

# DISCIPLINING FAIRNESS: THE ROLE OF PUBLIC PERCEPTION IN DISCIPLINING CAMPUS SEXUAL ASSAULT

## ABSTRACT

This Note addresses the influence of media coverage and politicization of institutional responses on Title IX disciplinary proceedings for allegations of sexual assault or misconduct. The Note posits that public misperception and divisive rhetoric motivated the withdrawal of the 2011 Dear Colleague Letter on Sexual Violence, resulting in unfair procedures and increased barriers for victims of sexual assault. The rules proposed by the Department of Education (DOE) attempt to turn school disciplinary proceedings into criminal trials, permitting higher standards of proof, cross-examinations, and deferments to police and outside investigations. In attempting to afford greater safeguards for the accused, this Note argues that the Administration has overcorrected and overlooked the fundamental purpose of Title IX—to “protect students from sex discrimination and protect equal educational opportunities.” These protections are to apply equally to all; by codifying standards favorable to the accused, the scales are further tipped against alleged victims as they seek to report and repair after a traumatic incident that poses a threat to their well-being and educational opportunity. Maintaining equity in institutional disciplinary proceedings does not violate due process—rather, it mitigates the risk that students will be deprived of an education in a safe and hostility-free environment.

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### INTRODUCTION

This Note addresses the misuse of the media as a platform for the Trump Administration to politicize institutional responses to Title IX disciplinary proceedings and to disenfranchise victims of sexual assault. Two months before the Department of Education's (DOE) Office for Civil Rights (OCR) officially rescinded the 2011 Dear Colleague Letter on Sexual Violence,<sup>1</sup> Acting Assistant Secretary for Civil Rights, Candice Jackson, made statements to the *New York Times*<sup>2</sup> that 90% of campus sexual assault allegations fall into the category of drunk sex and morning-after regrets.<sup>3</sup> While Jackson later apologized for her "flippant" remarks,<sup>4</sup> the statement foreshadowed, for victims' rights advocates, the underlying motivation behind the OCR's decision to withdraw the Title IX guidance: presumptions of false accusations.<sup>5</sup>

The same attitude resonates beyond the university context, as President Trump characteristically dismisses the women who accused him of sexual misconduct during his campaign as "phony accusers"<sup>6</sup> who are seeking to capitalize on his powerful position. President Trump tweeted this same sentiment during Justice Brett Kavanaugh's confirmation process: if the sexual assault reported by Dr. Christine Blasey Ford "was as

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1. See Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007). The 2011 Dear Colleague Letter on Sexual Violence is a guidance document issued by the OCR under the Obama Administration as an attempt to provide students "with an educational environment free from discrimination," while recognizing that "[t]he sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination . . . ." RUSSELLYN ALI, U.S. DEPT. ED., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER ON SEXUAL VIOLENCE 1, 1 (Apr. 4, 2011). Agencies typically rely on such guidance documents to simultaneously inform the public of policies and provide clear direction to agency employees.

2. Erica L. Green & 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>.

3. *Id.*

4. Tovia Smith, *Trump Administration Defends Campus Sexual Assault Rules*, NPR (July 20, 2018, 5:11 AM), <https://www.npr.org/2018/07/20/630742928/trump-administration-defends-campus-sexual-assault-rules>.

5. *Id.*

6. *Id.*

bad as she says,” then she would have filed charges at the time of the alleged assault.<sup>7</sup> White House Spokesperson, Kerri Kupec, closely echoed this derision of accusers following a second allegation against Justice Kavanaugh by former classmate, Deborah Ramirez.<sup>8</sup> Kupec characterized the allegation as “the latest in a coordinated smear campaign . . . designed to tear down a good man.”<sup>9</sup> Such statements not only attempt to minimize women’s agency to report instances of sexual assault but also bolster the impression that the current Administration predicates its sexual assault policies on a perpetuation of victim-blaming ideals and misplaced criminal due process standards.<sup>10</sup>

These archaic notions were displayed even more prominently as a national spotlight shined on the Judiciary Committee hearing of Dr. Ford and then-Supreme Court nominee Kavanaugh.<sup>11</sup> The impassioned testimony from Dr. Ford (that her memory of the alleged assault and the laughter “haunted [her] episodically as an adult,”)<sup>12</sup> and Kavanaugh (that he was 100% innocent)<sup>13</sup> incited a fury of backlash from both sides of the political divide—drudging up emotionally-charged images of the believability of the victim and sincerity of the accused. Senator Lindsey Graham’s (South Carolina-R) exclamation—that voting against confirmation would mean “legitimizing the most despicable thing” conceivable during his time in politics—exemplified the extent of partisanship in the questioning.<sup>14</sup> While politics weighed heavily in the contentious hearing, the American Bar Association (ABA) quickly released a letter urging the Judiciary Committee to ground its vote in the commitment to the rule of law and due process.<sup>15</sup> The ABA recognized the danger in these sentiments and behavior, which are the driving force behind the shifting response toward sexual assault on college campuses and the new Title IX regulations.

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7. Sheryl Gay Stolberg, *Grassley Extends Negotiation Deadline for Christine Blasey Ford*, N.Y. TIMES (Sept. 21, 2018), [https://www.nytimes.com/2018/09/21/us/politics/trump-kavanaugh-blasey-attack.html?emc=edit\\_na\\_20180921&nl=breaking-news&nid=72778888ing-news&ref=cta](https://www.nytimes.com/2018/09/21/us/politics/trump-kavanaugh-blasey-attack.html?emc=edit_na_20180921&nl=breaking-news&nid=72778888ing-news&ref=cta).

8. Ronan Farrow & Jane Mayer, *Senate Democrats Investigate a New Allegation of Sexual Misconduct, From Brett Kavanaugh’s College Years*, NEW YORKER (Sept. 23, 2018), <https://www.newyorker.com/news/news-desk/senate-democrats-investigate-a-new-allegation-of-sexual-misconduct-from-the-supreme-court-nominee-brett-kavanaughs-college-years-deborah-ramirez>.

9. *Id.*

10. Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call For Victims’ Attorneys*, 65 DRAKE L. REV. 293, 314–15 (2017).

11. National news outlets broadcasted the hearings live on September 27, 2018. Eric Bradner & MJ Lee, *Ford ‘100%’ Certain of Assault Claim; Kavanaugh says ‘I am Innocent’*, CNN (Sept. 28, 2018, 12:51 AM), <https://www.cnn.com/2018/09/27/politics/brett-kavanaugh-hearing/index.html>.

12. *Id.*

13. *Id.*

14. Justin Sink & Jennifer Jacobs, *Kavanaugh’s Fiery Denial Gives Republicans Cover to Vote ‘Yes’*, BLOOMBERG (Sept. 27, 2018, 4:53 P.M.), <https://www.bloomberg.com/news/articles/2018-09-27/kavanaugh-s-fiery-denial-gives-republicans-cover-to-vote-yes?srnd=politics-vp>.

15. Letter from Robert M. Carlson, President, American Bar Association to The Hon. Charles E. Grassley, Chairman, Comm. on the Judiciary, U.S. Senate (Sept. 27, 2018), <http://www.documentcloud.org/documents/4951406-Senator-Grassley-From-ABA-9-27-18.html>.

This Note argues that the portrayal of Title IX disciplinary proceedings by the media and prominent officials has dangerously politicized institutional responses to sexual assault allegations, which ultimately misconstrues statutory due process protections; mischaracterizes both victims and accused; threatens to suppress reporting; and deprives victims of necessary resources. The heightened scrutiny brought on by the media, along with the current Administration's efforts to strip victims of their Title IX protections, demonstrates the need to oppose the imposition of criminal due process standards in the sphere of higher education.

New proposed guidance dangerously departs from past practice in a way that not only misconstrues the motivations of the victims coming forward but also misconprehends the nature and purpose of the school disciplinary proceedings tasked with addressing allegations of sexual misconduct. The current Administration's Title IX sexual misconduct policies will be detrimental to student-victims who will experience diminished institutional protections in the reporting process, will be dissuaded from reporting, and will lose their rights as a result of misinformed "due process" considerations. The media, as a conduit for the Trump Administration's highly divisive political rhetoric, contributes to national confusion on the distinction between institutional disciplinary proceedings and criminal trials for sexual misconduct. Because the central purpose of Title IX is to "protect students from sex discrimination and protect equal educational opportunities,"<sup>16</sup> it is vital that school disciplinary proceedings remain wholly distinct from the criminal system. Establishing and maintaining separateness between these proceedings will allow greater discretion in sanctions and remedies under a standard of evidence that affords equitable access to justice for both parties—not merely the accused.

This Note proceeds as follows. Part I discusses the development of Title IX, its structural intent, and its application to institutions of higher education following the withdrawal of the 2011 Dear Colleague Letter guidelines. Part II focuses on the legal distinctions between criminal due process rights and those afforded to the accused in civil and institutional proceedings. This Part, in particular, analyzes the criticisms of the criminal framework for sexual misconduct proceedings at universities. Next, Part III examines the detrimental effects of the media's portrayal of sexual misconduct complaints on campuses and the characterization of the victims that report, specifically in the wake of the #MeToo movement. Part IV highlights a case study from the University of Michigan, which outlines institutional responses to violations of Title IX, the structural mechanics of the University's procedures, and the public response. Finally, Part V argues that to ensure victims' rights are protected in the midst of media skepticism and administrative criticism, there must be a nexus between a

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16. See Behre, *supra* note 10, at 324.

political remedy, leveraged through the entities like the #MeToo movement, and the congressional process.

### I. THE DEVELOPMENT AND LANDSCAPE OF TITLE IX IN HIGHER EDUCATION

On June 23, 1972, President Richard Nixon signed into law Title IX of the Education Amendments of 1972.<sup>17</sup> The language of Title IX states that no person “shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination”<sup>18</sup> by any educational institution that receives federal funds.<sup>19</sup> The impetus for this statute was derived from the fundamental 1950s Supreme Court holding in *Brown v. Board of Education*,<sup>20</sup> which bans racial segregation in public education,<sup>21</sup> and the subsequent Civil Rights Act of 1964, that prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.<sup>22</sup> As the tides began to shift towards equitable protections for the historically disenfranchised, the statutory framework settled, but a notable gap still remained: sex discrimination in education. Title IX was developed to fill that gap through mimicking the language and mechanics of fellow civil rights statutes, Title VI and Title VII.<sup>23</sup> How precisely to fill the gap has caused a great deal of consternation, which has permeated in the rhetoric throughout Title IX’s development.

This Section provides a temporal framework from which these new policies developed. First, I discuss the legislative development of Title IX and its statutory counterparts, followed by a brief introduction of the Clery Act and its impact on data reporting at institutions. The latter half of this Section discusses the development of the Dear Colleague Letter, its retraction in late 2017, and the uncertainty of the future proceedings amidst variable public discourse.

#### A. *The Rise of Title IX*

Though the passage of Title IX did not come until the early 1970s, it was over a decade in development by the time it hit President Nixon’s desk.<sup>24</sup> In the midst of the women’s civil rights movement, debates over the lack of equity and meaningful progress for women in education shed light on a pattern of bias in higher education.<sup>25</sup> The American Association

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17. *Overview of Title IX of the Education Amendments of 1972, U.S.C. A§ 1681 Et. Seq.*, U.S. DEP’T JUS., <https://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq> (last visited Sept. 3, 2019).

18. 20 U.S.C. § 1681 (2018).

19. IRAM VALENTIN, U.S. DEP’T EDUC., TITLE IX: A BRIEF HISTORY (1997).

20. 347 U.S. 483 (1954).

21. *Id.* at 495.

22. 42 U.S.C. § 2000(e) (prohibiting discrimination in employment).

23. Ramya Sekaran, *The Preponderance of the Evidence Standard and Realizing Title IX’s Promise: An Educational Environment Free From Sexual Violence*, 19 GEO. J. GENDER & L. 643, 651 (2018).

24. U.S. DEP’T JUST., TITLE IX LEGAL MANUAL (2019).

25. *Id.*

of University Women (AAUW) released a study in December 1970 documenting the pervasive sex discrimination women faced in higher education that helped spark legislative debate that same year.<sup>26</sup> The House Subcommittee on Education, led by Representative Edith Green (Oregon-D), held hearings on education discrimination in 1970, followed by an unsuccessful attempt to add the prohibition on sex discrimination to the Education Amendments of 1971.<sup>27</sup> Shortly thereafter, Senator Birch Bayh (Indiana-D) introduced an amendment he purported would fight “the continuation of corrosive and unjustified discrimination against women in the American educational system.”<sup>28</sup> Senator Bayh reiterated that sex discrimination in education is immensely destructive and that a comprehensive measure was necessary to offer women “solid legal protection from the persistent, pernicious discrimination” that “perpetuate[s] second-class citizenship for American women.”<sup>29</sup> After months of continued debate, and the inclusion of clarifying stipulations, Title IX legislation was officially enacted the summer of 1972.<sup>30</sup>

Beyond mere discrimination on the basis of sex in institutions of higher education, Title IX also sought to reduce or eliminate sexual violence on campuses.<sup>31</sup> Because Congress intended Title IX to be used as a tool to hold institutions accountable for the type of peer-on-peer harassment that is so pervasive as to effectively “deprive[] the student of the educational opportunities or benefits,”<sup>32</sup> sexual assault and sexual violence fall within the ambit of a “hostile environment”<sup>33</sup> that would hinder educational attainment. The nexus between a hostile environment and Title IX regulation brings instances of sexual assault under this statutory umbrella.

Because the development and legislative history of Title IX followed fellow Civil Rights statutes, the language, purpose, and structure of Title IX is virtually identical to Titles VI and VII of the Civil Rights Act of

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26. *Our History: The Story of AAUW's Place in Women's History*, AM. ASSOC. U. WOMEN, <https://history.aauw.org/category/title-ix> (last visited Oct. 22, 2019).

27. U.S. DEP' T JUST., *supra* note 24.

28. *Id.* (quoting 118 Cong. Rec. 5803 (1972)).

29. *Id.* (quoting 118 Cong. Rec. at 5806-07).

30. During the legislative process, there was much debate as to whether the legislation was attempting to implement ratios of men to women in colleges. Senator Bayh was required to perpetually reiterate that the language of the statute did “not require reverse discrimination” and that it was purely intended to provide an environment free from discrimination and judgment independent of sex. *Id.*

31. *Compliance Overview of Title IX, DFSCA, and FERPA*, CLERY CTR., <https://clerycenter.org/policy-resources/title-ix-related-acts/> (last visited Oct. 22, 2019).

32. Where the harassment is so pervasive and severe as to limit access to or attainment of benefits from educational programming, there is an overt violation of Title IX, and the environment is no longer conducive to learning. Letter from Fatima Goss Graves, President & CEO, Nat'l Women's Law Ctr., to Betsy DeVos, Secretary of Educ. (July 11, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> (quoting U.S. DEPT. OF EDUC., OFF. FOR C.R., SEXUAL HARASSMENT GUIDANCE 1997: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997)).

33. The “hostile environment” standard was originally introduced by the OCR in its 1997 guidance, which was later solidified by the Supreme Court's decision in *Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 636–37 (1999).

1964.<sup>34</sup> The language of Title IX substitutes “on the ground of race, color, or national origin”<sup>35</sup> from Title VI for “on the basis of sex”;<sup>36</sup> otherwise, the language is identical.<sup>37</sup> Title VII effectively does the same; the distinction being that the prohibition is on discrimination by employers and unions.<sup>38</sup> The plain text and the legislative history implicate that Congress modeled Title IX on these civil statutes,<sup>39</sup> as Congress expressly incorporated the procedural provisions—the preponderance of the evidence standard chief among them—of Title VI. Further, Title IX was drafted to mirror the general purpose of Title VII: to eradicate sex discrimination<sup>40</sup> while providing a private right of action for civil suits.<sup>41</sup> Statutes that incorporate provisions of another statute and share a common purpose, in part or in whole, are said to be *in pari materia* and must be interpreted together—procedural provisions and all.<sup>42</sup> Specifically, the U.S. Supreme Court has applied the preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964,<sup>43</sup> which suggests that the same preponderance of the evidence standard must be applied to Title IX, noncriminal cases.<sup>44</sup>

#### *B. Shifting Toward Greater Regulation: The Impact of the Clery Act*

One provision of Title IX requires institutions of higher education to “take immediate and effective steps to end sexual harassment and sexual violence” to remain in compliance.<sup>45</sup> Despite the statute’s implementation and purported purpose, reports of high rates of sexual violence on college campuses surfaced in the early 2000s,<sup>46</sup> and fallout from the data presented in the fundamental *United States v. Morrison*<sup>47</sup> decision led to heightened public and administrative concern.<sup>48</sup> In response to these concerns, the Obama Administration called upon the Jeanne Clery Act Disclosure of Campus Security and Campus Crime Statistics Act (Clery Act),<sup>49</sup> in 2009,

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34. See Sekaran, *supra* note 23, at 646, 648–49.

35. 42 U.S.C. § 2000(d) (2018).

36. 20 U.S.C. § 1681.

37. See Sekaran, *supra* note 23, at 650–51.

38. 42 U.S.C. § 2000(e).

39. Sekaran, *supra* note 23, at 651.

40. *Id.* at 652.

41. See *Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 633 (1999).

42. See *United States v. Stewart*, 311 U.S. 60, 64 (1940).

43. See ALI, *supra* note 1.

44. Nicole E. Smith, Note, *The Old College Trial: Evaluating the Investigative Model for Adjudicating Claims of Sexual Misconduct*, 117 COLUM. L. REV. 953, 961 (May 2017).

45. ALI, *supra* note 1.

46. See *Id.*

47. *United States v. Morrison*, 529 U.S. 598, 630–34 (2000) (Souter, J., dissenting).

48. Reports during the enactment of the Violence Against Women Act of 1994 (VAWA) submitted to Congress evidenced that approximately 125,000 college women could expect to be raped during any given year. *Id.* at 633 (referencing reports submitted to Congress and committees over the course of enacting the VAWA). Additionally, issues raised by the dissent include a report that found less than one percent of rape victims collect damages following the perpetration of the crime. *Id.* (quoting S. REP. NO. 102–97, at 49 (1991)).

49. 20 U.S.C. § 1092(f) (2018).

to collect concrete data on campus sexual assault offenses.<sup>50</sup> This Act is a federal statute that requires institutions receiving federal financial aid to retain and make available crime statistics and security information from the past three years on their respective campuses.<sup>51</sup>

The data collected from the 2009 Clery Act served as not only a shocking depiction of the culture of sexual assault and sexual misconduct on college campuses but also a call to action.<sup>52</sup> The data found that in 2009 institutions reported over three thousand known forcible sex offenses, as defined under the Clery Act.<sup>53</sup> As a supplement to Clery Act reports, statistics from the National Institute of Justice determined that nearly one in five women are victims of some form of sexual assault while attending college.<sup>54</sup> To address these startling statistics, institutions are capable of investigating sexual assaults and misconduct on their campuses without triggering full-scale criminal investigations—though the obligation to report remains under both the Clery Act and Title IX regulations.<sup>55</sup>

### C. The Administration Responds

In response to the statistics, increased concerns over student safety, and a desire to ensure that students who experienced sex discrimination will be entitled to prompt and equitable institutional action, the OCR published the 2011 Dear Colleague Letter on Sexual Violence to provide colleges with concrete guidance in handling complaints.<sup>56</sup> While Title IX regulations require that colleges and universities create and publish “grievance procedures providing for prompt and equitable resolution[s]”<sup>57</sup> for any alleged complaint, the 2011 letter further clarifies the mechanics for supplying an equitable grievance procedure.<sup>58</sup>

The 2011 Dear Colleague Letter establishes a set of clear guidelines intended to directly address perceived gaps and missteps in institutional responses to sexual misconduct claims and subsequent disciplinary proceedings.<sup>59</sup> Key components of the proffered requirement are: (1) use of the preponderance of the evidence standard in disciplinary proceedings for sexual misconduct; (2) an equal opportunity for each party to present relevant witnesses and evidence to be used at the hearing in a similar and

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50. *See id.*

51. In addition to reporting the raw statistics, institutions are required to include specific details about efforts and policies in place to improve campus safety. *Summary of the Jeanne Clery Act*, CLERY CTR., <https://clerycenter.org/policy-resources/the-clery-act/> (last visited Oct. 22, 2019).

52. *Id.*

53. This data does not account for the high amount of unreported cases of sexual assault and sexual misconduct on college campuses. ALI, *supra* note 1, at 2.

54. This figure indicates that nearly 20% of women—and 6.1% of men—report that they are survivors of a sexual assault that took place while they were enrolled in college or university. CHRISTOPHER P. KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT* xiii (Oct. 2007).

55. *See Summary of the Jeanne Clery Act*, *supra* note 51.

56. *See Smith*, *supra* note 44, at 959–60.

57. 34 C.F.R. §106.8(b) (2019).

58. *See Letter from Fatima Goss Graves*, *supra* note 32.

59. *See Smith*, *supra* note 44.



timely manner; and (3) the prohibition on parties personally cross-examining one another.<sup>60</sup> Additionally, the letter indicates that it would be highly inappropriate for cases involving sexual assault to resolve complaints via mediation.<sup>61</sup>

The DOE issued a supplemental question-and-answer guidance on April 24, 2014, upon request from institutions and students.<sup>62</sup> Former U.S. Secretary of Education, Arne Duncan, stated that “the incentives to prevent and respond to sexual violence have gone in the wrong direction at schools and on college campuses” and that the guidance, along with federal laws, are actively working to halt the “rape-permissive cultures and campus cultures that tolerate sexual assault.”<sup>63</sup> The document serves to clarify the legal requirements provided in the 2011 Dear Colleague Letter and furnishes concrete examples of proactive efforts and remedies schools could institute to prevent and address sexual violence on campuses.<sup>64</sup> A provision of the guidance specifically addresses the intersection of Title IX investigations with criminal investigations.<sup>65</sup> The guidance emphasizes the contrasting nature between the two proceedings; particularly, because Title IX investigations do not present the potential for incarceration, the same procedural protections and legal standards afforded in criminal proceedings are not required.<sup>66</sup> The abovementioned requirements and emphasis on the distinction between standards and proceedings operate as the foundation for the political divisiveness and media attention—sparking administrative action under the new regime.<sup>67</sup>

#### *D. The Fall of the 2011 Dear Colleague Letter and 2014 Guidance*

On September 22, 2017, Education Secretary Betsey DeVos withdrew the Obama Administration’s 2011 Dear Colleague Letter on Sexual Violence and the 2014 Questions and Answers on Title IX Sexual Violence (Guidance),<sup>68</sup> which provided direction for educational institutions in addressing complaints of sexual misconduct.<sup>69</sup> DeVos, through OCR, issued temporary replacement guidance and an interim Questions and Answers support document to aid in assessing compliance with Title IX.<sup>70</sup> On November 16, 2018, DeVos released her formal proposal<sup>71</sup>—amid a series

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60. *Id.*

61. *See* ALI, *supra* note 1.

62. U.S. DEP’T EDUC., GUIDANCE ISSUED ON RESPONSIBILITIES OF SCHOOLS TO ADDRESS SEXUAL VIOLENCE, OTHER FORMS OF SEX DISCRIMINATION (2014).

63. *Id.*

64. U.S. DEP’T EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 2014).

65. *Id.* at 27–28.

66. *Id.* at 27.

67. *See* Smith, *supra* note 44.

68. *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, U.S. DEP’T EDUC. (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>.

69. *See* ALI, *supra* note 1.

70. U.S. DEP’T EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT (Sept. 2017).

71. U.S. DEP’T EDUC., TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 (Nov. 2018).

of policy shifts headed by the Trump Administration—that threatens to undermine a key purpose of Title IX: to mandate that any institution that receives federal funds have systems in place to promptly address sex discrimination in educational programs.<sup>72</sup>

The proposed rules, influenced by anecdotes of the accused who gained the ear of Secretary DeVos,<sup>73</sup> depart from the previous guidelines that aimed at providing “prompt and equitable” grievance procedures for both the alleged victim and the accused.<sup>74</sup> Among others, the most notable changes include: allowing institutions to require that a higher standard of proof—clear and convincing evidence—apply in sexual assault cases; permitting appeals only from the accused; and prolonging investigations for unreasonable periods of time.<sup>75</sup>

In contrast to the former guidance, the proposed rules also limit the investigation or prosecution of sexual harassment to cases in which the alleged victim has formally filed a complaint with a narrow list of proper authorities and only for conduct that was committed on campus.<sup>76</sup> Simply reporting to a “mandatory reporter”—an individual identified as having the ability and obligation to report a sexual assault—would not constitute a formal complaint.<sup>77</sup> The policies adopt the U.S. Supreme Court definition of sexual harassment,<sup>78</sup> previously reserved only for the most egregious situations, and only hold institutions responsible for investigating formal complaints where officials have “actual knowledge” of the incident.<sup>79</sup> Following the expiration of the public comment period, codification of these rules acquire the force of law—an act unprecedented for institution-based disciplinary proceedings.<sup>80</sup>

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72. A component of preventing sex discrimination in educational programs requires that institutions protect against “hostile environments which deprive many students of equal educational opportunities.” See Letter from Fatima Goss Graves, *supra* note 32.

73. See Green & Stolberg, *supra* note 2.

74. See Letter from Fatima Goss Graves, *supra* note 32.

75. See Smith, *supra* note 4. Clear and convincing evidence is “that the thing to be proved is highly probable or reasonably certain.” *Evidence, Clear and convincing evidence*, BLACK’S LAW DICTIONARY (11th ed. 2019).

76. See Erica L. Green, *New U.S. Sexual Misconduct Rules Bolster Rights of the Accused and Protect Colleges*, N.Y. TIMES (Aug. 29, 2018), <https://www.nytimes.com/2018/08/29/us/politics/devos-campus-sexual-assault.html>.

77. See U.S. DEP’T EDUC., *supra* note 71, at 22. This standard falls between preponderance of the evidence and beyond the reasonable doubt standard used in criminal proceedings. *Id.*

78. *Davis v. Monroe Cty. Bd. of Ed*, 526 U.S. 629, 676 (1999) (defining sexual harassment as “behavior [that] is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.”).

79. See U.S. DEP’T EDUC., *supra* note 71, at 18. An official would trigger the “actual knowledge” requirement only when they have the authority to institute corrective measures and would exclude resident advisors despite their designation as mandatory reporters. 20 U.S.C. § 1681 (2018).

80. Not only would the proposal codify how it defines sexual harassment in schools but it would also codify the steps institutions are legally required to take to address it. 20 U.S.C. § 1681.

Victims' rights advocates have expressed concerns that the rules effectively silence victims from reporting assaults.<sup>81</sup> Specifically, the rules further perpetuate the ill-conceived, dangerous paradigm that victims of sexual assault are stereotypically white, heterosexual women who regret the sexual encounter and purge that "shame" by vindictively accusing young men.<sup>82</sup> These advocates fear that this discriminatory mindset motivated decision-makers at the DOE.<sup>83</sup> Shortly after the release of the proposed rules, Fatima Goss Graves, Chief Executive Officer of the National Women's Law Center, expressed fear that "schools will become more dangerous for all students and more schools will shield harassers and rapists."<sup>84</sup> The current Administration has grasped on to the few instances of false reports to validate their fearmongering; however, these rare cases should not sacrifice victims' ability to report and seek out protections.<sup>85</sup> Furthermore, media portrayal and misinformation, propagated by the current Administration, perpetuates false beliefs about victims who choose to come forward, causing both sides to harden in a manner that is harmful to the process, the institution, and the victims themselves.

Detractors, media pundits, and politicians began to protest that students accused of rape or sexual assault were not being provided the procedural safeguards they deserved and should be entitled to greater protections than those facing other accusations: ranging from assault to academic fraud or dishonesty.<sup>86</sup> Grounded in the argument that the former guidance did not adhere to the requirements of the Administrative Procedures Act (APA),<sup>87</sup> which mandates that new procedures go through a notice-and-comment period prior to enactment,<sup>88</sup> Education Secretary DeVos accused the Obama Administration of "weaponizing" federal guidance documents and coercing schools to overreach during disciplinary proceedings.<sup>89</sup> It is precisely this type of charged language that led the DOE, under DeVos, to

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81. See Collin Binkley, *DeVos Proposes Overhaul to Campus Sexual Misconduct Rule*, AP (Nov. 16, 2018), [https://apnews.com/22112e361b1f4d30ad5e3d26e3b0fa52?utm\\_campaign=Social-Flow&utm\\_source=Twitter&utm\\_medium=AP](https://apnews.com/22112e361b1f4d30ad5e3d26e3b0fa52?utm_campaign=Social-Flow&utm_source=Twitter&utm_medium=AP).

82. Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 162 (2016).

83. Not only is this mindset problematic, but, as the legal director of Equal Rights Advocates, Jennifer Reisch, suggests, "The message that is sent is that the administration believes that women who report sexual harassment and violence are liars." See Smith, *supra* note 4.

84. See Fatima Goss Graves, *NWLC Responds to the Department of Education's Attempt to Weaken Protections Against Sexual Assault*, NAT'L WOMEN'S LAW CTR. (Nov. 16, 2018), <https://nwlc.org/press-releases/nwlc-responds-to-the-department-of-education-attempt-to-weaken-protections-against-sexual-assault/>.

85. False accusations exist in all crimes; however, only around 2% to 10% of rape allegations are found to be false. Chad W. Dunn, *Don't Fall for the Misinformation Campaign Against Title IX Reforms*, WASH. POST (Aug. 24, 2017), [https://www.washingtonpost.com/opinions/dont-fall-for-the-misinformation-campaign-against-title-ix-reforms/2017/08/24/1ebb4450-8834-11e7-961d-2f373b3977ee\\_story.html?utm\\_term=.7064fb996b9b](https://www.washingtonpost.com/opinions/dont-fall-for-the-misinformation-campaign-against-title-ix-reforms/2017/08/24/1ebb4450-8834-11e7-961d-2f373b3977ee_story.html?utm_term=.7064fb996b9b).

86. See Graves, *supra* note 84.

87. 5 U.S.C. § 552 (2018).

88. *Id.* § 552(a)(6)(D).

89. Ashe Schow, *Betsy DeVos To Rework Obama-Era Campus Sexual Assault Rules*, FEDERALIST (Sept. 7, 2017), <https://thefederalist.com/2017/09/07/betsy-devos-rework-obama-era-campus-sex-assault-rules/>.

take up arms in ensuring that heightened protections are provided to the accused—an overreach on the opposite side of the pendulum swing.

Critics argue that the 2011 Dear Colleague Letter encourages universities to find students responsible for sexual assault no matter the circumstances.<sup>90</sup> Further, critics argue that universities are motivated by their ever-present need to cultivate a sense of safety on their campuses, and the trepidation that they will receive negative publicity if they ultimately do not find the student accused responsible.<sup>91</sup> In direct response to this criticism, DeVos withdrew the 2011 Dear Colleague Letter and 2014 Guidance document in September 2017 and concurrently proposed new guidelines<sup>92</sup> and rules in November 2018.<sup>93</sup> This proverbial call-and-response has led to knee-jerk reactions by executive administrations seeking to align with shifting public perception and pervasive rhetoric.

### *E. The Uncertain Future of Title IX and Disciplinary Proceedings*

The future of Title IX and campus disciplinary proceedings is uncertain under the Trump Administration's policies. Provisions that alter the definition of sexual harassment, and the steps institutions are legally bound to pursue, exemplify a concerted shift in policy that destabilizes regulatory understanding.<sup>94</sup> The nearly 100,000 public comments directed at the DOE in response to this shift clearly indicate the fear and apprehension associated with such broad sweeping changes.<sup>95</sup> Terry Hartle of the American Council on Education (ACE) anticipated that submissions would far surpass totals for most major regulatory provisions—estimating as high as twenty times more comments.<sup>96</sup>

The bulk of uncertainty, and the source of most consternation, centers upon a handful of key provisional changes. ACE, along with sixty other higher education associations,<sup>97</sup> express concern, first with the Guidance's adoption of the U.S. Supreme Court's definition of sexual harassment, which was previously reserved only for the most deplorable allegations.<sup>98</sup>

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90. See Smith, *supra* note 44, at 969.

91. *Id.*

92. See Green, *supra* note 76.

93. See generally 20 U.S.C. § 1981.

94. *Id.*

95. Laura Meckler & Susan Svrluga, *Nearly 100,000 Comments on Betsy DeVos's Plan to Overhaul Rules on Sexual Assault Probes*, WASH. POST (Jan. 30, 2019, 5:10 PM), [https://www.washingtonpost.com/local/education/nearly-100000-comments-on-betsy-devos-plan-to-overhaul-rules-on-sexual-assault-probes/2019/01/30/ce441956-24b9-11e9-ad53-824486280311\\_story.html?utm\\_term=.af6b97d8f62f](https://www.washingtonpost.com/local/education/nearly-100000-comments-on-betsy-devos-plan-to-overhaul-rules-on-sexual-assault-probes/2019/01/30/ce441956-24b9-11e9-ad53-824486280311_story.html?utm_term=.af6b97d8f62f) (noting that comments included responses from universities, attorneys for both victims and accused, women's groups, students, parents, and families among others).

96. Hartle asserted that the DeVos guidance, as written, should be considered “the most controversial undertaking in the history of the DOE.” *Id.*

97. Letter from the Am. Council on Educ. to the Dep't of Educ. (Jan. 30, 2019), <https://www.acenet.edu/news-room/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf>.

98. *Id.* The definition, if codified, would require unwelcome conduct on the basis of sex that is “so severe, pervasive and objectively offensive . . . that the victims are effectively denied access to an institution's resources and opportunities.” *Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 651 (1999).

Additionally, the rules maintain Secretary DeVos's policy of using mediation to reach informal resolutions in sexual assault complaints, limit the scope of actionable allegations to those occurring on campus, and permit adversarial cross-examination between the alleged victim and the accused.<sup>99</sup> This assertion starkly contrasts with Federal Circuit precedent, finding that the right to cross-examine witnesses is not essential to due process in school disciplinary proceedings.<sup>100</sup> ACE posits that the requirement of a live hearing and cross-examination specifically "imposes highly legalistic, court-like processes" upon the institutional disciplinary board that contradict the principal purpose of its educational charge.<sup>101</sup> In contrast, the Foundation for Individual Rights in Education (FIRE), an organization that seeks to defend the individual rights of students, lauds the guidance as a step towards "greatly improv[ing] the fundamental fairness of campus sexual misconduct proceedings."<sup>102</sup>

According to the proposed rules, institutions are only legally responsible for investigating formal complaints and responding to reports where officials have actual knowledge of the happening through "an official who has the authority to institute corrective measures."<sup>103</sup> This proposal mitigates the potential of institutional liability by eliminating Title IX liability if the institution only had *constructive knowledge* and by requiring the accuser to prove *actual knowledge* by the institution.<sup>104</sup>

DeVos asserts that the rules protect students from being "ambushed" without knowing the charges or evidence against them and assures that the

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99. Title IX liability for institutions would then be limited purely to incidents that occur "under any education program or activity," which the DOE has narrowly construed to mean facilities or activities that occur on the physical campus—wholly ignoring that a vast number of sexual assaults occur at fraternity houses or off-campus venues where events are hosted by school-sanctioned clubs, groups, and organizations. *See* 20 U.S.C. § 1681; *see also* Green, *supra* note 76.

100. Both the Second and the Fifth Circuit have asserted that in school disciplinary proceedings due process does not require a full-scale judicial hearing, which would include, by virtue of similarity, a right to cross-examine the witness directly. *See* Winnick v. Manning, 460 F.2d 545, 549 (2d. Cir. 1972); *see also* Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961). Furthermore, the Supreme Court opted not to construe due process as mandating that hearings are required to allow an accused student to confront and cross-examine the alleged victim. *Goss v. Lopez*, 419 U.S. 565, 583 (1975). Though the right to confront and cross-examine the accuser is neither guaranteed nor essential, courts still are concerned with providing respondent students the ability to meaningfully confront witnesses—especially through non-adversarial, indirect means. *See* Smith, *supra* note 44. Additionally, the DOE has historically prohibited the use of mediation in sexual assault cases. *See* Coker, *supra* note 82, at 154.

101. Letter from the Am. Council on Educ., *supra* note 97 (stating specific concerns that the rules would undermine college and university efforts to address sexual assault and harassment due to the "educational mission" that they are founded upon).

102. FIRE, *Comment of the Foundation for Individual Rights in Education in Support of the Department of Education's Proposed Regulations on Title IX Enforcement*, FIRE (January 30, 2019), <https://www.thefire.org/fires-comment-in-support-of-the-department-of-educations-proposed-regulations-on-title-ix-enforcement/>.

103. Actual knowledge now precludes reporting to a resident advisor, whom would be designated as a mandatory reporter. *See* 20 U.S.C. § 1681. The 2011 Dear Colleague Letter formerly required the school to "know, or reasonably should know" about an alleged sexual harassment to establish liability. Green, *supra* note 76.

104. A.J. Bolan, *Deliberate Indifference: Why Universities Must Do More to Protect Students From Sexual Assault*, 86 GEO. WASH. L. REV. 804, 823–22. (2018).

new measures are less “draconian” than prior guidance.<sup>105</sup> The Administration’s implementation of these changes follow a series of scandals at large universities like Michigan State University and the University of Southern California, which are under the microscope for failing to respond to and protect students from serious sexual misconduct on the part of coaches and campus doctors.<sup>106</sup> Yet, the new standard makes it more difficult to hold institutions liable for failure to act. The threshold for triggering deliberate indifference becomes much harder to reach if institutions are only held accountable for the complaints that they explicitly *knew* about, as opposed to endemic, longstanding issues.<sup>107</sup> Cumulatively, the rules serve to overextend the protections for the accused in a manner that heavily shifts the balance, while also protecting colleges and universities from liability at the expense of the rights of the victim.<sup>108</sup> Alternatively, FIRE proffers that the previous guidance delivered “errant results” and undermined confidence in the system, stymying the DOE and institutions from taking action.<sup>109</sup>

With such a large volume of submissions, this issue cannot be easily dismissed. It is of paramount importance to the public at large. Public perception and confidence that the system provides a fair process is nonexistent on either side of the partisan divide. Nevertheless, it is clear that the loudest voice and strongest hand—certainly not the law—is shaping policy.

## II. THE LEGAL FRAMEWORK: CRIMINAL VERSUS CIVIL DUE PROCESS

The genesis of the due process of law concept traces back to thirteenth century England, first conceptualized in King John’s Magna

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105. See Green, *supra* note 76.

106. Susan Adams, *New Campus Sexual Misconduct Rules From Betsy DeVos Protect The Accused And Colleges*, FORBES (Aug. 29, 2018), <https://www.forbes.com/sites/susanadams/2018/08/29/new-campus-sexual-misconduct-rules-from-betsy-devos-protect-the-accused-and-colleges/#4919d4414501>; see Caroline Kitchener, *The Nassar Investigation That Never Made Headlines*, ATLANTIC (Jan. 29, 2018), <https://www.theatlantic.com/education/archive/2018/01/the-nassar-investigation-that-never-made-headlines/551717/> (addressing both the former and recent Title IX investigation into Michigan State University’s response to reports of misconduct by Larry Nassar, who was sentenced to 175 years in prison for molesting dozens of female athletes, and the 2014 Title IX investigation that proved fruitless). The University of Southern California (USC) similarly faced complaints after a scandal involving sexual misconduct on the part of former campus gynecologist, Dr. George Tyndall. More than fifty current and former USC students filed suit against the University. See Cheri Mossburg & Madison Park, *USC President Steps Down After Campus Gynecologist Scandal*, CNN, <https://www.cnn.com/2018/08/07/us/usc-president-steps-down/index.html> (last updated Aug. 8, 2018).

107. Universities and colleges, theoretically, should have a greater incentive to address sexual assaults that are reported to avoid liability for deliberate indifference; however, this standard narrows the scope dramatically for when knowledge and responsive action is mandated. See Bolan, *supra* note 104, at 818–20. An additional proposal suggests changing the deliberate indifference standard to that of due diligence to match the international human rights standard premised on the assumption that victims of sexual assault have a human right to access an effective remedy. *Id.* at 826.

108. See Dunn, *supra* note 85.

109. See *supra* note 102 and accompanying text.

Carta.<sup>110</sup> Since its origin, the notion has become a fundamental component of the American legal system, guaranteeing a constitutional safeguard that all persons will be provided fair procedures and their private rights will be protected.<sup>111</sup> Both the Fifth and the Fourteenth Amendment of the Constitution guarantee that no person may be deprived “of life, liberty, or property, without due process of law,” a right that all individuals retain regardless of the type or manner of proceeding.<sup>112</sup> The constitutional minimum, in any proceeding, is that all individuals are entitled to the opportunity to be heard<sup>113</sup>; however, the standard application of due process is heavily contextual and dependent on the category of proceeding.<sup>114</sup>

#### A. Criticisms of a Criminal Framework

Procedural due process rights are distinct from any other constitutional right because they are heavily context dependent.<sup>115</sup> The U.S. Supreme Court defines due process in a particular circumstance as contingent on the private interest affected; the risk of an erroneous deprivation; the probable value of additional procedural safeguards; and the governmental interest at stake.<sup>116</sup> In balancing these factors, the Court recognizes its own truism that due process is a flexible concept, and the protections the Court provides can be adapted to whatever a particular situation demands.<sup>117</sup>

The severity of deprivation is one relevant factor in defining the type of due process necessary.<sup>118</sup> This is particularly important in criminal proceedings where the potential deprivation may be liberty,<sup>119</sup> or even life in capital cases.<sup>120</sup> Under the balancing test, the private interest affected in criminal proceedings is the interest in freedom from false imprisonment and deprivation of rights; the risk of erroneous deprivation is incredibly high; and the governmental burden is never high enough to supplant the

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110. See MAGNA CARTA, c. 39 (1215) (stating that “[n]o free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.”). King Edward III later replaced the term “the law of the land” with “due process of law” in a 1345 statute that reiterated the Magna Carta’s guarantee of liberty. See *Magna Carta: Muse and Mentor*, LIBR. CONGRESS, <http://www.loc.gov/exhibits/magna-carta-muse-and-mentor/due-process-of-law.html> (last visited Oct. 22, 2019).

111. *Due Process*, BLACK’S LAW DICTIONARY (11th ed. 2019).

112. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

113. *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018).

114. *Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 15 (D. Me. 2005) (The very nature of due process was intended to be recognized as “not a fixed or rigid concept, but . . . a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of deprivation.”); Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 646 (2018).

115. Mann, *supra* note 114, at 646.

116. See Smith, *supra* note 44, at 975 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

117. *Mathews*, 424 U.S. at 334 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

118. *Bd. of Curators v. Horowitz*, 435 U.S. 78, 86 (1978) (finding that in cases resulting in academic dismissal, the requisite procedural requirements may be less stringent than in other contexts).

119. The legal definition of liberty is expressed as “freedom from arbitrary or undue external restraint,” both in body and in terms of right. *Liberty*, BLACK’S LAW DICTIONARY (11th ed. 2019).

120. See Mann, *supra* note 114, at 639–40.

requirement that the highest procedural due process standard—beyond a reasonable doubt—be used in criminal trials.<sup>121</sup>

As sanctions in a criminal case can result in potential loss of liberty, the burden of proof must be the highest our legal system has to offer, and the accused must receive the full breadth of protections available.<sup>122</sup> Critics—politicians and conservative media outlets—of the 2011 Dear Colleague Letter and institutional procedures argue that courts implicate the higher standard when a government entity acts to deprive an individual of a life, liberty, or property interest.<sup>123</sup> The assertion equates a student's right to education at a specific, particular institution as a liberty interest akin to freedom from imprisonment and loss of physical liberty.<sup>124</sup> Critics argue that students have a substantial interest in school disciplinary hearings for sexual misconduct—labeling an accused as a sex offender has an immediate and long-lasting impact on a student's life.<sup>125</sup> As expounded in *Gomes v. Univ. of Maine Sys.*,<sup>126</sup> “where a person's good name, reputation, honor, or integrity is at stake . . . the minimal requirements of the [Due Process] Clause must be satisfied,” but the question whether there is a fair hearing centers on the opportunity “to answer, explain, and defend, and not whether the hearing mirrored a common law criminal trial.”<sup>127</sup>

While there is no doubt that there is an interest in protecting students accused of sexual misconduct in institutional proceedings, there is equivalent interest in ensuring alleged victims are able to attain an education in a safe and hostile-free environment—the balance of which would not be struck through the imposition of criminal due process standards. Further, the repercussions of suspension or discipline do not equate to imprisonment for the purposes of procedural due process. The Court determined, in *Mathews v. Eldridge*,<sup>128</sup> that the only benefits that entitle an individual to a full-blown hearing are welfare benefits because, in the case of all other benefits (e.g., disability or educational benefits), the person whose benefits are reduced or taken away is capable of getting them back<sup>129</sup>—for example, obtaining an education elsewhere. Victims must be afforded the ability

121. *Mathews*, 424 U.S. at 334; see also Mann, *supra* note 114, at 639–40.

122. Among the requisite protections and procedural due process measures that must be afforded are the right counsel, the right to cross examine witnesses, and the right to discovery, among other things. Mann, *supra* note 114, at 639–40.

123. The governmental entities that critics argue is acting in these cases are the educational institutions themselves—those that receive federal funding pursuant to Title IX requirements. *Id.* at 647.

124. *Id.* at 652.

125. *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018) (citing *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018)).

126. *Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005).

127. *Id.* at 16–17 (first quoting *Goss v. Lopez*, 419 U.S. 565, 574 (1975); then quoting *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 15 (1st Cir. 1988)). Justice White explained that “the Due Process Clause requires, not an ‘elaborate hearing’ before a neutral party, but simply ‘an informal give-and-take between student and disciplinarian’ which gives the student ‘an opportunity to explain his version of the facts.’” *Gomes*, 365 F. Supp. 2d at 17 (quoting *Gorman*, 837 F.2d at 16).

128. 424 U.S. 319 (1976).

129. See *id.* at 325, 344–45.



to get an education in an environment that does not require repeated, traumatizing contact with the alleged perpetrator.<sup>130</sup> Precedent cautions that courts ought not impose all the requisite procedural structures of common law criminal trials upon educational institutions and, instead, precedent urges that courts look to the particular circumstances to ensure that the hearing is fair and provides individuals with the essential elements of due process as context requires.<sup>131</sup>

*B. Civil System: Due Process and Private Rights*

In 1999, the U.S. Supreme Court recognized a private cause of action under Title IX for peer-to-peer sexual harassment claims.<sup>132</sup> The Court held that the legislative decision to pattern Title IX on Title VI was to both protect individuals from discrimination and to create a private right of action under Title IX.<sup>133</sup> In recognizing this ability to bring an individual complaint, the forum where the claim is filed constitutes a vital component as to what process and procedures are thus implicated. In the realm of institutional disciplinary proceedings, the long-recognized preponderance of the evidence standard is used in civil proceedings.<sup>134</sup>

Scholars note that using procedures similar to full-dress criminal trials substantially deter victims from pursuing complaints in the first place.<sup>135</sup> The primary concern is that the adversarial method that is used in criminal proceedings, and the procedural standards adopted, can be harmful to those vulnerable complainants who have survived the traumatic experience of sexual assault.<sup>136</sup>

It is well documented that the majority of students-victims of sexual assault will not report the assault to either law enforcement or the institution.<sup>137</sup> In a pilot study of undergraduate females reporting sexual assault, rape, or sexual battery, the victimization incidence rate, between 2014 and 2015 across the nine participating schools was 176 per 1,000.<sup>138</sup> These numbers only account for the small percentage of victims who report their

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130. See Behre, *supra* note 10, at 337.

131. *Gomes*, 365 F. Supp. 2d at 20, 24 (citing *Gorman*, 837 F.2d at 13, 16).

132. Behre, *supra* note 10, at 322 (citing *Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 633 (1999)). Private damages actions may be brought against an institution for student-on-student harassment if the institution acts with “deliberate indifference” to “known” acts of harassment, meaning that colleges and universities may be held liable. Behre, *supra* note 10, at n.110.

133. See *Davis*, 526 U.S. at 639; see also Bolan, *supra* note 104, at 811. The Court recognized the ability of victims, asserting institutional and peer-to-peer sexual assault claims, to pursue a private right of action. *Davis*, 526 U.S. at 639. A private right of action constitutes an individual’s ability to sue in a personal capacity on a legal claim. *Right of Action*, BLACK’S LAW DICTIONARY (11th ed. 2019).

134. See Smith, *supra* note 44.

135. *Id.* at 973. “[D]ue process in the context of academic discipline does not necessarily require students be given a list of witnesses and exhibits prior to the hearing, provided the students are allowed to attend the hearing itself.” *Gomes*, 365 F. Supp. 2d at 23 (citing *Nash v. Auburn Univ.*, 812 F.2d 655, 662–63 (11th Cir. 1987)).

136. Smith, *supra* note 44, at 972.

137. See Behre, *supra* note 10, at 318.

138. KREBS ET AL., *supra* note 54.

sexual assault to the institution itself, seeing as rape and sexual assaults are already heavily underreported on campuses.<sup>139</sup> Reforms that would require survivors to prove that a sexual assault occurred under the heightened, “beyond a reasonable doubt,” standard would make it nearly impossible for institutions to address the complaints of sexual assault victims.<sup>140</sup>

Disciplinary systems are not primarily adversarial processes and, thus, are not required to replicate court hearings.<sup>141</sup> Critics of the 2011 Dear Colleague Letter are misguided in arguing that the Guidance deprived accused students of their due process rights; instead, the Dear Colleague Letter mandates equitable treatment of the alleged victim and the accused.<sup>142</sup> Prior guidance mandates that, in any grievance for sexual assault or sexual misconduct, both the complainant and the accused must be provided with the same rights: right to review documents, right to counsel, right to present witnesses and evidence, and right to an appeal.<sup>143</sup> Despite the equitable distribution of these rights, the public was inundated with claims from the Trump Administration that this was a “failed system” that did little to preserve fairness for the accused in campus sexual assault enforcement.<sup>144</sup> What the Trump Administration and the conservative media demands in the context of institutional disciplinary proceedings goes beyond what the U.S. Supreme Court guarantees.<sup>145</sup>

Institutions deal with a variety of situations that constitute both conduct code violations and potential criminal actions: drug use, drug dealing, threats, assault and battery, and theft.<sup>146</sup> If educational institutions were required to provide the essential equivalents to criminal proceedings in these cases, educational institutions would be overwhelmed and effectively transform into simple extensions of the courts.<sup>147</sup> Under *Gomes*, the court recognized that “a major purpose of the administrative process and hearing is to avoid formalistic and adversarial procedures,” which suggests that “escalating its formality and adversary nature may not only make it

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139. Mann, *supra* note 114, at 638. Only 16% of forcible rape victims and 8% of incapacitated sexual assault victims report to crisis or campus health centers. *Id.* Even fewer report to law enforcement: 13% of forcible rape victims and 2% of incapacitated sexual assault victims. *Id.*

140. See Dunn, *supra* note 85.

141. Mann, *supra* note 114, at 652–53.

142. Letter from Fatima Goss Graves, *supra* note 32, at 5. “A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.” 34 C.F.R. §106.8(b) (2019) (emphasis added).

143. Letter from Fatima Goss Graves, *supra* note 32, at 5.

144. Laura Meckler, Valerie Strauss, & Nick Anderson, *Education Department Considers Greater Rights for Students Accused of Sexual Assault, Officials Say*, WASH. POST (Aug. 29, 2018, 7:40 PM), [https://www.washingtonpost.com/local/education/education-department-considers-greater-rights-for-students-accused-of-sexual-assault-officials-say/2018/08/29/dc3603f4-abd7-11e8-b1da-ff7faa680710\\_story.html](https://www.washingtonpost.com/local/education/education-department-considers-greater-rights-for-students-accused-of-sexual-assault-officials-say/2018/08/29/dc3603f4-abd7-11e8-b1da-ff7faa680710_story.html).

145. Letter from Fatima Goss Graves, *supra* note 32, at 5.

146. See Mann, *supra* note 114, at 667.

147. *Id.*

too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.”<sup>148</sup>

### C. *What the Courts Say*

Under the 2011 Dear Colleague Letter and 2014 Questions and Answers document, institutions were given broad guidance on how to conduct campus disciplinary proceedings for sexual assault and misconduct allegations to ensure that the institution provided students alleging sex discrimination with a prompt and equitable response.<sup>149</sup> As a result, any institution—public or private<sup>150</sup>—that accepts federal funding or receives federal financial assistance must abide by the guidance to remain Title IX compliant.<sup>151</sup> The exact manner of investigation and proceeding utilized by institutions varies as long as educational institutions stay within the strictures of Title IX and Guidance documents.<sup>152</sup> Though the Obama-era guidance was broad in its parameters, it provides institutions great discretion to navigate and meet the criteria.<sup>153</sup>

The U.S. Supreme Court has heard relatively few cases bearing directly on students’ due process rights in institutional disciplinary hearings.<sup>154</sup> Even the foundational U.S. Supreme Court case *Davis v. Monroe County Board of Education*<sup>155</sup> holds that institutions could be found liable for indifference to complaints of sexual harassment or sexual assault, but they were not beholden to any particular form of disciplinary action against the perpetrator.<sup>156</sup> What Title IX and the 2011 Dear Colleague Letter require is that the institution-specific policies are “well-published” and disseminated to students such that they are sufficiently aware of the processes.<sup>157</sup> Furthermore, no federal appellate court holds that due process requires an absolute, affirmative right to adversarial cross-examination in

148. *Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 16–17 (D. Me. 2005) (*Goss v. Lopez*, 419 U.S. 565, 583 (1975)). The relatively tight timeframes that are imposed upon university disciplinary hearings mean that there is not adequate time for the strict imposition of formalistic, legal standards that are afforded in full-fledged criminal proceedings. *Gomes*, 365 F. Supp. 2d at 21. Additionally, it is often upon request by the student that these matters be handled expeditiously so as to have a minimal impact on their education. *Id.*

149. *See Smith, supra* note 44, at 959–60.

150. *Exemptions from Title IX*, U.S. DEP’T EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html> (last updated Sept. 25, 2018).

151. *See VALENTIN, supra* note 19.

152. Djuna Perkins, *Behind the Headlines: An Insider’s Guide to Title IX and the Student Discipline Process for Campus Sexual Assaults*, 59 BOS. B.J. 19, 21 (2015). Some institutions used a single-investigator model for proceedings where the Title IX administrator overseeing the complaint would adopt the recommendation of the investigator directly, while other used a “hybrid model” that allowed an investigator to supply a recommendation to a panel of administrators tasked with providing the ultimate ruling. *Id.* Additionally, some institutions held formal hearings with measures meant to mitigate potentially traumatizing affects for the reporting student, while others use less formal mechanisms for addressing claims of sexual assault and misconduct. *Id.*

153. *See generally Smith, supra* note 44, at 958.

154. *See id.* at 974.

155. 526 U.S. 629 (1999).

156. *See id.* at 648.

157. *See Mann, supra* note 114, at 644. Often, the publications can be found in the student handbook or code of conduct made available to students at each respective institution. *Id.*

the educational context—an area of contention in the present conversation surrounding the new guidelines.<sup>158</sup>

Recent Sixth Circuit decision, *Doe v. Baum*,<sup>159</sup> reaffirms that, at a minimum, if a student is accused of sexual misconduct, the university must hold a hearing or afford the opportunity for some type of due process procedure before it permissibly imposes a sanction, such as suspension or expulsion, on the accused.<sup>160</sup> However, *Baum* also suggests that when an institutional determination depends upon the credibility of the alleged victim or a witness, the hearing should allow for an opportunity to cross-examine.<sup>161</sup> This opportunity to cross-examine the alleged victim still would not allow for an accused student to confront his or her accuser *personally*.<sup>162</sup> A multiplicity of recent Sixth Circuit precedent reiterates that “[f]ull-scale adversarial hearings in school disciplinary proceedings have never been required by the Due Process Clause.”<sup>163</sup> Ultimately, institutions have a legitimate interest in eschewing procedures that expose an alleged victim to even greater harm or harassment.<sup>164</sup>

### III. THE IMPACT OF MEDIA REPRESENTATION ON INSTITUTIONAL PROCEEDINGS AND PUBLIC PERCEPTION

The media, as a speak-piece for the current Administration, plays a prominent role in fostering volatile, adversarial depictions of the climate of sexual assault on campuses. One such illustration comes from the extensive coverage of the Columbia University “Carry That Weight” demonstration; otherwise known as the “mattress girl” protest.<sup>165</sup> The media response demonstrates how its coverage intensifies the divisiveness already apparent in discussions of campus sexual assault proceedings. For her senior thesis performance-art project, Emma Sulkowicz, a senior at Columbia University, carried a fifty-pound mattress with her at all times to symbolize the burden imposed on her by the man who allegedly raped her and

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158. *Id.* at 658.

159. 903 F.3d 575, 586 (6th Cir. 2018).

160. *Id.* at 581 (citing *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399–402 (6th Cir. 2017); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005)). Courts generally look at the potential sanction being imposed upon the student in the educational setting and “have uniformly held that fair process requires notice and an opportunity to be heard before the expulsion or significant suspension of a student from a public school.” *Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 24 (D. Me. 2005) (quoting *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 13 (1st Cir. 1988)).

161. *Baum*, 903 F.3d at 581.

162. *Id.* at 583 (citing *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018) (clarifying that “even in the face of a sexual-assault accusation,” protections for accused students do not need to replicate those “that would be present in a criminal prosecution.”)).

163. There would be a significant burden on the students and the school if full-scale proceedings were required for educational institutions, as there would be a sharp increase in the amount of time, expense, and complexity in every hearing. *Baum*, 903 F.3d at 590 (Giman, J. concurring in part and dissenting in part) (citing *Doe*, 173 F.Supp. 3d at 603 (quoting *Flaim*, 418 F.3d at 640)).

164. *Baum*, 903 F.3d at 583.

165. Jeremy Bauer-Wolf, *Mattress Protest and Its Aftermath*, INSIDE HIGHER ED (July 24, 2107), <https://www.insidehighered.com/news/2017/07/24/media-circus-surrounding-mattress-girl-case-changed-conversation-sexual-assault>.

walked free.<sup>166</sup> Sulkowicz filed a complaint with the university alleging that she was anally raped on the evening before the start of classes her sophomore year.<sup>167</sup>

The *New York Times* profiled Sulkowicz's story, characterizing her as a woman "refusing to keep her violation private, carrying with her a stark reminder of where it took place," and providing her with a platform for agency and voice.<sup>168</sup> However, shortly after Sulkowicz's story gained prominence, editorials sympathetic to Paul Nungesser, the accused, surfaced—presenting evidence of exchanges that suggested he was the victim of an unjust system.<sup>169</sup> Nungesser effectively became the symbol of a man wrongfully accused and whose reputation was tarnished in the process.<sup>170</sup> In the wake of the proceedings and media coverage, Annie E. Clark, Executive Director of End Rape on Campus, criticized Columbia's handling of the sexual assault complaint for letting the accused off the hook. Clark disparaged the media for its propensity to "normalize the rape myth" by dedicating substantial air time and article space to profiling the wrongly accused (despite the fact that the wrongly accused comprise only a small percentage of those formally accused).<sup>171</sup>

A catalog of media platforms: liberal, conservative, mainstream, and social media are all shining a spotlight on campus responses to sexual assault and Title IX procedures. Divisive dialogue has begun to stir over what constitutes appropriate practices for handling allegations of sexual misconduct on campuses and what that means for the rights of victims and accused.<sup>172</sup> This dialogue falls within a larger societal conversation echo-

166. *Id.*

167. Kate Taylor, *Columbia Settles with Student Cast as a Rapist in Mattress Art Project*, N.Y. TIMES (July 14, 2017), <https://www.nytimes.com/2017/07/14/nyregion/columbia-settles-with-student-cast-as-a-rapist-in-mattress-art-project.html> (discussing the settlement process between the university and the accused student, Nungesser).

168. Roberta Smith, *In a Mattress, a Lever for Art and Political Protest*, N.Y. TIMES (Sept. 21, 2014), <https://www.nytimes.com/2014/09/22/arts/design/in-a-mattress-a-fulcrum-of-art-and-political-protest.html>.

169. Cathy Young, *Columbia Student: I Didn't Rape Her*, DAILY BEAST (Feb. 3, 2015, 5:55 A.M.), <https://www.thedailybeast.com/columbia-student-i-didnt-rape-her>.

170. Bauer-Wolf, *supra* note 165.

171. *Id.*

172. See Anna Dubenko, *Right and Left React to Betsy DeVos's Changes to Sex Assault Rules*, N.Y. TIMES (Sept. 12, 2017), <https://www.nytimes.com/2017/09/12/us/politics/betsy-devos-title-ix.html> (providing a detailed collection of reaction articles from right-leaning, left-leaning, and centrist news outlets). December 2017, former Associate Deputy Attorney General, Andrew Leonie, posted to Facebook a rant berating the #MeToo movement, stating "Aren't you also tired of all of the pathetic 'me too' victim claims? . . . Victim means nothing anymore," followed with a link to an article asserting that women "want" to be objectified. Maggie Astor, *Texas Attorney General's Aide Resigns After Mocking #MeToo Movement*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/us/andrew-leonie-texas-attorney-general.html>; see also John G. Browning, *Taking the Heat for a Tweet: A Look at Lawyers, the First Amendment, and Social Media*, D MAGAZINE (Dec. 2013), <https://www.dmagazine.com/publications/d-ceo/2013/december/legal-matters-of-social-media>. On the other side of the political spectrum, Robert Ranco, Austin-based attorney tweeted, following Secretary DeVos's decision to withdraw the Obama Administration Title IX guidelines, that the move was "bad for young women," and that he would "be ok if #BetsyDeVos was

ing across the country during the rise and reign of the #MeToo movement.<sup>173</sup> Though empirical data on recent reporting trends at institutions are not yet available, Title IX officers note an increase in sexual-harassment reports on campuses—heavily attributable to the visibility and power of the #MeToo movement and the social climate in a post-Weinstein age.<sup>174</sup> With reporting on the rise, and approximately 33% of undergraduate women estimated to be victims of nonconsensual sexual contact while enrolled in college,<sup>175</sup> it is essential that institutions foster a safe environment for all students.

This Part examines how a divisive Administration manipulates the media to provide a platform for the Administration's own rhetoric, painting a misguided view of the "paradigm victim" and ignoring the realities of campus sexual assault and misconduct in a manner that is dangerous to both victims and institutional due process. First, this Part analyzes the motivations underpinning the regulatory shift, which is followed by a discussion on how this perception paints a distorted picture of the paradigmatic definition of a victim of sexual assault. Finally, this Part evaluates how the public perception and divisive rhetoric can result in secondary victimization that undermines the importance of campus disciplinary proceedings generally.

#### A. Rhetoric and Motivation Shaping Media Messaging

Much of the media coverage on positions critical of Obama-era Title IX proceedings aim to push back against the progressive efforts of the #MeToo movement. These positions would wholly absolve institutions of their obligation to investigate known incidents by diverting sexual assault

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sexually assaulted." *Id.* (quoting James Wilkinson, *Texas Professor Resigns from Law Firm After Tweeting He'd Be 'OK' With Betsy DeVos Being Sexually Assaulted After She Changed Title IX Rule for Campus Rape Cases*, DAILY MAIL (Sept. 12, 2017), <http://www.dailymail.co.uk/news/article-4877732/Texas-prof-tweeted-d-OK-DeVos-sex-assault.html>).

173. See Lena Felton, *How Colleges Foretold the #MeToo Movement*, ATLANTIC (Jan. 17, 2018), <https://www.theatlantic.com/education/archive/2018/01/how-colleges-foretold-the-metoo-movement/550613/>.

174. In a December, 2017 report, *The Harvard Crimson* published that it had seen a 20% increase in sexual harassment claims since Weinstein's allegations came to light. *Id.* The uptick in reporting reaffirms that sexual harassment and sexual misconduct occur at high rates in the college and university setting, and this movement has mobilized victims to come forward at rates previously unimaginable. *Id.* Additionally, a recent report from the U.S. Equal Employment Opportunity Commission (EEOC) found, based on preliminary data for fiscal year 2018, nearly a 50% increase in sexual harassment suits in the last year and charges alleging sexual harassment up by greater than 12%. *EEOC Releases Preliminary FY 2018 Sexual Harassment Data*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Oct. 4, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm>.

175. See Smith, *supra* note 44, at 954.

and sexual misconduct proceedings to outside investigations by law enforcement.<sup>176</sup> Not only will this move likely result in diminished reporting<sup>177</sup> but also, deferring solely to outside investigations, lessens or eliminates either party's opportunity to challenge the investigator's conclusion in institutional proceedings.<sup>178</sup>

Many right-wing media pundits and platforms<sup>179</sup> call to shift the responsibility for handling complaints to outside investigations<sup>180</sup> through "civil authorities and prosecut[ion] in a courtroom, not a faculty lounge"<sup>181</sup> despite evidence denoting low-reporting rates to law enforcement.<sup>182</sup> Right-wing media outlets further expound that the Obama Administration's "distortion of Title IX to micromanage the way colleges and universities deal with allegations of abuse contravenes our country's legal traditions and must be halted."<sup>183</sup> These distortions and misconceptions only further perpetuate the endemic underreporting of sexual assault on college campuses while serving as the direct impetus for Secretary DeVos's roll-backs<sup>184</sup>—a devastating blow to survivors. Much of the underreporting connects to a historically substantiated fear that the reports will be the subject of preconceived doubt, which suggests that they will not be fully and adequately investigated.<sup>185</sup> This fear played out in front of over twenty-million viewers tuning in to watch Justice Kavanaugh's confirmation hearing on September 27, 2018.<sup>186</sup> Dr. Ford candidly described how "terrified" she was to be telling her story in front of some of the country's most powerful

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176. See Bolan, *supra* note 104, at 819.

177. See Dunn, *supra* note 85.

178. Not only would this present difficulties in challenging conclusions of the sole, outside investigation, but could also implicate an *actual*, actionable deprivation of due process. See Smith, *supra* note 44, at 957.

179. Senator James Lankford (Oklahoma-R), a strident critic of the Obama-era OCR, objected strongly to what he claimed to be "egregious examples of executive overreach and intimidation," suggesting regulatory mechanisms, for example, outside investigations, be the restorative processes the new administration should take. See Jake New, *Campus Sexual Assault in a Trump Era*, INSIDE HIGHER ED (Nov. 10, 2016), <https://www.insidehighered.com/news/2016/11/10/trump-and-gop-likely-try-scale-back-title-ix-enforcement-sexual-assault>.

180. The suggestion centers upon exporting claims to a regional center that would collect evidence and adjudicate the sexual assault allegation without the input or involvement of the institution in any capacity. See Schow, *supra* note 89.

181. New, *supra* note 179.

182. Only 2% of incapacitated sexual assault victims report to law enforcement following an attack. See Mann, *supra* note 114, at 638.

183. New, *supra* note 179. Senator Lankford vowed that he would "push our new Republican-led Washington to put a stop to this abuse and restore proper regulatory and guidance processes to the federal government."

184. *Id.*

185. See Behre, *supra* note 10, at 319. There is a perception that is deeply saddled in law enforcement, especially, that rape or sexual assault allegations involving the use of drugs or alcohol are inherently false, and officers will be unlikely to believe the victim, whom may even be fearful that the officer will file a charge against them for making a false police report. See also Dunn, *supra* note 85.

186. This number does not include the presumably millions of more viewers that streamed the hearing on phones or computers, watched in public, or watched in groups, suggesting the viewership number is far higher than that reported. Reuters, *More than 20 Million Viewers Watched Kavanaugh Hearing on TV*, NBC NEWS (Sept. 28, 2018, 5:27 PM), <https://www.nbcnews.com/pop-culture/tv/more-20-million-viewers-watched-kavanaugh-hearing-tv-n914946>.

individuals, all of whom had the authority to wholly disregard her allegations.<sup>187</sup> Power discrepancy and the fear of being ignored often are strong impediments for victims coming forward to report their allegations to outside entities like the police.<sup>188</sup>

According to the Justice Department, only 20% of female student-victims report their sexual assaults to a law enforcement officer.<sup>189</sup> Additionally, less than 2% of sexual assaults that are reported to law enforcement result in jail time for the perpetrator, even though sexual misconduct is one of the most frequently filed complaints.<sup>190</sup> Even given the #MeToo movement's platform encouraging more victims to feel empowered to come forward,<sup>191</sup> many victims still feel reticent about reporting to independent investigators and law enforcement.<sup>192</sup>

Student-victims often turn first to their educational institutions for help, believing it to be the most effective and direct way of pursuing education-based remedies that will allow them to continue their education.<sup>193</sup> Much of this can be attributed to the directness of community-centered remedies, in an environment that is familiar to the victim, as opposed to trying to navigate a foreign system that may or may not provide the type of solutions that the victim requires.<sup>194</sup>

Often, victims seek school-specific solutions like: no contact orders; schedule and housing changes; academic support; or, if severe enough, suspension or expulsion. Each of these solutions serve as institution-specific means of restoring the sense of safety and community for the victim in a more expedient manner than could be afforded by a civil court.<sup>195</sup> These remedies are unique to educational institutions, where the main goal is to ensure freedom from a sexually hostile environment, which otherwise

187. Kamala Kelkar, *#MeToo and Narrow Definitions of Sexual Assault Can Isolate Survivors*, *Says Yale Law Professor*, PBS NEWS HOUR (Sept. 29, 2018, 2:36 PM), <https://www.pbs.org/newshour/nation/kavanaugh-metoo-christine-blasey-ford-sexual-assault-survivors>. Following a tweet by President Trump asking for an official filing for sexual assault subsequent to Dr. Ford's accusation of Kavanaugh, thousands of Twitter users shared their own reasons for being reticent to report their sexual assault under "#WhyIDidntReport." *Sexual Assault Survivors Share Stories With #WhyIDidntReport*, PBS NEWS HOUR (Sept. 22, 2018, 5:19 PM), <https://www.pbs.org/newshour/show/sexual-assault-survivors-share-stories-with-whyididntreport> (transcript). Janet Garrett, US House Candidate from Ohio, joined in the hashtag movement, tweeting that "I did report, but it was dismissed by the police . . ." Janet Garrett (@Janet4OH), TWITTER (Sept. 21, 2018, 3:40 PM), <https://twitter.com/Janet4OH/status/1043238675629387776>

188. *Campus Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/campus-sexual-violence> (last visited Oct. 22, 2019).

189. DEP'T JUST., RAPE AND SEXUAL VICTIMIZATION AMONG COLLEGE-AGED FEMALES, 1995-2013 (2014).

190. Letter from Fatima Goss Graves, *supra* note 32.

191. Kate Zernike & Emily Steel, *Kavanaugh Battle Shows the Power and the Limits, of #MeToo Movement*, N.Y. TIMES (Sept. 29, 2018), <https://www.nytimes.com/2018/09/29/us/politics/kavanaugh-blasey-metoo-supreme-court.html>.

192. Behre, *supra* note 10, at 318.

193. Mann, *supra* note 114, at 640-41.

194. *Id.* at 640.

195. AM. ASSOC. U. PROFESSORS: COMMITTEE ON WOMEN IN THE ACAD. PROF., CAMPUS SEXUAL ASSAULT: SUGGESTED POLICIES AND PROCEDURES (2012).



would deprive student-victims of educational opportunity through material disruption.<sup>196</sup> Furthermore, victims are reticent to report to police or outside law enforcement because they do not want to get the perpetrator into criminal trouble.<sup>197</sup> This runs counter to the problematic comments the Administration expounded to the media that Title IX investigators were told to “fish for violations” based on the notion of vindictive victims who report in order to seek out retribution.<sup>198</sup> However, Title IX and institutional policies, which are tailored to address the kind of educational deprivations that result from campus sexual assault, ensure that reports of sexual assault are addressed.<sup>199</sup> While DeVos’s proposed rules provide for informal, supportive measures to victims,<sup>200</sup> the practical application of such measures, without the aid of disciplinary proceedings, appears idealistic at best.

Though many of the allegations that are reported to the institution could be pursued criminally, no crime victim is legally required to pursue a criminal case—something that the media and critics of the Obama-era policies often forget.<sup>201</sup> Advocates for cases to be handled exclusively by the criminal justice system overlook the victim’s contextual and remedy-centered basis for deciding to whom victims should report their sexual assault; if they choose to report at all.<sup>202</sup>

#### *B. A Revolution of the Paradigm Victim?*

The evolution of the #MeToo movement has profoundly impacted shifting national conversations regarding sexual assault and misconduct.<sup>203</sup> The movement has mobilized women to come forward with their stories in an attempt to shift the cultural attitudes about victims of sexual assault

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196. Letter from Fatima Goss Graves, *supra* note 32, at 9.

197. Approximately 7% of sexual violence victims chose not to report to police so as to not get the accused into legal trouble, 8% believed that their assault was not important enough to report, and 2% believed that the police would not be able to do anything even if they had reported. *Campus Sexual Violence: Statistics*, *supra* note 188.

198. See Green & Stolberg, *supra* note 2.

199. Discipline and adherence to the community standards that are generally outlined in the student handbook or institutional code of conduct are part of the educational process; therefore, the institution is the most well-equipped to implement these goals. Mann, *supra* note 114, at 650. Schools address a myriad of situations that could constitute both conduct code violations as well as potential criminal actions, thus, if institutions were required to provide the essential equivalent to criminal proceedings, they would become overwhelmed and become little more than extensions of criminal courts themselves. *Id.* at 652, 657.

200. See U.S. DEP’T EDUC., *supra* note 71, at 31–32.

201. *Id.* at 639.

202. Caroline Kitchener, *How Campus Sexual Assault Became So Politicized*, ATLANTIC (Sept. 22, 2017), <https://www.theatlantic.com/education/archive/2017/09/how-campus-sexual-assault-became-so-politicized/540846/>.

203. Peter Baker, *In a Risky Shift, Trump and G.O.P. Directly Assail Christine Blasey Ford*, N.Y. TIMES. (Oct. 3, 2018), [https://www.nytimes.com/2018/10/03/us/politics/blasey-ford-trump-republicans.html?mc=edit\\_th\\_181004&nl=todaysheadlines&nid=727788881004](https://www.nytimes.com/2018/10/03/us/politics/blasey-ford-trump-republicans.html?mc=edit_th_181004&nl=todaysheadlines&nid=727788881004).

and misconduct.<sup>204</sup> Despite the efforts of the movement to combat the media and public's misperception as to the demographic of victims, there has been substantial pushback predicated on stereotypical representations of those who are victimized and those who report sexual assault on campuses.<sup>205</sup>

The paradigm victim of campus sexual assault—portrayed in the media and the rhetoric of prominent politicians—is a white, heterosexual female; incapacitated due to alcohol; and, thus, a target of nonconsensual penetration.<sup>206</sup> The danger of this paradigm is multifaceted. Not only does the paradigm marginalize victims of color, male victims, victims with disabilities, and nonheterosexual victims,<sup>207</sup> but it also perpetuates the dangerous belief that the majority of campus sexual assault allegations are a result of drunk sex and morning-after regrets.<sup>208</sup> Most concerning in the propagation of this paradigm is that it plays a noticeable role in driving the policy shift put forward by Secretary DeVos, which downplays allegations and further marginalizes nonparadigmatic victims.<sup>209</sup>

At the time that the 2014 Questions and Answers guidance was published by OCR, one of the key objectives, according to then-Assistant Secretary for Civil Rights Catherine E. Lhamon, was to demand that all “women and men; gay and straight; transgender or not; citizen and foreign students” be afforded an opportunity to experience an educational environment devoid of sexual assault and harassment.<sup>210</sup> According to the Association of American Universities' (AAU) report on their campus climate survey data, victimization of nonheterosexual, nonwhite, nondisabled students is higher than that of the paradigm victim.<sup>211</sup> Nonheterosexual students and students of color frequently raise concerns that their perspectives and experiences are relatively absent from conversations on campus sexual assault.<sup>212</sup>

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204. Jillian Kestler-D'Amours, *MeToo Founder: Kavanaugh Debate Shows 'More Education is Needed'*, ALJAZEERA (Oct. 4, 2018), <https://www.aljazeera.com/indepth/features/metoo-founder-kavanaugh-debate-shows-education-needed-181004143715327.html>.

205. The #MeToo movement has been criticized internally for projecting the experiences of white, affluent, and educated women over the stories of women of color or men who are victims, claiming that they have taken a step backward in fighting the stereotype that has been historically rampant in these conversations. Gillian B. White, *The Glaring Blind Spot of the 'Me Too' Movement*, ATLANTIC (Nov. 22, 2017), <https://www.theatlantic.com/entertainment/archive/2017/11/the-glaring-blind-spot-of-the-me-too-movement/546458/>.

206. See Coker, *supra* note 82, at 162.

207. *Id.* at 155.

208. Green & Stolberg, *supra* note 2.

209. *Id.*

210. U.S. DEP'T EDUC., *supra* note 62.

211. DAVID CANTOR ET AL., REPORTER ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 34–35 (2015). Heterosexual victims reported rates of sexual misconduct at 10.8%; gay or lesbians reported at 13.7%; bisexual students reported at 25.3%. *Id.* at 102. The breakdown of victimization rates for race were 13.0% White; 15.1% American Indian or Alaska Native; 7.7% Asian; 13.1% Black or African American; and 12.2% Native Hawaiian or Pacific Islander. *Id.* Non-disabled victims reported 11.3% and disabled reported rates of 21.4%. *Id.*

212. Coker, *supra* note 82, at 165.

When focusing on the paradigm victim, and legislating to avail the grievances associated with such stereotypes, policymakers and media outlets overlook that marginalized student-victims will be further stripped of protections under the new guidance.<sup>213</sup> Mandatory deferral to outside investigators or law enforcement overlooks bias based on race, sexual orientation, or identity that student-victims often are forced to weigh. These biases disincentivize individuals from engaging authorities in the event they become victims of sexual assault.<sup>214</sup> Rather than creating what the Administration believes to be a “fairer” disciplinary system, the proposed rules further marginalize student-victims and stifle their ability to report campus sexual assault in any capacity.<sup>215</sup>

The proposed rules also fail to conceptualize the reality that male students are also victims of campus sexual assault.<sup>216</sup> Fear mongering on the side of many right-wing officials and media outlets have formulated this gender-divide narrative—female victim against the male accused.<sup>217</sup> Rallying cries from the right to “think of your son” or “think of your husband”<sup>218</sup> not only unfairly generalize both the victim and the accused but also indicate the closed mindset underlying the policy changes for institutional disciplinary proceedings. These slogans do more than stoke the fire of constituents’ fear; the slogans minimize the experience of male victims of sexual assault who already face stigma and skepticism when coming forward.<sup>219</sup> Rhetoric that casts doubt or creates even greater barriers for victims of all genders, races, classes, ability, and sexual orientations only further isolates victims and discourages reporting; this rhetoric does nothing to address the systemic culture of campus sexual assault.<sup>220</sup>

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213. See Dunn, *supra* note 85.

214. See Coker, *supra* note 82, at 169.

215. See Smith, *supra* note 4.

216. Male college students are five times more likely to be victims of rape or sexual assault than nonstudents, and approximately 3% of American men have been victims of an attempted or completed rape during their lifetime. *Campus Sexual Violence: Statistics*, *supra* note 188.

217. Coker, *supra* note 82, at 184.

218. President Trump, speaking to a rowdy crowd during a rally in Wouthaven, Mississippi regarding the Kavanaugh hearings the week prior. Miles Park, *Trump Mocks Ford’s Testimony at Rally, Beggars Crowd to ‘Think Of Your Son’*, NPR (Oct. 2, 2018, 4:00 PM), <https://www.npr.org/2018/10/02/653699004/trump-it-s-a-very-scary-time-for-young-men-in-america>.

219. Male survivors are generally affronted with questions about why they did not enjoy it, or why they did not fight the perpetrator, male or female, off, ultimately minimizing and ignoring their story in a manner reflecting many of the same barriers and stereotypes that women survivors face. See Anna North, *The Asia Argento Allegations Reveal Our Damaging Misconceptions About Sexual Assault Survivors*, VOX (Aug. 12, 2018, 12:30 PM), <https://www.vox.com/identities/2018/8/21/17760222/asia-argento-jimmy-bennett-sexual-assault-me-too>; see also Molly Roberts, *The Asia Argento Accusation Proves #MeToo’s Point*, WASH. POST (Aug. 21, 2018), [https://www.washingtonpost.com/news/act-four/wp/2018/08/21/the-asia-argento-accusation-proves-metoo-point/?utm\\_term=.eedb4ff33553](https://www.washingtonpost.com/news/act-four/wp/2018/08/21/the-asia-argento-accusation-proves-metoo-point/?utm_term=.eedb4ff33553).

220. See Dunn, *supra* note 85.

### C. Veracity in the Media and Secondary Victimization

Negative interactions when reporting a sexual assault to community resources, law enforcement, or institutional administrators can cause “second rape” or “secondary victimization” for the subset of survivors that do choose to report.<sup>221</sup> The characterization and rhetoric about victims as “phony accusers,”<sup>222</sup> or the use of the media as a tool to cast doubt on their veracity, may lead to adoption of the new regulations. However, the procedural barriers in reporting and prosecuting sexual assault or misconduct claims forces victims to choose between silence<sup>223</sup> or a painful hearing where the entirety of his or her sexual history will effectively be on display.<sup>224</sup> Recounting the assault ad nauseam is often traumatic for a victim, but when this vulnerability is met with hostility, the victim loses agency and becomes a victim of the process as well.<sup>225</sup>

Because institutional disciplinary proceedings are not criminal trials, rape shield laws<sup>226</sup> do not prevent the airing of irrelevant information about sexual history before the adjudicator or disciplinary board.<sup>227</sup> Criminal courts provide greater procedural protections for both the victim and accused because of the potential loss of liberty for the accused and possibility for public denigration of the victim.<sup>228</sup> Should the Administration’s media campaign succeed and Secretary DeVos’s proposals be enacted, the scales will tilt against the victim. By providing the accused with protections equivalent to those criminally accused, victims are bereft of their own mechanisms for protection.<sup>229</sup>

If institutions implement the clear and convincing evidence standard under the proposed rules, these special process protections for students accused of sexual assault or misconduct increasingly place the victim at a grave disadvantage.<sup>230</sup> Ultimately, institutions have an interest in providing educational opportunity to students and must do so equally under Title IX. Therefore, the institutional adjudicatory systems must not reproduce the same inequalities rampant in the criminal process in its own proceedings.<sup>231</sup> The interest of equity and opportunity in pursuit of education must

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221. See Behre, *supra* note 10, at 325.

222. See Smith, *supra* note 4.

223. *Id.*

224. Behre, *supra* note 10, at 346.

225. *Id.* at 330.

226. FED. R. EVID. 412(a)(1)–(2).

227. Behre, *supra* note 10, at 346.

228. At the time President Jimmy Carter signed the Privacy Protection for Rape Victims Act (Federal Rule of Evidence 412) into law, he emphasized that it would “end the public degradation of rape victims” and would ultimately prohibit a criminal defendant from “making the victim’s private life the issue in the trial.” See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 93 (2002).

229. See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 2000 (2016).

230. It is especially important to place into context the many historical attempts to deter legitimate complaints of rape or sexual assault by imposing “unique procedural hurdles” for victims to overcome. See *id.*

231. *Id.* at 1997–98.

trump the temptation to turn disciplinary proceedings into full-fledged criminal trials.

#### IV. DISCIPLINARY PROCEEDINGS IN PRACTICE: UNIVERSITY OF MICHIGAN CASE STUDY

The DOE's proposed rules require institutions to reevaluate their own policies to substantially comply, while maintaining equity in their respective systems. Under the proposed rules and guidance, many institutions have revised their policies to accommodate the changes. Some institutions have incorporated the heightened standard of proof, included the use of mediation as alternative dispute resolutions, and deferred to outside investigations to address campus sexual assault complaints; while other institutions have maintained their former standards, reluctant to promote the policies at all.<sup>232</sup> The University of Michigan (the University) example provides an opportunity to evaluate the effectiveness of the DeVos guidance by one of the few institutions that have opted-in as an early adopter. This Part evaluates the Administration's and the University's push towards mediation, the effect on institutional liability, and finally, the outcome of the recent Sixth Circuit decision in *Doe v. Baum*.

##### A. Shifting Policies and Movement Toward Mediation

Following the decision to rescind the 2011 Dear Colleague Letter and 2014 Questions and Answers document, many institutions—Yale University, California State University Northridge, and Washington University in St. Louis—issued statements that they would not deviate from the former policies and were committed to Title IX and its protections.<sup>233</sup> In contrast, the University of Michigan opted in to some of the new policies that survivor advocates had publicly, vehemently opposed.<sup>234</sup> Notably, the University is one of few institutions that offers alternative resolutions through mediation of sexual assault and misconduct claims.<sup>235</sup> The University's policy permits the use of mediation in sexual assault claims so long as the claims do not involve “vaginal, anal, or oral penetration.”<sup>236</sup> Furthermore, the University lengthened its timeline to allow for proceedings to run for up to seventy-five days, with the option to extend further.<sup>237</sup>

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232. See Smith, *supra* note 4.

233. Tovia Smith, *Campuses Cautious as They Adjust to New Sexual Assault Guidelines*, NPR (September 28, 2018, 1:31 PM), <https://www.npr.org/sections/ed/2017/09/28/554000605/campuses-cautious-as-they-adjust-to-new-sexual-assault-guidelines>.

234. Bauer-Wolf, *supra* note 165. Additional past concerns regarding the use of mediation in campus sexual assault complaints where victims reported that university administrators has encouraged the use of mediation to the point of coercion as a means of settling and minimizing the dispute. See Coker, *supra* note 82, at 154.

235. Bauer-Wolf, *supra* note 165.

236. U. MICH., U. MICH. POL'Y & PROC. ON STUDENT SEXUAL & GENDER-BASED MISCONDUCT & OTHER FORMS OF INTERPERSONAL VIOLENCE (2019).

237. Bauer-Wolf, *supra* note 165.

Victim advocates fear that, even if both parties voluntarily consent to mediation as an alternative resolution mechanism, the potential of obtaining consent without any pressure or coercion is minimal at best.<sup>238</sup> Erik Wessel, Director of the Office of Student Conflict Resolution at the University, insists that the University would never attempt to force or push a survivor into mediation; however, strong, serious, self-serving incentives motivate universities to utilize proceedings with non-punitive remedies.<sup>239</sup> Such methods alleviate the kinds of institutional liability under Title IX that *Davis v. Monroe County Board of Education*<sup>240</sup> originally outlined.

### *B. Federal Investigation and Attempts to Limit Liability*

This shift in policy was instigated in response to a federal investigation into the University's mishandling of three sexual assault complaints filed in 2014.<sup>241</sup> After a series of untimely delays and requests for extensions as the OCR widened the scope to 180 cases, the University faced the potential withdrawal of all federal financial aid funding to the school.<sup>242</sup> With the increased public scrutiny<sup>243</sup> resulting from the federal investigation, and the increased societal awareness of sexual misconduct, thanks to the prominence of the #MeToo movement,<sup>244</sup> the University shifted its policy to allow for mediation to limit its own liability and deter future complaints as to the handling of sexual assault investigations by either party.<sup>245</sup> However, since the implementation of the new policy, no individual accused of sexual assault has elected alternative procedures like mediation—instead, all have opted for an investigation.<sup>246</sup>

238. *Id.*

239. *Id.*

240. *Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 683 (1999) (Kennedy, J., dissenting) (mandating that an institution may be liable for peer sexual harassment under Title IX if they had the authority to take remedial action against the harasser; a point that would be moot if “resolved” through mediation).

241. David Jesse, *U-M Pushed for Delays in Feds' Sex Assault Investigation*, DETROIT FREE PRESS (June 4, 2016, 11:29 PM), <https://www.freep.com/story/news/local/michigan/2016/06/04/university-michigan-sex-assault-investigation/85340204/>.

242. A 2015 survey that the University of Michigan released showed that over 20% of undergraduate females reported that they had experienced “nonconsensual sexual behavior” in the prior year and 12% had experienced nonconsensual penetration. *Id.*

243. When news of the sexual misconduct investigation broke, student groups and local media heavily criticized the University administration, the fallout of which lasted for years. *Baum*, 903 F.3d at 586. The University knew that a female student triggered the investigation and the news media consistently highlighted the poor response to complaints. *Id.*

244. *Reported Sexual Assaults at University of Michigan Rise by 61 Percent*, WXYZ DETROIT (Sept. 6, 2018, 5:59 AM), <https://www.wxyz.com/news/reported-sexual-assaults-at-university-of-michigan-rise-by-61-percent>. In a report issued by the University, there had been a 62% rise in sexual assault reporting and 27% rise for sexual harassment to total 277 for the year. OFF. FOR INSTITUTIONAL EQUITY, U. MICH., ANNUAL REPORT REGARDING STUDENT SEXUAL & GENDER-BASED MISCONDUCT & OTHER FORMS OF INTERPERSONAL VIOLENCE JULY 2017–JUNE 2018, at 11 (2018). Of the 277 reports, the Office for Institutional Equity conducted twenty investigations, completed ten by the time of this report; three of which students were found to be in violation of the Policy and subject to sanctions. *Id.*

245. See Bauer-Wolf, *supra* note 165. Hope Brinn, a Michigan law student and survivor advocate worker, stated, “Most people make reports because they want something done,” and the type of result that will not come from mediation. *Id.*

246. OFF. FOR INSTITUTIONAL EQUITY, U. MICH., *supra* 244, at 11.

*C. Doe v. Baum: The Court Speaks*

On September 7, 2018, the Sixth Circuit Court of Appeals issued its opinion on an appeal from the District Court in *Baum*. The Sixth Circuit reversed the trial court, in part, and granted the University's motion to dismiss a Section 1983 claim that its disciplinary proceedings for sexual misconduct violated the male-student accused's due process rights and constituted a Title IX violation.<sup>247</sup> The action arose from a sexual misconduct complaint reported to the University by a woman who alleged that she was too drunk to consent to sexual intercourse with the accused.<sup>248</sup> The University undertook an investigation, collected evidence, interviewed the alleged victim and the accused, and spoke with twenty-three witnesses.<sup>249</sup> Conflicting stories and statements emerged. The investigator concluded that the evidence for finding the presence of sexual misconduct was not more convincing than the evidence in opposition; thus, recommended that the administration find in favor of the accused.<sup>250</sup> The alleged victim appealed; and, ultimately, the Disciplinary Board reversed the decision and proceeded to issue sanctions on the accused, who agreed to withdraw from the school.<sup>251</sup> The accused subsequently filed a lawsuit against the University for violating Title IX and his due process rights.<sup>252</sup>

Upon *de novo* review, the Sixth Circuit evaluated the scope of due process rights in disciplinary proceedings, claiming that the essential element to be considered when a student is accused of misconduct is that they have the "opportunity to be heard."<sup>253</sup> The court noted that in cases with conflicting narratives and alleged inconsistencies, which play upon the credibility of the victim or the accused, there must be a means of cross-examination afforded to the parties—though that does not include a right to *personally* confront the other party.<sup>254</sup> This revelation by the court suggests that institutions should be reticent about alternative dispute resolutions like mediation where there would be a personal confrontation between the victim and accused.<sup>255</sup> Further, the court noted that full scale adversarial hearings at educational institutions have never been required under the Due Process Clause<sup>256</sup> and courts should be cautious in imposing

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247. See *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018).

248. *Id.* at 579.

249. *Id.*

250. *Id.* at 580.

251. *Id.*

252. *Id.*

253. *Id.* at 581 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

254. The court specifically stated that there is a legitimate interest in avoiding proceedings that may expose an alleged victim to greater harm, and there is no need to proceed in a manner that would reach the level of a criminal prosecution. *Baum*, at 903 F.3d at 583. (referencing a similarly decided case *Miami Univ.*, 882 F.3d at 600).

255. The intent behind removing the prohibition on use of mediation in sexual assault claims was to allow for requests for evidence and cross-examination of the parties, though this runs counter to the Court's rationale regarding personal confrontation in *Baum*. See Green, *supra* note 76.

256. *Baum*, 903 F.3d at 590 (Gibbons, J., concurring) (quoting *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 603 (6th Cir. 2017) (quoting *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 640 (6th Cir. 2005)).

the procedural requirements of criminal courts on educational institutions.<sup>257</sup> While context and circumstances vary in institutional disciplinary proceedings, the most fundamental inquiry to determine compliance is whether the hearing is fair and provides the essential elements of due process for the settling of the complaint.<sup>258</sup>

The Sixth Circuit was speculative in its holding that due process requires personal cross-examination and appropriate measures to address sexual assault complaints, which would suggest that the use of mediation as alternative resolution mechanisms may be ripe for debate in light of the decision.<sup>259</sup> With an affirmative showing that mediation has not been utilized as a preferred method “to be heard,” it is likely that the Guidance’s preference for mediation will be largely ignored. Students will continue to opt for adversarial hearings that subscribe to the requirements of the previous guidance. Furthermore, the court never referenced the level of due process that should be afforded in such proceedings but simply stated that the essential elements of due process must be met.<sup>260</sup>

## V. RECOMMENDATIONS AND REMEDIES

The current focus on sexual assault in America—whether derived from the fall of powerful individuals at the hands of the #MeToo movement, the divisive conversation surrounding the election of President Trump, or the nomination of Justice Brett Kavanaugh—has substantiated the need to address the current culture. This task starts with our educational institutions. Harkened by the call of advocates for the accused, the decision to rescind the 2011 Dear Colleague Letter and 2014 Questions and Answers document indicates a step backward in the fight against sexual assault on campuses. The new rules overcorrect for the instances of unjust outcomes to the detriment of longstanding policies, practices, and legislative understanding.<sup>261</sup>

Title IX is a civil rights statute, not a criminal statute.<sup>262</sup> Student-victims who seek administrative support and report incidences of sexual assault or misconduct may choose not to seek vindication in the form of criminal prosecution. In the vast majority of cases, student-victims seek support and relief from an environment hostile to the educational experience.<sup>263</sup> There is a growing movement, propagated by misinformation in the media and in the rhetoric of politicians, to ignore the civil rights origins

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257. *Baum*, 903 F.3d at 590 (quoting *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988)).

258. *See Baum*, 903 F.3d at 590.

259. *Id.* at 583 (citing *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018)).

260. The broad statement by the court suggests that much of the debate over due process rights is circumstance dependent and the litmus test for whether the rights have been afforded is whether the hearing or process itself was fair. *Baum*, 903 F.3d at 590 (Gibbons, J., concurring) (quoting *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988)).

261. *See Dunn*, *supra* note 85.

262. *See U.S. DEP’ T JUST.*, *supra* note 24.

263. *See Letter from Fatima Goss Graves*, *supra* note 32.



of Title IX and push campuses to morph into subsidiaries of the criminal justice system.<sup>264</sup> However, colleges and universities are not criminal courts. Colleges and universities are institutions for learning—governed by their codes of conduct and student policies—aimed at providing students with the opportunity to pursue educational opportunities conducive to a safe environment.<sup>265</sup>

Disciplinary proceedings should not become iterations of criminal courts. Fairness in due process should be attained through balanced investigations and hearings. Further, fair proceedings should be handled by the institution and not partial investigators or law enforcement. Due process should only be outsourced to investigators or law enforcement when the victim provides affirmative consent, and the process is predicated on the appropriate standard of proof—by a preponderance of the evidence. Equity and fairness can be attained without tilting the scales against either the victim or the accused—as long as both are given the “opportunity to be heard.”<sup>266</sup> The majority of cases do not result in severe sanctions for the accused.<sup>267</sup> This reality suggests that a higher standard of proof only makes successful claims more difficult for a victim; a higher standard of proof is likely to further decrease the rate of reporting below today’s already staggeringly low rates.<sup>268</sup>

The future of Title IX disciplinary proceedings for sexual assault is uncertain; thus, victim proponents must exert a continued and concerted effort to push back against so called reforms. The #MeToo movement, campus administrators, Title IX coordinators, and the general public must urge the DOE to change or remove the draft policies. Silence cannot be seen as an endorsement. To protect victims and to prevent institutions of higher learning from becoming full-fledged criminal courts, groups must draft proposals, criticisms, and recommendations opposing the proposals of the Trump Administration; otherwise, we will adhere to fundamentally unfair policies indefinitely without the benefit of sustained pressure by victims’ advocates to move procedures in a more just direction.

#### CONCLUSION

The DOE, under the direction of the OCR and Secretary DeVos, has signaled a sharp, didactic shift in institutional response to claims of sexual assault and sexual misconduct to the benefit of the accused and the insti-

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264. See Behre, *supra* note 10, at 324.

265. U.S. DEP’T EDUC., *supra* note 62.

266. See Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018) (citing Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

267. Only 30% of students found responsible for sexual assault are expelled from the institution, and about 47% face some sort of suspension imposed by the institution; however, the majority of cases where the accused is found guilty result in lower-level sanctions. Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFF POST (Sept. 29, 2014, 8:59 AM), [https://www.huffpost.com/entry/campus-sexual-assault\\_n\\_5888742?utm\\_hp\\_ref=college](https://www.huffpost.com/entry/campus-sexual-assault_n_5888742?utm_hp_ref=college).

268. See Mann, *supra* note 114, at 638.

tution and to the detriment of the victim. Misinformation and misconceptions have plagued the DOE's decision to ignore the civil rights nature of Title IX and has transformed colleges and universities into criminal courts in an effort to placate critics of the old Guidance and tilt the scales in favor of the accused. It is unreasonable to impose a higher standard of proof for victims in disciplinary proceedings where the same liberty interests are not at stake. Nor is it fair to subject victims to secondary victimization at the hand of coerced mediation. For student-victims already reticent to report, the possibility for their claim to be further delegitimized chills victims into not reporting. It is far more dangerous to the educational environment for perpetrators to go free and unreported than to retain a system that encourages reporting and fosters a sense of safety for victims of sexual assault. Victims' advocates, campus administrators, institutions, and survivor groups must continue to resist adoption and codification of the new rules. Once enacted, it is up to Congress to level the scales and fight for student-victims' safety in the pursuit of educational opportunity.

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