment or dating violence. Further, in many communities, social workers are predominately white, which can lead to the reinforcement of classist, racist ideologies about student behavior. In order to ensure students of color can feel supported, schools should also make space for a range of qualified adult helpers, including those who are not traditionally credentialed, with connections to student communities and who can support anti-racist conflict resolution, peacekeeping, and in some cases, counseling and therapy. As much as possible, non-police adults in schools should look like the students they are there to help.

5. ABOLISH DRESS CODES.

Dress codes promote rape culture and deprive students of equal opportunities to learn. Not only do dress codes frequently reflect sex and race stereotypes, but they are also often enforced in a manner that discriminates on the basis of gender, transgender status, race or color, and size.[15] When schools remove students—usually girls—from the classroom over a dress code violation, they send dangerous messages to all students that what girls look like is more important than what they think, that girls are responsible for ensuring boys are not "distracted," and that girls provoke sexual harassment. These harmful messages are exacerbated for girls of color—especially Black girls—who are more likely to be viewed as "promiscuous," are more likely to be ignored or punished when they report sexual harassment, and are more likely to be disciplined for a dress code violation. For all of these reasons, school districts should eliminate dress codes. (Or, at the very least, school districts should implement a universal, inclusive, and gender-neutral dress code that does not perpetuate discriminatory stereotypes.)

6. COLLECT CLIMATE SURVEY DATA.

School climate surveys are an important tool for understanding whether students feel supported and safe in their school community. E ective school climate surveys include questions about the prevalence of di erent types of harassment, the impact of di erent types of harassment, student attitudes toward harassment, student and sta perceptions of the e ectiveness of school responses to harassment, and awareness of reporting and supportive measures for student survivors. School districts should ensure that their school climate surveys are confidential, fair, unbiased, scientifically valid, reliable, and implemented every one to two years among all students and school sta. Afterward, school districts should make the survey data available online in an accessible and usable format for all students, families, and school sta. The survey data should inform school districts' programs, policies, and practices for preventing and responding to sexual harassment.

RESPONDING TO SEXUAL HARASSMENT

7. MAKE IT EASY TO REPORT SEXUAL HARASSMENT.

School districts should ensure that their sexual harassment policies are written in plain language, available in multiple languages and accessible formats, and distributed widely among students, families, and school sta. Annual training should be provided to all students, families, and school sta on how to recognize sexual harassment, how to report it to school oicials, what supportive measures are available to victims, and what confidential reporting options for support and care are available, such as disclosures to mental health counselors. Schools should also inform local community groups, such as local cultural or religious organizations, on how students can report sexual harassment to their schools, so that community leaders can be ective partners in addressing sexual harassment when students turn to them for guidance.

8. PROVIDE SUPPORTIVE MEASURES TO STUDENTS WHO REPORT SEXUAL HARASSMENT.

Sexual harassment can make it harder for students to study, maintain their grades, participate in school activities, or even attend school. When a student reports sexual harassment, they have a right to supportive measures that ensure their equal access to education—even if there is an ongoing school investigation or police investigation, even if the incident happened o campus or online, and even if the harasser is a student or adult at another school district. For example, if a student does not feel safe at school, the school district should make reasonable schedule changes so that the victim and harasser do not share classes, hallway routes, school activities, or transportation routes. Similarly, if sexual harassment has made it harder for a student to learn, the school district should oer counseling, tutoring, excused absences, extra time for homework or tests, and/or opportunities to resubmit homework or retake a test. All school sta who are involved in providing or enforcing these supportive measures should be informed of the measures in writing.

Note that many students who experience sexual harassment may be afraid to request the supportive measures they need to stay in school because they are afraid of triggering their school's mandatory reporting obligations to notify the police. Fear of interacting with police can be especially pronounced for students who are Black, Latinx, Muslim, and/or immigrants.[16] School districts should designate staff who can authorize supportive measures without requiring students to share information that could trigger a mandatory report to police.

9. PROTECT—DON'T PUNISH—STUDENTS WHO REPORT SEXUAL HARASSMENT.

School districts should refrain from disciplining students whose reports of sexual harassment indicate that they had at some point engaged in consensual sex acts with their harasser or used drugs or alcohol in violation of school rules when they were harassed. Similarly, students should not be punished for making a "false accusation" or "defaming" their harasser (except in extraordinary circumstances),[17] for engaging in reasonable self-defense against their harasser, for acting out in age-appropriate ways due to trauma, for publicly talking about being sexually harassed, or for missing class in the aftermath of sexual harassment. Nor should students who report be pressured or forced to take time o□, transfer to another school, or enroll in an inferior or "alternative" education program that isolates them from their teachers and friends. Finally, school districts should inform students who report sexual harassment that they are protected from retaliation by other students or school sta□ and must check in with them to ensure retaliation is not occurring.

10. ENSURE PROMPT AND EQUITABLE INVESTIGATIONS.

If a student reports sexual harassment and asks for an investigation, the school must conduct a prompt and equitable investigation, separate from any current or future criminal investigation.[18] Except in limited and rare circumstances, investigations should take no more than 60 days from the filing of a complaint to ensure that neither the complainant nor respondent are wrongly denied access to their education.

During an investigation, both sides should have equal rights to be interviewed, identify witnesses, submit and review evidence, be assisted by an advisor or support person, and appeal the school district's decision. Complainants should not be blamed for their own harassment based on their clothing or appearance, alcohol or drug use, prior sexual history, or stereotypes about "promiscuity." Nor should they be disbelieved merely because they did not "act like a victim"—e.g., because they did not fight back, did not come forward immediately, continued dating or being friends with their harasser, or continued to do well in school. To avoid retraumatizing victims, a school district should not use mediation to address sexual assault and should require students to submit any questions for the other side to a neutral school o□icial rather than using live cross-examination in any harassment investigation. To balance student rights to speech and privacy, a school district should require students to keep confidential any information they learn about each other during an investigation, without restricting their ability to discuss the allegations with others when seeking legal advice, counseling or other emotional support, or witnesses and other evidence.

At the end of an investigation, school districts should apply a preponderance of the evidence standard to determine whether it is more likely than not that the sexual harassment happened. Both sides should be informed

in writing at the same time about the decision and how to appeal. If the school district decides that there was sexual harassment, the victim should be informed of available supportive measures and any punishment of the harasser that directly a□ects the victim, such as a no-contact order, suspension, transfer, or expulsion. Even if the school district decides that there was no sexual harassment, it should still continue providing supportive measures to the complainant. Respondents should not be informed of supportive measures that are o□ered to complainants.

11. OFFER A RESTORATIVE PROCESS.

Restorative justice is a non-punitive framework with roots in di□erent Indigenous cultures around the world that brings together the victim and wrongdoer to acknowledge the harm that occurred, center the victim's needs, and create a plan for the wrongdoer to repair the harm they caused. A restorative process is not a space for the parties to contest the facts; nor is it a mediation or conflict resolution that requires the parties to reach a compromise. Rather, a restorative process first requires the wrongdoer to admit that they caused harm and then allows them to make amends to the victim and to eventually reenter their shared community. The process is driven by the victim's needs and desired outcomes—including what constitutes an adequate apology, changed behavior, restitution, and accountability. The victim is not required to forgive the wrongdoer.

When non-sexual harm is addressed using a restorative process, victims are more likely to receive sincere apologies and su□er less PTSD, and wrongdoers are less likely to harm again.[19] While less research is available on sexual harm, studies have found that sexual harm victims who undergo a well-implemented restorative process feel safe and respected and would recommend the process to others, and that students who cause sexual harm achieve better learning outcomes through a well-implemented restorative process than through a traditional disciplinary process.[20]

Schools should allow (but not require or pressure) students to address sexual harassment through a restorative process. Before beginning such a process, all parties should give voluntary, informed, and written consent. Importantly, a respondent cannot consent to a restorative process without admitting that they caused sexual harm to the complainant. The parties should also agree not to disclose any information they learn about each other during the restorative process without the other party's consent, although the school should not restrict their ability to discuss the allegations with others when seeking legal advice, counseling or other emotional support, or restorative process participants. Schools should also ensure that the facilitator is well-trained on restorative justice, sexual harassment, and trauma-informed practices. At any point before resolution, schools should allow any party to withdraw from a restorative process to begin a traditional disciplinary process or to withdraw from a traditional disciplinary process to begin a restorative process.

Sexual harm victims who undergo a well-implemented restorative process feel safe and respected and would recommend the process to others.

ENDNOTES

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2 GLSEN, The 2017 National School Climate Survey xviii, 26 (2018), https://www.glsen.org/research/school-climate-survey.

3 Nat'l Women's Law Ctr., Let Her Learn: Stopping School Pushout for Girls Who Have Su▫ered Harassment and Sexual Violence 1 (2017) [hereinafter NWLC Sexual Harassment Report], https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-su□ered-harassment-and-sexual-violence.

4 Nat'l Women's Law Ctr., Let Her Learn: Stopping School Pushout for LGBTQ Girls 3 (2017), https://nwlc.org/resources/stopping-school-pushout-for-lgbtq-girls.

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6 National Women's Law Center, Let Her Learn: Stopping School Pushout for Girls with Disabilities 7 (2017), https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities.

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8 Joanne Smith et al., Hey, Shorty!: A Guide to Combating Sexual Harassment and Violence in Schools and on the Streets (2011).

9 AAUW Sexual Harassment Report, supra note 1, at 28.

10 NWLC Sexual Harassment Report, supra note 3, at 2.

11 Girls for Gender Equity, To Those Who Seek A Better World in the #Metoo Era (Oct. 2018), https://www.ggenyc.org/better-world.

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13 Girls for Gender Equity, Map of Incidents of Police Violence Against Girls of Color (last updated Dec. 2019), https://uploads.knightlab.com/storymapjs/eb4c15f3cada9cc6a6d4d64c74e6e1a0/sro-goc/index.html; Girls for Gender Equity, Map of Campaigns to Remove Police from Schools, https://www.ggenyc.org/the-schools-girls-deserve/police-free-schools-movement-map; Girls for Gender Equity, School Policing Disparities for Black Girls: Analyzing Reported NYPD Interventions During School Year 2018-2019 (2020), https://www.ggenyc.org/wp-content/uploads/2020/01/GGE-Policy-Brief_-NYPD-School-Policing-Data-Impact-on-Girls-of-Color.pdf.

14 See, e.g., Lauren del Valle, Michigan school resource o▫icer sentenced to 1 year in jail for sexually assaulting 3 high school students (Oct. 3, 2019), https://www.cnn.com/2019/10/03/us/michigan-o□icer-sentenced-sexual-assault/index.html.

15 National Women's Law Center, Dress Coded: Black Girls, Black Bodies, and Bias in D.C. Schools 1 (2018), https://nwlc.org/resources/dresscoded.

16 See, e.g., Mahroh Jahangiri, Activist and Sexual Assault Survivor Mahroh Jahangiri Wants Betsy DeVos to Know Why Title IX is So Important, TEEN VOGUE (Jan. 18, 2017), https://www.teenvogue.com/story/know-your-ix-dear-betsy-devos-sexual-assault-survivor.

17 Men and boys are far more likely to be victims of sexual assault than to be falsely accused of it. E.g., Tyler Kingkade, Males Are More Likely To Su▫er Sexual Assault Than To Be Falsely Accused Of It, Hu□ington Post (Dec. 8, 2014) [last updated Oct. 16, 2015], https://www.hu□ingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html.

18 While the Department of Education's new Title IX rule requires many survivor-hostile procedures, school districts still retain discretion to maintain a variety of survivor-supportive policies (i) when implementing a grievance procedure that is consistent with the new Title IX rule and (ii) when implementing a separate "non-Title IX" procedure. Dep't of Educ., Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020), https://www.federalregister.gov/d/2020-10512;. 34 C.F.R. § 106.45(b)(3)(i); 85 Fed. Reg. at 30154, 30157, 30443; Dep't of Educ., O□ice for Civil Rights, The Title IX Rule Is E▫ective on August 14, 2020, And Is Not Retroactive (Aug. 5, 2020), https://www2.ed.gov/about/o□ices/list/ocr/blog/index.html.

19 David Karp & Kaaren Williamsen, Five Things Student A▫airs Administrators Should Know About Restorative Justice and Campus Sexual Harm 10-11 (Mar. 12, 2020), https://www.naspa.org/report/five-things-student-a□airs-administrators-should-know-about-restorative-justice-and-campus-sexual-harm1.

20 Id. at 12.

TO LEARN MORE ABOUT HOW TO CREATE BETTER POLICIES IN YOUR SCHOOL DISTRICT THAT INCORPORATE THESE BEST PRACTICES,

please contact National Women's Law Center and Girls for Gender Equity at info@nwlc.org and media@ggenyc.org.

By working together to ensure that schools prevent and respond to sexual harassment e□ectively, we can create a better world for all students.

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Eliminating Adversarial Hearings from Sexua
Canadian Post-Secondary Institutio

Karen Busby
Professor of Law
Faculty of Law, University of Mani

Abstract: Early iterations of formal complaint proc
sexual violence policies permitted respondent
panel of professors and students. It was qui
the guiding principles of these policies and
process. Many PSIôs responded by amending the
finding power to an expert investigator or ad
processes (thereby eliminating the possibilit
grounds (egregious errors only) for review of
especially the elimination of the right to cr
in court, this chapter sets out some ways tha

A complete copy of this paper is available from
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NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

January 30, 2019

Kenneth L. Marcus
Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Submitted via www.regulations.gov

Re: ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

Dear Mr. Marcus:

We are writing on behalf of the National Women's Law Center in response to the Department of Education's (the Department) Notice of Proposed Rulemaking (NPRM or proposed rule) to express our strong opposition to the Department's proposal to amend its regulations implementing Title IX of the Education Amendment Act of 1972 (Title IX) as published in the Federal Register on November 29, 2018.

The National Women's Law Center (the Center) is a non-profit legal advocacy organization founded since 1972 to combat sex discrimination and expand opportunities for women and girls in every facet of their lives, including education. Founded the same year as Title IX of the Education Amendments of 1972 was enacted, the Center has participated in all major Title IX cases before the Supreme Court as counsel[1] or amici. The Center is committed to eradicating all forms of sex discrimination in school, specifically including discrimination against pregnant and parenting students, LGBTQ students, and students who are vulnerable to multiple forms of discrimination, such as girls of color and girls with disabilities. This work includes a deep commitment to eradicating sexual harassment (including sexual violence) as a barrier to educational success. We equip students with the tools to advocate for their own Title IX rights at school, assist policymakers in enforcing Title IX and strengthening protections against sexual harassment and other forms of sex discrimination, and litigate on behalf of students whose schools fail to adequately address their reports of sexual harassment in violation of Title IX.

As attorneys representing those who have been harmed by sexual violence and other forms of sexual harassment, we know that too often when students seek help from their schools to address the harassment, they are retaliated against or pushed out of school altogether. For example, one of our current plaintiffs, Jane Doe, was fourteen years old when she was repeatedly subjected to sexual harassment, including three sexual assaults in schools bathrooms by multiple older male peers.[2] When Jane and her friends reported the assaults and other harassment to the school, instead of investigating the incidents, a school resource officer coerced her into revising her previous written statement to say she was a "willing participant."[3] The school then suspended Jane for what it called "sexual misconduct." The school offered no counseling, tutoring, or other accommodations to address the impacts of the harassment and help her again feel safe at school.[4] Terrified of returning to school, Jane, who was previously a

[1] *E.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999).
[2] Compl. at ¶ 1, *Doe v. Sch. Bd. of Miami-Dade Cnty.*, No. 1:19-cv-20204 (S.D. Fla. Jan. 15, 2019).
[3] *Id.* at ¶¶ 2, 49-51.
[4] *Id.* at ¶¶ 2-3.

conscientious and ambitious student, was absent for more than three months and now has a full academic quarter of failing grades on her high school transcript.[5] She was forced to transfer to another school when it became clear that no meaningful steps would be taken to protect her.

DarbiAnne Goodwin, another current client of the Center ô, was a high school sophomore when she was sexually assaulted by a male classmate over winter break.[6] When they returned to school, he and his friends spread sexual rumors about her, subjected her to sexual slurs, and threatened to physically attack her.[7] However, her school refused to conduct an adequate investigation or otherwise take steps to provide a safe educational environment for her.[8] As a result, Darbi developed post-traumatic stress disorder (PTSD) and was effectively pushed out of school not once, but twice ð once into homebound instruction, and a second time into cyber school, an inferior alternative school where she was forced to withdraw from two of her courses and retake a third course she had already completed the previous year.[9] Once an A-student who had been active in extracurricular activities, Darbi suffered a sharp decline in her grade point average and had to leave the student council and turned down a nomination to be its president.[10]

Jane and Darbiôs experiences illustrate how schoolsô failure to address sexual two exam harassment can result in a very real loss of educational opportunities for survivors. Rather than working to ensure that fewer students face such experiences and that schools take more effective steps to address sexual harassment, the Department makes it more likely that those who experience would sexual assault and other forms of harassment confront the same types of inadequate school responses as Jane and Darbi. In a reversal of longstanding Department policy, schools would be encouraged ð and in many cases, required ð to do less to address sexual harassment. There is simply no valid justification for the Departmentôs proposal.

The Department proposes to remove significant protections for students and employees who experience sexual assaults and other forms of sexual harassment, apparently motivated by unlawful sex stereotypes that women and girls are likely to lie about sexual assault and other forms of harassment and by the perception that sexual harassment has a relatively trivial impact on those who experience it. Just weeks before rescinding two important Title IX gu guidanceò in advance, Secretary DeVos diminished the full range of sexual harassment that deprives students of equal access to educational opportunities, claiming everything is ñ harassment,[11] Former Acting Assistant Secretary Candice Jackson reinforced the myth of false accusations, telling a conference that Title IX inve ñdrunk [en] sexual[12] Neomi Rao, the Administrator of the Office of Information and Regulatory Affairs, presaged Ms. Jacksonôs rhetoric and urged, false a when she claimed that ñcasual sex for women often leads to

[5] *Id.* at ¶ 3.
[6] *Goodwin v. Pennridge Sch. Distr.*, 309 F. Supp. 3d 367, 371 (E.D. Pa. 2018); *see also* Pl.ôs Mot. for *Goodwin* Summ. J. a *Pennridge Sch. Dist.*, No. 17-cv-3570-TR (E.D. Pa. Jan. 14, 2019).
[7] *Goodwin*, 309 F. Supp. at 373; Summ. J. at 1, *Goodwin*, No. 17-cv-3570-TR.
[8] *Goodwin*, 309 F. Supp. 3d at 373; *Goodwin*, No. 17-cv-3570-TR; Mot. for Summ. J. at 1, *Goodwin*, No. 17-cv-3570-TR.
[9] *Goodwin*, 309 F. Supp. 3d at 372; *Goodwin*, No. 17-cv-3570-TR; Pl.ôs Mot. for Summ. J. at 7, *Goodwin*, No. 17-cv-3570-TR.
[10] *Goodwin*, 309 F. Supp. 3d at 373; Summ. J. at 5, 9, *Goodwin*, No. 17-cv-3570-TR.
[11] Depôt of Ed. Secretary DeVos, *Prepared Remarks on Title IX Enforcement* (Sept. 7, 2017) [hereinafter *DeVos Prepared Remarks*], *available at* https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement.
[12] Erica L. Green & Sheryl Gay Stolberg, Campus Rape Policies Get a New Look as the A (July 12, 2017), https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html.

choices,ò leading to assault allegations.[13] And President Trump himself has repeatedly publicly dismissed and disputed allegations of sex-based harassment and violence made by women.[14] Tellingly, these officials have not expressed the same skepticism of the denials made by men and boys accused of sexual harassment, including sexual assault.

The harm of the Departmentôs proposed to both tools cannot be overstated. The proposed rules would make schools more dangerous for all students, with especial risk to students experiencing sexual harassment who are students of color, pregnant and parenting students, LGBTQ students, and/or students with disabilities, as they are more likely to experience sexual harassment and more likely to be ignored, punished, and pushed out of school entirely. Simultaneously, schools would be forced to adopt inflexible, costly, and ineffective procedures that would expose them to more litigation and that create less inclusive and equitable communities.[15]

The proposed rules ignore the devastating impact of sexual violence and other forms of sexual harassment in schools. Instead of effectuating Ti tecting students and school employees from sexual abuse and other forms of sexual harassment½that is, from unlawful sex discrimination½they make it harder for individuals to report abuse, allow (and sometimes require) schools to ignore reports when they are made, and unfairly tilt the investigation process in favor of respondents, to the direct detriment of survivors. For the reasons discussed at length in this comment, the Center unequivocally opposes the Departmentôs proposed ru and calls for its immediate withdrawal.

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[13] Neomi Rao, ñThe Feminist Dilemmaò, YALE FREE PRESS (Apr. 1993), https://afj.org/wp-content/uploads/2019/01/02-The-Feminist-Dilemma.pdf.

[14] When White House officials Rob Porter and David Sorensen resigned amidst reports that they had committed gender-based violence, the president tweeted: ñPeoples [sic] lives are being shattered and de recovery for someone falsely accused ð life and career are gone. Is there no such thing any longer as Due P Donald Trump (@realDonaldTrump), TWITTER (Feb. 10, 2018, 7:33 AM), https://twitter.com/realDonaldTrump/status/962348831789797381. *See also* Jacey Fortin, *Trumpôs History of Defend Accused of Hurting Women*, N.Y. TIMES (Feb. 11, 2018), https://www.nytimes.com/2018/02/11/us/trump-sexual-misconduct.html (about harassment claims against former Fox News host Bill OôRe adding, ñI think heôs a person I know well. He is a good person, ò and about sexual harassment claims against former chairman of Fox News, Roger Ailes, Trump said he ñfelt very badly,ò and that some of the women that are complaining, I know how much he helped them); Lisa Bonos, *Trump asks why Christine Blasey Fo allegations sooner. Survivors answer with #WhyIDidntReport*, WASH. POST (Sept. 21, 2018), https://www.washingtonpost.com/news/soloish/wp/2018/09/21/trump-asks-why-christine-blasey-ford-didnt-report-her-allegation-sooner-survivors-answer-with-whyididntreport/?utm_term=.3ca0d0017c36 (about sexual assault claims against Justice Brett Kavanaugh, Trump doubted Dr. Fordôs account, stating ñif the attack o ld have been immediately filed with local Law Enforcement Authoritiesò); Allie Malloy, et al., *Trump Mocks Christine Bla Testimony, Tells People to óThink of Your Sonsô*, CNN (Oct. 3, 2018), https://www.cnn.com/2018/10/02/politics/trump-mocks-christine-blasey-ford-kavanaugh-supreme-court/index.html (reporting on Trump mocking Dr. Fordô Judiciary Committee);

[15] *See* Letter from Assôn of Am. Univs. (AAU) to Brittany Bull at https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Higher-Education-Regulation/AAU-Title-IX-Comments-1-24-19.pdf (discussing the high costs of the regulations on schools); Letter from Colls. and Univs. (AICUM) to Secôy Elisabeth DeVos at 2 (Jan. 23, 2019) content/uploads/2019/01/AICUM-public-comments-on-Notice-of-Proposed-Rulemaking-%E2%80%9CNPRM%E2%80%9D-amending-regulations-implementing-Title-IX-of-the-Education-Amendments-of-1972-Title-IX%E2%80%9D-Docket-ID-ED-2018-OCR-0064.pdf (ñ[s]uch financial costs and administrative bu Letter from The School Superintendents Assôn (AASA) to Secôy Elisabeth DeVos at 1, [hereinafter AASA Letter], http://aasa.org/uploadedFiles/AASA_Blog(1)/AASA Title IX Com changing current policies and procedures, é increased litigat professional development to changing practices and policies,ò and ñmuch c IX complaints and violations in courtò).

Part I illustrates the prevalence, underreporting, and pernicious effects of sexual harassment and assault on students' equal opportunities. Part II describes how the proposed rules would permit or require schools to ignore reports of sexual harassment and assault. Part III details how the students would be denied necessary supportive measures under the proposal. Part IV details how the proposed grievance procedures would permit or require schools to unlawfully favor respondents over complainants and retraumatize survivors and other harassment victims. Part V describes how the proposed rules would weaken the ability of the Department to remedy sex discrimination and broaden the ability of schools to engage in sex discrimination. Part VI explains that the proposed rules exceed the Department's authority under Title IX. Parts VII-IX describe how the proposed rules would conflict with Title VII, the Clery Act, and many state laws. Part X explains how the Department's actions violated the cost-benefit analysis mandated by Executive Order 12866, the Administrative Procedure Act, the Information Quality Act, Executive Orders 13563 and 12866. Part XI details how the Department failed to follow other procedural requirements in violation of numerous laws, including Title IV, the Regulatory Flexibility Act, and Executive Orders 12250, 13132, 13175, and 13272. Part XII responds to the Department's Directed Question and explains how many of its proposal are unworkable and fail to take into account the unique circumstances of various parties and/or schools.

I. Sexual harassment, including sexual assault, is a pervasive problem in school but is chronically underreported and has severe consequences for a student's educ

A. Sexual harassment, including sexual assault, is pervasive in schools across the country.

Students experience high rates of sexual harassment. In grades 7-12, 56 percent of girls and 40 percent of boys are sexually harassed in any given school year.[16] More than one in five girls ages 14 to 18 are kissed or touched without their consent.[17] During college, 62 percent of women and 61 percent of men experience sexual harassment,[18] and more than one in five women and nearly one in 18 men are sexually assaulted.[19] Historically marginalized and underrepresented groups are more likely to experience sexual harassment than their peers. Native, Black, and Latina girls are more likely than white girls to be forced to have sex when they do not want to do so.[20] Fifty-six percent of girls ages 14-18 who are pregnant or parenting are kissed or touched without their consent.[21] More than half of LGBTQ students ages 13 to 21 are sexually harassed at school.[22] Nearly one in four transgender and gender-nonconforming students are

[16] Am. Assôn of Univ. Women, *Crossing the Line: Sexual Harassment at School* 2 (2011) [hereinafter *Crossing the Line*], https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf.

[17] Natôl Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017) [hereinafter *Let Her Learn: Sexual Harassment and Violence*], *available at* https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence/.

[18] AAUW, *Drawing the Line: Sexual Harassment on Campus* 17, 19 (2005) [hereinafter *Drawing the Line*], https://history.aauw.org/files/2013/01/DTLFinal.pdf (noting differences in the types of sexual harassment and reactions to it).

[19] *E.g.*, AAU, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, 13-14 (Sept. 2015) [hereinafter *AAU Campus Climate Survey*], https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf.

[20] *Let Her Learn: Sexual Harassment and Violence*, *supra* note 17, at 3.

[21] Natôl Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 12 (2017) [hereinafter *Let Her Learn: Pregnant or Parenting Students*], *available at* https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting/.

[22] GLSEN, *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 26 (2018) [hereinafter *2017 National School Climate Survey*], *available at* https://www.glsen.org/article/2017-national-school-climate-survey-1.

sexually assaulted during college.[23] Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.[24]

Sexual harassment and assault occurs both on-campus and in off-campus spaces closely associated with school. Nearly nine in ten college students live off campus.[25] Forty-one percent of college sexual assaults involve off-campus parties.[26] Many fraternity and sorority houses are located off campus. Students are far more likely to experience sexual assault if they are in a sorority (nearly one and a half times more likely) or fraternity (nearly three times more likely).[27] When schools fail to provide effective responses, the impact of sexual harassment and assault can be devastating.[28] Too many individuals who experience sexual assault or other forms of sexual harassment end up dropping out of school because they do not feel safe on campus; some are even expelled for lower grades in the wake of their trauma.[29] For example, 34 percent of college student survivors of sexual assault drop out of college.[30]

B. Sexual harassment, including sexual assault, is consistently and vastly underreported.

Reporting sexual harassment can be hard for most victims, and the proposed rules would further discourage students from coming forward to ask their schools for help. Already, only 12 percent of college survivors who experience sexual assault,[31] and only 7.7 percent of college students who experience sexual harassment, report to their schools or the police.[32] Only 2 percent of girls ages 14 to 18[33] report sexual assault or harassment. Students often choose not to report for fear of reprisal, because they believe their abuse was not important enough,[34] because they are embarrassed, ashamed or that it would be too emotionally difficult,[35] because they think no one would do anything to help,[36] and because they fear that reporting would make the situation even worse.[37] Common rape myths, such as those perpetuated in statements made by officials in this Administration, that a victim could have prevented their assault if they had only acted differently, wore something else, or did not consume alcohol, only exacerbate underreporting.

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[23] *AAU Campus Climate Survey*, *supra* note 19 at 13-14.
[24] National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017) [hereinafter *Let Her Learn: Girls with Disabilities*], *available at* https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities.
[25] Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, N.Y. TIMES (Aug. 5, 2016), https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html (87 percent).
[26] United Educators, *Facts From United Educators' Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (2015), https://www.ue.org/sexual_assault_claims_study.
[27] Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Surveys: 2014, 2015, and 2015-2016* (Oct. 16, 2014), *available at* https://www.uwire.com/2014/10/16/sexual-assault-more-prevalent-in-fraternities-and-sororities-study-finds (finding that 48.1 percent of females and 23.6 percent of males in Fraternity and Sorority Life (FSL) have experienced non-consensual sexual contact, compared with 33.1 percent of females and 7.9 percent of males not in FSL).
[28] *E.g.*, Audrey Chu, I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus, VICE (Sept. 21, 2017), https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.
[29] *E.g.*, Alexandra Brodsky, *How much does sexual assault cost college students every year?*, WASH. POST (Nov. 18, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-students-every-year.
[30] Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), *available at* https://doi.org/10.1177/1521025115584750.
[31] *Poll: One in 5 women say they have been sexually assaulted in college*, WASH. POST (June 12, 2015) [hereinafter Washington Post Poll], https://www.washingtonpost.com/graphics/local/sexual-assault-poll.
[32] *AAU Campus Climate Survey*, supra note 19 at 35.
[33] *Let Her Learn: Sexual Harassment and Violence*, *supra* note 17 at 2.
[34] *AAU Campus Climate Survey*, *supra* note 19 at 36.
[35] *Id.*
[36] RAINN, *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence.
[37] 2017 National School Climate Survey, *supra* note 22, at 27.

Survivors of sexual assault may also be unlikely to make a report to law enforcement because, in many instances, criminal reporting often does not serve survivorsô best interes concerned with investigating crimes and catching perpetrators; they are not in the business of providing supportive measures to survivors and making sure that they feel safe at school. And some students ð especially students of color, undocumented students,[38] LGBTQ students,[39] and students with disabilities ð can be expected to be even less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence and/or deportation. Survivors of color also may not want to report to the police if their assailant is non-white, in order to avoid exacerbating the overcriminalization of men and boys of color.

C. Students who do report sexual harassment are often ignored or even punished by their schools.

Unfortunately, students who reasonably choose not to turn to the police often face hostility from their schools when they try to report. Reliance on common rape myths that blame individuals for the assault and other harassment they experience[40] can lead schools to minimize and discount sexual harassment reports. An inaccurate perception that false accusations of sexual assault are common[41] ð despite the fact that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it[42] ð can also lead schools to dismiss reports of assault and assume that complainants are being less than truthful. Indeed, many students who report sexual assault and other forms of sexual harassment to their school face discipline as the result of speaking up, for engaging in so-called ñconsensualô sexual sex,[43] or premarital sex,[44] for defending themselves against their harassers,[45] or for merely talking about their assault with other students in violation of a ñgagòor nondisclosure agreement imposed by their school.[46] The Center regularly receives requests for legal assistance from student survivors across the country who have been disciplined by their schools after reporting sexual assault.[47]

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[38] *See* Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. TIMES (April 30, 2017), https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3.

[39] National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* 12 (Dec. 2016) [hereinafter *2015 U.S. Transgender Survey*], https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf.

[40] *See e.g.*, Bethonie Butler, *Survivors of sexual assault confront victim blaming on Twitter*, WASH. POST (Mar. 13, 2014), https://www.washingtonpost.com/blogs/she-the-people/wp/2014/03/13/survivors-of-sexual-assault-confront-victim-blaming-on-twitter.

[41] David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16(12) VIOLENCE AGAINST WOMEN 1318 ï1334 (2010), *available at* https://doi.org/10.1177/1077801210387747.

[42] *E.g.*, Tyler Kingkade, *Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It*, HUFFINGTON POST (Dec. 8, 2014) [last updated Oct. 16, 2015], https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html.

[43] *See, e.g.*, Brian Entin, *Miami Gardens 9th-grader says she was raped by 3 boys in school bathroom*, WSVN-TV (Feb. 8, 2018), https://wsvn.com/news/local/miami-gardens-9th-grader-says-she-was-raped-by-3-boys-in-school-bathroom; Nora Caplan-Bricker, ñMy School, Slate (Sept. 19, 2016), https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html; Aviva Stahl, *'This Is an Epidemic': How NYC Public Schools Punish Girls for Being Raped*, VICE (June 8, 2016), https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped.

[44] Sarah Brown, *BYU Is Under Fire, Again, for Punishing Sex-Assault Victims*, CHRONICLE OF HIGHER EDUC. (Aug. 6, 2018), https://www.chronicle.com/article/BYU-Is-Under-Fire-Again-for/244164.

[45] NAACP Legal Defense and Educ. Fund, *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* 25 (2014) [hereinafter *Unlocking Opportunity*], https://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf.

[46] *See, e.g.*, Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, HUFFINGTON POST (Sept. 9, 2015), https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment_us_55ada33de4b0caf721b3b61c.

[47] As of this writing, NWLC is litigating on behalf of three student survivors who were punished or otherwise unfairly pushed out of their high schools when they reported sexual harassment, *Miami Shool*

Women and girls of color already face discriminatory discipline due to race and sex stereotypes.[48] Schools are also more likely to ignore, blame, and punish Black and Brown women and girls who report sexual harassment due to harmful race and sex stereotypes that label them as “promiscuous,” and less[49] deserving of protection and care.[50] For example, Black women and girls are commonly stereotyped as “Jezebels,” Latina women and girls as “hot-blooded,” Asian American and Pac girls as “submissive,” and Native women and girls due to the legacy of colonization.[51]

With respect to Black girls specifically, studies show that adults view Black girls as more adult-like and less innocent than their white peers, a phenomenon referred to as “adultific girls are stereotyped as hypersexualized”; as a result, schools a harassment with less seriousness, and more likely to place blame on Black girls for their victimization.[52] Indeed, Black women and girls are especially likely to be punished by schools for their behaviors. For example, The Department of Education’s 2013-14 Civil Rights Data Collection (CRDC) shows that Black girls are five times more likely than white girls to be suspended in elementary and secondary school, and that while Black girls represented 20 percent of all preschool enrolled students, they were 54 percent of preschool students who were suspended.[53] Schools are also more likely to punish Black women and girls by labeling them as the aggressor when they defend themselves against their harassers or when they respond in age-appropriate ways to traumatic experience because of stereotypes that they are “angry” and “aggre[54]

Schools may rely on many other stereotypes to ignore, blame, and/or punish students who report sexual harassment. For example, students who are pregnant or parenting are more likely to be blamed for sexual harassment than their peers, due to the stereotype that because they have engaged in sexual intercourse in the past. Similarly, LGBTQ students are less likely to be believed and more likely to be blamed due to stereotypes that they are “hypersexual,” “deviant,” or bringing it upon themselves.[55] Students with disabilities, too, are “attention

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Board Pushed Survivor of Multiple Sexual Assaults Out of School, Says NWLC (Jan. 15, 2019), https://nwlc.org/press-releases/miami-school-board-pushed-survivor-of-multiple-sexual-assaults-out-of-school-says-nwlc; Nat’l Women’s Law *Pennridge School District Consistently Pushes Survivors of Sex-Based Harassment Out of School, Says NWLC* (Aug. 9, 2017), https://nwlc.org/press-releases/pennridge-school-district-consistently-pushes-survivors-of-sex-based-harassment-out-of-school-says-nwlc; Nat’l Women’s Law Ctr., *NWLC Files Lawsuit against PA School District for Failing to Address Sexual Assault of High School Student* (May 31, 2017), https://nwlc.org/press-releases/nwlc-files-lawsuit-against-pa-school-district-for-failing-to-address-sexual-assault-of-high-school-student.

[48] Nat’l Women’s Law Ctr., *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color* 1 (2016) [hereinafter *Let Her Learn: Girls of Color*], *available at* https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color.

[49] *E.g.*, Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARVARD J.L. & GENDER 16, 24-29 (forthcoming), *available at* https://ssrn.com/abstract=3168909.

[50] Georgetown Law Center on Poverty and Inequality, *Girlhood Interrupted: The Erasure of B*, 1 (2018) [hereinafter *Girlhood Interrupted*], https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf.

[51] Cantalupo, *supra* note 49, at 24-25.

[52] *Girlhood Interrupted, supra* note 50, at 2-6.

[53] U.S. Dep’t of Education Office for Civil Rights, *A First Look: Key Data Highlights on Equity and Opportunity Gaps in Our Nation’s Public Schools*, at 3 (June 7, 2016; last updated Oct. 28, 2016), https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf.

[54] *Unlocking Opportunity*, *supra* note 45, at 5, 18, 20, 25. *See also* Sonja C. Tonnesen, *Commentary: "Hit It and Quit It": Responses to Black Girls' Victimization in School*, 28 BERKELEY J. GENDER L. & JUST. 1 (2013), http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1312&context=bglj.

[55] *See, e.g.*, Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 CARDOZO L. REV. 2115, 2118 (2018), http://cardozolawreview.com/heterosexism-rules-evidence; Laura Dorwart, *The Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women*, MEDIUM (Dec. 3, 2017), https://medium.com/@lauramdorwart/the-hidden-metoo-epidemic-sexual-assault-against-bisexual-women-95fe76c3330a.

less likely to be believed because of stereotypes about people with disabilities being less credible[56] and because they may have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability.[57]

The changes to Title IX enforcement that the NPRM proposes must be considered against the backdrop of underreporting and a pervasive culture in which those who do report sexual harassment, including sexual assault, are likely to be blamed and disbelieved. Unfortunately, and as explained in great detail throughout this comment, rather than seeking to remedy that culture, the NPRM reinforces false and harmful stereotypes about those who experience sexual harassment and proposes rules that would further discourage reporting and make it harder for schools to adequately respond to complaints.

II. The proposed rules would hobble Title IX enforcement, discourage reporting of sexual harassment, and prioritize protecting schools over protecting survivors and other harassment victims.

For the better part of two decades, the Department has used one consistent standard to determine if a school violated Title IX by failing to adequately address sexual assault or other forms of sexual harassment. The Department's 2001 Guidance, which underwent notice-and-comment and has been enforced in both Democratic and Republican administrations,[58] defines sexual harassment as "unwelcome conduct that a reasonable person would find so severe, pervasive, or persistent that it interferes with or limits a student's ability to participate in or benefit from the school's programs."[59] The 2001 Guidance requires schools to address student-on-student harassment if *any employee* "knew, or in the exercise of reasonable care should have known" about the harassment. In the context of employee-on-student harassment, the 2001 Guidance requires schools to address whether a school employee "has apparent authority."[60] Under the 2001 Guidance, the Department would consider schools that failed to "take immediate and effective corrective action to be in violation of Title IX."[61] These standards have appropriately guided the Department's Office of Civil Rights' (OCR) enforcement activities for almost twenty years, effectuating Title IX's nondiscrimination mandate by requiring schools to quickly and effectively respond to serious instances of harassment and fulfilling OCR's purpose of "ensuring equal access to educational opportunities and enforcing students' civil rights."

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[56] The Arc, *People with Intellectual Disabilities and Sexual Violence* 2 (Mar. 2011), *available at* https://www.thearc.org/document.doc?id=3657

[57] *E.g.*, Natôl Inst. of Justice, *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14-15 (2016), *available at* https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx.

[58] These standards have been reaffirmed time and time again, in 2006 by the Bush Administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama Administration, and even in the 2017 guidance document issued by the current Administration. *See* U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Harassment* (Jan. 25, 2006) [hereinafter 2006 Guidance], https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html; U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010) [hereinafter 2010 Guidance], https://ww2ed.gov/about/offices/ list/ocr/letters/colleague-201104.pdf; U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, &16 (Apr. 4, 2011) [hereinafter 2011 Guidance], https://ww2ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 1-2 (Apr. 29, 2014) [hereinafter 2014 Guidance], https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Campus Sexual Misconduct* (Sept. 2017) [hereinafter 2017 Guidance], https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

[59] U.S. Dep't of Educ, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter 2001 Guidance], https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

[60] *Id.*

[61] *Id.*

This standard appropriately differs from the higher bar erected by the Supreme Court in the particular and narrow context of a Title IX sexual harassment lawsuit seeking monetary damages from a school. To recover monetary damages, a plaintiff must show that the school was deliberately indifferent to known sexual harassment that was severe and pervasive and deprived a student of equal access to educational opportunities and benefits.[62] But in establishing that standard, the Court recognized that it was *specific* to private suits seeking monetary damages, not to administrative enforcement. It explicitly noted that the standard it announced did not affect agency action: the Department was still permitted to administratively enforce rules addressing a broader range of conduct to fulfill direction to effectuate Title IX's broad and distinct mandate to prohibit sex discrimination[63] and to behavior that Title IX proscribes" and identifying to respond to harassment supports a claim for monetary damages.[64] And it recognized that the liability standard for money damages does not limit the agency's authority to requirements that effectuate[65] The 2001 Guidance likewise addressed the difference between suits for money damages and Department enforcement, concluding that it was inappropriate for the Department to limit its enforcement activities to the narrower damages standard and that the Department would continue to enforce the broad protections provided under Title IX. Indeed, in the current proposed regulations, the Department acknowledges that it is adopt the liability standards applied by the Supreme Court in private suits for money damages."[66] Yet, despite knowing that adopting such a standard creates higher burdens for students who are sexually harassed to get help from their schools, the Department nevertheless insists on importing those standards without adequate justification.

Indeed, under proposed § 106.30, the Department seeks to import effort a standard that is *more stringent* than the Supreme Court's standard IX harassment cases. The Court defined sexual harassment as equal access *resources and opportunities* not *opportunities and benefits*."[67] The Department proposes a standard requiring a showing that the harassment *denies* a student of access to a school's "program[s]"[68] a significantly more burdensome threshold than *effective denial of equal access to* a school's resources, opportunities, or benefits, which requires a student to have to be far more harmed in their education before a school must intervene.

In seeking to impose this liability standard to cabin the Department's enf Department ignores key distinctions that the Supreme Court has specifically recognized between the practical realities of agency enforcement and court action. For instance, under the proposed rules a school would not be required to respond to reports of sexual harassment unless a school offi authority to institute corrective measures" had standard is drawn from the Court's *Gebser v. Lago Vista Independent School District*.[69] But in

[62] *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 290 (1998) (detailing standard for employee-on-student harassment); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (detailing standard for student-on-student harassment).
[63] *Gebser*, 524 U.S. at 291-92 (citing 20 U.S.C. § 1682).
[64] *Davis*, 526 U.S. at 639.
[65] *Gebser*, 524 U.S. at 292 (citing 20 U.S.C. § 1682).
[66] 83 Fed. Reg. at 61468, 61469.
[67] *Davis*, 526 U.S. at 631.
[68] Proposed § 106.30.
[69] *See Gebser*, 524 U.S. at 290. The Department further misstates the law by claiming that the proposed rules adopt the "*Gebser/Davis* standard." *See* 83 Fed. Reg. at 61467. The Court in *Davis* did not require a plaintiff alleging student-on-student harassment to prove actual knowledge by an appropriate person with the "au *See, e.g.*, Brian Bardwell, No One Is an Inappropriate Person: The Mistaken App *Title IX Peer-Harassment Cases*, 68 Case W. Res. L. Rev. 1343, 1347-48. Moreover, nine circuit courts do not require plaintiffs to prove actual knowledge by an "appropri- harassment" as mandated in *Davis*. *See, e.g.*, *L.O.* of their pe

Gebser, the Court reasoned that this actual notice standard is appropriate for suits seeking monetary relief by analogy to the Department's enforcement mechanism for withdrawing federal funding. The Court observed that before a school could be deprived of federal funding for a Title IX violation, it must receive notice of that violation, because the Department's regulations *require that OCR provide notice* to a school by advising the school about its failure to comply with Title IX requirements and giving it an opportunity to come into voluntary compliance *before* initiating enforcement proceedings.[70] Thus, *Gebser* recognizes (and nowhere questions) OCR's authority to institute corrective measures on notice of sexual harassment, if such an official did not have notice before the complaint was filed. *Gebser*'s notice requirement in money damages lawsuits was explicitly designed to mirror the effect of this pre-enforcement notice by OCR, which is already built into the Department's administrative enforcement mechanisms. Importing the *Gebser* notice requirement into this administrative enforcement mechanism serves no purpose other than sheltering schools from Title IX enforcement proceedings. While the Department asserts that it is aware of the differences between private litigation for damages and agency enforcement, the proposed rules ignore these differences.[71]

The Department also ignores important distinctions between suits seeking different remedies. Although proof of deliberate indifference is required in Title IX suits for money damages, *lawsuits for equitable relief* do not require a showing of deliberate indifference.[72] It has been the position of the United States for 20 years, since its amicus brief in *Davis*, that the standards currently enforced by the Department are the same as those applied in lawsuits for equitable relief.[73] Given that the *Gebser* standard does not apply in lawsuits seeking only equitable relief, it is especially perverse to apply that standard to agency enforcement efforts to secure such relief. The Department's proposal to import the liability standard for money damages in the administrative context is arbitrary and capricious, as it threatens to create significant asymmetries between equitable remedies pursued through administrative means and the courts.

As set out in further detail below, the notice requirement, definition of harassment, and deliberate indifference standard set out by the Supreme Court for the unique circumstances of determining schools' monetary liability have no place in the far different context of administrative enforcement, with its iterative process and focus on voluntary corrective action by schools. By choosing to import those liability standards, the Department threatens devastating effects on students.

Evesham Twp. Bd. of Educ., 710 F. App'x 561 (3d Cir. 2017); *Yamaguchi v. U.S. Air Force*, 515 F. App'x 175 (4th Cir. 2013); *Williamson v. Penn State Univ.*, 529 F. App'x 167 (3d Cir. 2013); *Whitfield v. Notre Dame Middle Sch.*, 412 F. App'x 517 (3d Cir. 2011); *Doe v. Dekalb Cty. Sch. Dist.*, 145 F.3d 1441 (11th Cir. 1998); *Doe v. Bellefonte Area Sch. Dist.*, 106 F. App'x 800 (3d Cir. 2004); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001); *Dawn L. v. Greater Johnstown Sch. Dist.*, 614 F. Supp. 2d 555, 568 (W.D. Pa. 2008) (explaining that *Davis* "prohibit[s] student on student sexual discrimination where the misconduct is so severe, pervasive, and objectively offensive that it has the purpose or effect of depriving the victim of access to the educational benefits or opportunities provided by the school").

[70] *Gebser*, 524 U.S. at 288-89.

[71] 83 Fed. Reg. at 61480.

[72] *See Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979). *See also Frederick v. Simpson College*, 160 F. Supp. 2d 1033, 1035-36 (S.D. Iowa 2001) (deciding that the heightened *Gebser* standard for claims seeking monetary damages does not apply to claims requesting equitable relief).

[73] *See, e.g.*, Brief for the United States as Amici Curiae Supporting Petitioner, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843), https://www.justice.gov/osg/brief/davis-v-monroe-county-bd-educ-amicus-merits ("explaining "requirement of actual knowledge and deliberate indifference responds to concerns about subjecting a fund recipient to potential liability for money damages" and "a student may establish a violation of Title IX and *entitlement to equitable relief* if she can show '[petitioner] was subjected to a hostile environment [that] the school district knew or should have known of the harassment, and they failed to take prompt, appropriate corrective action'").

A. The proposed rules' definitions and standards for when schools are responsible for addressing harassment create inconsistent rules for students versus employees.

Under Title VII, the federal law that addresses workplace harassment, a school is potentially liable for harassment of an employee "if the harassment is severe or pervasive to alter the conditions of the employee's employment."[74] If the employee is harassed by a coworker or other third party, the school is liable if (1) it "knew or should have known" of the harassment and (2) failed to take immediate and appropriate corrective action.[75] If the employee is harassed by a supervisor, the school is automatically liable if the harassment resulted in a tangible employment action such as firing or demotion, and otherwise unless the school can prove that the employee unreasonably failed to take advantage of opportunities offered by the school to address harassment.[76] Schools are liable for harassment of employees under Title VII if the harassment occurs in a work-related context outside of the regular place of work[77] or outside of work but results in an impact on the work environment.[78] However, under the proposed Title IX rules, a school would only be held responsible for harassment against a student if it is (1) deliberately indifferent to (2) sexual harassment that is so severe, pervasive, *and* objectively offensive that it *denied* the student equal "access to the school's education program or activity; (3) the harassment occurred within the school's program or activity; and (4) the school had actual knowledge and responded with" corrective measures. In other words, under the proposed rules, schools would be held to a far lesser standard in addressing the harassment of students – including the sexual harassment and abuse of children under its care – than in addressing harassment of adult employees.

Moreover, in contrast to the Title VII approach, which recognizes employer responsibility for harassment enabled by supervisory authority, and in contrast to the 2001 Guidance, the proposed rule does not recognize any higher obligation by schools to address harassment of students by school employees who are exercising authority over students. The 2001 Guidance imposed liability when an employee "is reasonably appearing to be acting in the context of carrying out these responsibilities over students, without regard to whether the school officials had notice of this behavior.[79] By jettisoning this standard, the Department would free schools

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[74] *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (emphasis added).

[75] *Meritor Savings Bank v. Vinson*, 477 US 57, 63 (1986) (internal quotations and brackets omitted); Equal Employment Opportunity Commission, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999) [hereinafter "EEOC Guidance"] ("An employer is automatically liable for harassment by a supervisor who is a successively higher) authority over the employee." www.eeoc.gov/policy/docs/harassment.html.

[76] *Meritor*, 477 US at 63.

[77] *Nichols v. Tri-State Logistics*, 809 F.3d 981, 985-86 (8th Cir. 2016) (holding that district court erred in analyzing hostile work environment claim by plaintiff, a truck driver, by excluding alleged sexual harassment of plaintiff by her driving partner during mandatory rest period); *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008) (concluding that Title VII covered sexual harassment during course of employer-mandated training, where training facility was controlled by a third party); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 967 (9th Cir. 2002) (concluding that business meeting outside her workplace was sufficient to establish hostile work environment since having out-of-office meetings with potential clients was job requirement); *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 135 (2d Cir. 2001) (concluding that "work environment" for flight attendant included foreign country where employer provided block of hotel rooms and ground transportation).

[78] *Lapka*, 517 F.3d at 983 (explaining that, to be actionable, harassment need only have consequences in the workplace); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409-10 (1st Cir. 2002) (stating that harasser's ability to show why complainant feared him and why his presence around her at work created a hostile work environment); *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999) (stating that employee may reasonably perceive her work environment as hostile if forced to work for someone who harassed her outside the workplace).

[79] 2001 Guidance, *supra* note 59. ("if an employee who is acting (or who reasonably appears to be acting) in carrying out these responsibilities over students engages in sexual harassment – generally this means harassment that is carried out during the performance of his or her responsibilities in relation to students, including teaching, counseling,

from liability in many instances even when their employees use the authority they exercise as school employees to harass students. Under the proposed rules, for example, schools would bear no responsibility for the harms inflicted by serial abusers like Larry Nassar, George Tyndall, and Richard Strauss, who assaulted hundreds of students in their roles as school doctors, leaving survivors too embarrassed or afraid to report.

The drastic differences between Title VII and the proposed rules would mean that in many instances schools are *prohibited* from taking the same steps to protect children in schools that they are *required* to take to protect adults in the workplace, as set out further below.[80] And when they are not affirmatively prohibited from taking action, the proposed rules still create a more demanding standard for children in schools than for adults in the workplace to get help in ending sexual harassment.

B. The proposed definition of harassment improperly prevents schools from providing a safe learning environment.

Proposed ÄÄ 106.30 and 106.45(b)(3) define sexual h
re c i p i e n t c o n d i t i o n i n g t h e p r o v i s i o n o f a n a i d , b e
p a r t i c i p a t i o n i n u n w [e]lcome conduct on the basis of sexual is o t ò ; (2) ñ
severe, pervasive, and objectively offensive that it effectively denies a person equal access to the
[s c h o o l ô s] e d u c a t i o n p r o g r a m o r a c t i v i t y ò ; o r (3)
proposed rules mandate dismissal of all complaints of harassment that do not meet this standard. Thus, if a complaint did not allege quid pro quo harassment or sexual assault, a school would be *required* to
d i s m i s s a s t u d e n t ô s r a s s m e n t h a s n o t y t A d v a n c e d o p o i n t h a t i t i s a c t i v e l y t h e h a
h a r m i n g a s t u d e n t ô s b e q u i r e d t o d i s m i s s s u c h a c o m p l a i n t e v e n i f i t i n v o l v e d
harassment of a minor student by a teacher or other school employee. A school would be required to dismiss such a complaint even if the school would typically take action to address behavior that was not based on sex but was similarly harassing, disruptive, or intimidating. T h e D e p a r t m e n t ô s p r o p
definition is out of line with Title IX purposes and precedent, discourages reporting, unjustifiably creates a higher standard for sexual harassment than other types of harassment and misconduct, and excludes many forms of sexual harassment that interfere with equal access to educational opportunities.

The Department does not provide a persuasive justification to change the definition of sexual
h a r a s s m e n t f r o m t h a t i n t h e 2 0 0 1 G u i d a n c e , w h i c h
s e x u a l [81] The current definition rightly charges schools with responding to harassment before it escalates to a point that students suffer se v e r e h a r m . B u t u n d e r t h e D e p a r t m e
definition of harassment, students would be forced to endure repeated and escalating levels of abuse, from a student or teacher, before their schools would be permitted to take steps to investigate and stop the harassment. As the School Superintendents Association (AASA) states, the proposed definition would
ñ m o v e [s c h o o l s] i n t h e f e d e r a l g o v e r n m e n t s h o u l d b e e n c o u r a g i n g o f w h a t
s c h o o l p e r s o n [82] Similarly, the National Association of Secondary School Principals
(N A S S P) o p p o s e s t h e p r o p o s e d d e f i n i t i o n b e c a u s e i

supervising, advising, and transporting students ï a n d t h e h a r a s s m e n t d e n i e s t o p a r t i c i p a t i o n o r l i m i t s a s t
benefit from a school progr a m o n t h e b a s i s o f s e x , t h e r e c i p i e n t i s r e s p o n s i

[80] Of course, as set out in greater detail in Part VII. below, school employees are also protected by Title IX from sex discrimination in the workplace, but the proposed rules fail to grapple with how schools are to navigate the conflicting requirements of Title VII and the proposed rules in addressing workplace sexual harassment.

[81] *Id.*

[82] AASA Letter, *supra* note 15, at 3-4.

higher level when there are fewer distractions or outside influences that negatively impact their learning, such as bullying[83] or harassmentò

Schools are already escaping liability for money damages in the courts under this demanding standard even when they fail to address harassment that harms students. For example, in one particularly troubling case from the 11th Circuit, three second-grade girls reported that a male classmate was repeatedly touching their chests, rubbing his body against them, chasing them, and using highly explicit and graphic language about the sex acts he wanted to subject them to (e.g., ñsuck [their] b milk came outò and have th[84] Although two of the girls were so upset that they faked being sick four or five times to avoid going to school, the court found that the school was not liable for money damages because there was ñno cor receive an education or the enjoyment of equal access to educational programs of[85] The opportun proposed rules would not only ensure that schools also escape administrative enforcement in such cases, but would also actually prohibit schools from being more responsive to harassment complaints to ensure students are able to learn in a safe educational environment. In other words, under the proposed rules, the school would not only not face consequences for failing to respond to the girls in a case like the 11th Circuit, it would also be *required* to ignore them. This would particularly harm elementary and secondary school students, who are often forced to be in close proximity to their harassers because they are legally required to attend school and have less autonomy than students in higher education to make decisions about where they go and what they do at school.

In addition, the proposed rules are inconsistent with the Supreme Courtôs money damages, which holds schools liable for sexual harassment that, *inter alia*, ñeffectively de person] *equal* access to *resources and opportunities* to or *opportunities or benefits*.ò[86] Setting aside for a moment the fact that agency enforcement standards need not ð and should not ð be as demanding as litigation standards for money damages, the proposed rule is nonetheless still more burdensome than the Supreme Court has held is sufficient to establish a violation of ñactivity more burdensome threshold than denial of ñopportunity or benefits.ò

The Department has proposed a complicated, burdensome definition of sexual harassment that would be difficult for administrators, employees, and students would struggle to understand which complaints meet the standard. These difficulties would be significantly compounded for elementary and secondary school students and students with developmental disabilities. Students confronted with this lengthy, complicated definition of sexual harassment would have a hard time understanding whether the harassment they endured meets the Department narrow standard. How would these student in their formal complaint in order to avoid mandatory dismissal? A student may believe that she suffered harassment that was both severe and pervasive, but does she know whether it was al offensive and whether ñreasonable person in the complainantôs circumstances, in the same circumstances, would find the conduct to be so severe, pervasive, and objectively offensive that it effectively denied a person equal access to the recipientôs education program or activity.ò The definition was created with the legal process in mind, contemplating trained lawyers and judges carefully weighing whether conduct meets each element of the standard. It was not intended to be applied as a threshold for determining whether any action can be taken in response to the requests made by students ð many of them minors ð in their own words for help from the school officials they trust. Students are not equipped to understand the complexities of this definition, nor should they be asked to carefully measure

[83] Letter from Natôl Assôn of Secondary School Principals (NASS [hereinafter NASSP Letter], https://www.nassp.org/wordpress/wp-content/uploads/2019/01/NASSP_Title_IX_Comments_-_1.17.19_V2.pdf..

[84] *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1289 (11th Cir. 2003).

[85] *Id.*

[86] *Davis*, 526 U.S. at 631 (emphasis added).

and parse their complaints when all they are asking for is their school to stop their sexual harassment and ensure that they can learn in a safe environment.

The Departmentôs proposed definition would dis
harassment. Already, the most commonly cited reason for students not reporting sexual harassment is the fear that it is ñinsufficiently [87] Moreover, if a student is turned away by her respons
school after reporting sexual harassment because it does not meet the proposed narrow definition of sexual harassment, the student is even more unlikely to report a second time when the harassment escalates. Similarly, if a student knows of a friend or classmate who was turned away after reporting sexual harassment, the student is unlikely to make even a first report. By the time a student reports sexual harassment that the school can or must respond to, it may already be too late: because of the impact of the harassment, the student might already be ineligible for an important AP course, disqualified from applying to a dream college, or derailed from graduating altogether.

In addition, the proposed definition excludes many forms of sexual harassment, including some that schools are required to report under the Cle
would be required to dismiss some complaints of stalking, dating violence, and domestic violence, while also being required to report those complaints to the Department under Clery.[88] These inconsistent requirements would cause confusion among school administrators struggling to make sense of their obligations under federal law and demonstrate the p
respond to harassment complaints.

Finally, the Department's definition and mandatory dismissal requirement would create inconsistent rules for sexual harassment as compared to other misconduct. Harassment based on race or disability, for example, would continue t
pervasive[89] And schools could address harassment that was not sexual in nature even if
the same time, being required to dismiss complaints of similar conduct if it is deemed sexual. This would create inconsistent and confusing rules for schools in addressing different forms of harassment. It would send a message that sexual harassment is less deserving of response than other types of harassment and that victims of sexual harassment are inherently less deserving of assistance than victims of other forms of harassment. It would also force students who experience multiple and intersecting forms of harassment to slice and dice their requests for help from their schools in order to maximize the possibility that the school might respond, carefully excluding reference to sexual taunts and only reporting racial slurs by a harasser, for example.[90] Further, it would also make schools vulnerable to litigation by students who rightfully claim that being subjected to more burdensome requirements in order to get help for sexual harassment than their peers who experience other forms of student misconduct, is discrimination based on their sex, in direct violation of Title IX. In other words, schools would be hard-pressed to figure out how to comply with Title IX when they are instructed to follow a new set of rules that demands responses that violate Title IX.

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[87] Kathryn J. Holland & Lilia M. Cortina, ñIt Happens to Girls All the Timeò: Examini
*Not Using Campus Suppor*t 56 AM. J. COMMUNITY PSYCHOL. 50, 61 (2017), *available at* https://doi.org/10.1002/ajcp.12126.

[88] *See* 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C § 1092(f)(6)(iv)); 34 C.F.R. § 668.46(a)).

[89] *See e.g.*, *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (applying pervasive standa
racial discrimination hostile work environment claim).

[90] *See Joanna L. Grossman & Deborah L. Brake, A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018), *available at* https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence.

The Departmentôs repeated attempt to justify its proposed rules by asserting that they are necessary to protect freedom of speech and academic freedom[91] are unpersuasive. Harassment is not protected speech when it creates a hostile environment that interferes with a studentôs ability to participate in or benefit from an educational activity.[92] The Supreme Court made clear nearly a half century ago in *Tinker v. Des Moines* that school officials can regulate student speech if they reasonably conclude that it will cause interference with school activities or the rights of other students.[93] There is no conflict between protecting students from sexually harassing speech in schools and the First Amendment.[94]

C. The proposed notice requirement undermines Title IX by making it harder to report sexual harassment, including sexual assault.

Under proposed §§ 106.44(a) and 106.30, schools would only be responsible for addressing sexual harassment when one of a small subset of school employees actually knew about the harassment. Schools would not be required to address sexual harassment unless the harassment by (i) a Title IX coordinator, (ii) an elementary or secondary school teacher (but only for student-on-student harassment, *not* employee-on-student harassment); or (iii) an official who has the authority to institute corrective measures.[95] This is a dramatic change, as the Department has long required schools to address *student-on-student* sexual harassment if almost any school employee[96] either knows about it or should reasonably have known about it.[97] This standard takes into account the reality that many students disclose sexual abuse to employees who do not have the authority to institute corrective measures, both because students seeking help turn to whatever adult they trust the most, regardless of that adultôs formal authority, and because students are likely not informed about which employees have authority to address the harassment. The 2001 Guidance also requires schools to address all employee-on-student sexual harassment, stating that [school] has notice when the harassment is known by the employees.[98] The 2001 Guidance recognized the particular harms of students being preyed on by adults in positions of authority, and studentsô vulnerability to such abuse, and accordingly acknowledged schoolsô responsibility for harassment by their employees.

In contrast, under the proposed rules, schools would not be required to address any sexual harassment unless one of a small subset of school employees had actual knowledge of it. This rule also unjustifiably limits the set of school employees who are able to receive actual notice that triggers the schoolôs Title IX duties. For example, if a college graduate student told her professor, residential advisor, or teaching assistant that they had been raped by another student or by a professor or other university employee, the university would have no obligation to help them. If an elementary or secondary school student told a non-teacher school employee they trust ð such as a guidance counselor, teacher aide, playground supervisor, athletics coach, bus driver, cafeteria worker, or school resource officer ð that they

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[91] 83 Fed. Reg. at 61464, 61484. *See also* proposed § 106.6(d)(1), which states that nothing in Title IX requires a school to restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution.

[92] See Grossman & Brake, *supra* note 90 ("The only legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational

[93] 2001 Guidance, *supra* note 59.

[94] 393 U.S. 503, 513, 514 (1969).

[95] Proposed § 106.30.

[96] This duty applies to "any employee who has the authority to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibilit *supra* note 59 at 13.

[97] *Id* at 14.

[98] *Id.* at 10.

had been sexually assaulted by another student, the school would have no obligation to help the student.[99] And if an elementary or secondary school student told a teacher that she had been sexually assaulted by another teacher or other school employee, the school would again have no obligation to help her.[100]

Perversely, the proposed rules thus provide a more limited duty for elementary and secondary schools to respond to a student's allegations of sexua an outcome that is especially concerning given that one in three employee-respondents in elementary and secondary schools sexually abuse multiple student victims.[101] The proposed rules are also particularly unworkable for elementary and secondary school students who are very young, students with physical or intellectual disabilities, and English Language Learners, who not only may struggle with describing their harassment, but who may have closer relationships with their teacher aides, members of their Section 504 team or Individualized Education Program (IEP) team, school psychologists, and other school employees who are not their teachers or the Title IX coordinator.

Because the proposed rules do not define who e measures" are, many students at all ceive help from s of edu their schools would need to report harassment directly to their Title IX coordinator – even though school district and university Title IX coordinators are usually central office administrators who do not work in student's o have usually strangers to the student body.

Sexual assault is very difficult to talk about. Proposed §§ 106.44(a) and 106.30 would mean even when students find the courage to talk to the adult school employees they trust, schools would frequently have no obligation to respond. For example, if the proposed rules had been in place, colleges like Michigan State and Penn State would have had no responsibility to stop Larry Nassar and Jerry Sandusky – even though their victims reported their experiences to at least 14 school employees over a 20-year period – including athletic trainers, coaches, counselors, and therapists[102] – because those employees are not considered to be school officia measures." This would absolve some of the worst Title IX offenders of legal liability. It is therefore unsurprising that the AASA objects to these proposed attack" on[103] a student that AASSP, fears the ity will lead t victims, which could lead to prolonged harassment and suffering."[104]

The Department incorrectly relies on two Circuit cases that mis-cite *Gebser* in order to support its position in proposed § 106.30 that obligation to report sexual harassment does not qualify an employee as one who institute corrective school.[105] One of the cases, *Plamp v. Mitchell*, cites a passage from *Gebser* that merely explains why it is necessary for *the Department* to provide notice to an corrective ficial with measures" before the Department can iate an "*Gebser* passage says nothing about what type of notice is required before a *school* can initiate an

[99] *See* proposed § 106.30 (83 Fed. Reg. at 61496) (for elementary and secondary school elementary and secondary context with regard to student-on-student harassment).
[100] *See id*.
[101] Magnolia Consulting, *Characteristics of School Employee Sexual Misconduct: What We Know from a 2014 Sample* (Feb. 2018), https://magnoliaconsulting.org/news/2018/02/characteristics-school-employee-sexual-misconduct.
[102] Julie Mack & Emily Lawler, *MSU doctor's alleged victims talked for 20 years. Was anyone listening?*, MLIVE (Feb. 8, 2017), https://www.mlive.com/news/index.ssf/page/msu_doctor_alleged_sexual_assault.html.
[103] AASA Letter, *supra* note 15, at 2-3.
[104] NASSP Letter, *supra* note 83, at 1.
[105] 83 Fed. Reg. at 61497.

investigation into a sexual harassment complaint.[106] The second case, *Santiago v. Puerto Rico*, in turn relies on *Plamp*.[107] Neither case supports the Department's proposed rules that would limit schools' obligations to respond to reports of sexual harassment.

D. The proposed rules would *require* schools to dismiss reports of harassment that occurs outside of a school activity, even when it creates a hostile educational environment.

Proposed §§ 106.30 and 106.45(b)(3) would *require* schools to dismiss all complaints of off-campus or online sexual harassment that happen outside of a school-sponsored program – even if the student is forced to see their harasser at school every day and the harassment directly impacts their education as a result. To understand why Title IX requires schools to respond to out-of-school harassment, one only need look at the Department's recent findings against the Chicago Public Schools for failing to address two reports of out-of-school sexual assault, which the Department described as "among the most pervasive violations" it has found under Title IX.[108] In one case, a tenth-grade student was forced to perform oral sex in an abandoned building by a group of 13 boys, eight of whom she recognized from school. In the other case, another tenth-grade student was given alcohol and sexually abused by a teacher in his car. If the proposed rules become final, school districts would be required to dismiss complaints of similarly egregious behavior simply because they occurred off-campus outside a school program, even if they result in a hostile educational environment.

The proposed rules conflict with Title IX's statutory text, which prohibits discrimination in the *underlying conduct* occurred but instead prohibits discrimination in, . . . participation in, . . . denie[s a person] the benefits of, or . . . subject[s a person] to discrimination under any education program or activity."[109] For almost as long as it has been a federal agency for nearly four decades, the Department has agreed that schools are responsible for addressing sexual harassment if it is "sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program[s]"[110] regardless of where it occurs.[111] No student who experiences out-of-school harassment should be forced to wait until they are sexually harassed again on school grounds or during a school activity in order to receive help from their school. Nor has the Supreme Court ever suggested that a school must ignore harassment that occurs off school grounds under Title IX. In *Gebser*, for example, the harassment at issue included multiple instances in which a teacher had sexual intercourse with a student on school property.[112] In requiring courts to consider whether the school "had actual knowledge of, and was deliberately indifferent to, the teacher's misconduct," *Gebser* did not limit the inquiry to misconduct that occurred on school grounds.

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[106] *Id.* (quoting *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 459 (8th Cir. 2009) (quoting *Gebser*, 524 U.S. at 289 ("Presumably, a central purpose of requiring notice of the violation to the appropriate person and an opportunity for voluntary compliance before *administrative enforcement proceedings* can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures.") (emphasis added))).

[107] *Id.* (quoting *Santiago v. Puerto Rico*, 655 F.3d 61, 75 (1st Cir. 2011) (citing *Plamp*, 565 F.3d at 458)).

[108] *See* David Jackson et al., *Federal officials withhold grant money from Chicago Public Schools, citing failure to protect students from sexual abuse*, CHICAGO TRIBUNE (Sept. 28, 2018), https://www.chicagotribune.com/news/local/breaking/ct-met-cps-civil-rights-20180925-story.html.

[109] 20 U.S.C. § 1681(a).

[110] 2001 Guidance, *supra* note 59.

[111] 2017 Guidance, *supra* note 58 at 1 n.3 ("Schools are responsible for redressing a sexually hostile environment even if it relates to off-campus activity."); 2014 Guidance, *supra* note 58 (2 ("a school must process all complaints of sexual violence, regardless of where the conduct occurred"); *supra* note 58 (G ("Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, during non-school activities, or outside the educational program."); *supra* note 58 at 2 (finding Title IX violation where "conduct was sufficiently severe, persistent so as to interfere with or limit a student's ability to participate in or benefit from the school's activities, or opportunities offered by the school," regardless of location of harassment).

[112] *Gebser*, 524 U.S. at 278.

sufficient to subject it to liability for money damages,[113] the Court never suggested that the fact that the sexual encounters occurred outside of school somehow rendered them irrelevant under Title IX. If off-campus harassment, including assault, lies beyond the reach of Title IX, *Gebser* would be a case in which the question of the schoolôs actual notice of har vehicle for the Court to establish the rule of actual notice as a prerequisite to money damages.

Nevertheless, under the proposed rules, if an elementary or secondary school student is being sexually harassed by her classmates on Instagram or Snapchat outside of school, or on the way to/from school in a private carpool, her school would be forbidden from investigating the complaint or ending the harassment ð even if as a result of the harassment she has become too afraid to attend class and face her harassers. Similarly, if a middle sc would not be student allowed to take action to remedy the impact of the assault ð even if seeing the rapist every day in their classes, hallways, or cafeteria leaves her unable to function in school. Even if a parent reports that a school employee is sending their child sexually explicit messages via text or social media, or, as in *Gebser*, that a teacher has initiated a sexual relationship with their child outside of school, the school would still be required to dismiss those complaints ð an especially concerning result given that mobile devices are the most common method of communications between school employees, including child sexual abusers, and students.[114] Not only do the proposed rules prohibit elementary and secondary schools from responding appropriately and adequately to these harrowing examples of sexual harassment, they fail to take into account the unique circumstances of elementary and secondary school students with disabilities, who are often segregated from their peers and even removed to off-site educational and day services, where they are isolated and more vulnerable to child sexual abuse.[115]

Similar harm would accrue to students at institutions of higher education. According to a 2014 U.S. Department of Justice report, 95 percent of sexual assaults of female students ages 18-24 occur outside of school.[116] In a leaked version of the proposed rules, the Department itself cited a study finding that 41 percent of college sexual assaults occur off campus.[117] But under the proposed rules, if a college or graduate student is sexually assaulted by a classmate in off-campus housing, their university would be required to dismiss their complaint ð even though almost nine in ten college students live off campus.[118] If a student is assaulted off-campus by a professor, his college would be required to ignore his complaints ð even if he would be required to co Although the preamble briefly mentions one case where a Kansas State college fr activity the purposes of Title IX, the Department fails to explain conclusively whether all fraternities and sororities are covered by Title IX.[119] Many schools may therefore interpret the proposed rules to prevent them from addressing any sexual harassment that occurs in fraternities, sororities, and other social clubs not recognized by the school (*e.g.*, the Harvard final clubs[120]) ð a particularly troubling outcome given that students are more likely to be sexually assaulted if they belong to a fraternity or sorority.[121]

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[113] *Id.* at 291.
[114] Magnolia Consulting, *supra* note 101.
[115] Nat ô Council on Disability, *The Segregation of Students with Disabilities* 18-19 (Feb. 2018), https://ncd.gov/sites/default/files/NCD_Segregation-SWD_508.pdf.
[116] U.S. Depôt ea of Justice Statistics, *Rape and Sexual Assault Victimization Among College-Age Females, 1995 ï 2013* at 6 (Dec. 2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.
[117] Letter from Anne C. Agnew to Paula Stannard et al., *HHS Review: Department of Education Regulation ï Noon September 10*, U.S. DEP ô OF HEALTH & HUMAN SERVS. 79 n.21 (Sept. 5, 2018), https://atixa.org/wordpress/wp-content/uploads/2018/09/Draft-OCR-regulations-September-2018.pdf.
[118] Sharpe, *How Much Does Living Off-Campus Cost?*, *supra* note 25.
[119] 83 Fed. Reg. at 61468.
[120] *E.g.*, Harvard University, *Unrecognized Single-Gender Social Organizations*, (Dec. 5, 2017), https://www.harvard.edu/president/news/2017/unrecognized-single-gender-social-organizations.
[121] Freyd, *supra* note 27.

Although the proposed rulesô preamble explains th
school program or activity if the school ñowned t
discipline; or funded, sponsored, promoted, or endo rsed the event or circumstan
to include this explanation in the language of the proposed rules themselves, making it even more difficult for students and schools to understand their rights and obligations under this already-confusing multi-factor test.[122]

The proposed rules would also pose particular risks to students at community colleges and vocational schools. Approximately 5.8 million students attend community college (out of 17.0 million total undergraduate students),[123] and 16 million students attend vocational school.[124] But because none of these students live on campus, harassment they experience by faculty or other students is especially likely to occur outside of school, and therefore outside of the protection of the proposed Title IX rules.

Finally, proposed § 106.8(d) would create a unique harm to the 10 percent of U.S. undergraduate students who participate in study abroad programs. If any of these students report experiencing sexual harassment during their time abroad, including within their study abroad program, their schools would be required to dismiss their complaints ð even if they are forced to see their harasser in the study abroad program every day, and even if they continue to be put into close contact with their harasser when they return to their home campus.

Representatives of school leaders like the AASA[125] and NASSP[126] oppose mandatory dismissal of complaints alleging out-of-school harassment. They recognize that out-of- school conduct ñoft
over into the school day and school environmentò and this
school districts across the campus or conduct ñ, is with tim
drugs or alcohol at a house party, cyberbullying, hazing, physical a ssfaucl ti,ng schools etc.ò[127]
dismiss complaints of out-of- school sexual harassment, the propose
school leaders who believe every chi ld would deserves a[128]
also require schools to single out complaints of sexual harassment by treating them differently from other types of student misconduct that occur off-campus, perpetuating the pernicious notion that sexual harassment is somehow less significant than other types of misconduct and making schools vulnerable to litigation by students claiming unfairness or dis
based on sex differently from other forms of misconduct.

E. The Department ô schools cuongdeusctti opna-Ttaihtalte lsIcXò proceed for complaints that would be mandatorily dismissed under the proposed rules is confusing, impractical, and unlikely to be followed.

The Department notes that if conduct of harassment does not
or occurs outside of school, schools could still process the complaint under a different conduct code, but not Title IX. This ñsolutionò to its required dis
impractical. Students and school employees do not make complaints ñun

[122] 83 Fed. Reg. at 61468.
[123] Statista, *Community colleges in the United States - Statistics & Facts*, https://www.statista.com/topics/3468/community-colleges-in-the-united-states; National Center for Education Statistics, *Fast Facts*, https://nces.ed.gov/fastfacts/display.asp?id=372 (about 17.0 million students enrolled in undergraduate programs in fall 2018).
[124] David A. Tomar, *Trade Schools on the Rise*, THE BEST SCHOOLS (last visited Jan. 20, 2019), https://thebestschools.org/magazine/trade-schools-rise-ashes-college-degree (an estimated 16 million students were enrolled in vocational schools in 2014).
[125] AASA Letter, *supra* note 15, at 5-6.
[126] NASSP Letter, *supra* note 83, at 1.
[127] AASA Letter, *supra* note 15, at 5-6.
[128] *Id.* at 5.

complaints of sexual harassment. Schools faced with determining when to have a non-Title IX proceeding to address sexual harassment allegations, as opposed to one that do ñunder Title IX,ò have little guidance on how to exclude any reference to, or consideration of, the sexual nature of the harassment or assault complained of? Would the initial complaint carefully avoid making any reference to the sexual nature of the harassment or assault in order to have access to such non-Title IX proceedings? The proposed regulations offer no guidance or safe harbor for schools to offer parallel sexual harassment proceedings that do not comply with the detailed and burdensome procedural requirements set out in the proposed rule. Schools with such parallel proceedings would no doubt be forced to contend w school had failed to comply with the requirements set out in the proposed rules and thus violated respondentsô described. Schools are therefore likely to err on the side of taking no action at all on complaints that must be dismissed under the proposed rules.

F. The proposed ñdeliberate indifferenceò standard nothing in response to complaints of sexual assault and other forms of sexual harassment.

The ñdeliberate indifferenceò standard is a lax standard adopted for measuring schoolsô response to sexual harassm requires schools to act ñreasonablyò and ñtake im harassment complaints.[129] Under the proposed rules, by contrast, schools would simply have to not be deliberately indifferent; in other words, their response to harassment would be deemed to comply with Title IX as long as it was not *clearly* unreasonable. The deliberate indifference standard would exacerbate the problem that survivors and other harassment victims who are met with ñindiffer authority figures suffer increased symptoms of post-traumatic stress and depression in addition to the trauma of the underlying assault.[130]

The Departmentôs proposed ñsafe harborsò within still further, allowing schools to avoid liability even if they unreasonably handled a Title IX complaint. As long as a school follows the requirements set out in proposed Ä 106.45, the schoolôs harassment complaints could not be challenged, effectively insulating them from any review as long as they check various procedural boxes.[131] NASSP opposes this standard precisely because it would allow schools to treat survivors poorly as long as the school follows various procedures in place, regardless of how those procedures [132] And by codifying the rule that the Department survivo would not find a school deliberately indifferent based on a schoolôs erroneous determ responsibility, the Department further provides a safe harbor for schools that erroneously determine that sexual harassment *did not occur*, but does not provide a corresponding rule protecting schools from liability if they erroneously decide that sexual harassment *did* occur.[133] This means it would always be safer for a school to make a finding of non-responsibility for sexual harassment. Indeed, such a rubber stamp finding would be completely permissible under the proposed rules as long as the school went through the motions of the required process.

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[129] 2001 Guidance, *supra* note 59.

[130] Letter from 903 Mental Health Professionals and Trauma Specialists to Assôt hSLeMarcuy at 3 (Jan. 30, 2019) [hereinafter Mental Health Professionals Letter], https://nwlc.org/wp-content/uploads/2019/01/Title-IX-Comment-from-Mental-Health-Professionals.pdf.

[131] *See* proposed Ä 106.44(b)(2) (ñIf the Title IX Coordinator files a follows procedures (including implementing any appropriate remedy as required) consistent with proposed § 106.45 in response to the formal complaint, the recipientôs response to the rep

[132] NASSP Letter, *supra* note 83, at 2.

[133] *See* proposed § 106.44(b)(5), 83 Fed. Reg. at 61471 (explaining that proposed § 106.44(b)(5) is meant to clarify that OCR will not ñconduct a deconvestigations and determinatio

The practical effects of this proposed rule would shield schools from any accountability under Title IX, even if a school mishandles a complaint, fails to provide effective supports for survivors and other harassment victims, and wrongly determines against the weight of the evidence that no sexual assault or harassment occurred.

III. The proposed rules impermissibly limit the supportive measures and remedies available to sexual harassment complainants.

A. The proposed rules do not contemplate restoration of equal educational opportunity in response to education program

The proposed rules refer repeatedly to supportive measures (§§ 106.30, 106.44(b)(3), and 106.45(b)(7)(ii)) and remedies (§§ 106.45(b)(1)(i), 106.45(b)(4)(ii)(E), 106.45(b)(5), 106.45(b)(7)(i)(A), and 106.45(b)(7)(ii)) that *access* to the *education program or activity*.[134] This proposed language on supportive measures and remedies is problematic for a number of reasons. First, it is inconsistent with the Department's inconsistent which covers conduct that *equal access* or activity." Under the Department's inconsistent harassment that satisfies the narrow definition in proposed § 106.30, their school would only be required to give them supportive measures or remedies that res

Second, the proposed rules are inconsistent wi damages in two ways (again, setting aside the fact that agency enforcement standards need not and should not be as demanding as litigation standards for money damages). First, restoration of access is an incomplete remedy for the harm and violation of Title mentioned above in Part II.B, restoration of access to a school is not equivalent to the more demanding requirement of restoration of equal access to a school's opportunities. The remedies required by the regulations fail to correct the violation of Title IX that occurs when harassment *equal access* and *opportunities* or *opportunities* or *benefits*."[135]

These inconsistencies would have significant implications on the ability of complainants to enjoy equal, nondiscriminatory access to educational opportunities. For example, under the proposed rules a high school addressing sexual assault could simply enroll a student survivor in an alternative program, such as a cyber or evening school, thereby restor without ensuring the student's ability to attend ("opportunity") her classmates who have not suffered sexual harassment. "Restoring or preserving access" to a program is a minimal s supportive measures and remedies are necessary or appropriate.

B. Complainants would not be entitled to the full range of s necessary to ensure equal access to educational opportunities.

Under proposed § 106.30, even if a student suffered harassment that occurred on campus and made a complaint that properly alleged it was "severe, pervasive, *and* objectively offensive

[134] Proposed § 106.45(b)(7)(ii) (recordkeeping of actions, including supportive measures, as a result of reports or formal complaints).
[135] *Davis*, 526 U.S. at 631 (emphasis added).

would still be able to deny the student the ñsupp
the proposed rules allow schools ve measures ò as student
grounds that the requested measures are ñdisciplin
party.ò For example, a school responding to another class or constrai
dorm because it may ñunreasonably burdenò him, harassment victim to change all of her a
own classes and housing assignments in order to avoid her harasser. In addition, schools may interpret this proposed rule to prohibit issuing a *one-way* no-contact order against an assailant and require a survivor to agree to a *mutual* no-contact order, which implies that the survivor is at least partially responsible for her own assault. However, such a rule would be contrary to decades of expert consensus that *mutual* no-contact orders are harmful to victims, because abusers often manipulate their victims into violating the mutual order,[136] and would allow perpetrators to turn what was intended to be a protective measure for the student survivor into a punitive measure against the survivor. The proposed rule would also be a departure from longstanding practice under the 2001 Guidance, which instructed schools to ñdirect[] *the harasser to have no further contact with the harassed student* ò but -versa.[137] And
groups such as the Association for Student Conduct Administration (A
interim measures, *actions restricting the accused*, should be offered and used while cases are
being resolved, as well as without a formal compl[138]

The proposed rule also fails to contemplate any *restorative* supportive measures that are often necessary to ensure a comp opportunities. Despite including a long access
list of examples of supportive measures in the preamble and in the language of proposed § 106.30, the Department makes no mention of restorative measures, such as the ability to retake a class, to remove a
ñWithdrawalò or harassment victim's grade from transcript, or to obtai
tuition after being forced to withdraw and retake a course as a result of sexual harassment.

C. The proposed rules would steer students in higher education toward ineffective supportive measures and would bar some elementary and secondary school students from receiving any supportive measures at all.

Proposed § 106.30 would require a ñformal complaintò
coordinator, requesting initiation of the grievance procedures, in order for the student to receive help.[139] If a formal complaint is not submitted, institutions of higher education would be able to avoid Title IX
liability under the safe harbor in Ä 106.44(b)(3)
harbor may incentivize institutions of higher education to steer students away from filing a ñformal
complaintò and toward accepting ñsupportive measu
measuresò are defined in proposed § 106.30 (as detailed in Part IV.A-V.B), the
interaction of proposed §§ 106.30 and 106.44(b)(3) may result in many students receiving ineffective
ñsupportive measures.ò

The proposed definition of elementary and secondary school ñformal complaintò
students in particular. Children in elementary and secondary schools are likely not equipped to draft a written, signed, formal complaint that alleges the very specific and narrow definition of harassment under the proposed rules. Unlike college and graduate students, who are guaranteed at least some supportive measures in the absence of a formal complaint under the safe harbor in proposed § 106.44(b)(3),

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[136] *E.g.*, Joan Zorza, *What Is Wrong with Mutual Orders of Protection?* 4(5) DOMESTIC VIOLENCE REP. 67 (1999), *available at* https://www.civicresearchinstitute.com/online/article.php?pid=18&iid=1005.

[137] 2001 Guidance, *supra* note 59, at 16.

[138] Ass'n for Student Conduct Admin., *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses* 2 (2014) [hereinafter ASCA 2014 White Paper], https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf.

[139] The Department does not justify its requirement that a formal complaint be signed.

elementary and secondary school students would not be guaranteed any supportive measures if they do not sign a formal complaint, and accordingly, may not get any help at all because of their inability to sufficiently describe the harassment allegations in their written complaint.

IV. The grievance procedures required by the proposed rules would impermissibly tilt the process in favor of respondents, retraumatize complainants, and conflict with Title IX's nondiscrimination mandate.

Current Title IX regulations require schools to provide for a prompt and equitable resolution of misconduct.[140] The proposed rule at § 106.8(c) purports to require "equit However, the proposed rules are also riddled with language that would require schools to conduct their grievance procedures in a fundamentally *inequitable* way that favors respondents.

The Department repeatedly cites the purported need to increase pr process rights" to justify weakening Title IX pro § 106.6(d)(2), which specifies that nothing in the rules would require a school to deprive a person of their due process rights. But the current Title IX regulations already provide more rigorous due process protections than are required under the Constitution. The Supreme Court has held that students facing short-term suspensions from public schools[141] require only "some kind of" "some kind."[142] The Court has explicitly said that a 10-day suspension does not opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to ver[143] Further, the Department already instructs schools to pr[144] Adding proposed § 106.6(d)(2) provides no new or necessary protections and inappropr mandate against the Constitution when no such conflict exists.[145] As Liberty University notes:

> "Institutions need [145] As Liberty University notes: judicial court systems in order to prevent sex discrimination from blocking student access to federally supported higher education programs. A smaller and less prescriptive approach is all that is required—one that recognizes that there is a criminal justice system with all its due process for those who seek to access an adversarial system for their day[146]

Further, there is no evidence to support the D abandoned due process in order to comply with current Title IX rules and guidances. While it may be true that students disciplined for sexual assault have been litigating more frequently since the 2011 Guidance and 2014 Guidance were issued, the simpler explanation for any such uptick in legal claims is that these guidances improved school procedures, made it easier for survivors to report sexual assault, and therefore made warranted disciplinary outcomes for respondents more likely. Respondents today are

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[140] 34 C.F.R. § 106.8(b).

[141] Constitutional due process requirements do not apply to private institutions.

[142] *Goss v. Lopez*, 419 U.S. 565, 566, 579 (1975).

[143] *Id.* at 583. *See also Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 23 (D. Me. 2005); *B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 247 (D. Vt. 1994).

[144] 2001 Guidance, *supra* note 59 at 22.

[145] The odd phrasing of the proposed rules also suggests that the Department may be seeking to extend Due Process Clause obligations to private entities covered by Title IX, but of course any such imposition of Constitutional obligations on private actors is well beyond the Department's power.

[146] Letter from Liberty Univ. to Betsy DeVos at 2 (Jan. 24, 2019) [hereinafter Liberty University Letter], http://www.liberty.edu/media/1617/2019/jan/Title-IX-Public-Comments.pdf.

likely ñjust as litigious as they were prior to t
today. This is not because of problems that the [2011 and 2014 Guidances] caused; rather, it is because of the problems [147][they] corrected.ò

We note that some have welcomed the proposed rule changes by erroneously claiming that the proposed rules would protect Black men and boys from being unfairly disciplined for false allegations; these arguments have effectively erased the experiences of Black women and girls, who are not only more likely than white women and girls to be sexual harassed,[148] but are also often ignored, blamed,[149] pressured to stay silent,[150] suspended by their schools,[151] and/or pushed into the criminal justice system[152] (i.e., the school-to-prison pipeline).[153] The sole data to substantiate the claim that Black men and boys are disproportionately disciplined by schools for sexual misconduct; in fact, the D own elementary and secondary school data shows that 0.3 percent of Black boys and 0.2 percent of white boys are disciplined for *sexual harassment*, a minor difference compared to the wide disparity between the proportion of Black boys (18 percent) and white boys (6 percent) who are disciplined for *any type of student misconduct*.[154] While we continue to strongly advocate against discriminatory discipline practices and policies in schools, we note that any claim that these proposed rules are motivated by such concern is sharply undercut by the fact this administration rescinded ð without adequate justification ð the Department of Education's 2014 Guidance on student discipline in December 2018,[155] unfair disc during the public comment period for the proposed Title IX rules.

Finally, there is no evidence that Title IX ha
A 2018 report studying more than 1,000 reports of sexual misconduct in institutions of higher education found that ñ[f]ew incidents reported to Title IX Coordin fewer still resulted in a finding of responsibility or suspension/expulsion of the responsible student.ò[156] Despite the Department's assumptions that students falsely accused of sexual misconduct are outcome of reports were victimized,[157] Moreover, any argument that not perp focuses on the false narrative that respondents' due process rights have been increasingly violated over the years because of current and rescinded OCR guidance completely ignores complainants who are still treated unfairly in violation of Title IX and are often pushed out of schools from inadequate and unfair responses to their reports.

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[147] Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONTANA L. REV. 71, 72 (2017), https://scholarship.law.umt.edu/cgi/viewcontent.cgi?article=2416&context=mlr.

[148] *Unlocking Opportunity*, *supra* note 45, at 24-25.

[149] *E.g.*, Cantalupo, *supra* note 49, at 1, 16, 24, 29.

[150] Lauren Rosenblatt, *Why it's harder for African American women to report campus sexual assaults, even at mostly black schools*, LOS ANGELES TIMES (Aug. 28, 2017), https://www.latimes.com/politics/la-na-pol-black-women-sexual-assault-20170828-story.html.

[151] *See supra* notes 43-46 and accompanying text.

[152] Nia Evans, *Too Many Black Survivors Get Jail Time, Not Justice*, NAT'L WOMEN'S LAW CTR. (Dec. 14, 2018), https://nwlc.org/blog/too-many-black-survivors-get-jail-time-not-justice.

[153] Human Rights Project for Girls, Georgetown Law Ctr. on Poverty and Inequality, and Ms. Found. for Women, *The Sexual Abuse to Prison Pipeline* (2015), https://rights4girls.org/wp-content/uploads/r4g/2015/02/2015_COP_sexual-abuse_layout_web-1.pdf.

[154] U.S. Gov't Accountability Off., *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities* (Mar. 2018), https://www.gao.gov/assets/700/690828.pdf.

[155] Dep't of Justice & Dep't of Educ., *Dear Colleague Letter* (Dec. 21, 2018), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf.

[156] Tara N. Richards, *No Evidence of "Weaponized Title IX" Here: An Empir Case Processing, and Outcomes*, L. & HUMAN BEHAVIOR (2018), *available at* http://dx.doi.org/10.1037/lhb0000316.

[157] *Id.*

A. The proposed ruleôs requirement that a respo harassment is inequitable and inappropriate in school proceedings.

Under proposed § 106.45(b)(1)(iv), schools would be required to presume that the reported harassment did not occur, which would ensure partiality to the respondent. This presumption would also exacerbate the rape myth upon which many of the proposed rules are based ð namely, the myth that women and girls often lie about sexual assault.[158] The presumption of innocence is a criminal law principle, inappropriately imported into this context.[159] Criminal defendants are presumed innocent until proven guilty because their very liberty is at stake: criminal defendants go to prison if they are found guilty. There is no such principle in civil proceedings generally or civil rights proceedings specifically, and Title IX is a civil rights law that ensures t education. As NASSP notes, this proposed rule would result in schools harassment victims of due process.ò[160]

The proposed non-responsibility presumption is inconsis explanation of why it is proposed. The Department explains that the requirement ñis added to impartiality by the recipient until *against the* termination of a complaint that harassment occurred.ò[161] This is anything but impartial. In fact, the presumption ensures partiality to the named harasser, particularly because officials in this Administration have spread false narratives about survivors and other harassment victims being untruthful and about the ñpendulum swinging too farò in school proceedings. This would unduly influence schools to conclude this proposed rule means that a higher burden should be placed on complainants. The presumption of non-responsibility may also discourage schools from providing crucial supportive measures to complainants, in order to avoid being perceived as punishing respondents.[161]

Proposed § 106.45(b)(1)(iv) would only encourage schools to ignore or punish historically marginalized groups that report harassment.[162] As explained above in Part I.C., schools may be more likely to ignore or punish harassment victims who are women and girls of color,[163] pregnant and parenting students,[164] LGBTQ students,[165] and students with disabilities because of harmful stereotypes that label them as less credible and in need of protection by their schools.

This presumption conflicts with the current Title IX rules[166] and other proposed rules,[167] which require that schools provide ñequitableò resoluti

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[158] Indeed, the data shows that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it. *See, e.g.*, Kingkade, *supra* note 42.

[159] *See also* the Departmentôs reference to ñimpartialò in proposed rÝ 106.45 (which is part of Departmentôs assertion that ñFederal [sic] law and most State laws provide the ñpresumption of innocenceò to respondents.ò Elizabeth Dewes, *Betsy DeVos's school of injustice*, WASH. POST (Nov. 20, 2018), https://www.washingtonpost.com/opinions/betsey-devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2_story.html.

[160] NASSP Letter, *supra* note 83, at 2.

[161] *See* Michael C. Dorf, *What Does a Presumption of Non-Responsibility Mean in a Civil Context*, DORF ON LAW (Nov. 28, 2018), https://dorfonlaw.org/2018/11/what-does-presumption-of-non.html.

[162] *See, e.g.*, Kingkade, *supra* note 46.

[163] *E.g.*, Cantalupo, *supra* note 49 at 1, 16, 24, 29; *Let Her Learn: Girls of Color*, *supra* note 48 at 1.

[164] Chambers & Erausquin, *The Promise of Intersectional Stigma to Understand the Complexities of Adolescent Pregnancy and Motherhood*, JOURNAL OF CHILD ADOLESCENT BEHAVIOR (2015), https://www.omicsonline.org/open-access/the-promise-of-intersectional-stigma-to-understand-the-complexities-ofadolescent-pregnancy-and-motherhood-2375-4494-1000249.pdf.

[165] *See e.g.*, David Pinsof, et al., *The Effect of the Promiscuity Stereotype on Opposition to Gay Rights* (2017), *available at* https://doi.org/10.1371/journal.pone.0178534.

[166] 34 C.F.R. § 106.8(b).

[167] Proposed §§ 106.8(c) and 106.45(b).

against the other is not equitable. This proposed presumption is also in significant tension with proposed § 106.45(b)(1)(ii), which states that ñcredibility complainantò or ñrespondent.ò

B. The proposed rules would require live cross-examination by the other choice in higher education and would permit it in elementary and secondary schools.

Proposed Ä 106.45(b)(3)(vii) requires colleges and requires parties and witnesses to submit to cross-examination by the other par choíò often an attorney who is prepared to grill a survivor about the traumatic details of an assault, or possibly an angry parent or a close friend of the respondent, or a teacher, coach, or other adult in a position of authority over the complainant or witness. Proposed § 106.45(b)(3)(vi) would allow elementary and secondary schools to use this process, even when children, who are likely to be easily intimidated under hostile questioning by an adult, are complainants and witnesses.[168] The adversarial and contentious nature of cross-examination would further traumatize those who seek help through Title IX to address assault and other forms of harassment ð especially where the named harasser is a professor, dean, teacher, or other school employee. Being asked detailed, personal, and humiliating questions often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced[169] would understandably discourage many students ð parties and witnesses ð from participating in a Title IX grievance process, chilling those who have experienced or witnessed harassment from coming forward.[170] The requirement that schools must provide each party is aligned with what party to conduct cross-examination would not account for the existence of multiple complainants and/or multiple respondents, who may not have mutually aligned interests and whose interests may not be served by a single advisor conducting cross-examination on their collective behalf. Nor would the proposed rules entitle the individual who experienced harassment to the procedural protections that witnesses have during cross-examination in the criminal court proceedings that apparently inspired this requirement. Schools would not be required to apply general rules of evidence or trial procedure;[171] would not be required to make an attorney representing the interest of the complainant available to object to improper questions; and would not be required to make a judge available to rule on objections. The live cross-examination requirement would also lead to sharp would arise when respondents are able to afford attorneys and complainants cannot.[172] According to the president of Association of Title IX Administrators (ATIXA), the live cross-examination provision

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[168] *See, e.g.*, Gail S. Goodman et al, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT, Serial no. 229, Vol. 57, No. 5, at p.85 (1992).

[169] Zydervelt, S., Zajac, R., Kaladelfos, A. and Westera, N., *Lawyersô Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s?*, BRITISH JOURNAL OF CRIMINOLOGY, 57(3), 551-569 (2016).

[170] *See, e.g.*, Eliza A. Lehner, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 YALE J. OF LAW & FEMINISM 207 (2018) (ñrape victims avoid or halt criminal investigation and prosecution because they anticipate the ordeal of cross-examinationò); Mitchell J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 932 936-37 (2001) (decision not to report (or to drop complaints) is influenced by repeated questioning and fear of cross-examination); As one defense attorney recently acknowledged it often is in adult rape cases½you have to go *at* the witness. There is no way around this fact. Effective cross-examination means exploiting every uncertainty, inconsistency, and implausibility. M Smith, *Representing Rapists: The Cruelty of Cross-Examination and Other Challenges for a Feminist Criminal Defense Lawyer*, 53 AM. CRIM. L. REV. 255, 290 (2016).

[171] The proposed rules impose only mild restrictions on what it (excluding evidence ñof the complainantôs sexual behavior or predisposition,ò unless sexual behavior is offered to prove that someone other than consented). The problems inherent in the evidence restrictions the Department chooses to adopt (and those it chooses not to) are discussed in Part IV.E. See proposed § 106.45(b)(3)(vi)

[172] Andrew Kreighbaum, *New Uncertainty on Title IX*, INSIDE HIGHER EDUCATION (Nov. 20, 2018), https://www.insidehighered.com/news/2018/11/20/title-ix-rules-cross-examination-would-make-colleges-act-courts-lawyers-say.

alone ñeven with accommodations likely would lead to a 50 percent or more drop in the reporting of misconduct.[173]

The Department assumes that cross-examination will improve the reliability of a decision-maker's determinations of responsibility and allows[174] But the reality is much more complicated, particularly in schools, where procedural protections against abusive, misleading, confusing, irrelevant, or inappropriate tactics are largely unavailable. Empirical studies show that adults give significantly more inaccurate responses to questions that involve the features typical of cross-examination, like relying on leading questions, compound or complex questions, rapid-fire questions, closed (i.e., yes or no) questions, questions that jump around from topic to topic, questions with double negatives, and questions containing complex syntax or complex vocabulary.[175] While these common types of questions are likely to confuse adults and result in inaccurate or misleading answers, these problems are compounded and magnified when such questions are targeted at children or youth.[176] Indeed, there is a large, consistent, and growing body of research that shows that children subject to cross-examination-style questioning are more likely to repudiate accurate statements and to reaffirm inaccurate ones.[177] And matters unrelated to whether the witness is telling the truth significantly influence the effects of cross-examination on a witness's testimony, self-esteem, self-confidence, and assertiveness½all of which are characteristcs of children who have experienced sexual misconduct½are less likely to provide accurate statements during cross-examination.[178]

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[173] *Id.*

[174] 83 Fed. Reg. at 61476. The Department offers no evidence to support its assumption; it merely cites a case which relies on John Wigmore's treatise. *See id.* (citing *California* v. *Green*, 399 U.S. 149, 158 (1970) (quoting John H. Wigmore, 5 Evidence sec. 1367, at 29 (3d ed., Little, Brown & Co. 1940))).

[175] Emily Henderson, *Bigger Fish to Fry: Should the Reform of Cross-Examination Be Expanded Beyond Vulnerable Witnesses*, 19(2) INTERNATIONAL J. OF EVIDENCE AND PROOF 83, 84-85 (2015) (collecting studies of adults).

[176] Saskia Righarts, *Addressing the Negative Effects of Cross-Examination Questioning on Children's Accuracy: Can We Intervene?*, 37 (5) LAW AND HUMAN BEHAVIOR 354, 354 (2013) (ñCross-examination directly contravenes almost every principle that has been established for eliciting

[177] Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-Examination on Children's Coached Reports*. 21 PSYCH., PUBLIC POLICY, & LAW 10 (2015) (cross-examination led children to recant their initial true allegations of witnessing transgressive behavior and significantly reduced children's testimonial accuracy); Saskia Righarts et al., *Young and Older Children's Responses to Cross-Examination Style Questioning: The Effects of Delay and Subsequent Questioning*, 21(3) PSYCH., CRIME & LAW 274 (2015) (cross-examination resulted in a robust negative effect on children's accuracy, which improved in accuracy); Fiona Jack and Rachel Zajac, *The Effect of Age and Reminders on Witnesses' Responses to Cross-Examination-Style Questioning*, 3 J. OF APPLIED RESEARCH IN MEMORY AND COGNITION 1 (2014) (ñadolescents's accuracy was also significantly reduced by cross-examination-style questioning); Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-Examination on Children's Reports of Neutral and Transgressive Events*, 19 LEGAL & CRIM. PSYCHOL. 296 (2014) (cross-examination led children to provide significantly less accurate reports for neutral events and actually reduced the number of older children who provided truthful disclosures for transgressive events); Joyce Plotnikoff & Richard Woolfson, ó*Kicking and Screaming*ô: *The Slow Road to Cross-Examination Time to Change the Rules?* 21, at 27 (John Spencer & Michael Lamb eds. 2012) (a child's inaccurate answers to questions that suggest they are lying may simply be a child's desire to agree with the suggestion that they are lying); Jason Chojnacki, *The Negative Effect of Cross-Examination Style Questioning on Children's Accuracy: Not Immune*, 10 APPLIED COGNITIVE PSYCHOLOGY 3 (2006) (43% of older children changed their originally correct answers to incorrect ones under cross-examination); Rachel Zajac et al., *Asked and Answered: Questioning Children in the Courtroom*, 10 PSYCHIATRY, PSYCHOLOGY AND LAW 199 (2003); Rachel Zajac & Harlene Hayne, *I Don't Think That's What* Really *Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports*, 9(3) J. OF EXPERIMENTAL PSYCH.: APPLIED 187 (2003) (ñCross-examination did not increase the accuracy of children who made errors in their original reports. Furthermore, cross-examination actually decreased the accuracy of children whose original reports were highly accurate.

[178] Rachel Zajac et al., *Disorder in the Courtroom: Child Witnesses Under Cross-Examination*, 32 DEVELOPMENTAL REV. 181, 187 (2012).

The proposed ruleôs flat prohibition on relian
examination[179] would force survivors to a ñHobson ôs choiceò between being revictimized by their assailant or having their testimony completely disregarded, and would prohibit schools from simply ñfactoring in the victimôs level of participation in [its] assessment of witness credibility.ò[180] It would also make no allowance for the unavailability of a witness and would not allow any reliance at all on previous statements, regardless of whether those statements have other indicia of reliability, such as being made under oath or against the declarantôs own interest. The rule would require schools to disregard relevant evidence in a variety of situations in a manner that could pose harms to both parties and would hinder the schoolôs ability to ensure that their findings concerning responsibility are not erroneous.

Neither the Constitution nor any other federal law requires live cross-examination in public school conduct proceedings. The Supreme Court has not required any form of cross-examination (live or indirect) in disciplinary proceedings in public schools under the Due Process clause. Instead, the Court has explicitly said that a 10-day suspension does not require ñthe opportunity to examine witnesses.ò[181] The vast majority of courts that have reached the issue have agreed that live cross-examination is not required in public school disciplinary proceedings, as long as there is a meaningful opportunity to have questions posed by a hearing examiner.[182] The Department itself admits that written questions submitted by students or oral questions asked by a neutral school official are fair, effective, and wholly lawful ways to discern the truth in elementary and secondary schools,[183] and proposes retaining that method for elementary and secondary school proceedings. It has not explained why the processes that it considers effective for addressing harassment in proceedings involving 17- or 18-year-old students in high school would be inequitable or ineffective for 17- or 18-year-old students in college. Nor does it explain why it seeks to require live hearings and cross-examination of students in schools when such a process is rarely, if ever, required of employees in workplace sexual harassment investigations.

The proposed rules also ignore the reality that many survivors of sexual assault develop anxiety, depression, PTSD, or other mental illnesses as a result of their assault. Survivors with PTSD, as well as survivors with other disabilities, have the right to request accommodations under Section 504[184] and the Americans with Disabilities Act (ADA),[185] and elementary and secondary students have accommodation rights under the Individuals with Disabilities in Education Act (IDEA).[186] These disability accommodations include the right to answer questions in writing or through a neutral school employee instead of being subjected to live cross-examination by their assailantôs

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[179] *See* proposed Ä 106.45(b)(3)(vii) (cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regar

[180] Liberty University Letter, *supra* note 146, at 5.

[181] *Goss*, 419 U.S. at 583. *See also Coplin*, 903 F. Supp. at 1383; *Fellheimer*, 869 F. Supp. at 247.

[182] The Department cites to one case, *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) to support its proposed cross-examination requirement. However, *Baum* is anomalous. *See e.g.*, *Dixon*, 294 F.2d at 158, *cert. denied* 368 U.S. 930 (1961) (expulsion does not require a *full-dress judicial hearing, with the right to cross-examine witnesses*); *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (holding no due process violation in expulsion of college student without providing him right to cross-examination); *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (cross-examination of witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.); *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988) (a public institution need not conduct a hearing which involves the right to confront or cross-examine witnesses). *See also A Sharp Backward Turn*, *supra* note 92 (*Baum* ñis anomalous.ò).

[183] 83 Fed. Reg. at 61476.

[184] 29 U.S.C. § 794; 34 C.F.R. pt. 104.

[185] 42 U.S.C. § § 12131-12134; 28 C.F.R. pt. 35.

[186] 20 U.S.C. §§ 1400-1419; 34 C.F.R. pt. 300. *See also* U.S. Depôt of Educ., *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools* (2014) [hereinafter Disability Guidance], https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf.

of higher education the ability to provide these accommodations to their students, proposed § 106.45(b)(3)(vii) would force these schools to violate Section 504 and the ADA.

Ironically, mandated live cross-examination also fails to meet the stated goal of flexibility. Indeed, it is in sharp conflict with that stated goal. Throughout the preamble, the Department repeatedly criticizes the 2011 and 2014 Guidances for lacking "flexibility" and for "one-size-fits-all" approaches,[187] and claims that the proposed rule would remedy these problems. Yet requiring all institutions of higher education to facilitate live, trial-like hearings with cross-examination to address any allegation of sexual harassment, whether employee-on-student, employee-on-employee, student-on-employee, student-on-student, other third party-on-student, or other third party-on-employee, and regardless of the type of behavior alleged, is the very definition of inflexibility. While this proposed requirement is problematic for all institutions, regardless of size and resources available,[188] it would fall particularly heavily on community colleges, vocational schools, online schools, and other educational institutions that lack the resources of a traditional four-year college or university. The difficulty and burden imposed by this mandate will also likely ensure that proceedings to address sexual harassment allegations are consistently delayed, harming all who seek prompt resolution of such matters and especially harming those who are depending on final determinations to address and remedy harassment.

Most fundamentally, in requiring institutions of higher education to conduct live, quasi-criminal trials with live cross-examination to address allegations of sexual harassment, when no such requirement exists for addressing any other form of student or employee misconduct at schools, the proposed rules communicate the message that those alleging sexual assault or other forms of sexual harassment are uniquely unreliable and untrustworthy. Implicit in requiring cross-examination for complaints of sexual harassment, but not for complaints of other types of student misconduct, is an extremely harmful, persistent, deep-rooted, and misogynistic skepticism of sexual assault and other harassment complaints. Sexual assault and sexual harassment are already dramatically underreported. This underreporting, which significantly harms schools' ability to create safe and inclusive learning environments, will be exacerbated if any such reporting forces complainants into traumatic, burdensome, and unnecessary procedures built around the presumption that their allegations are false. This selective requirement of cross-examination harms complainants and educational institutions and is contrary to the letter and purpose of Title IX.

Unsurprisingly, superintendents, Title IX experts, student conduct experts, institutions of higher education, and mental health experts overwhelmingly oppose these proposed rules on live cross-examination. The AASA "strongly opposes requiring elementary and secondary schools to subject students to cross-examination" and "urges the Department to withdraw the requirement for live cross-examination."[189] ATIXA also opposes live, adversarial cross-examination, instead recommending that the parties submit questions they want asked to the investigators, and pose those questions to the other party and witnesses, and that investigators deem appropriate.[190] ASCA agrees that schools should investigate and limit "participation in student conduct proceedings to a trained investigator who will ask questions on behalf of the parties."[191] The American Bar Association recommends that schools provide "the opportunity for both parties to submit questions to be asked of

[187] 83 Fed. Reg. at 61466, 61468, 61469, 61470, 61472, 61474 n.6, 61477.
[188] *E.g.*, Liberty University Letter, *supra* note 146, at 4.
[189] AASA Letter, *supra* note 15, at 4.
[190] ATIXA, *ATIXA Position Statement on Cross-Examining: The Urge to Transform College Conduct Proceedings into Courtrooms* 1 (Oct. 5, 2018), *available at* https://atixa.org/wordpress/wp-content/uploads/2018/10/ATIXA-Position-Statement_Cross-Examination-final.pdf.
[191] *ASCA 2014 White Paper*, *supra* note 138 at 2 (2014).

chaí The Association of Independent Colleges and Universities in Massachusetts (AICUM), representing 55 accredited, nonprofit institutions of higher education, oppose the cross-examination requirement because it would ñdeter complainants from participating in the process, undermine institutionsô ability to meet their Title IX obligations of preventing discrimination and harassment, stopping it when it does occur, and remedying its effects.ò[192] The Association of American Universities (AAU), representing 60 leading public and private universities, oppose the requirement because it can be ñtraumatizing and humiliatingò and ñundermines other responsible interventions.ò[193] And over 900 mental health experts who specialize in trauma state that subjecting a survivor of sexual assault to cross-examination in the school investigation would ñlikely [] to aggravate their symptoms of post-traumatic stress, and ñis likely to cause students to complain and to deter even[194] more victims from coming forward.ò[195]

C. The proposed rules would allow schools to pressure survivors of sexual assault, and students victimized by school employees, into traumatizing and inequitable mediation procedures with their assailants.

Proposed Ä 106.45(b)(6) would allow schools to use any informal resolution process, such as mediation, to resolve any complaint, including sexual assault, so long as the school obtains the studentsô ñvoluntary, written consentò to the informal resolution process. Mediation is a process that brings together a neutral third party to help two disputing parties reach a voluntary, mutually agreeable resolution. It is often used to resolve peer conflict, where both sides must take responsibility for their actions and come to a compromise. However, mediation is never appropriate for resolving sexual assault, even on a voluntary basis, because of the power differential between assailants and victims, the potential for re-traumatization, and the implication that survivors somehow share ñpartialò responsibility for the assault.

Mediation can also be especially harmful in cases of employee-on-student harassment, where again a significant power differential means a teacher or faculty respondent can essentially coerce a student victim into ñconsentingò to mediation and re-traumatization. The power differential is also greater in cases of adult-on-child sexual abuse, where both the adult abuser and adult mediator can coerce or manipulate the minor victim into ñconsentingò to mediation. The dangers of mediation are also exacerbated at schools where mediators are untrained in trauma and sexual assault and at some religious schools, where mediators may be especially likely to rely on harmful rape myths, such as ñgood girlsò[196] Minor students may be especially likely to feel they have no choice other than to consent to mediation if adult school officials are encouraging them to participate in the process and are especially vulnerable to being pressured into whatever resolution is favored by the adult mediator, whether or not they believe such a resolution to be adequate or responsive to their needs. Furthermore, students with developmental disabilities ð both complainants and respondents ð are vulnerable to being pressured or manipulated into participating in mediation and agreeing to harmful mediation outcomes, including outcomes that unfairly remove a complainant or respondent with a disability from their current school and instead push them into an alternative school.

In contrast to the proposed rule, the Department recognized in its 2001 Guidance that students must always have the right to end the informal process at any time and begin the formal stage of the

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[192] Am. Bar Ass'n Criminal Justice Section Task Force On College Due Process Rights and Victim Protections: *Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct* 8-10 (June 2017).
[193] AICUM Letter, *supra* note 15.
[194] AAU Letter, *supra* note 15.
[195] Mental Health Professionals Letter, *supra* note 130.
[196] *E.g.*, Grace Watkins, *Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution*, TIME (Oct. 2, 2017), http://time.com/4957837/campus-sexual-assault-mediation.

complaint.[197] The right to end mediation or other informal processes at any time is a critical safeguard to ensure that participation in such processes remains fully voluntary and that those participating in such processes are not inappropriately pressured or coerced into inappropriate resolutions. In contrast, proposed Ä 106.45(b)(6) would allow schools to ñpformal complaint participating in informal processö even if a survivor changes her mind and realizes that mediation is too traumatizing to continue, or even if someone participating in the process realizes she is being inappropriately pressured to accept a particular resolution. Such a rule would empower schools to lock students into the continuation of informal processes even if those processes reveal themselves to be ineffective or harmful, effectively denying students the ability to withdraw their consent to these processes. For those who have experienced sexual assault or other forms of harassment, this coercion would compound the harm of the underlying violation.

For all of these reasons, the Department recog consent to mediation is never appropriate to resolve cases of sexual assault. Experts also agree that mediation is inappropriate for resolving sexual violence. For example, the National Association of Student Personnel Administrators (NASPA), representing student affairs administrators in higher education, stated in 2018 that it was concerned about studen against [198] Likewise, both the AASA[199] and NASSP[200] oppose the use of mediation in a manner that would preclude a party from pursuing formal procedures in school Title IX proceedings. Mental health experts also oppose mediation for sexual assault because it would ñperpetuat blame the victimò and ñcan only result in further [201]

D. The proposed rules would allow and in some instances force schools to use a more demanding standard of proof to investigate sexual harassment than they use to investigate other types of misconduct.

The Departmentôs longstanding interpretation of Title IX requires that schools use ñpreponderance of the evidenceò as the standard for investigating and deciding whether sexual harassment occurred.[202] Proposed § 106.45(b)(4)(i) departs from that practice, and establishes a system where schools could elect to use a more demanding standard for sexual harassment matters, while allowing all other student or employee misconduct investigations to be governed by the preponderance of the evidence standard, even if they carry the same maximum

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[197] 2001 Guidance, *supra* note 59, at 21.

[198] Natôl Assôn of Student Personnel Administrators (NASPA), *NASPA Priorities for Title IX: Sexual Violence Prevention & Response* 1-2 [hereinafter *NASPA Title IX Priorities*], *available at* https://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf.

[199] AASA Letter, *supra* note 15 at 6.

[200] NASSP Letter, *supra* note 83, at 2.

[201] Mental Health Professionals Letter, *supra* note 130 at 3.

[202] The Department has required schools to use the preponderance standard in Title IX investigations since as early as 1995 and throughout both Republican and Democratic administrations. For example, its April 1995 letter to Evergreen State College concluded that its use of the clear and convincing standard ñadher under Title IXò and that the College was ñnot in compliance *Letter from Gary Jackson, Regional Civil Rights Director, Region X, to Jane Jervis, President, The Evergreen State College* (Apr. 4, 1995), at 8, http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf. Similarly, the to Georgetown University reiterated sexual harassment grievance procedures to be consistent with Title IX standards, the recipient must é us[e] a preponderan Rights, *Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University* (Oct. 16, 2003), at 1, http://www.ncherm.org/documents/202-GeorgetownUniversity--110302017Genster.pdf.

penalties.[203] Indeed in some instances, the proposed rules would require schools to impose a more burdensome "clear and convincing evidence" standard.[204]

The Department allows schools to impose a more burdensome standard in sexual harassment matters than in any other investigations of student or employee misconduct appears to rely on the stereotype and false assumption that those who report sexual assault and other forms of sexual harassment (mostly women) are more likely to lie than those who report physical assault, plagiarism, or the wide range of other school disciplinary violations and employee misconduct. When this unwarranted skepticism of sexual assault and other harassment allegations, grounded in gender stereotypes, infect sexual misconduct proceedings, even the preponderance standard could end-up operating as a clear and convincing or even a beyond-a-reasonable-doubt standard.[205] Previous Department guidance recognized that, given these pervasive stereotypes, the preponderance standard was required to ensure that the playing field, at least on paper, was as even as possible. The Department now ignores the reality of these harmful stereotypes by imposing a standard of evidence that encourages, rather than dispels, the stereotype that women and girls lie about sexual assault and other harassment, a result that is contrary to Title IX.

1. The preponderance standard is the only appropriate standard for Title IX proceedings.

The preponderance standard is used by courts in all civil rights cases—including Title IX cases brought by *respondents* claiming their schools wrongly disciplined them for committing sexual assault.[206] It is also used for nearly all civil cases, including where the conduct at issue could also be the basis for a criminal prosecution.[207] The preponderance standard is also used for people facing more severe deprivations than suspension, expulsion or other school discipline, or termination of employment or other workplace discipline, including in proceedings to determine paternity,[208] competency to stand trial,[209] enhancement of prison sentences,[210] and civil commitment of defendants acquitted by the insanity defense.[211] The Supreme Court has only required something higher than the preponderance standard in a narrow handful of civil cases—such as when the consequences are "unusually severe"[212]—where consequences far more severe than suspension, expulsion, or firing are threatened, such as termination of

[203] Proposed § 106.45(b)(4)(i) would permit schools to use the preponderance standard *only if* it uses that standard for all other student misconduct cases that carry the same maximum sanction *and* for all cases against employees. This is a one-way ratchet: a school would be permitted to use the higher clear and convincing evidence standard in sexual assault cases, while using a lower standard in all other cases.

[204] Proposed § 106.45(b)(4)(i) (explaining that the clear and convincing evidence standard must be used if schools use that standard for complaints against employees, and whenever a school uses clear and convincing evidence for any other case of student misconduct).

[205] Michael C. Dorf, *Further Questions About the Scope of Dept of Ed's Title IX Power*, DORF ON LAW (Dec. 3, 2018), https://dorfonlaw.org/2018/12/further-questions-about-scope-of-dept.html#more.

[206] Katharine Baker et al., *Title IX & the Preponderance of the Evidence: A White Paper* (July 18, 2017), http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf (signed by 90 law professors).

[207] To take one famous example, O.J. Simpson was found responsible for wrongful death in civil court under the preponderance standard after he was found not guilty for murder in criminal court under the beyond-a-reasonable-doubt standard. *See* B. Drummond Ayres, Jr., *Jury Decides Simpson Must Pay $25 Million in Punitive Award*, N.Y. TIMES (Feb. 11, 1997), https://www.nytimes.com/1997/02/11/us/jury-decides-simpson-must-pay-25-million-in-punitive-award.html.

[208] *Rivera v. Minnich*, 483 U.S. 574, 581 (1987).

[209] *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996).

[210] *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986).

[211] *Jones v. United States*, 463 U.S. 354, 368 (1983).

[212] *Addington v. Texas*, 441 U.S. 418, 424 (1979) (civil commitment).

parental rights,[213] civil commitment for mental illness,[214] deportation,[215] denaturalization,[216] and juvenile delinquency with the "possibility of" incarceration or confinement.[217] In all of these cases, incarceration or permanent loss of a profound liberty interest was a possible outcome—unlike in school sexual harassment proceedings. Moreover, in all of these cases, the government and its vast power and resources was in conflict with an individual—in contrast to school harassment investigations involving two students with roughly equal resources and equal stakes in their education, two employees who are also similarly situated, or a student and employee, where any power imbalance would tend to favor the employee respondent rather than the student complainant.[218] Preponderance is the only standard of proof that treats both sides equally and is consistent with Title IX grievance procedures—which must be "prompt and equitable."[219]

For this reason, Title IX experts and school leaders alike support the preponderance standard, which is used to address harassment complaints at over 80 percent of colleges.[220] The National Center for Higher Education Risk Management (NCHERM) Group, whose white paper *Due Process and the Sex Police* was cited by the Department,[221] has promulgated materials that require schools to use the preponderance standard, because "[w]e believe higher standards"[222] The white paper by four Harvard professors that is cited by the Department[223] recognizes that schools should use the preponderance standard and Title IX[224] mandates it. The OCR takes the position that

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[213] *Santosky v. Kramer*, 455 U.S. 745, 758 (1982).
[214] *Addington*, 441 U.S. at 432.
[215] *Woodby v. INS*, 385 U.S. 276, 286 (1966).
[216] *Chaunt v. United States*, 364 U.S. 350, 353 (1960); *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).
[217] *In re Winship*, 397 U.S. 358, 367-68 (1970).
[218] Despite overwhelming Supreme Court and other case law in support of the preponderance standard, the Department cites just two state court cases and one federal court district court case to argue for the clear and convincing standard. 83 Fed. Reg. at 61477. The Department claims that expulsion is similar to loss of a professional license and that held that the clear and convincing standard is required in cases where a person may lose their professional license *Id*. However, even assuming expulsion is analogous to loss of a professional license, which is certainly debatable as it is usually far easier to enroll in a new school than to enter a new profession, this is a weak argument, as there are numerous state and federal cases that have held that the preponderance standard is the correct standard to apply when a person is at risk of losing their professional license. *See, e.g.*, *In re Barach*, 540 F.3d 82, 85 (1st Cir. 2008); *Granek v. Texas State Bd. of Med. Examiners*, 172 S.W. 3d 761, 777 (Tex. Ct. App. 2005). As an example, the Department cites to *Nguyen v. Washington*, 144 Wash.2d 516 (Wash. 2001), *cert. denied* 535 U.S. 904 (2002) for the contention that courts "generally employ a clear and convincing evidence standard in civil administrative proceedings." In that case, the court reversed the revocation of a physician's license was revoked after allegations of sexual misconduct. But that case is an anomaly; a study commissioned by the U.S. Department of Health and Human Services found that two-thirds of the states use the preponderance of the evidence standard in physician misconduct cases. *See* Randall R. Bovbjerg et al., *State Discipline of Physicians* 14-15 (2006), https://aspe.hhs.gov/sites/default/files/pdf/74616/stdiscp.pdf. *See also* Kidder, William, *(En)forcing a Foolish Consistency?: A Critique and Comparative Analysis of Evidence Regulation for Campus Administration of Title IX Proceedings* (January 27, 2019), *available at* http://ssrn.com/abstract=3323982 (providing an in depth comparative analysis of the many instances in which the preponderance standard is used instead of the clear and convincing evidence standard).
[219] The Department's claim that the preponderance standard is the "unusual" standard (83 Fed. Reg. at 61464) is simply wrong as a matter of law. Courts routinely apply lower standard of proof in traffic stops ("reasonable suspicion") and searches ("probable cause"). *See Terry v. Ohio*, 392 U.S. 1 (1968) (traffic stops); U.S. Const. amend. IV (searches).
[220] Heather M. Karjane, et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 120 (Oct. 2002), https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf.
[221] 83 Fed. Reg. at 61464 n.2.
[222] The NCHERM Group, *Due Process and the Sex Police* 2, 17-18 (Apr. 2017), *available at* https://www.ncherm.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf.
[223] 83 Fed. Reg. at 61464 n.2.
[224] Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For All Students Under Title IX* 5 (Aug. 21, 2017), https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf.

> any standard higher than preponderance advantages those accused of sexual violence (mostly men) over those alleging sexual violence (mostly women). It makes it harder for women to prove they have been harmed by men. The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. *No other evidentiary standard is equitable*.[225]

ASCA agrees that schools should ñ[u]se the prepon
reso l v e a l l a l l e g a t i ō n s e c o a f u s s e x ñ u i a t l i m s i s t c h o e n d o u n c l t y ò s t a n d a
of equitable student conduct processes wh[226] [227] ch trea
Indeed, even the reDsepaprtmeènt oadmits shoo[228]l s to ñuse the

2. The Departmentôs proposed rules are inconsis
double standards for sexual harassment versus other student and employee misconduct.

By permitting and sometimes mandating the clear and convincing evidence standard in sexual harassment proceedings, the Department treats sexual harassment differently from other types of school disciplinary violations and employee misconduct, uniquely targeting and disfavoring sexual harassment complainants. First, the Department argues that Title IX harassment investigations are different from civil cases, and therefore may appropriately require a more burdensome standard of proof, because many Title IX harassment investigations do not use full courtroom procedures, such as active participation by lawyers, rules of evidence, and full discovery.[229] However, the Department does not exhibit this concern for the lack of full-blown judicial proceedings to address other types of student or employee misconduct, including other examples of student or employee misconduct implicating the civil rights laws enforced by the Department. Schools have not as a general rule imposed higher evidentiary standards in other misconduct matters, nor have employers more generally in employee misconduct matters, to make up for the fact that the proceedings to address such misconduct fall short of full-blown judicial trials, and the Department does not explain why such a standard is appropriate in this context alone.

Second, although the proposed rules would requ
standard for sexual harassment investigations if they use it for *any* other student or employee misconduct investigations with the same maximum sanction,[230] and would require that it be used in student harassment investigations if it is used in *any* employee harassment investigations, the proposed rules would not prohibit schools from using the clear and convincing standard in sexual harassment proceedings *even if* they use a lower proof standard for *all* other student conduct violations.[231] School leaders agree that requiring different standards for sexual misconduct as opposed to other misconduct is inequitable. NASSP notes that by an inappropriate and more demanding
s t a n d a r d o f p r o o f t o i n v e s t i g a t e s e x u a l h a r a s s m e n
the proposed rule would ñdenyNASSP recommends that victims
[232]
preponderance standard:

[225] ATIXA, *ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence* 4 (Feb. 17, 2017), *available at* https://atixa.org/wordpress/wp-content/uploads/2017/02/2017February-Final-ATIXA-Position-Statement-on-Colleges-Addressing-Sexual-Violence.pdf.
[226] *ASCA 2014 White Paper*, *supra* note 138.
[227] ACSA, *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes*, https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf.
[228] 83 Fed. Reg. at 61477.
[229] *Id.*
[230] Proposed § 106.45(b)(4)(i).
[231] *See* Grossman & Brake, *supra* note 90 (ñ l t - w a y a r a m e h e t . ò) .
[232] NASSP Letter, *supra* note 83, at 2.

> Allowing campuses to single out sexual assault incidents as requiring a higher burden of proof than other campus adjudication processes make it ï by definition ï harder for one party in a complaint than the other to reach the standard of proof. Rather than leveling the field for survivors and respondents, setting a standard higher than preponderance of the evidence tilts proceedings to unfairly benefit respondents.[233]

By allowing and in some contexts requiring schools to impose higher evidentiary standards in sexual harassment proceedings than in comparable misconduct proceedings, the Department would allow disparate treatment targeting those who have experienced sexual harassment, in violation of Title IX and other laws against sex discrimination.

Further, many school employees have contracts that require using a more demanding standard of evidence than the preponderance standard for employee misconduct investigations.[234] The proposed rules would force those schools to either (1) impose the same standard of proof for *all* cases of misconduct that carry the same maximum sanction as Title IX proceedings (and thereby eliminating any flexibility schools have to define how they handle misconduct of a nonsexual nature, completely exceeding the Department's[235] or (2) maintain the clear and convincing evidence standard for only employee misconduct and student sexual misconduct proceedings. The latter choice would leave schools vulnerable to liability for sex discrimination, as schools cannot defend specifically disfavoring sexual harassment investigations, which is a form of sex discrimination, by pointing to collective bargaining agreements or other contractual agreements for employees that require a higher standard.[236]

3. The proposed rules impose double standards for complainants versus respondents.

By allowing schools to use a ñclear and convin
permit schools to tilt investigations in favor of respondents and against complainants. The Department argues that sexual harassment investigations may require a more demanding standard because of the ñheightened stigmaò and -rheacñhsiinggnòi fciocnasnetq,uepnecremsanfec they are found responsible for sexual harassment.[237] But the Department ignores the reality that Title IX complainants face ñheightened stigmaò for reporti student or employee misconduct, and th-ateacbompgain consequences to their education or their career if the school fails to meaningfully address the harassment.[238] In the context of peer sexual harassment, both the complainant and the respondent have an equal interest in obtaining an education. In matters involving the sexual harassment of a student by a school employee, the complainantôs educational in employment interest. And in matters involving sexual harassment between employees, both the complainant and the respondent have interests in ensuring that they can continue in their jobs. Catering only to the impacts on respondents in designing a grievance process to address sexual harassment is inequitable.

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[233] *NASPA Title IX Priorities*, *supra* note 198 at 1-2.

[234] *See* Grossman & Brake, *supra* note 90 (clear and convincing evi in Association of is ñthe stan University Professors] has urged on colleges and universities for faculty discipline and which some unionized institutions have incorporated in collective bargaining agreements with instit

[235] Although the Department claims that it wants to give schools is standard of proof, 85 Proposed ò in choo §106.45(b)(4)(i) would effectively force schools to use ñcle investigations if ñcle used by a school in *employee* sexual harassment investigations. Given that most schools already use the preponderance standard in student Title IX proceedings, many of them would be forced to change their procedures ðhardly the ñflexibilityò it claims it wishes to provide the Depa

[236] *See* 34 C.F.R. Ä 106.51 (ñA recipient shall not en *or indirectly* that the a contra effect of subjecting employees or students to discrimination

[237] 83 Fed. Reg. at 61477.

[238] For example, 34 percent of college students who are sexually assaulted drop out of school. Mengo & Black, *supra* note 30, at 234, 244.

4. The shift in treatment of the standard for sexual misconduct matters appears to stem from the Departmentôs belief that individuals alleging

All in all, the Department's justifications for allowing schools to use the clear and convincing evidence standard are without merit. Although claiming otherwise, the Department is not proposing this change to give schools flexibility, because in many instances schools would be forced to apply the clear and convincing evidence standard regardless of their judgment as to the appropriateness of the standard. The Department is not proposing this change because it is recommended by the experts who engage with and work at schools, as most experts oppose use of the clear and convincing evidence standard. Nor is the Department proposing this change in order to ensure equity for all parties, as the proposed rules would actually make Title IX proceedings more *inequitable*, violating Title I for equitable grievance procedures. And finally, the Department is not proposing this change because it is consistent with most legal actions that involve civil rights complaints or wherein similar losses are at stake, as those civil actions uniformly use the preponderance of the evidence standard. Thus, in an arbitrary and capricious fashion, the Department proposes this rule that effectively mandates an inappropriate standard of proof, impacting thousands of students and employees at schools, without any adequate justification, apparently based on nothing more than the harmful myth that those alleging sexual assault and other forms of sexual harassment are inherently less credible than those alleging other forms of misconduct.

E. The proposed rules would allow schools to consider irrelevant or prejudicial evidence, including irrelevant or prejudicial sexual history evidence, in sexual harassment investigations.

Despite adding numerous procedural requirements to the proposed rules, the Department fails to include a rule that evidence must be excluded in a sexual harassment investigation if it is irrelevant,[239] or if it is relevant but its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the factfinder, undue delay, wasting time, and/or needlessly presenting cumulative evidence.[240]

One particularly troubling consequence of this omission is that the proposed rules at §§ 106.45(b)(3)(vi)-(vii) improperly allow schools to consider any evidence related to the sexual history between the parties if even if such evidence relies on victim-blaming and -shaming myths that cause unfair prejudice to and -shaming myths that cause unfair prejudice to decisionmaker(s), or render the evidence entirely irrelevant to the investigation. In contrast, the 2014 Guidance instructed schools to ñrecognize that the mere fact of a current sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence.ò[241] The proposed rules not only provide no such instruction, but by explicitly allowing consideration of a previous sexual relationship in these circumstances, it invites schools to improperly conclude that such sexual history demonstrates consent.

The Department cites Federal Rule of Evidence 412 to support its proposed rules without mentioning that Rule 412 contains different restrictions on the admissibility of sexual history evidence in criminal versus civil proceedings.[242] In criminal cases, such evidence may be offered by the defendant without restriction.[243] But in civil cases, sexual history evidence i

[239] *See* Fed. R. Evid. 401, 402.
[240] *See* Fed. R. Evid. 403.
[241] 2014 Guidance, *supra* note 58, at 31.
[242] 83 Fed. Reg. at 61476.
[243] Fed. R. Evid. 412(b)(1)(B).

probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.[244] The Department fails to explain why it seeks to import the criminal rule rather than its civil counterpart to school sexual harassment proceedings, which, to the extent they are properly analogized to trials in a court of law at all (a dubious proposition), are self-evidently civil rather than criminal in nature.

F. The proposed rules fail to impose clear timeframes for investigations and allow impermissible delays.

Proposed § 106.45(b)(1)(v) would require schools to allow for temporary delays or limited extensions of timeframes for concurrent law enforcement activity or the needs of disabled parties, but the proposed rules do not define what constitutes a temporary delay or limited extension of timeframes. This provision would also allow schools to create practices, these delays, particularly in combination with the delays likely to be created by the rules' burdensome proceedings in all harassment investigations, are likely to result in violations of Title IX's prompt requirement under current § 106.8(b) and proposed § 106.8(c). In contrast, the 2011 and 2014 Guidances recommended that schools finish investigations within 60 days,[245] and the 2001 Guidance continues to prohibit schools from delaying a Title IX investigation merely because of a concurrent law enforcement investigation.[246] All of these guidances recognized that while criminal investigations seek to punish an abuser for misconduct, Title IX investigations are intended to assess the educational or restorative opportunities that have become inaccessible as a result of harassment.

Many schools may wrongly interpret proposed § 106.45(b)(1)(v) to allow them to delay Title IX investigations indefinitely if there is any concurrent law enforcement activity. This is especially concerning for students in elementary and secondary schools, as well as adult students with developmental disabilities, whose reports of sexual abuse may automatically trigger a law enforcement investigation under state mandatory reporting laws. As a result, these students would have no way to secure a timely school investigation and resolution, as the mere act of reporting could trigger an automatic delay.

Schools may also wrongly interpret proposed § 106.45(b)(1)(v) to allow for effectively unlimited delays if any party or witness requires a disability accommodation. As discussed in Part IV.B, individuals who develop anxiety, depression, PTSD, or other mental disabilities as a result of sexual harassment or assault, as well as students with preexisting disabilities, are entitled to reasonable disability accommodations under Section 504, the ADA, and the IDEA.[247] However, many schools require documentation in order for a student to receive disability accommodations, and documentation for certain diagnoses, such as PTSD, are often unavailable for a period of time due to persistence-based diagnostic criteria.[248] Schools may believe that the proposed rules would allow them to indefinitely delay harassment or assault proceedings while they wait for diagnoses that necessarily take time to make, rather than moving forward in promptly accommodating an individual. In addition, because institutions of higher education are not required to accept an incoming student's disability from their IEP in secondary school, complainants and respondents with disabilities in higher education may encounter delays in simply obtaining new documentation of their disability. Survivors with disabilities already face many barriers to obtaining relief, including long distances between their

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[244] Fed. R. Evid. 412(b)(2).
[245] 2014 Guidance, *supra* note 58, at 31; 2011 Guidance, *supra* note 58, at 12.
[246] 2001 Guidance, *supra* note 59, at 21. *See also* 2014 Guidance, *supra* note 58, at 27-28; 2011 Guidance, *supra* note 58, at 10.
[247] *See supra* notes 184-186 and accompanying text.
[248] Taylor S. Parker, *The Less Told Story: The Intersection of Title IX and Disability* at 14-16, *at* https://www.stetson.edu/law/academics/highered/home/media/Title%20IX%20and%20Disability%20Taylor%20S%20Parker.pdf.

schoolôs Title IX inaccessible sexual assault training programs and materials,[249] inaccessible sexual assault services, and service providers who lack disability training.[250] They should not be forced to endure additional delays in obtaining the accommodations they need to meaningfully participate in their Title IX investigations. Likewise, the proposed rules should not allow schools to delay Title IX proceedings based on disability accommodations promptly in violation of existing disability civil rights laws. Rather, the need for prompt proceedings to address harassment allegations is an additional reason that schools must promptly provide the disability accommodations to which an individual is entitled.

For the same reasons, schools should not be allowed to rely on proposed § 106.45(b)(1)(v) to impose unreasonable delays if any party or witness requires language assistance. Students and guardians are already entitled to language assistance under Title VI.[251] A schoolôs failure to pro assistance in a timely manner in violation of Title VI should not be a valid basis for delaying a Title IX investigation. Rather, the need for a timely sexual harassment investigation should require a school to promptly provide any necessary language assistance.

School leaders and experts alike agree that proposed § 106.45(b)(1)(v) would cause unacceptable delays in investigations. NASSP opposes this standard because it would allow schools to ñder harassment victims . . . due process.[252] ATIXA agrees there i that a school that ñdelay[s] or suspend[s] its investig risk to a survivor of sexual assault and to ñother students,[253]

G. The proposed rules may require schools to provide respondents appeal rights that they deny complainants.

Although Secretary DeVos has claimed that the available to both parties,[254] the proposed rules would provide unequal *grounds for appeal* to both parties. In proposed §§ 106.45(b)(1)(i), 106.45(b)(1)(vi), 106.45(b)(4)(ii)(E), 106.45(b)(5), and 106.45(b)(7)(i)(A), the Departmentôs repeated reference to sanctions, coupled with its conclusion that ñsanctions are not a category of remedies. Proposed § 106.45(b)(5) also explicitly affirms the right of complainants to appeal their remedies while stating that ña complainant is not entitled to a particular sanction.ò As a result, schools are likely to conclude that the proposed rules would bar complainants from appealing a school's decision to impose inadequate sanctions on a respondent, while allowing respondents to appeal their sanctions. Allowing only the respondent the right to appeal a sanction decision would be both unfair and a violation of the requirement of ñequitable procedures, because complainants are also affected by sanction decisions. For example, in instances of sexual assault, if their assailant is still allowed to live in the same dorm as the survivor, or to teach a class that is required for the survivorôs major, the survivor may experience further trauma from repeated encounters with their assailant and be exposed to the risk of further harassment or assault.

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[249] *Id*. at 2.
[250] National Council on Disability, *Not on the Radar: Sexual Assault of College Students with Disabilities* 33-58 (Jan. 30, 2018), *available at* https://ncd.gov/publications/2018/not-radar-sexual-assault-college-students-disabilities.
[251] 42 U.S.C. § 2000d to d-7; U.S. Deptôt of Educ. & Dept of Justice, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* 37-38 (2015) [hereinafter Language Guidance], https://www2.ed.gov/about/offices/list/ocr/letters/ colleague-el-201501.pdf.
[252] NASSP Letter, *supra* note 104, at 2.
[253] ATIXA, *ATIXA Position Statement on the Proposed Legislation Entitled: Promoting Real Opportunity, Success, And Prosperity Through Education Reform (PROSPER) Act (Higher Education Act Reauthorization)* (Jan. 18, 2018), https://atixa.org/wordpress/wp-content/uploads/2015/03/ATIXA-POSITION-STATEMENT-ON-PROSPER-ACT-Final.pdf.
[254] DeVos, *supra* note 159.

Experts and school leaders alike support equal appeal rights. The American Bar Association recommends that the grounds for appeal include (that is, too[255] ATIXA announced in October 2018 that it supports equal rights to appeal for both complainants and respondents.[256] Even the white paper by four Harvard professors that is cited by the Department[257] recognizes that schools should allow [each party to appeal].[258] The NASSP notes that by requiring schools to give unequal appeal rights with respect to sanctions, the proposed rule would deny harassment victims . . .[259]

Additionally, the Department mischaracterizes court precedent to support its position that complainants should not be permitted to appeal a[260] While the Department asserts that *Davis*[261] and *Stiles ex rel. D.S. v. Grainger County, Tennessee*[262] support its proposed rule preventing complainants from appealing particular sanctions, those cases merely explain that courts should refrain from second-guessing the disciplinary decisions made by schools.[263] These cases do not prohibit students, whether complainants or respondents, from appealing their school's disciplinary decisions through their school. The other case cited by the IX grievance Department, *Sanches*, merely explains that "[c]ourts should defer to school authorities' choice of remedial[264] actions and do not prohibit complainants from appealing what remedies or sanctions are appropriate.

H. The proposed rules would allow and would in some instances require schools to violate individuals' privacy rights.

The proposed rules at § 106.45(b)(3)(viii) and 106.45(b)(4)(ii)(E)) would allow or even require schools to violate students' privacy rights, making both complainants and witnesses vulnerable to retaliation. Proposed § 106.45(b)(3)(viii) would require schools to allow both parties to inspect and review any evidence "directly related to the allegations raised," even evidence upon which the school "does not intend to rely in reaching a determination regarding responsibility." Confusingly, however, it suggests that schools may ignore irrelevant evidence without placing any limitations on their discretion to do so. Moreover, by allowing unfettered access to irrelevant or prejudicial evidence that the school does not intend to rely upon in making its decision, including sexual history evidence, this provision would open the door to retaliation against complainants, respondents, and witnesses.

Proposed § 106.45(b)(4)(ii)(E)) would require school discipline on the respondent and "any remedies" for the complainant that directly relate to the respondent and may violate the Family Educational Rights and Privacy Act (FERPA).[265] This proposed rule would depart from twenty-two years of Department guidance, which recognized that while complainants could be informed

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[255] Am. Bar Ass'n, *supra* note 192, at 5.
[256] ATIXA, *ATIXA Position Statement on Equitable Appeals Best Practices* 1 (Oct. 5, 2018), *available at* https://atixa.org/wordpress/wp-content/uploads/2018/10/2018-ATIXA-Position-Statement-Appeals.pdf.
[257] 83 Fed. Reg. at 61464 n.2.
[258] Bartholet, et al., *supra* note 224.
[259] NASSP Letter, *supra* note 83, at 2.
[260] 83 Fed. Reg. at 61479.
[261] 526 U.S. at 648.
[262] 819 F.3d 834, 848 (6th Cir. 2016).
[263] *Davis*, 526 U.S. at 648; *Stiles ex rel. D.S.* v. *Grainger Co., Tenn.*, 819 F.3d 834, 848 (6th Cir. 2016).
[264] *Sances v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 167-68 (5th Cir. 2011) (emphasis added).
[265] 20 U.S.C. Ä 1232g(b)(1) (generally prohibiting disclosure of student information, including disclosures of information about the complaint, investigation, and outcome of a disciplinary proceeding, without consent of the student).

of the sanctions imposed on a respondent if (1) t
harassment involves sexual assault, stalking, dating violence, domestic violence, or other violent crime at a postsecondary institution,[266] that respondents should not be informed of any remedies for complainants at all.[267] Schools should not be forced to choose between violating their obligations under Title IX or violating student FERPA privacy rights under

I. The proposed rules would allow schools to destroy records relevant to a student or employeeôs Title IX lawsuit or administrativ employee offenders to escape accountability.

Proposed § 106.45(b)(7) would require schools to keep records of sexual harassment proceedings for only three years, which would limit complaina complaint. First, because the Title IX statute does not contain a statute of limitation, courts generally apply the statute of limitat[268] ion which is the lesser of state contract or personal injury statute,[269] the latter of which varies from one to six years depending on the state.[270] As a result, proposed § 106.45(b)(7) would allow schools in many states to destroy relevant records before a student or employee has an opportunity to file a complaint or complete discovery in a Title IX lawsuit. Second, given that OCR complaints involving campus sexual assault have, in recent years, taken an average of more than four years to resolve,[271] proposed § 106.45(b)(7) could potentially allow the majority of schools undergoing an OCR investigation to destroy relevant records and thus escape liability.

The proposed rule would also make students vulnerable to school employees who are repeat offenders. Unlike students, school employees have the ability to harass numerous victims (students and fellow employees) during many years or decades at a school. But the proposed rule would permit schools to destroy records involving employee-respondents after three years, allowing repeat employee offenders to escape accountability despite multiple complaints, investigations, or findings against them.

J. The proposed rules fail to include a prohibition on retaliation against parties and witnesses.

Current Title IX rules prohibit retaliation through incorporation of Title VI rules.[272] But given the extensive and detailed explication of procedures and procedural rights in the proposed rules, it is not clear why the Department declined to include an explicit prohibition of retaliation against individuals for making a sexual harassment complaint or participating in a sexual harassment investigation. Proposed §§ 106.45(b)(1) (required grievance procedures) and 106.45(b)(2) (notice to parties) do not include prohibition of retaliation against parties and witnesses or any notice of the right to be free from retaliation. The Departmentôs failure to address retaliation is confusing and unjustifiable. pro

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[266] 2017 Guidance, *supra* note 58 at 6; 2014 Guidance, *supra* note 58 at 36-37; 2011 Guidance, *supra* note 58, at 13-14; 2001 Guidance, *supra* note 59, at vii; 1997 Guidance, 62 Fed. Reg. at 12034, 12038, 12051. *See also* 20 U.S.C. 1232g(b)(6)(C)(i).
[267] 2014 Guidance, *supra* note 58, at 36.
[268] Natôl Women *Breaking Down Barriers* at 91 n.354 (2015), https://nwlc.org/wp-content/uploads/2015/08/BDB07_Ch6.pdf.
[269] *Id*. at 92 n.355-57.
[270] Parker Waichman LLP, *Statutes of Limitations ï A Legal Guide*, http://www.statutes-of-limitations.com/search?statutes_next_page=1&state_id=Choose%20Jurisdiction&case_type_id=-7&year_limit=Year%20Limit&x=60&y=14.
[271] Jake New, *Justice Delayed*, INSIDE HIGHER ED (May 6, 2015), https://www.insidehighered.com/news/2015/05/06/ocr-letter-says-completed-title-ix-investigations-2014-lasted-more-4-years.
[272] 34 C.F.R. § 106.71 (incorporating 34 C.F.R. § 100.7, the Title VI regulation prohibiting ñintimida

K. The proposed rulesô suggestion that these in necessary in order to avoid sex discrimination against named harassers and assailants turns Title IX on its head.

Proposed Ä 106.45(a) asserts that the rules are necessary to avoid sex discrimination in violation of Title IX, implying that the inequitable, complainant-hostile procedures set out in the proposed rules are necessary to avoid sex discrimination against the respondent. This suggestion that Title IXôs prohibition on sex discrimination requires respondents be afforded particular rights and protections when being investigated for sexual harassment turns Title IX on its head. Title IX was enacted to protect individuals from discrimination on the basis of sex in educational programs and activities, with the recognition of the long and pernicious history of discrimination against women and girls in schools. This protection against sex discrimination necessarily includes ensuring that students who experience sexual harassment continue to have equal access to educational opportunities. Proposed § 106.45(a) threatens to invert that purpose by turning named harassers and rapists into a protected class.[273]

The proposed rules thus threaten to create a system in which it is easier to show that schools engaged in reverse ñsex discriminationò against respondents than to show that they discriminated against employees who experienced sexual harassment. The proposed rules suggest a respondent might be able to claim a Title IX violation merely by showing that the school deviated from the procedural requirements set out in the rules.[274] By contrast, nowhere in the proposed rules or preamble does the Department indicate that depriving a *complainant* of procedural protections would be a Title IX violation; due process for *respondents*, however, is explicitly mentioned repeatedly.[275] Thus, it appears that the only way a complainant could prove a Title IX violation in the Department's judgment would be if she suffered sexual harassment that was ñso severe, pervasive, and objectively offensive that it effectively denied the [school's][276] equal educational access;ò (ii) a school employee with the authority to institute corrective measures on behalf of the [school][277] had actual knowledge of the sexual harassment;[278] and (iii) the school's response was ñdeliberately indifferent.ò[279] This is a much higher bar than ñclear error,ò the standard for violating the procedural requirements for grievance procedures under the proposed rules. As a result, the proposed rules will likely incentivize schools to protect against allegations of reverse sex discrimination by respondents than allegations of sex discrimination by complainants claiming inadequate and unfair responses to their sexual harassment.[280] This incentive would be exacerbated by proposed § 106.44(b)(5), which provides that a school could not be held to be deliberately indifferent to harassment ñmerely because[ò] it decided there was no sexual harassment or made an erroneous determination.ò The result is a system of rules that provides more rights under Title IX for individuals who are sexually harassed than for individuals who are alleged to have sexually harassed others.

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[273] Grossman & Brake, *supra* note 90 (criticizing the Departmentôs attempt to ñtra neither law nor logic ò).
[274] Proposed § 106.45(a).
[275] 83 Fed. Reg. at 61462, 61465, 61472 (three times), 61473, 61477, 61484, 61489 (twice), 61490.
[276] Proposed § 106.30.
[277] Proposed § 106.45(b)(3).
[278] Proposed § 106.30.
[279] Proposed § 106.44(a).
[280] Grossman & Brake, *supra* note 90 (ñIf it is sex discrimination against the acc but only sex discrimination against the complainant if her complaint is met with deliberate indifference, then siding with respondents is the less perilous path toward Title IX compli

V. The proposed rules would weaken the ability of the Department to remedy sex discrimination and broaden the ability of schools to engage in sex discrimination.

A. The proposed rules would inappropriately shift the remedying sex discrimination.

Like all civil rights laws, at the core of Title IX is its mandate against sex discrimination.[281] However, the Department's proposed revisions to Section 106.3(a) would remove it entirely from the provision setting out the remedial action that the Department may require. The current § 106.3(a) acknowledges that remedial action under Title IX flows from the Department's determination that a school has "discriminated" on the basis of sex and requires it to "take such action necessary" to overcome the effects of discrimination. The proposed rules would omit any reference to regulations identifying, instead focusing on remedying "violations" of Title IX. These changes are troubling for two reasons. First, they unjustifiably expands rights for respondents to challenge "violations" of their rights under these proposed rules, shifting efforts further away from protecting the right to equal access to educational opportunities for individuals who have been sexually harassed. Second, the proposed removal of the Department's authority to provide remedies to victims suggests a decision has been made to ignore the far-reaching effects of sexual harassment and other forms of discrimination on the victims and on others in the school community. We are therefore concerned that the proposed changes to § 106.6(a) could not only inappropriately narrowing its nondiscrimination mandate but also signal to schools that they will no longer be held fully accountable for permitting or engaging in illegal sex discrimination.

B. The proposed rules do not make it clear whether students who have suffered sex discrimination in violation of Title IX would be entitled to monetary compensation through OCR enforcement.

The Department fails to clearly explain whether monetary compensation would be available to a complainant who has suffered sex discrimination, including sexual harassment, in violation of Title IX. The proposed rule at § 106.3(a) would deny complainants any monetary relief from schools for violations of Title IX. The Department's explanation of the distinction between private litigation (where money damages are available) and agency enforcement (where money damages are not available).[282] However, the Department's explicit goal to "make [agency] standards [] generally aligned with" standards in cases of sexual harassment.[283] An outright prohibition of money damages in cases of sexual harassment is indefensible and inconsistent with the Department's goal. If schools are to be subject sexual harassment victims who seek agency enforcement to the same stringent standards as are imposed in private litigation for money damages, it cannot justify precluding those same students from obtaining money damages through agency enforcement.

The Department creates further confusion in the preamble when it explains that it could still require a school to "reimburse a student for documented expenses incurred as a result of a student's impermissibly revoked scholarship," "adjust or otherwise remedy a payment" or "[require] a [school] to pay money."[284] [285] The Department, however, fails to explain the difference

[281] 20 U.S.C. § 1681(a).
[282] 83 Fed. Reg. at 61480.
[283] *Id.* at 61466.
[284] *Id.* at 61480.
[285] *Id.* at 61489.

ñreimburse[ments],ò ñadjust[ments],ò ñexpenses,ò neither students nor schools would understand whether monetary compensation would be available if a student suffers sex discrimination in violation of Title IX and files a complaint with the Department.

C. The proposed rules would allow schools to publish materials that suggest disparate treatment of applicants, students, or employees on the basis of sex, and would inappropriately seek to reduce the amount of information available to parents and applicants about whether schools comply with Title IX.

Proposed § 106.8(a)(2)(ii) would prohibit schools from using or distributing a publication ñ*stating* that [it] treats applicants, students, or employees differently on the basis of sex except as such ***treatment is permitted by***, the current equivalent, § 106.9(b)(2), ***as added*** prohibits schools from using or distributing a publication that ñ*suggests*, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment ***is permitted by this part*** (emphasis added). Under discrimination would be prohibited, and schools would not be held responsible, for example, for publications that serve to steer students to particular courses of study or employees to particular roles on the basis of sex, as long as the school stopped short of overt discriminatory statements.

Further, proposed § 106.8(b)(1) would remove the requirement (currently in § 106.9(a)) that a ***recipient must notify ñparents of elementary and*** on the basis of sex. Proposed § 106.8(b)(2) would remove the requirement (currently in § 106.9(b)) that a recipient include a non-***discrimination statement in each ñannouncement, form,ò while adding a requirement to include the statement on*** And the NPRM proposes deleting current § 106.9(c), which requires that a recipient not to discriminate in distributing its publications, to apprise its recruiters of its policy of non-discrimination, ensure that recruiters adhere to such a policy.[286]

The NPRM claims that proposed ***§ 106.8(b)(1) ñwould streamlineò the list of persons to be notified about*** discrimination policy.[287] But the NPRM does not give any reason why the list needs to be streamlined, or why, if it does, parents of elementary and secondary school students should be the ones deprived of information that they have received for over 40 years. Nor will this amendment actually reduce burden on school districts, as the requirement to notify parents that the recipient does not discriminate remains in the regulations of 25 other federal agencies, many of which (such as the United States Department of Agriculture (USDA) through its free and reduced price meals program) provide federal financial assistance to elementary and secondary schools.

The NPRM claims that proposed ***§ 106.8(b)(2) likewise ñstreamlines*** must include the non-***discrimination statement***.[288] But again the NPRM ***ñreduce burdò*** offers no reason why it needs to be streamlined or why the particular items proposed to be dropped ðsuch as application forms ð are the appropriate ones to cut. Nor does the NPRM explain why it added ***ñhandbooksò to enumerate*** (or not) with the items deleted ðsuch as announcements and bulletins. If handbooks are no different, then there is no reason for the change. If it they are different from announcements and bulletins, then the practical effect will be to increase the burden on recipients because, as noted above, the requirement to include the non-discrimination statement in announcements, bulletin, and applications remains in the regulations of 25 other federal agencies, many of whom (such as

[286] 83 Fed. Reg. at 61482.
[287] *Id.* at 61481.
[288] *Id.* at 61482.

the USDA through its free and reduced price meals program) provide federal financial assistance to elementary and secondary schools.

NPRMôs only explanation for deleting § 106.9(c) is again to reduce burden, suggesting that the availability of websites will suffice.[289] This explanation makes no sense. Current § 106.9(c) does not require that the publications identified in proposed § 106.8(b)(2) (currently in § 106.9(b)) be distributed. It requires that when they are distributed, they must be distributed *without discrimination on the basis of sex*. That is, for example, a school district could not send school catalogs to parents of girls but ignore parents who have only boys. Nor does the NPRM even mention, much less justify the elimination of, the last portion of current § 106.9(c), which requires a recipient to train its recruiters on its non-discrimination policy and to ensure that its recruiters adhere to the policy. These are important requirements to ensure that its non-discrimination policy is not diluted in the field. They should not be deleted. These proposed changes are just more examples of the Departmentôs efforts to undermine civil rights protection for students and school employees.

D. The proposed rules would allow recipients to claim religious exemptions from Title IX with no warning to students or prior notification to the Department.

The current rules allow religious schools to claim religious exemptions from particular Title IX requirements by notifying the Department in writing and identifying which Title IX provisions conflict with their religious beliefs. The proposed rules remove that requirement and permit schools to opt out of Title IX without notice or warning to the Department or students. This would allow schools to conceal their intent to discriminate, exposing students to harm, especially women and girls, LGBTQ students, pregnant or parenting students (including those who are unmarried), and students who access or attempt to access birth control or abortion.[290] Transgender students are especially at risk because this proposed change threatens to compound the harms created by (i) the Departmentôs February 2017 decision to rescind Title IX guidance on the rights of transgender students; (ii) the Departmentôs February 2018 decision to stop investigating civil rights complaints from transgender students regarding access to sex-segregated facilities; and (iii) HHSôs leaked proposed rule that would allow federal agencies to exclude transgender, non-binary, and intersex students. It allows schools to assert post facto religious justifications for discrimination in violation of Title IX, to the detriment of students.

Further, the Departmentôs proposed rule permits schools to violate Title IX requirements directly conflict with the current[291] and proposed[292] rulesô requirements that an educational institution ñnotify applicants, students, and employees that it does not discriminate on the basis of sex.ò By allowing schools to discriminate while requiring a school to simultaneously allowing it to opt out of anti-discrimination provisions whenever it chooses, the Department is creating a system that enables schools to actively mislead students. This bait-and-switch practice demonstrates that the Department is more interested in protecting schools from liability when they discriminate than in protecting students from discrimination.

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[289] *Id.*

[290] *See* Jeremy W. Peters et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html; Moriah Balingit, *Education Department no Longer Investigating Transgender Bathroom Complaints*, WASH. POST (Feb. 12, 2018), https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints; Erica. L. Green et al., óTransgenderô Could Be Defined Out of Existence Under Trump Rule, N.Y. TIMES (Oct. 21, 2018), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html.

[291] 34 C.F.R. § 106.9(a).

[292] Proposed § 106.8(b)(1).

VI. The proposed rules would exceed the Department's Title IX nondiscrimination mandate.

As discussed above, proposed § 106.45(b)(3) *requires* schools to dismiss complaints of sexual harassment if they do not meet specific narrow standards. If the school determines that the complaint does not allege harassment that meets the improperly narrow definition of severe, pervasive, *and* objectively offensive, or that does not meet the other two proposed definitions of sexual harassment,[293] it *must* be dismissed, per the command of the rule. If severe, pervasive, *and* objectively offensive conduct occurs outside of an educational program or activity, including most off-campus or online harassment, it *must* be dismissed. However, the Department lacks the authority to require schools to dismiss complaints of discrimination. Under Title IX, the Department is only authorized to issue rules to effectuate the "[nondiscrimination] provision of [Title IX]." Title IX does not demand that schools dismiss complaints of discrimination schools *when they cannot* protect students against sex discrimination.[294] By requiring schools to dismiss certain types of complaints of sexual harassment, without regard to whether those forms of harassment deny individuals educational opportunities on the basis of sex, proposed § 106.45(b)(3) fails to effectuate Title IX's nondiscrimination mandate and would force many schools that, for example, already investigate off-campus sexual harassment under their student conduct policies to abandon these anti-discrimination efforts. While the Department is well within its authority to require schools to adopt civil rights protections to effectuate Title IX's nondiscrimination mandate, it does not have authority to cabin schools' otherwise lawful responses to sexual harassment and employees' other civil rights laws by forcing schools to dismiss reports of sexual harassment.

VII. The proposed rules threaten to violate the Title VII rights of school employees, exposing employees to an increased risk of sexual harassment and schools to Title VII liability.

Although the regulations and the preamble indicate that the Department was primarily focused on peer sexual harassment in the rulemaking process, Title IX also protects school employees from sex discrimination, including sexual harassment.[295] The proposed rules as drafted would apply to sexual harassment complaints and investigations involving the millions of employees who work for school districts, colleges, and universities covered by Title IX, including the disproportionately female workforce employed in elementary and secondary schools.[296] While the proposed rules assert that they shall be read in derogation of an employee's rights,[297] the rules make no attempt to grapple with the complexities created by the overlap and conflict posed by their mandates and employee protections under Title VII. As a result, employees are left unsure of their right to be free from sexual harassment in the workplace and place schools in the impossible position of being

[293] Proposed § 106.30 also provides two other definitions of sexual harassment: "conduct on the basis of sex that constitutes an employee denying a student equal access to the recipient's education program or activity on the basis of sex, or that constitutes the provision of an aid, benefit, or service in a manner that is not equal, or treating a student differently on the basis of sex" and "Sexual assault, as defined in 34 CFR 668.46(a)."

[294] *See* Michael C. Dorf, *The Department of Education's Title IX Power Grab*, VERDICT (Nov. 28, 2018), https://verdict.justia.com/2018/11/28/the-department-of-educations-title-ix-power-grab.

[295] 34 C.F.R. § 106.51(a).

[296] In 2011-2012, 76.3% of teachers in public elementary and secondary schools were female compared to 74.8% in private elementary and secondary schools. *See* Natôl Ctr. for Educ. Statistics, *Table 209.10. Number and percentage distribution of teachers in public and private elementary schools, by selected characteristics: Selected years, 1987-88 through 2015-16*, https://nces.ed.gov/programs/digest/d17/tables/dt17_209.10.asp; In 2011, 48.2% of faculty in degree-granting postsecondary institutions were female. *See* Natôl Ctr. for Educ. Statistics, *Table 315.10. Number of faculty in degree-granting postsecondary institutions, by employment status, sex, control, and level of institution: Selected Years, fall 1970 through fall 2016*, https://nces.ed.gov/programs/digest/d17/tables/dt17_315.10.asp.

[297] Proposed § 106.6(f).

forced to choose which federal mandate they will violate when addressing workplace harassment complaints. For this reason, both advocates for employee interests (*e.g.*, the National Employment Lawyers Association) and advocates for employer interests (*e.g.*, the College and University Professors Association for Human Resources) have submitted comments harshly critiquing the proposed rules and their impact.

First, as set out in detail above, the proposed rules mandate both dismissal of complaints that allege conduct that does not meet the standard set out in the proposed rules and dismissal of most complaints alleging off-campus or online harassment. These standards, however, do not align with Title VII's protections. Under certain limited exceptions, sexual harassment is defined as and limited to ñ[u]nwelcome conduct on the basis of sex that is so objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.ò[298] In contrast, the relevant inquiry under Title VII is whether the conduct had the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.[299] Although the proposed regulations require that the harassment be severe ñandò pervasive, the Title VII standard is satisfied by conduct that is sufficiently severe ñorò pervasive.[300] In addition, the question of whether the harassment was directed at the complainant or a third party is irrelevant to the question of whether a hostile environment has been created. Moreover, Title VII includes no categorical exception for harassment that takes place outside the workplace, asking instead whether the harassment ñhas the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment,ò rather than the location in which the unlawful harassment occurred.[301] Yet the proposed rules squarely mandate that schools dismiss sexual harassment complaints, apparently including employee sexual harassment complaints, that do not conform to the cramped requirements of the proposed rules, whether or not they violate Title VII.[302]

Similarly, the actual notice and deliberate indifference standard that the proposed regulations mandate for consideration of sexual harassment complaints differ sharply from applicable standards under Title VII. If an employee is harassed by a coworker, the employer is liable if it knew or should have known about the harassment and failed to take reasonable steps to address the harassment.[303] If an employee is sexually harassed by his or her supervisor, the employer is ordinarily strictly liable, regardless of whether it had any notice of the harassment.[304] If the harassment by a supervisor did not result in a tangible employment action, the employer may be able to establish an affirmative defense to a

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[298] Proposed § 106.30.

[299] 28 C.F.R. § 1604.11(a). In its entirety, Section 1604.11(a) provides:

> Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is sued as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect or unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

[300] *Meritor*, 477 U.S. at 67 (describing harassment actionable under conditions of employment that create an abusive work environment); *Harris*, 510 U.S. at 21 (actionable harassment is harassment that is ñso severe or pervasive that ... gender . . .ò).

[301] 28 C.F.R. § 1604.11(a).

[302] *See supra* notes 77 and 78 and accompanying text.

[303] *Faragher v. City of Boca Raton*, 524 U.S. 775, 799, 806 (1998); *Burlington Industries, Inc .v. Ellerth*, 524 U.S. 742, 759 (1998).

[304] *Faragher*, 524 U.S. at 792.; *Ellerth*, 524 U.S. at 765.

supervisor harassment claim if it can show that it took reasonable care to prevent sexual harassment and to correct sexual harassment and that the employee unreasonably failed to avail himself or herself of any avenues provided by the employer to correct or address harassment.[305] All of this is sharply different from the *clearly* unreasonable/deliberate indifference standard set out in the proposed rule.

As set out in detail above, the proposed rules require procedurally burdensome processes to address sexual harassment, like cross-examination and live hearings, which would delay school s ô p r o m p t responses to employee complaints. And just as they subject students with sexual harassment complaints to uniquely hostile and burdensome proceedings, the proposed rules appear to require schools to institute more complainant-hostile processes for employee sexual harassment matters than other discrimination-related matters and other employee misconduct matters, opening them to possible Title VII liability for discrimination on the basis of sex. Moreover, courts might easily conclude that it would not be unreasonable for an employee to decline to avail himself or herself of these uniquely complainant-hostile proceedings, which would mean that employers relying on such proceedings to address employee complaints of sexual harassment would have no affirmative defense available in cases of sexual harassment by a supervisor.[306]

Most fundamentally, analysis of the numerous differences between the sexual harassment standards mandated in the proposed rules and the sexual harassment standards required by Title VII actually *understates* the mismatch between the proposed rules and the employment context, because (in sharp contrast to the approach taken by the proposed rules) Title VII in no way prohibits employers from taking action to address harassment that does not rise to a level that is not yet actionable under Title VII. To the contrary, employers are consistently encouraged, by the Equal Employment Opportunity Commission, by employment lawyers, and by human resources professionals, to intervene to address harassment long before it rises to such a level, in order to promote an inclusive and productive workplace culture, as well as to minimize the likelihood that harassment ever becomes so severe or pervasive as to a l t e r a n e m p l o y e e ô s p o t e n t i a l e m p l o y e r l i a b i l i t y . [307] T h e p r o p o s e d r u l e s a r e a n d e x absolutely contrary to these principles.

While one might argue that the boilerplate language in the proposed rules indicating that nothing therein derogates employee Title VII rights means that schools may disregard the requirements set out in the proposed rules when considering employee complaints of sexual harassment, schools choosing this path would run significant risks. They would invite OCR complaints or lawsuits by harassment respondents alleging that their Title IX rights under the proposed regulations had been violated. Such a l e g a l c h a l l e n g e b y r e s p o n d e n t s w o u l d n o d o u b t r e l deviation from the proposed rules may constitute sex discrimination against respondents in violation of Title IX.[308] The confusion and potential litigation created by the proposed rules threatens harm to e m p l o y e e s a n d e m p l o y e r s , s e r v i n g n o o n e ô s i n t e r e s

[305] *Faragher*, 524 U.S. at 805; *Ellerth*, 524 U.S. at 764-65.

[306] *See, e.g.*, *Minarsky v. Susquehanna County*, 895 F.3d 303, 313-14 & n.12 (3d Cir. 2018) (I f a plaintiff ô s g e n u i n e l y h e l d , subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second *Faragher-Ellerth* element as a matter of law. Instead, the court should leave the issue for the jury to determine at trial. ò)

[307] *See, e.g.*, U . S . E q u a l E m p l o y m e n t O p p o r t u n i t y C o m m i s s i o n , *Select Task Force on the Study of Harassment in the Workplace* (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf; Chai R. Feldblum & Sharon P. Masling, *Convincing CEOs to Make Harassment Prevention a Priority*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Nov. 19, 2018), https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/convincing-ceos-to-make-harassment-prevention-a-priority.aspx.

[308] *See* proposed § 106.44(a).

VIII. The proposed rules are inconsistent with the Clery Act.

A number of the Departmentôs proposed rules are inconsistent with the Clery Act, which the Department also enforces, and which also addresses the obligation of institutions of higher education to respond to sexual assault and other behaviors that may constitute sexual harassment, including dating violence, domestic violence, and stalking. First, the proposed rules prohibiting schools from investigating off-campus and online sexual harassment conflict with the Clery Act. The Clery Act requires institutions of higher education to notify all students who report sexual assault, stalking, dating violence, and domestic violence that occurred on "campus."[309] The Clery Act also requires institutions of higher education to report all sexual assault, stalking, dating violence, and domestic violence that occurred on "campus," which includes all property controlled by a school-recognized student organization (such as an off-campus fraternity); near by "public property"; and "areas within the campus security" that police patrol.[310] The proposed rules would undermine Clery's perverse system in which schools would be required to report instances of sexual assault that occur off-campus to the Department, yet would also be required by the Department to dismiss these complaints instead of investigating them.

Second, the Departmentôs definition of "supportive measures" requires institutions of higher education to provide "non-punitive, non-disciplinary, non-monetary and non-burdensome" measures to "reasonably available" to students who report sexual assault, dating violence, domestic violence, and stalking.[311] The Clery Act does not prohibit accommodations or protective measures that "disciplinary sanction[s]" or "unduly burden[] the other party." These rights conflict with the preamble's statement that institutions of higher education are required to provide "available, supportive measures" which would not necessarily include the right to appeal a sanction.[312]

Finally, Clery requires that investigations of sexual assault and other sexual harassment be "prompt, fair, and impartial."[313] But the proposed rules for investigations conflict with Cleryôs mandate for "prompt." And the many proposed rules discussed above that tilt investigation procedures in favor of the respondent are anything but fair and impartial.

Although the Department acknowledges that Title IX and the Clery Act may overlap in certain areas,[314] it fails to explain how institutions of higher education should resolve the conflicts between two different sets of rules when addressing sexual harassment. These different sets of rules would likely create widespread confusion for schools.

IX. The proposed rules fail to consider federalism principles and ignore the obligations imposed on schools by state and local requirements.

The proposed rules seek to set a national standard on various matters related to the investigation and adjudication of claims of sexual assault and other forms of sexual harassment by school districts and public and private institutions of higher education. Those same topics are the subject of state, local, and

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[309] 20 U.S.C. § 1092(f)(8)(C).
[310] 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C § 1092(f)(6)(iv)); 34 C.F.R. § 668.46(a)).
[311] 20 U.S.C. § 1092(f)(8)(B)(vii); 34 C.F.R. § 668.46(b)(11)(v).
[312] U.S. Depôt of Educ.; Violence Against Women Act; Final Rule (34 C.F.R. Pt. 668), https://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf.
[313] 20 U.S.C. § 1092(f)(8)(b)(iv)(I)(aa).
[314] 83 Fed. Reg. at 61468.

tribal laws. Yet, the proposed rules contain no discussion of preemption, contrary to both Executive Order 13132, Executive Order 12988, and the 2009 Presidential Preemption Memorandum, and provide no guidance to institutions bound by state, local, or tribal requirements that run contrary to the proposed rules.

Executive Orders have recognized the special federalism concerns when a federal agency regulates matters that are traditionally reserved to the states. The 2009 Presidential Memorandum requires that "preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption."[315] It is unclear whether by the proposed rules the Department intends to preempt contrary state requirements, but it appears the Department has engaged in no such consideration. The proposed rules ignore the significant efforts states have made to increase student protections from sexual harassment, including sexual assault; in at least 10 states, current statutory provisions do not align with the Department's proposed rules.[316] In fact, recently, 145 state legislators from 40 States have submitted the District of Columbia submitted a joint comment letter to the Department opposing the proposed rules because, among other things, they claim that the Department ignores the efforts of many states that passed laws addressing sexual harassment in schools.[317] And 48 members of the New York State Legislature, which recently passed strong laws designed to protect college students from sexual harassment, also submitted a letter opposing the proposed rules, calling them "a dangerous attempt to undo protections that would undoubtedly create unnecessary hurdles to combat incidents of rape and sexual assault."[318] The Council of the District of Columbia also expressed opposition to the proposed rules, stating that they "represent not only a step backward in addressing campus safety and sexual misconduct, but a dangerous misstep in discrimination in education."[319]

For example, proposed § 106.45(b)(4)(i) identifies two—and only two—potential evidentiary standards that a decision-maker may use to determine whether a respondent has engaged in sexual harassment, as the appropriate standard or the standard that must be used in resolving complaints against students if that standard is used in resolving complaints against employees and a different standard may be used for all other complaints—even that standard for other conduct code violations that carry the same maximum disciplinary sanction. The proposed rules thus conflict with state laws that require a "substantial evidence" or "substantial and competent evidence" standard for student sexual harassment complaints.[320] These standard

[315] Memorandum from the President for the Heads of Executive Agencies re: Preemption (May 20, 2009).

[316] *See e.g.*, California (Cal. Educ. Code § 67386, Cal. Educ. Code § 66290.1); Connecticut (Conn. Gen. Stat. Ann. § 10a-55m); Hawaii (Haw. Rev. Stat. Ann. § 304A-120), Illinois (110 Ill. Comp. Stat. Ann. 155); Maryland (Md. Code Ann., Educ. § 11-601); New Jersey (N.J. Stat. Ann. § 18A:61E-2); New York (N.Y. Educ. Law §§ 6439-49); Oregon (Or. Rev. Stat. Ann. § 350.255, Or. Rev. Stat. Ann. § 342.704); Texas (Tex. Educ. Code Ann. § 51.9363); and Virginia (Va. Code Ann. § 23.1-806).

[317] Letter from State Legislators to Assôt-Secôy Kenneth L. Mar ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/01/State-Legislator-Comment-Letter-1.25.pdf.

[318] Letter from Members of New York State Legislature to Secôy *available at* https://www.nystateofpolitics.com/2019/01/rozic-organizes-push-against-title-ix-changes/.

[319] Comment from Council of District of (Jan. 30, 2019), submitted via regulations.gov to Secôy Elisabeth

[320] Cal. Educ. Code § 48918(h) ("A decision of the governing board of the substantial evidence showing that the pupil committed any of the committing or attempting to commit a sexual assau 72-6116(a)(8) (student to commit suspension of more than 10 days mus *Bd. of Educ. of City Sch. Dist. of City of New York v.* ñsubstantial e *Mills*, 741 N.Y.S.2d 589, 591 (App. Div. 2002) (explaining that in N for student suspension proceedings is "imposed 306[1]); Minn. Stat. 37-9-1 to "[t]he standard Ann. § 122A.40(14) ("substantial and competent evide of proof in all [student] disciplinary proceedings shall be substant

standards have been interpreted to be less[321] burden
The proposed regulations would also seem to conflict with state laws that require that schools *always* use of preponderance of the evidence standard for making determinations in sexual harassment matters.[322] Depending on whether that recipient uses the preponderance standard for other conduct code violations, the law could conflict or not.

Similarly, a state law provision granting a student the right to present the testimony of the studentôs witnesses by affi 106.45(b)(3)(vi)ôs pr
relying on any statement of a person who does not submit to cross-examination.[323]

These are only a few examples. No doubt an exhaustive search of the statutes and regulations of every State, tribe, and locality would produce more. Yet the Department does not appear to have undertaken any such search. Executive Order 13132 anticipated precisely the problem of potential contradictory regulatory obligations by requiring the Department to consult with elected[324] (not non-elected)[325] state and local officials early in the process and to publish a federalism summary impact statement. Executive Order 13175 imposes the same early consultation and impact statement requirements for preemption of Tribal laws.[326] The burden to obtain the relevant information is the Departmentôs.

The proposed rules also fail to meet the requirements imposed on the Department regarding regulations that may have preemptive effect and give no guidance to schools that must navigate contradictory legal obligations. First, the proposed regulations fail to s
preemptive effect, if any,[327] in violation of Executive Order 12988. Second, regulat
the implicit regulatory preemption in the proposed regulations does not appear to be ñrestricted to
minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated,ò[328] in violation of Executive Order 13132. Indeed, given that, as set out above, many of the proposed rules are outside of its regulatory authority to effectuate Title IX, these rules presumably cannot have preemptive effect. However, the lack of clar
preemptive effects, if any, would create a source of confusion for schools that are attempting to ensure that they follow state, local, tribal, and federal law.

X. <u>The Departmentôs act -benefit analysis violated the Administrative its cos Procedure Act, the Information Quality Act, Executive Order 13563, and Executive Order 12866.</u>

[321] *Mills*, 741 N.Y.S.2d at 591 (ñthe Court of Appeals has ... the evidence éôò but ñwe are unconvinced that use of the compete ... and substantial evidence standard risks an erroneous deprivation of the student's l ... e.g., *Terminating Public School Teachers for Cause* interestsò *Under Minnesota Law*, 31 WM. MITCHELL L. REV. 303, 313 (2004) (ñsubstantial evidenceò st ... viewed as less burdensome than the ópreponderanceô standardò
[322] Cal. Educ. Code § 67386(3) (requiring all institutions of higher education that accept state financial assistance to provide that ñthe standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidenceò).
[323] Kan. Stat. Ann. § 72-6116(a)(5) (student potentially subject to suspension of more than 10 days must be granted right ñto present the pupil's own witnesses in person or their testimo
[324] Executive Order 13132, §§ 1(d), 6(a), 6(c)(1)-(2).
[325] Office of Management and Budget, *Guidance for Implementing E.O. 13132*, M-00-02, at 4 (Response to Question 8) (Oct. 28, 1999).
[326] Executive Order 13175, § 5(c); Department of Educationôs Consultation Pla
[327] Executive Order 12988 § 3(b)(2)(A).
[328] Executive Order 13132 § (4)(c).

The Department claims that the proposed rules would reduce the number of sexual harassment investigations conducted by schools and accordingly would save $286.4 million to $367.7 million over the next 10 years.[329] However, it failed to disclose the data it relied on, failed to assess the accuracy of this data, and failed to account for many significant costs to students and schools imposed by the proposed rules, in violation of the Administrative Procedure Act, the Information Quality Act, Executive Order 13563, and Executive Order 12866.

A. The Department failed to disclose the information it relied on in developing its proposed rules and failed to assess the quality of this information in violation of the Administrative Procedure Act, Executive Order 13563, and Information Quality Act.

Agencies engaged in rulemaking are required by the Administrative Procedure Act (APA) to disclose "for public evaluation" including information used for the Regulatory Impact Analysis required under Executive Order 12866,[331] so that the public can determine whether the agency may be drawing improper conclusions based on erroneous information.[332] Executive Order 13563 also requires agencies to provide the public an opportunity to view online and comment on "all parts of the rulemaking docket, including relevant scientific and technical findings." The Department has failed to meet both of these requirements. In the proposed rules' preamble to "public investigations at [institutions of higher education]" as the sources relied upon in creating the proposed rules,[333] the Department did not make these documents available or even identify which schools or reports were reviewed. Similarly, it failed to publish online the underlying data or statistical model used to estimate the number of Title IX investigations currently conducted by schools and the projected cost savings from reducing the number of investigations under the proposed rules.[334] Nor were the "[p]rior analyses" it used in assessing the Department's information in the public rulemaking docket.[335] As a result of the Department's failures,[336] the public has been denied the opportunity to assess the accuracy of the Department's information in violation of the APA and Executive Order 13563.

The APA also requires all agencies to examine the data they use in rulemaking for inaccuracies.[337] The Department is also required under its own Information Quality Act (IQA) guidelines to assess information quality for utility, objectivity, reliability, and unbiased nature of information.[338] However, in estimating the number of sexual harassment cases that are currently being investigated and that would be investigated under the proposed rules, the Department relied almost exclusively on the Civil Rights Data Collection (CRDC) and the Clery Act,[339] both of which contain serious inaccuracies. It is common knowledge that several portions of

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[329] 83 Fed. Reg. at 61463, 61484.
[330] *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).
[331] *See Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199, 201-202 (D.C. Cir. 2007)
[332] *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984).
[333] 83 Fed. Reg. at 61485.
[334] *Id.* at 61487.
[335] *Id.* at 61485-89.
[336] *Id.* at 61490-93.
[337] *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56-57 (D.C. Cir. 2015); *see also id.* ("agencies do not have inaccurate data"); *New Orleans v. FCC*, 969 F.2d 1163, 1167 (D.C. Cir. 1992) ("an agency's reliance on a report ascertaining the accuracy of the data contained in the study or the methodology used to collect the data is arbitrary" (quotation marks omitted)).
[338] U.S. Dep't of Ed., *Information Quality Guidelines* (effective Oct. 1, 2002), https://www2.ed.gov/policy/gen/guid/infoqualguide.html.
[339] 83 Fed. Reg. at 61485.

the CRDC contain errors,[340] and, most relevant to the proposed rules, that many school districts consistently and inaccurately report that they receive zero complaints of sexual harassment from students or that no complaints of harassment result in student discipline.[341] Similarly, approximately 90 percent of colleges consistently report in their annual Clery statistics that they received zero reports of rape on their campuses[342] – part of a broader and alarming pattern of underreporting and misreporting of sexual assault that has been well-documented for more than a decade[343] and that is consistent with OCR's own enforcement findings.[344] Yet the Department failed to identify any of these weaknesses in accuracy and reliability of the CRDC and Clery data, a clear violation of IQA guidelines.

Moreover, statements by Department and Administration officials provide concern about the reliability and biased nature of the data, reports, and studies relied on by the Department in proposing changes to Title IX. Just a few weeks before rescinding two important Title IX guidances on sexual violence and issuing the proposed rule, Secretary DeVos claimed in advance of the proposed rule that the "devastating reality of campus sexual misconduct has been "lost" and "ruined" and cited by anecdotes of purported guidance, when "such "due process" actually have been in violation of the rescinded guidance.[345] In that same speech, she diminished the full range of sexual harassment that deprives

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[340] *See, e.g.*, Evie Blad, *How Bad Data from One District Skewed National Rankings on Chronic Absenteeism*, EDUCATION WEEK (Jan. 9, 2019) http://blogs.edweek.org/edweek/rulesforengagement/2019/01/chronic_absenteeism.html; Anya Kamenetz, *The School Shootings That Weren't*, NATIONAL PUBLIC RADIO (Aug. 27, 2018), https://www.npr.org/sections/ed/2018/08/27/640323347/the-school-shootings-that-werent; Andrew Ujifusa & Alex Harwin, *There Are Wild Swings in School Discipline Data. The Feds Want to Stop Relying on It*, EDUCATION WEEK (May 2, 2018), https://www.edweek.org/ew/articles/2018/05/02/there-are-wild-swings-in-school-desegregation.html.

[341] *See, e.g.*, AAUW, *Three-Fourths of Schools Report Zero Incidents of Sexual Harassment in Grades 7-12* (Oct. 24, 2017), https://www.aauw.org/article/schools-report-zero-incidents-of-sexual-harassment https://www.aauw.org/article/schools-report-zero-incidents-of-sexual-harassment; Lisa Maatz, AAUW, *Why Are So Many Schools Not Reporting Sexual Harassment and Bullying Allegations?*, HUFFINGTON POST (October 24, 2016), https://www.huffingtonpost.com/lisa-maatz/why-are-so-many-schools-n_b_12626620.html; AAUW, *Two-Thirds of Public Schools Reported Zero Incidents of Sexual Harassment in 2013–14* (July 12, 2016), https://www.aauw.org/article/schools-report-zero-sexual-harassment.

[342] *See, e.g.*, AAUW, *89 Percent of Colleges Reported Zero Incidents of Rape in 2015* (May 10, 2017), https://www.aauw.org/article/clery-act-data-analysis-2017; AAUW, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014* (Nov. 23, 2015), https://www.aauw.org/article/clery-act-data-analysis.

[343] *See, e.g.*, California State Auditor, *Clery Act Requirements and Crime Reporting: Compliance Continues to Challenge California Colleges and Universities*, Report 2017-032 (May 2018); National Academies of Sciences, Engineering, and Medicine, *Innovations in Federal Statistics: Combining Data Sources While Protecting Privacy* 44 (2017) ("the data on violence reported by many institutions in response to the [Clery] act's requirements"); Jacqueline Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOLOGY, PUBLIC POLICY, AND LAW 1 (Feb. 2015) ("[T]he ordinary way to understand incidents of [on-campus] sexual assault. Only during periods in which schools are audited [by the Department of Education for Clery Act compliance] do they appear to offer a more complete picture of sexual assault levels on campus. Further, the data indicate that the [Department audit] has no long-term effect on the reported levels of sexual assault, as those crime rates returned to previous level after an audit was completed."); *Grinder*; James Cooper, *Campus: Can Clery Act Data from Universities and Colleges be Trusted?*, 9 ASBBS EJOURNAL 51 (Summer 2013) ("underreporting of burglary and rape among Clery crimes"); Baldy & Kristi Jones, *Campus Sexual Assault Statistics: Discrepancies in Clery Act Numbers*, CRIME FOR PUBLIC INTEGRITY (Dec. 2, 2009) [last updated Mar. 26, 2015] [hereinafter *Campus Sexual Assault*] ("Statistics reported to the U.S. Department of Education differing interpretations of the law are sowing confusion – with one school submitting sexual assault numbers required and another the bare minimum. Ultimately, Clery data these days are almost meaningless."); http://crimeforpublicintegrity.org/campus-sexual-assault-statistics-long-added up; Heather M. Karjane, et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* (Oct. 2002) ("Only 36.5 percent of schools in the sample reported at least one forcible sex offense, a statistic that is [Campus Sexual Assault, *supra* note 343] ("Nine of the 25 Clery compliance investigations conducted by the Education Department over the past decade [1999-2009] determined that schools were omitting sexual offenses collected by some sources or failing to report them at all.").

[345] *DeVos Prepared Remarks*, *supra* note 11.

students of equal access to educational opportunities, claiming, ñif there is nothing i
is.[346] While heading the Departmentôs Office for Civi
2014 guidance documents were rescinded, former Acting Assistant Secretary Candice Jackson, reinforced the myth of false accusations, claiming that ñ90 percentò of her office
result of ñdrunk [en]ò and requiring her staff to read excerpts from a book[347] regre
that baselessly labeled college campuses as ña secret cornucopia o[348]

Other officials in this Administration have propagated rape myths about false accusations and victim-blaming, again raising questions about the integrity of the information relied on by government officials in developing proposed changes to the Title IX rules. Neomi Rao, Administrator of Office of Information and Regulatory Affairs when the offic
for publication, claimed [a woman] drinks to the point where she can newspaper
longer choose, well, getting[349] In another article, Ms. Rao questioned was par
the ñfeminist chant that women should be free to Ms.
Jacksonôs rhetoric about [a] culture, actions, statements often leads to regretò and[350] Ms. Rao also wrote dismissively ñrun fr
about ñsexual and racial emperors [in] [the] ñwinning new[351] While these statements were made years college, these remarks, particularly when paired with C
proposed rules would impose on victims of harassment and assault (as detailed below) raise significant questions regarding her judgment on these matters.

Finally, the president himself has encouraged these harmful and false rape myths. Not only has he openly bragged about ñgrab [bing] [the]ò[352] but he also continues to deny the their genit
experiences of women and girls who have experienced sex-based harassment and violence. When at least 16 women alleged that he sexually[353] and assaulted them,
formalized his assertion into an official White House statement.[354] When White House officials Rob Porter and David Sorensen resigned amidst reports that they had committed gender-based violence, the president tweeted: ñPeople [lives] are being shattered and destroyed by a mere allegation. é Th
no recovery for someone falsely accused ð life and career are gone. Is there no such thing any longer as Due Process?ò[355]

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[346] *Id.*

[347] Green & Stolberg, *supra* note 12.

[348] Democracy Forward, Advocacy Groups Advance Legal Fight Against Secret
Protections (Jan. 14, 2019), https://democracyforward.org/updates/advocacy-groups-advance-legal-fight-against-secretary-devoss-unconstitutional-rollback-of-survivor-protections.

[349] Neomi Rao, *Shades of Gray*, YALE HERALD (Oct. 14, 1994), https://assets.documentcloud.org/documents/5684266/01-Shades-of-Gray-Neomi-Rao.pdf.

[350] Neomi Rao, ñThe Femini *supra* note 13.

[351] Neomi Rao, *Submission, Silence, Mediocrity*, YALE FREE PRESS (Nov. 1993), https://www.documentcloud.org/documents/5684271-Rao-Submission-Silence-Mediocracy.html.

[352] Derek Hawkins, *Billy Bush says there were 8 witnesses to Trump's 'Access Hollywood' comments*, WASH. POST (Dec. 4, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/12/03/he-said-it-billy-bush-reiterates-that-trumps-access-hollywood-tape-is-real.

[353] Ben Jacobs, *Trump Uses Gettysburg Address to Threaten to Sue Sex Assault Accusers*, THE GUARDIAN (Oct. 22, 2016), https://www.theguardian.com/us-news/2016/oct/22/donald-trump-gettysburg-contract-with-america-sue-accusers-hillary-clinton.

[354] John Wagner, *All of the Women Who Have Accused Trump of Sexual Harassment Are Lying, the White House Says*, WASH. POST (Oct. 27, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/10/27/all-of-the-women-who-have-accused-trump-of-sexual-harassment-are-lying-the-white-house-says.

[355] Donald Trump (@realDonaldTrump), TWITTER (Feb. 10, 2018), https://twitter.com/realDonaldTrump/status/962348831789797381.

In the context of these and countless other biased, rape-apologist statements made by the Department and the Administration, it is even more troubling that the Department failed to disclose or assess the credibility of the data, reports, and studies it relied on during this rulemaking process.

B. The Department failed to identify significant costs that the proposed rules would inflict on students who experience sexual assault or other sexual harassment, in violation of Executive Order 12866.

Executive Order 12866 requires agencies to assess all costs and benefits of a proposed rule "to the fullest extent that these can be usefully estimated." The Department failed to assess the costs of the proposed rules to students or employees who experience sexual harassment and failed to recognize that the proposed rules would not reduce costs but simply shift costs from schools to victims of sexual harassment.[356] Nor did the Department acknowledge that it is inappropriate to prioritize cost savings at all over educational harm to students; after all, the Department, in enforcing Title IX, is charged with preventing and remedying sex discrimination in education, not reducing costs to schools.[357] Contrary to the Department's unjustified assumption that "the reduced,[358] the proposed rules would in fact allow bad actors to engage in repeated and persistent harassment with impunity, thereby increasing the underlying rate of harassment and its associated costs to those who experience it.

Sexual assault inflicts enormous costs on survivors. A single rape can cost a survivor between $87,000 and $240,776.[359] Survivors are also three times more likely to suffer from depression, six times more likely to have PTSD, 13 times more likely to abuse alcohol, 26 times more likely to abuse drugs, and four times more likely to contemplate suicide.[360] The lifetime costs of intimate partner violence, which can constitute sexual harassment in educational settings, including related health problems, lost productivity, and criminal justice costs, can total $103,767 for women and $23,414 for men.[361] The Centers for Disease Control and Prevention estimates that the lifetime cost of rape is $122,461 per survivor, resulting in an annual national economic burden of $263 billion and a population economic burden of nearly $3.1 trillion over survivors' lifetimes.[362] More than half of this cost is due to loss of workplace productivity, and the rest due to medical costs, criminal justice fees, and property loss and damage.[363] About one-third of the cost is borne by taxpayers.[364] None of these costs, nor the significant costs to those suffering sexual harassment short of sexual assault, are mentioned in the rulemaking docket.

The Department also ignores the specific costs that students face when they are sexually assaulted. Although it acknowledges that 22 percent of survivors seek psychological counseling, 11 percent move residence, and 8 percent drop a class, it declined to analyze whether the proposed rules

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[356] *See* Grossman & Brake, *supra* note 90 ("Costs are not saved, but shifted.").
[357] *See* Grossman & Brake, *supra* note 90 ("[t]he Department of Education is not a neutral be
[358] 83 Fed. Reg. at 61485.
[359] White House Council on Women and Girls, *Rape and Sexual Assault: A Renewed Call to Action* 15 (Jan. 2014), https://www.knowyourix.org/wp-content/uploads/2017/01/sexual_assault_report_1-21-14.pdf.
[360] Feminist Majority Foundation, *Fast facts - Sexual violence on campus* (2018), http://feministcampus.org/wp-content/uploads/2018/11/Fast-Facts.pdf.
[361] Inst. for Women's Pol'y Research, *Dreams Deferred: A Survey on the Impact of Intimate Partner Violence on Su* *Education, Careers, and Economic Security* 8 (2018), https://iwpr.org/wp-content/uploads/2018/10/C474_IWPR-Report-Dreams-Deferred.pdf.
[362] Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52(6) AM. J. PREV. MED. 691, 698, (2017), *available at* https://stacks.cdc.gov/view/cdc/45804/cdc_45804_DS1.pdf.
[363] *Id.* at 691.
[364] *Id.* at 691.

would detrimentally affect student survivorsô need
housing, or withdraw from a course or from school.[365] Nor did the Department attempt to calculate any other incremental costs to those who experience sexual harassment, such as medical costs for physical and mental injuries; lost tuition and lower educational completion and attainment for those who are forced to withdraw from a class, change majors, or drop out, because their school refused to help them; lost scholarships for those who receive lower grades as a result of sexual violence or other sexual harassment; and defaults on student loans as a result of losing tuition and/or scholarships. Each of these omissions is a violation of Executive Order 12866. The harm to those affected by sexual harassment literally did not enter into the Departmentôs calcu

C. The Department inflated schoolsô estimated c 12866.

The Department significantly inflated the current number of Title IX investigations in order to inflate the ñcost savingsò. To estimate the number of Title IX these inve investigations at institutions of higher education, the Department relied on a 2014 Senate report that allowed institutions of higher education to report whether th-5y, 1ñ6ò conduc ñ > 1ò investigations of sexual violence in the previous five years.[366] Without justification or indeed any explanation whatsoever, the Department rounded up for each of these categories. If a school reported that it had c-5ò conducted 1ñ2ò investigations, it was assumed to have conducted ñ5ò and i its model,[367] far higher than the medians of 3.5 and 30 investigations for those two categories.[368] Elsewhere, the Department inexplicably assumed th investigations ò as there are ñsexual misconduct investig mean.[369] As a result, at each institution of higher education conducts 2.36 investigations per year is highly inflated. estimated ñcostò savings of reducing the number of investigations at institutions of higher education is also significantly inflated.

A similar method is used to inflate the current number of Title IX investigations in elementary and secondary schools. The Department knows that many elementary and secondary schools fail to investigate known reports of sexual violence. In September 2017, it was investigating 135 school districts for failing to address 153 cases of sexual violence.[370] In 2018, it withdrew partial funding from the Chicago Public Schools for Title IX violations, including failing to address nearly 500 complaints of student-on-student sexual violence in less than 3 months and 624 sexual assault complaints in a single semester.[371] Yet the Department assumed that the number of reports of sex-based harassment that each school reported in the CRDC was equal to the number of investigations conducted by each school district.[372] As a result, the ñestimateò that schools conduct per year and the ñcost savingsò of reducing this number are bo

Inflated estimates aside, the Departmentôs goal of reducing costs number of Title IX investigations is contrary to the purpose of Title IX and would make schools more

[365] 83 Fed. Reg. at 61487.
[366] 83 Fed. Reg. at 61485.
[367] *Id.* at 61485.
[368] *Id.* at 61485 n.18.
[369] *Id.* at 61485.
[370] U.S. Department of Civil Rights, *List of districts that have open Title IX sexual violence investigations at the elementary/secondary level* (Sept. 6, 2017), https://mediaassets.scrippsnationalnews.com/cms/dcbureau/SchoolSexAssaults/elementarysecondary.pdf.
[371] Associated Press, *624 sex assault complaints at Chicago schools this semester* (Nov. 29, 2018), https://apnews.com/ad8c79d567ff461a94642373579bd588.
[372] 83 Fed. Reg. at 61485.

dangerous for all students. As set out above, sexual assault and other forms of sexual harassment are already vastly underreported. Even when students do report sexual harassment, schools often choose not to investigate their reports. According to a 2014 Senate report cited by the Department,[373] 21 percent of the largest private institutions of higher education conducted fewer investigations of sexual violence than reports received, with some of these schools conducting seven times fewer investigations than reports received.[374] Instead of trying to reduce the number of investigations further, the Department should be working to combat the problems of underreporting and under-investigation.

D. The Department omitted significant costs to schools in violation of Executive Order 12866.

The Department also failed to consider many new costs to schools that the proposed rules would create. First, it greatly underestimated the total hours that school administrators would require to (i) ar policies and re-train employees and the associated cost of these hours. The Department assumed without justification that changing schools' internal policies would require: (i) at the elementary and secondary school level, a total of 24.5 hours for a Title IX coordinator, 16 hours each for the investigator and decisionmaker, 24.5 hours for a lawyer, and two hours for a web developer in elementary and secondary schools; and (ii) in institutions of higher education, a total of 33 hours for a Title IX coordinator, 16 hours each for the investigator and decisionmaker, 49 hours for a lawyer, and two hours for a web developer.[375] But school administrators and survivor advocates know that changing an internal policy can take many months and require the input of a task force comprised of a wide range of stakeholders. As the AASA stated in its comment opposing the proposed rules, "There is terms of training and professional development to changing practices and policies that are so embedded into the fabric of the school district that we be[376]

Second, the Department omitted the cost to schools of students and medical services as a result of being ignored, retraumatized, and punished by their schools when they report sexual harassment. Institutions of higher education are already spending significant amounts of money on campus mental health services; imposing new barriers and creating new stressors would only exacerbate these rising costs.

Third, the Department failed to consider the reality that schools would incur greater litigation costs if they investigated fewer reports of sexual harassment. Even if the rules are finalized, they would not have a dispositive effect on how Title IX claims are decided in private litigation. In a United Educators (UE) study of 305 reports of sexual assault from 104 colleges and universities between 2011 and 2013, more than one in four reports resulted in legal action, costing schools about $200,000 per claim, with 84 percent of costs resulting from claims brought by survivors and other harassment victims.[377] A second UE study of reports of sexual assault during 2011-2015 found that schools lost about $350,000 per claim, with some losses exceeding $1 million and one reaching $2 million.[378] As the AASA explained in its comment, "the same remedies and [the Department] no standards for enforcing Title IX, then presumably students will find civil litigation to be the better avenue

[373] *Id.* at 61485 n.17.
[374] U.S. Senate Comm. on Homeland Sec. & Governmental Affairs, U.S. Senate Subcomm. on Fin. & Contracting Oversight, *Sexual Violence on Campus: How too many institutions of higher education are failing to protect students* 9 (July 9, 2014), https://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf.
[375] 83 Fed. Reg. at 61486.
[376] AASA Letter, *supra* note 15, at 2.
[377] United Educators, *supra* note 26.
[378] United Educators, *The High Cost of Student-Victim Sexual Assault Claims and What Institutions Can Do* 3 (2017), https://static1.squarespace.com/static/53e530a1e4b021a99e4dc012/t/590501f74402431ac4900596/1493500411575/FN-+RE-+2017.04-+High+Cost+of+Student-Victim+SA+Claims.pdf.

for addressing their grievances against schools, which could lead to a significant and much costlier redirection of district resources towards.[379] In addressing addition, as set out above, the proposed rules would also expose schools to significant potential Title VII liability due to the conflicts between Title VII and the rulesô requirements, and contradictory state, local, or tribal standards.

Fourth, the Department failed to adequately consider the costs of mandating live hearings to resolve all formal complaints of sexual harassment that meet the standards set out in the proposed rules. Although the Department notes that 87 percent of institutions of higher education already use a hearing board,[380] it does not describe what hearing procedures are currently implemented at these institutions and fails to consider the additional costs of adopting all of the burdensome and inflexible hearing procedures required by the proposed rules. Associations representing higher education institutions have recently submitted comments to the Department raising concern about mandating live hearings with cross-examination and the costs and burdens this would place on schools. For example, the AAU cited ñhigh costs associated with [the] [proposed] rule,ò and the AAU observed that ñ[s]ignificant financial costs and administrative burdens may be overwhelming,ò and the AASA stated that this proposed rule would ñplace a new burden on district personnel [who] will need to be trained in how to facilitate and monitor a live hearing and ensure appropriate participation by all parties involved in a live hearing and how to view the evidence that arises during a live hearing.ò[381] [382]

Finally, the proposed rules would likely cause a significant decrease in application and enrollment rates for both male and female students at schools that ñreduceò the likelihood that students are more likely to apply to and enroll at a school where they know sexual harassment is being addressed and not ignored. For example, a July 2018 study found that schoolsô application and enrollment rates increased significantly in the one to three years after the Department launched a Title IX investigation.[383] In contrast, the proposed rules seek to decrease the number of Title IX investigations at each school. This sends a signal to students that they will not be safe, and that neither their school nor the Department will intervene to ensure that sexual harassment is being addressed. As a result, schools would likely see a significant decrease in both application and enrollment rates if they adopt the minimal requirements in the proposed rules.

Because of the Department's failure to disclose the methodologies and assumptions it used to estimate the accuracy of their data, the public is still unable to meaningfully comment on the cost-benefit analysis conducted by the Department, with the exception of noting all of the costs that the Department should have considered but failed to do.

XI. The Department failed to follow proper procedural requirements before issuing these proposed rules.

A. The Department has not complied with Title I of delayed effective dates.

[379] AASA Letter, *supra* note 15, at 2.
[380] 83 Fed. Reg. at 61488.
[381] AAU Letter, *supra* note 15, at 4.
[382] AASA Letter, *supra* note 15, at 4.
[383] Jason M. Lindo et al., *Any Press is Good Press? The Unanticipated Effects of Title IX Investigations on University Outcomes*, NAT'L BUREAU OF ECON. RES. 12-13 (July 2018), *available at* http://www.nber.org/papers/w24852.

The NPRM should be withdrawn because the changes made in the regulatory action materially alter the rights and obligations of federal financial assistance under Title IV programs.[384] But these regulatory changes are not being adopted in compliance with requirements that apply to all regulations affecting Title IV programs.

Title IV requires that any regulatory changes *affecting the programs under this subchapter* [Title IV] that have not been published in final form by November 1 prior to the start of the award year shall not become effective until the beginning of the second award year after such November 1 date.[385]

Notably, this language is also not limited to regulations that rely on any Title IV provision as their authority for the proposed regulations, despite Congress's use of such authority.[386] As the NPRM itself acknowledges, these proposed regulations would materially alter the rights and obligations of federal financial assistance under Title IV and its programs.[387]

The drafting history confirms Congress's intent that Section 1089(c)(1) was limited to regulatory changes *general administration of* the programs. But Congress struck out the text "general administration" in 1992, thus removing that limitation. Congress removed that language because the Secretary had relied on it as an excuse not to engage in negotiated rulemaking on some regulations. The report explained that the Secretary had interpreted this language too narrowly so that only those provisions [dealing with the effective dates of] *all regulations* on Title IV are driven by the Master Calendar.[388]

B. The Department failed to obtain approval from the Department of Justice or work with the Small Business Administration, contrary to executive orders and statute.

The Department appears to have made no effort to work with other federal agencies as required by law and executive order.

1. Executive Order 12250 requires approval of proposed regulations by the Attorney General prior to publication.

Executive Order 12250 requires any NPRM that addresses sex discrimination under Title IX to be reviewed and approved by the Attorney General prior to its publication in the Federal Register.[389] That authority (although not the authority to approve final regulations) has been delegated to the Assistant Attorney General for Civil Rights.[390] The Attorney General's input and consent of the Department of Justice is regularly involved in interpreting and enforcing Title IX rules.

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[384] 83 Fed. Reg. at 61483.
[385] 20 U.S.C. § 1089(c)(1).
[386] *See, e.g.*, 20 U.S.C. §§ 1090(b) (governing regulations "promulgated pursuant to this subchapter"), 1091(e) ("regulations prescribed under this subchapter"), 1091(e) ("regulations is prescribed).
[387] 83 Fed. Reg. at 61483.
[388] Both quotations in this paragraph are from H.R. Rep. 102-447, 76-77, 1992 U.S.C.C.A.N. 334, 409-410. In the second quotation, emphasis was added.
[389] Executive Order 12250 §§ 1-202, 1-402.
[390] 28 C.F.R. § 0.51(a).

There is no indication in the proposed rules that this requirement was met. Indeed, there is no mention of this Executive Order in the NPRM at all. This omission may be one reason why, as we note later in this comment, there has been no attempt to address to how these proposed changes will interact with the Title IX regulations of other federal agencies, including when recipients receive financial assistance both from the Department and from other agencies and thus are simultaneously bound by inconsistent and contradictory Title IX regulations. As an example, the Department of proposed Title IX rules are inconsistent with the USDA's Title IX rules.[391]

Further, close coordination with the Department of Justice is crucial with regard to Title IX and sexual harassment in particular. For example, the Solicitor General of the United States previously informed the Supreme Court that it was the view of the United States that the deliberate indifference standard identified in *Gebser* did not apply to a federal agency enforcing Title IX administratively[392] and the Department of Justice has stated the same conclusion in its Title IX Legal Manual.[393] As a further example, in the Title IX context, Department of Justice has also encouraged agencies to seek damages for victims of discrimination in agency enforcement proceedings, in contrast to the prohibition on assessment of damages in the proposed rule.[394] The Department of Justice should necessarily be involved in any reversal of these and other positions by the proposed rule.

2. The Regulatory Flexibility Act and Executive Order 13272 require notification of the Small Business Administration early in the regulatory process.

The Regulatory Flexibility Act (RFA)[395] and Executive Order 13272 are intended to ensure that federal agencies consider the effect of proposed regulations on small governmental and private entities. This consideration is particularly important for proposed rules like these, which would dramatically impact small schools and school districts. To further that goal, both the statute and executive order require the Department to involve the Chief Counsel for Advocacy (Chief Counsel) of the Small Business Administration at critical stages. (Other obligations of the RFA and Executive Order 13272 will be discussed later in this comment).

The NPRM contained an initial regulatory flexibility analysis (IFRA).[396] But the NPRM did not say that the Department had shared a draft IFRA with the Chief Counsel when the Department submitted its draft rule to Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA) under Executive Order 12866 (i.e., August 31, 2018), as required by Executive Order 13272 § 3(b).

The NPRM also did not say that the Department was transmitting a copy of the IFRA to the Chief Counsel after it was published in the Federal Register, as required by the RFA.[397] Absent such

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[391] *See*. 7 C.F.R. § 15a.110(b) (proposed § 106.3(a) is inconsistent with USDA rule on remedial action); 7 C.F.R. §§ 15a.135, 15a.140 (proposed § 106.8 is inconsistent with USDA rules on designation of responsible employee and adoption of grievance procedures); 7 C.F.R. § 15a.205 (proposed § 106.12(b) is inconsistent with USDA rule on religious exemptions).

[392] U.S. *Amicus* Brief, *Davis v. Monroe County Bd. of Educ.*, No. 97-843, at 19-25 (Nov. 1998).

[393] Dep't of Justice, *Title IX Legal Manual*, https://www.justice.gov/crt/title-ix ("Importantly, for purposes of enforcement of Title IX and as a condition of receipt of federal financial assistance – as well as in private actions for injunctive relief – if a recipient is aware, or should be aware, of sexual harassment, it must take reasonable steps to eliminate the harassment, prevent its recurrence and, where appropriate, r

[394] *Id.* ("[A]gencies should identify and seek the full complement of relief for complainants and identified victims, where appropriate, as part of voluntary settlements, including, where appropriate, not only the obvious remedy of back pay for certain employment discrimination cases, but also compensatory damages for viola

[395] 5 U.S.C. § 601 et al.

[396] *See* 83 Fed. Reg. at 61490-493.

[397] 5 U.S.C. § 603(a).

transmission, the Chief Counsel had no formal notice of the NPRM and thus missed its opportunity to comment on behalf of affected smaller entities. This is more than a hypothetical possibility, given the Chief Counselôs recent objection[398] And while other commenters might be able to raise the same concerns (if they had been properly notified), the Department is required to give ñevery appropriate considerationò to its sole Chief Counsel[399] any change made to the proposed rule in the final rule as a result[400]

C. The Department failed to engage in required consultation with Native American tribes and small entities.

The NPRM identified the types of stakeholders with whom it purportedly conducted listening sessions and discussion.[401] Notably absent from those lists were officials from Indian Tribes and small entities. Those omissions reflect a violation of Executive Order 13175 and the Regulatory Flexibility Act.

1. The Department failed to consult Indian Tribal Governments in violation of Executive Order 13175 and the Departmentô

Title IX applies to any recipient that receives federal financial assistance for an education program or activity, including education programs or activities operated by Indian Tribes.[402] More than 25,000 students attend more than 125 school districts controlled by tribes and there are 17,000 students enrolled in more than 30 institutions of higher education controlled by tribes.[403] Of these students, Native girls ages 14-18 are more than twice as likely as the average girl aged 14-18 (11 percent versus 6 percent) to be forced to have sex when they do not want to do so.[404] The proposed rules would dictate how school districts and colleges operated by Indian Tribes would have to adjudicate allegations of sexual harassment, including sexual violence.

These proposed rules have tribal implications and thus require consultation with tribal officials under section 5(a) of Executive Order 13175. The Department does not appear to have met any of the requirements of its own Consultation Plan: there is no indication that the Department notified potentially affected Indian tribes in writing that the proposed rules have tribal implications and gave them at least 30 days to prepare for a consultation activity (IV.B.); that the Department engaged in any of the specified consultation mechanisms (IV.A.2 & C); or that the Department diligently and serious considered tribal views (IV. preamble & D). Merely allowing comment on the NPRM now is plainly not sufficient to meet these obligations.

Further, as discussed previously, these proposed rules may conflict with Tribal laws, and thus the Department was required to consult with tribal officials ñearly in the proposed regulatory[405] There is no evidence that the Department did so, to its detriment.

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[398] Letter from Small Bus. Admin. *available at* https://www.sba.gov/advocacy/8-30-DeVos (Aug 18-comments-general-provisions-federal-perkins-loan-program-federal-family-education.

[399] Executive Order 13272 § 3(c).

[400] 5 U.S.C. § 604(a)(3).

[401] 83 Fed. Reg. at 61463-464.

[402] *See* Office of Legal Counsel, *Applicability of Section 504 of the Rehabilitation Act to Tribally Controlled Schools*, 28 Opinions of Office of Legal Counsel 276 (Nov. 16, 2004); U.S. Dept of Educ. *Office for Civil Rights Jurisdiction Over Tribally Controlled Schools and Colleges* and accompanying *Questions and Answers Regarding Tribally Controlled Schools and Colleges* (Feb. 14, 2014).

[403] U.S. Dept of Educ. *Questions and Answers Regarding Tribally Controlled Schools and Colleges* (Response to Question 1) (Feb. 14, 2014).

[404] *Let Her Learn: Sexual Harassment and Violence*, *supra* note 17, at 3.

[405] Executive Order 13175 § 5(c)(2); Dept of Educ.ôs Consultation Plan, Part

Given the important government-to-government relationship that has been recognized by the United States with tribal sovereigns, it is particularly concerning that the Department would engage in such a significant matter without full consultation with tribal leaders. The NPRM should be withdrawn until such consultations can occur.

2. The Department failed to consult small entities in violation of the RFA.

Title IX applies to a diverse range of school districts and institutions of higher education. As required by the RFA,[406] the NPRM contains an estimate of the number of small entities to which the proposed rule will apply. The NPRM estimates that the overwhelming majority of school districts (more than 99 percent) are small entities;[407] and that 68 percent of all two-year institutions of higher education and 43 percent of all four-year institutions of higher education are small entities.[408] The Department did not certify that the regulations, if promulgated, would not have a significant economic impact on small entities.[409] Thus, the Department implicitly found that the regulations would have a significant economic impact. To the extent the Department did not expressly make such a finding because it estimated that small entities would experience a net cost savings, that would disregard the plain text of the statute; the statute does not require that the economic[410] impact And it is clear from the proposed rules that small entities *will* have to invest significant resources to develop new processes required by the NPRM, like live hearings. Indeed, schools and member organizations representing school administrators and institutions have expressed concern about the costs inherent in the proposed r[411] The fact that the NPRM does not procedura address these perceived costs demonstrates that the Department did not meaningfully consult with small entities before publishing the proposed rules.

When a proposed rule has a significant economic impact on a substantial number of small entities, the RFA requires the promulgating agenc participate in the rulemaking for the rule through the reasonable use of techniques such as ð

> (1) the inclusion in an advance notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;
> (2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;
> (3) the direct notification of interested small entities;
> (4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and
> (5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.[412]

The Department does not appear to have engaged in any such techniques. The NPRM itself is silent on any steps it took to notify small entities of the NPRM. Contrary to the mandatory requirements of the RFA, the Department did nothing special to notify and solicit comments from small entities. The

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[406] 5 U.S.C. § 603(b)(3).
[407] 83 Fed. Reg. at 61490.
[408] *Id.* at 61491.
[409] *Cf.* 5 U.S.C. § 605(b).
[410] U.S. Small Bus. Admin., Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* 20 n.70, 23-24 (Aug. 2017).
[411] *See supra* note 15.
[412] 5 U.S.C. § 609(a).

Federal Register notice alone was not sufficient, otherwise Section 609(a) would have no meaning. This statutory violation requires, at a minimum, a second round of comments after the Department has used reasonable techniques to notify small entities of the opportunity to participate in the rulemaking.

D. The Department did not assess how these proposed rules would interact with other civil rights statutes enforced by the Department and the regulations enforced by other federal agencies.

The NPRM proposes significant changes to the Department's Title IX regulations. But those regulations are part of a complicated web of non-discrimination obligations involving not only sex, race and disability discrimination provisions enforced by the Department but also involving sex discrimination regulations enforced by more than two dozen other federal agencies ïmany of which fund the same educational institutions as the Department.

1. Any proposed solution should not treat claims of sexual harassment differently than claims of racial or disability harassment.

The Departmentôs proposed rules solely address sexual harassment under Title IX. But the Department previously has interpreted the protections under Title IX, Title VI of the Civil Rights Act (race, color, and national origin), and Section 504 of the Rehabilitation Act (disability) as a piece.[413] There is no reason, for example, why a named sexual harasser should be given more protections by the Department than a named anti-Semitic harasser, or why an employee who sexually harasses students enjoys greater protections than an employee who racially harasses students.

But the Departmentôs Assistant Secretary for Civil Rights, in an appellate role, that Title VI itself requires schools to respond to complaints of racial discrimination and harassment in a way significantly at odds with the obligations in the proposed rules.[414] The Assistant Secretary held that a school's response to a student's complaint of harassment must be more precisely, when the student tried to discuss the matter informally, but the school ñfall[s] short of an appropriate response when it presented the student with a This was so even though the Departmentôs Title VI regulations do not expressly require equitableò grievance proceedings.

The Assistant Secretary also concluded that a single incident of race or national origin discrimination (in that case, at a single event, charging students who were perceived to be Jewish $5 to attend a lecture, but waiving the fee for other students) could result in the creation of a hostile environment in violation of Title VI. The Assistant Secretary further held that it was ñimmaterialò whether the discriminatory activity was directed at a group of students or at individuals, because both ñwould have been reasonably accepted by the And the Assistant Secretary, without mentioning the need to find deliberate indifference, remanded the case back for his staff to determine whether a hostile environment on the basis of national origin or race in violation of Title VI had occurred. In the event (2011). Finally, the Assistant Secretary held that a school that is on notice of harassment must take appropriate responsive actionò to ñeliminate any hostile environment.

These legal standards ð which Assistant Secretary Marcus apparently viewed as flowing from the statute, since no regulations are cited ð are sharply distinct from the different standards proposed for Title

[413] *See, e.g.*, 2001 Guidance, *supra* note 58.

[414] Letter from Kenneth L. Marcus, Assistant Secretary re: Appeal of OCR Case No. 02-11-2157 (Rutgers University) (Aug. 27, 2018).

IX, demonstrating the impropriety of the proposed rules, as Title VI has long been understood to be a key touchstone for the interpretation of Title IX.[415] The Departmentôs attempt to sh schools are instructed apply in analogous circumstances of harassment and discrimination is inequitable, unjustified, and will sow confusion among those charged with enforcing these and complying with these inconsistent obligations.

2. Any changes to the Title IX regulations should be done in coordination with the more than 20 other federal agencies that have Title IX regulations.

The proposed rules ignore the fact that more than twenty federal agencies have promulgated Title IX regulations and most of those agencies all provide financial assistance to school districts, colleges, and universities, who are therefore bound by multiple agenciesô Title IX rules. Most of adopted their virtually identical final Title IX regulations based on a single common NPRM. Those twenty-plus final regulations were thereby regulatives closely

The Department acknowledges that the standards in its proposed rules around sexual harassment are not legally required and that it ñcould have[416] That necessarily means that other federal agencies are free to maintain their existing Title IX regulations and enforce them in a manner consistent with the educational institution could be subjected to conflicting obligations. And there is reason to think it is likely to happen, as the National Science Foundation has already publicly committed to focusing on sexual harassment by college and university grant recipients.[417]

The Regulatory Flexibility Act requires the Department to identify and address ñall relevFederal rules which may duplicate, overlap or conflict with the proposed rule,[418] and Executive Order 12866 requires it to ñavoid regulations that are inconsistent, incompatible, or duplicative with other Federal regulations.ò[419] The Department has failed to comply with this mandate.

E. The Department provided an inadequately short time period for public comment despite repeated, reasonable requests for an extension.

Throughout the comment period, advocates, students, members of congress, and members of the public requested extensions to the comment period, with no response. The Center and over 100 organizations, as well as thousands of students and members of the public, noted that the 60-day comment period was opened in the midst of the holiday season. This was a particularly busy time for students, who were juggling final exams, preparations for winter break, and traveling home for the holidays. Teachers and school administrators were similarly overburdened. Due to the inopportune timing of the comment period and due to the sheer magnitude of the proposed changes, a meaningful extension of the comment period would have been the only way to ensure that the public had a real opportunity to comment.

Further still, in the middle of the comment period, this Administration began the longest government shutdown in U.S. history, starting on December 22, 2018 and ending on January 25, 2019, the partial government shutdown has impacted roughly a quarter of federal agencies. There was not

[415] *See, e.g.*, U.S. Dept of Transp., 477 U.S. 597, 600 n.4 (1986); *Grove City Coll. v. Bell*, 465 U.S. Am. 555, 566 (1984) (Title IX was patterned after Title VI).
[416] 83 Fed. Reg. at 61466 (actual knowledge), 61468 (deliberate indifference).
[417] Natôl Sci. Fdn., *NSF Announces New Measures to Protect Research Community From Harassment* (Sept. 19, 2018), https://www.nsf.gov/od/odi/harassment.jsp.
[418] 5 U.S.C. § 603(b)(5).
[419] Executive Order 12866 § 1(b)(10).

a definitive statement from administration officials as to whether public comments, or requests for agency action were being accepted and considered by agency officials during the shutdown. It was unclear whether the main conduits for online public participation in rulemaking, regulations.gov and federalregister.gov, were operating during that time due to a lapse in appropriations. When visiting federalregister.gov, visitors have been confronted with a message stating that the site is not being ñsupported.ò On January 16, 2019, regulations.gov was shut down completely,[420] with no notice or warning½leaving members of the public with no option to submit their comments electronically.[421] While assurances were given that the website would become operational within 24 hours, members of the public continued to be left with the distinct impression that neither site was operational or being updated, and there was significant confusion about whether both sites remained available for accepting public comments throughout the government shutdown. Such widespread confusion inevitably discouraged the public from submitting comments.

The Department of Educationôs decision to extend the comment period by a mere 14 days for its proposed *regulations.gov* inaccessibility was woefully inadequate and did not sufficiently respond to the many requests for a *meaningful* extension to the comment period. Further still, because the online comment portals were not being updated due to the shutdown, the comment deadline is still listed as January 28th at both *federalregister.gov*[422] and as both January 28th and January 30th at *regulations.gov*,[423] which is most certainly causing public confusion and uncertainty about when the comment period actually ends. The Departmentôs proposed ñfixò did nothing to alleviate the confusion and uncertainty that has limited the opportunity to participate in the rulemaking process. The proposed rules should be withdrawn because the public was not able to meaningfully participate.

F. The proposed rules ignore the will of the American public and should be withdrawn.

The Department leadership proposed rules are out of step with the majority of Americans. Rather than harassment, they are decidedly undemocratic. The American public overwhelmingly agrees that strong Title IX protections are necessary and important to ensure students have equal opportunities.

The majority of the American people support strong Title IX protections, including those in the 2011 Guidance and 2014 Guidance that the Department rescinded in September 2017. Last fall, when the Department asked the public for input on deregulation (i.e., which rules the Department should repeal, replace, or modify),[424] over 12,000 people submitted comments about Title IX, with 99 percent of them supporting Title IX and 96 percent explicitly urged the Department to preserve its 2011 Guidance.[425] They were joined by more than 150,000 other people who signed petitions and statements in support of the Departmentôs 2011 Guidance.[426] However, just one day after the public comment period for the Department's *Evaluation of Existing Regulations*, 82 Fed. Reg. at 28431 (June 22, 2017)

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[420] The regulations.gov landing page displayed a message stating that the website will remain unavailable for the duration of the government shutdown.

[421] The Title IX rules specify that the Department of Education will not accept comments by email or fax. While regulations.gov was down, the only options were to mail in comments or hand-deliver them.

[422] Federal Register, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (last visited Jan. 27, 2019), https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

[423] Regulations.gov, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (last visited Jan. 27, 2019), https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001.

[424] U.S. Dep't of Educ., *Evaluation of Existing Regulations*, 82 Fed. Reg. 28431 (June 22, 2017) https://www.regulations.gov/contentStreamer?documentId=ED-2017-OS-0074-0001&contentType=pdf.

[425] Tiffany Buffkin et al., *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education's Executive Order 13777 Comment Call*, CAL. L. REV. ONLINE 2 (forthcoming) (Sept. 25, 2018) [last revised Dec. 31, 2018), available at https://ssrn.com/abstract=3255205.

[426] *Id.* at 27-28 (48,903 people signed petitions and statements supporting Title IX and the 2011 Guidance); Caitlin Emma, *Exclusive: Education reform groups team up to make bigger mark*, POLITICO (Sept. 6, 2017),

period closed, the Department rescinded both the 2011 Guidance and the 2014 Guidance and issued the 2017 Guidance, when it could not possibly have finished reading and considering all of the comments it had received.[427] The rescission was an anti-democratic move contrary to the APA, which was enacted to hold non-elected agency officials like Secretary DeVos accountable to constituents by requiring agencies to consider public comments during the rulemaking process.

The Departmentôs proposed rules ignore the cul
publicôs intolerance of sexual harassment, including sexual assault, from our schools and workplaces. In the past sixteen months, the #MeToo hashtag has used more than 19 million times on Twitter,[428] the Timeôs Up Legal Defense Fund al raised more
harassment,[429] and state legislators passed more than 100 bills strengthening protections against sexual harassment.[430] In fall 2018, millions of people gathered across the country, online, and on the steps of the Supreme Court in solidarity with Dr. Christine Blasey Ford, Professor Anita Hill, and other survivors who have courageously come forward yet have been denied justice. In the face of this overwhelming support for survivors of sexual violence and those confronting other forms of sexual harassment, the
Departmentôs proposed Title IX rules contravene t
harassment and violence is a human right and the right to not have oneôs education h
harassment is a civil right.

More than 800 law professors, scholars, and experts in relevant fields have signed letters opposing the proposed regulations.[431] Similarly, survivors at Michigan State University, University of Southern California, and Ohio State University who were sexually abused by Larry Nassar, George Tyndall, and Richard Strauss expressed opposition to the Departmentôs[432] in a letter proposed rule
Secretary DeVos and Assistant Secretary Marcus, more than 80 of these survivors shared their concern
that ñ[t]he proposed rules will make schools less safe for survivors and enable more perpetrators ev
to commit sexual assault in the future.ò[433] They agreed that if these rules are finalized, conseque
ñfewer survivors will report their assaults and more survivors will be denied their legal right to equal access to educational opportunities after experiencing sexual assault.ò[434] More than 900 mental health professionals submitted a comment condemning the proposed rules, claiming that they would ñcause significant harm to students who report sexual harassment, including sexual assault, . . . [and] discourage students who have been victimized from

https://www.politico.com/tipsheets/morning-education/2017/09/06/exclusive-education-reform-groups-team-up-to-make-bigger-mark-222139 (more than 105,000 petitions delivered to Department of Education supporting 2011 and 2014 Title IX Guidances).

[427] Depôt of Educ., *Dear Colleague Letter rescinding 2011 Guidance and 2014 Guidance* (Sept.22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

[428] Monica Anderson & Skye Toor, *How social media users have discussed sexual harassment since #MeToo went viral*, PEW RESEARCH CTR. (Oct. 11, 2018), http://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral.

[429] Natalie Robehmed, *With $20 Million Raised, Time's Up Seeks 'Equity And Safety' In The Workplace*, FORBES (Feb. 6, 2018), https://www.forbes.com/sites/natalierobehmed/2018/02/06/with-20-million-raised-times-up-seeks-equity-and-safety-in-the-workplace/#f1425ca103c5.

[430] Andrea Johnson, Maya Raghu & Ramya Sekhran, *#MeToo One Year Later: Progress In Catalyzing Change to End Workplace Harassment*, NAT ô WOMEN ô LAW CTR. 1 (Oct. 19, 2018), https://nwlc.org/resources/metoo-one-year-later-progress-in-catalyzing-change-to-end-workplace-harassment.

[431] Letter from 201 Law Professors to the Honorable Betsy DeVos, Sec'y of Educ. (Nov. 8, 2018), http://goo.gl/72Aj1b; Letter from Women's Studies Assôn members to Secôy of Ed Elisabeth Kenneth L. Marcus, (Nov. 11, 2018), https://sites.google.com/view/nwsa2018openletter/home.

[432] Letter from 89 Survivors of Larry Nassar, George Tyndall, and Richard Strauss at Michigan State University, Ohio State University, and University of Southern California to Marcus (Nov. 1, 2018), at 2, https://www.documentcloud.org/documents/5026380-November-1-Survivor-Letter-to-ED.html.

[433] *Id.* at 1

[434] *Id.* at 2.

coming forward,ò and that they would also ñreinfo
long prevailed in our society, and [] worsen the problem of sex discrimination[435] in educatio

Rather than listening to survivors, students, and mental health professionals who understand the impact of trauma, the Department has chosen to listen to education lobbyists that have spent tens of thousands of dollars asking the Trump administration on fewer Title IX requirements.[436]

XII. Directed Questions

A. Q1: The proposed rules are unworkable for elementary and secondary school students and fail to take into account the age and developmental level of elementary and secondary school students.

As set out in detail above, the following proposed rules are especially unworkable for elementary and secondary school students because they fail to take into account the age and developmental level of those students and fail to consider the unique aspects of addressing sexual harassment in elementary and secondary schools: the narrow definition of harassment, narrow notice standard, mandatory dismissal of out-of-school harassment, requirement of a formal complaint to trigger deliberate indifference liability, permitted use of live cross-examination, permitted use of mediation, and lack of a clear timeframe (see Parts II.B-II.D, III.C, IV.B-IV.C, and IV.F above for more detail).

B. Q2: Proposed §§ 106.44(b)(3) and § 106.45(b)(3)(vii) would subject students in both elementary and secondary schools and in higher education to different types of harm.

Proposed § 106.44(b)(3) would, as discussed in more detail in Part III.C, incentivize institutions of higher education to steer students who report sexual harassment away from filing a formal complaint and toward simply accepting ñsupportive measures.ò defined narrowly in proposed § 106.30 to exclude many types of effective accommodations, including transferring the respondent out of the complainantôs education program or activity, or measures designed to preserve or restore ñequal access ò to educational opportunities and benefits.

All schools, regardless of type, provide supportive measures to students who report sexual harassment regardless of whether there is a formal complaint. However, no school should enjoy a safe harbor merely because it has provided supportive measures in the absence of a formal complaint, as schools should be considering the safety of all students and whether or not a failure to investigate or engage in disciplinary action against the respondent would subject the complainant and/or other students to harm.

Proposed § 106.45(b)(3)(vii) would also be unnecessarily traumatic for complainants in higher education and unnecessarily inflexible for institutions of higher education (see Part IV.B above for more detail). All students, regardless of age or type of school, should be allowed to answer questions through a neutral school official or through written questions ð not through any type of live and adversarial cross-examination.

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[435] Mental Health Professionals Letter, *supra* note 130.

[436] *See* Dana Bolger, Betsy DeVosôs New Harassment Project Protects Schools, N.Y. TIMES (Nov. 27, 2018), https://www.nytimes.com/2018/11/27/opinion/betsy-devos-title-ix-schools-students.html.

C. Q3: The proposed rules are unworkable in the context of sexual harassment by employees and fail to consider other unique circumstances that apply to processes involving employees.

The following proposed rules are especially unworkable in the context of sexual harassment of students by employees and fail to consider other unique circumstances that apply to processes involving employees: the deliberate indifference standard, narrow definition of sexual harassment, narrow notice standard, mandatory dismissal of out-of-school harassment, permitted use of live cross-examination in elementary and secondary schools, required use of live cross-examination in higher education, permitted use of mediation, and permitted (and in many cases, required) use of the clear and convincing evidence standard (see Parts II.A-II.D and IV.B-IV.D.2 above for more detail).

In addition, proposed § 106.45(b)(7) would allow schools to destroy records involving employee-respondents after three years, allowing repeat employee offenders to escape accountability despite multiple complaints, investigations, or findings against them (see Part IV.I above for more detail).

Furthermore, because of myriad conflicts with Title VII standards and purposes, the proposed rules are also unworkable when the harassment victim is an employee. Schools following the proposed rules in such circumstances would deny Title VII rights and face significant risk of increased Title VII liability (see Part VII above for more detail).

D. Q4: Proposed § 106.45(b)(1)(iii) fails to ensure that schools would provide necessary training to all appropriate individuals, including those at the elementary and secondary school level.

Regardless of its content, proposed § 106.45(b)(1)(iii) is inadequate and effectively meaningless because the rest of the proposed rules create a definition of sexual harassment that is in conflict with Supreme Court precedent and incorrect as a matter of law. Even if a school followed all of the proposed rules meticulously, including proposed § 106.45(b)(1)(iii), it would still be training its employees on the wrong definition of sexual harassment.

Assuming for a moment the legitimacy of these rules, proposed § 106.45(b)(1)(iii) is still inadequate because it would not require training of all school employees. It is not enough for schools to only train coordinators, investigators, and adjudicators on sexual harassment. Many school employees – including teachers, guidance counselors, teacher aides, playground supervisors, athletics coaches, cafeteria workers, school resource officers, bus drivers, professors, teaching assistants, residential advisors, etc. – interact with students on a day-to-day basis and are better-positioned than the Title IX coordinator and other high-ranking administrators to respond to sexual harassment before it escalates. This is especially true at the elementary and secondary school level, where the age differential has a greater impact on students and where students are more susceptible to grooming by adult sexual abusers. However, while school employees are in the best position to know whether other employees are engaging in inappropriate behaviors with students, they cannot respond adequately to sexual harassment if they do not know how to identify it, how to recognize grooming behaviors, or how to report sexual harassment to the Title IX coordinator. In addition, these school employees are the ones who must help implement supportive measures, such as homework extensions, hall passes to see a guidance counselor, and no-contact orders. But they cannot effectively do so if they do not understand the grievance process and the mechanisms for protecting student safety. Furthermore, all school employees should be trained on employee-on-student sexual harassment so that they can identify inappropriate conduct and interactions with students.

Proposed § 106.45(b)(1)(iii) is also inadequate because it would not require trainings to be trauma-informed. Scientific, trauma-informed approaches are critical to sexual assault investigations. For example, in order to ensure that investigations are reliable in ascertaining what actually occurred between the parties in a complaint, investigators should be knowledgeable about common survivor responses to sexual assault, such as tonic immobility, an involuntary paralysis common among survivors during their assaults[437] that has been recognized by psychiatrists[438] and legal scholars[439] in numerous peer-reviewed publications. Judges, too, have recognized the importance of trauma-informed training in properly adjudicating sexual assault cases. In fact, the National Judicial Education Program (NJEP), a project sponsored by the U.S. Department of Justice, produced a training manual written for judges by a nationwide survey of judges on what they wish they had known before they had adjudicated a sexual assault case.[440] These judges agreed that many survivor responses to sexual violence are counterintuitive to those that are not knowledgeable about sexual assault,[441] including tonic immobility, collapsed immobility, dissociation, delayed reporting, post-assault contact with the assailant, imperfect retrieval of memories, and a flat affect while testifying.[442]

Finally, proposed § 106.45(b)(1)(iii) is inadequate because it does not require employees to be trained on stereotypes and implicit biases impacting the full range of protected classes or on how to address the unique needs of harassment victims who are people of color, LGBTQ individuals, and/or people with disabilities. As explained above in more detail in Parts I.C and IV.A, schools are more likely to ignore or punish certain groups of students who report sexual harassment, including women and girls of color (especially Black women and girls), LGBTQ students, and students with disabilities because of stereotypes and implicit bias.

E. Q5: Parties with disabilities

The following proposed rules fail to take into account the needs of students with disabilities and fail to consider the different experiences, challenges, and needs of students with disabilities: the narrow definition of sexual harassment, narrow notice standard, mandatory dismissal of out-of-school harassment, required presumption of no harassment, permitted use of live cross-examination in elementary and secondary schools, required use of live cross-examination in institutions of higher education, permitted use of mediation, and lack of a clear timeframe (see Parts II.B-II.D, IV.A-IV.C, and IV.F above for more detail).

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[437] *E.g.*, Francine Russo, *Sexual Assault May Trigger Involuntary Paralysis*, SCIENTIFIC AMERICAN (Aug. 4, 2017), https://www.scientificamerican.com/article/sexual-assault-may-trigger-involuntary-paralysis; James Hopper, *Why many rape victims don't fight or yell*, WASH. POST (June 23, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell.

[438] *E.g.*, Juliana Kalaf et al., *Sexual trauma is more strongly associated with tonic immobility than other types of trauma: A population based study*, 25 J. AFFECTIVE DISORDERS 71-76 (June 2017), *available at* https://www.sciencedirect.com/science/article/pii/S0165032716317220; Brooke A. de Heer & Lynn C. Jones, *Investigating the Self-Protective Potential of Immobility in Victims of Rape*, 32 VIOLENCE & VICTIMS 210-29 (2017), *available at* http://connect.springerpub.com/content/sgrvv/32/2/210; Kasia Kozlowska, et al., *Fear and the Defense Cascade: Clinical Implications and Management*, 23 HARVARD REV. PSYCHIATRY 263-87 (July/Aug. 2015), *available at* https://journals.lww.com/hrpjournal/toc/2015/07000.

[439] Melissa Hamilton, *The Reliability of Assault Victims' Immediate Accounts: Evidence from Trauma Studies*, 26 STAN. L. & POL'Y REV. 269, 298, 301-03 (2015), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492785;

[440] National Judicial Education Program, *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case*, LEGAL MOMENTUM (2010) [hereinafter *Judicial Manual on Sexual Assault*], *available at* https://victimsofcrime.org/docs/nat-conf-2013/judges-tell-8-15-12_handout.pdf.

[441] *Judicial Manual on Sexual Assault*, *supra* note 440, at 2.

[442] *Id.* at 6-9.

The proposed § 106.44(c) may also encourage schools to impose unfair or excessive discipline on respondents with disabilities. This risk is exacerbated by the fact that proposed § 106.45(b)(1)(iii) would not require training on least restrictive remedies for school employees, including school police.

F. Q6: Proposed § 106.45(b)(4)(i) should require all schools to use the preponderance of the evidence standard in all Title IX proceedings.

The preponderance of evidence standard is the only standard of evidence that should be used in Title IX cases in all schools, regardless of what standard is used in disciplinary proceedings for other student misconduct and regardless of what standard is used in faculty misconduct proceedings (see Parts IV.D and VII for more detail).

G. Q7: Proposed § 106.45(b)(3)(viii) is unclear and would facilitate prohibited retaliation.

Proposed § 106.45(b)(3)(viii) fails to provide clarification on the admissibility of irrelevant or prejudicial evidence and opens the door to retaliation against complainants, respondents, and witnesses (see Part IV.H for more detail).

H. Q8: Proposed § 106.45(b)(7) would allow schools to destroy records relevant to a student or employee's Title IX lawsuit or administrative complaint and would allow repeat employee offenders to escape accountability.

As discussed in more detail in Part IV.I above, proposed § 106.45(b)(7) would allow schools in many states to destroy relevant records before a student or employee complainant is able to file a complaint or complete discovery in a Title IX lawsuit; and would allow the average school in an OCR investigation to destroy relevant records before the investigation is completed. In addition, the proposed rule would allow schools to destroy records involving employee-respondents after three years, allowing repeat employee offenders to escape accountability despite multiple complaints, investigations, or findings against them.

I. Q9: Proposed § 106.45(b)(3)(vii) lacks flexibility and would be especially burdensome on schools that are not a traditional four-year college or university.

The proposed rule lacks flexibility and would be especially burdensome on community colleges, vocational schools, online schools, and other educational institutions that lack the resources of a traditional four-year college or university (see Part IV.B for more detail).

* * * * *

The Department's proposed rules import inappro
rely on sexist stereotypes about individuals who have experienced sexual harassment, including sexual assault, and impose procedural requirements that force schools to tilt their Title IX investigation processes in favor of respondents to the detriment of survivors and other harassment victims. Instead of effectuating Title IX's prohibition on sex discrimination, these rules se
and obligation to address sexual harassment and (2) to protect named harassers and rapists from accountability for their actions. Twenty-eight of this Administration's actions have
already been successfully challenged in federal court,[443] and this NPRM, if finalized, is likely to be successfully challenged as well.

[443] Margot Sanger-Katz, *For Trump Administration, It Has Been Hard to Follow the Rules on Rules*, N.Y. TIMES (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/upshot/for-trump-administration-it-has-been-hard-to-follow-the-rules-on-rules.html.

For all of the above reasons, the National Wom
Education to immediately withdraw this NPRM and instead focus its energies on vigorously enforcing the Title IX requirements that the Department has relied on for decades, to ensure that schools promptly and equitably respond to sexual harassment.

Sincerely,

Emily J. Martin
Vice President for Education & Workplace Justice
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/s/ Shiwali Patel
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To President-Elect Biden and Vice President-Elect Harris ô Transition Team:

As civil rights advocates and advocates for student survivors of sexual assault and other forms of sexual harassment, we are grateful for President-Elect Biden ô long track record of and continued commitment to supporting student survivors and for Vice President-Elect Harris ô work to end sexual harassment and advance gender equity. Over the past four years, the Department of Education (ñthe Departmentò) has taken many steps under the Trump administration to weaken civil rights protections for student survivors, including by promulgating and implementing a new harmful Title IX rule that forces schools to ignore sexual harassment and adopt uniquely unfair procedures to address it. Under the Biden-Harris administration, we look forward to the Department returning to its role of protecting rather than eroding student ô Below are our recommendations to the Biden-Harris administration to address sexual harassment in schools, including strengthening Title IX enforcement, increasing support and resources for key initiatives, supporting federal legislation, improving data collection, appointing personnel, and listening directly to student survivors.

1. **<u>The Biden-Harris administration should strengthen Title IX enforcement.</u>**

The Biden-Harris administration should take several key steps to strengthen Title IX enforcement and reverse the damage caused by the Trump administration. First, as soon as President-Elect Biden takes office, the Department should stop enforcement of the recent changes to the Title IX rule and announce that it is taking steps to initiate new rulemaking, including by conducting a listening tour with students and survivors ð with a focus on underserved communities ð to understand how sexual harassment and the recent changes to the Title IX rule has affected student access to in-person and online education. The Department should also restore investigations of systemic discrimination at institutions, including of how schools respond to sexual harassment.

Pending new rulemaking, we ask that the Department promptly release interim guidance, drawn from key portions of earlier guidance addressing Title IX protections against sexual harassment in schools, and also addressing related issues that have emerged during the COVID-19 pandemic.

During the first 100 days, the Department should propose rescinding the Trump administration Title IX rules and replacing them with new Title IX sexual harassment regulations that would restore standards from earlier guidance; reaffirm that Title IX covers dating violence, domestic violence, and sex-based stalking; specify a wide range of supportive measures and remedies that schools must provide survivors; provide robust protections against retaliation; and ensure complainants and respondents have equal procedural rights in school investigations and disciplinary proceedings addressing harassment. As a part of this rulemaking, the Department should also issue new Title IX regulations addressing protections for LGBTQ students consistent with *Bostock* and other case law; addressing protections for pregnant, parenting, and breastfeeding students; prohibiting dress codes that rely on and reinforce gender stereotypes; and ensuring that religious exemptions do not inappropriately limit protections against sex discrimination.

2. **<u>The Biden-Harris administration should increase support and resources for key anti-sexual harassment initiatives.</u>**

In its first month, the Biden-Harris administration should establish a new White House Task Force on sexual harassment in schools, with an explicit focus on race, color, national origin, gender,

LGBTQ status, disability, and the intersections between these identities. The Task Force should develop and uplift model policies and other resources for schools, including policies and resources addressing supportive measures and remedies, sex education, training for school staff, data collection, and various kinds of equitable discipline models.

The Biden-Harris administration should also support and fund key anti-sexual harassment initiatives, including by establishing new grant programs and providing additional funding to the Department of Justiceôs Office on Violence Against Women and the Department of Health and Human Services, with a focus on schools with the greatest need. These grant programs can fund regular school climate surveys about sexual harassment, restorative justice and transformative justice pilot programs conducted by trained outside facilitators, comprehensive sexual health and consent education for all PK-12 students, and regular training to all school staff on how to recognize and respond to sexual harassment.

Finally, the FY 2022 budget request should include a significant increase for the Office for Civil Rights (OCR) ð a two-fold increase from the FY 2020 appropriation ð to ensure that OCR has the resources to investigate complaints promptly, provide technical assistance to schools, and otherwise effectively enforce civil rights laws.

3. **The Biden-Harris administration should support federal legislation that protects survivors and aims to prevent harassment in schools.**

There are a number of opportunities for the Biden-Harris administration to support federal anti-sexual harassment legislation. To ensure that PK-12 students are not left out of the Title IX narrative, the administration should support the Stop Sexual Harassment in K-12 Act (H.R. 8290) and the Supporting Survivors of Sexual Harassment in Schools Act (H.R. 8193). In higher education, the administration should support reauthorization of the Higher Education Act of 1965 with additional protections, including those found in the Hold Accountable and Lend Transparency on Campus Sexual Violence Act (ñHALT òH.R. 3381), the Tyler Clementi Higher Education Anti-Harassment Act (H.R. 2747), and Safe Equitable Campus Resources and Education Act (ñSECURE Act of 2021ò; H.R. 2026), and the reauthorization of the Violence Against Women Act. Furthermore, federal legislation like the Gender Equity in Education Act (H.R. 3513) can fund the training and capacity building of Title IX coordinators in both PK-12 and higher education.

4. **The Biden-Harris administration should improve agency data collection of sex-based harassment.**

The Biden-Harris administration should take steps to improve the accuracy, reliability, and utility of the Civil Rights Data Collection (CRDC) and the Campus Safety and Security Survey (CSS). First, the Department should address the ongoing and alarming problem that 70-90% of school districts and campuses report each year to the CRDC and CSS, respectively, that they received zero allegations of sex-based harassment or rape in the previous academic year, as these statistics are simply not credible.[1] The Department should also restore and update the Clery Handbook, which the Trump administration rescinded, to ensure that campus administrators have the necessary guidance to submit timely and accurate data to the CSS about crimes on and near campus. And in

[1] AAUW, *Schools Are Still Underreporting Sexual Harassment and Assault* (Nov. 2, 2018), https://ww3.aauw.org/article/schools-still-underreporting-sexual-harassment-and-assault.

K-12, the Department should expand the CRDC to include additional questions about student-on-student, staff/volunteer-on-student, and staff-on-staff sexual misconduct, both on and off campus, and should update the CRDCôs definitions of ñ Act definitions used in the CSS.

5. **The Biden-Harris administration should appoint diverse and highly qualified individuals who are committed to gender justice and ending sexual violence.**

The Biden-Harris administration will not be able to achieve the policy goals of preventing and remedying sexual harassment in schools without hiring diverse and highly qualified individuals who are committed to gender justice and all forms of justice to serve in key administration and agency positions. A Special Assistant for Gender Equity, a role that has remained unfilled in the last few administrations, should be appointed in the Department of Education to oversee gender equity programs. The administration should robustly resource the White House Council on Gender Equity (ñthe Council on Women and Girls) with issue area experts, including in education, to build on the past successes of the Obama administration White House Council on Women and Girls. The administration should also create a dedicated Senior Advisor on gender equity, appoint staff who are committed to gender justice to the Domestic Policy Council and Council of Economic Advisors, and designate staff in each agency at the Deputy Secretary level with reporting authority on gender justice issues to the Council.

6. **The Biden-Harris administration should listen directly to survivors and students about their experiences and needs.**

It is critical for students and survivors to have a direct say in the policies that impact their educational and personal experiences. To that end, the Biden-Harris administration should conduct a listening tour, as described above, and should take intentional steps to seek out perspectives from diverse communities, movements, and organizations that are leading the fight against sexual harassment in schools. In particular, the administration should seek out the perspectives of Black, Indigenous, and other survivors of color; LGBTQ survivors; survivors with disabilities; survivors in PK-12 schools, community colleges, vocational schools, universities, and graduate schools; survivors at HBCUs, MSIs, and tribally controlled schools; and survivors in rural, suburban, and urban areas.

* * *

Thank you for your consideration of our requests for the Biden-Harris Administration to effectively address sexual harassment in schools. If you have any questions about this letter, please contact Shiwali Patel (spatel@nwlc.org), Elizabeth Tang (etang@nwlc.org), and Lara Kaufmann (lkaufmann@girlsinc.org).

Sincerely,

American Association of University Women (AAUW)
American Atheists
American Federation of Teachers
American Psychological Association
AnitaB.org
Arkansas Coalition Against Sexual Assault
Assault Care Center Extending Shelter and Support

Atlanta Women for Equality
Augustus F. Hawkins Foundation
Autistic Self Advocacy Network
BHS Stop Harassing
California Coalition Against Sexual Assault
California Women's Law Center
Champion Women
Chicago Alliance Against Sexual Exploitation (CAASE)
Clearinghouse on Women's Issues
Clery Center
Colorado Coalition Against Sexual Assault (CCASA)
Connecticut Alliance to End Sexual Violence
Coordinadora Paz para la Mujer, Puerto Rico Coalition Against Domestic Violence and Sexual Assault
Crisis Intervention Service
Day One
Disability Rights Education & Defense Fund (DREDF)
Domestic Violence Intervention Program
Education Law Center-PA
End Rape On Campus
Enough is Enough Voter Project
Equal Rights Advocates
Every Voice Coalition
Faculty Against Rape
Family Crisis Centers
Family Equality
Family Resources
Feminist Majority Foundation
Florida Council Against Sexual Violence
Georgia Coalition Against Domestic Violence
Girls Inc.
GLSEN
Harvard Law School Gender Violence Program
Hindu American Foundation
Human Rights Campaign
Idaho Coalition Against Sexual & Domestic Violence
Illinois Coalition Against Sexual Assault
Iowa Coalition Against Sexual Assault (IowaCASA)
It's On Us
Jane Doe Inc.
Japanese American Citizens League
Kansas Coalition Against Sexual and Domestic Violence
Kentucky Association of Sexual Assault Programs
Know Your IX
LaFASA
Latinas Unidas por un Nuevo Amancecer (L.U.N.A.)
Legal Momentum, the Women's Legal Defense and Education Fund
Linda Shevitz Gender Equity in Edcuation

Maine Coalition Against Sexual Assault
Maryland Coalition Against Sexual Assault
Michigan Coalition to End Domestic & Sexual Violence
Minnesota Coalition Against Sexual Assault
Missouri Coalition Against Domestic and Sexual Violence (MCADSV)
Monsoon Asians & Pacific Islanders in Solidarity
NASPA - Student Affairs Administrators in Higher Education
National Alliance for Partnerships in Equity (NAPE)
National Alliance to End Sexual Violence
National Association of Councils on Developmental Disabilities
National Center for Youth Law
National Education Association
National Organization for Women
National Organization of API Ending Sexual Violence
National Women's Law Center
National Women's Political Caucus
NC Coalition Against Sexual Assault
Nebraska Coalition to End Sexual and Domestic Violence
Network for Victim Recovery of DC (NVRDC)
Nevada Coalition to End Domestic and Sexual Violence
New York State Coalition Against Sexual Assault
North American MenEngage Network
One Student
Pennsylvania Coalition Against Rape
PFLAG National
Public Justice
RESTORE Sexual Assault Services
S.E.S.A.M.E., Inc. (Stop Educator Sexual Abuse, Misconduct and Exploitation)
SafeBAE
SafePlace
Secular Student Alliance
Shift Cultures
Society of Women Engineers
Southeast Asia Resource Action Center (SEARAC)
Standpoint
Stop Sexual Assault in Schools (SSAIS.org)
Texas Association Against Sexual Assault
The Maryland Multicultural Coalaition
UIS
Union for Reform Judaism
Vermont Network Against Domestic and Sexual Violence
Victim Rights Law Center
Wellesley Centers for Women, Wellesley College
Wisconsin Coalition Against Sexual Assault
Women of Reform Judaism
Women's Law Project
Young Invincibles
YWCA Evanston/North Shore